



DWYER HARRIS

Update on Class Actions in Australia

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Overview

- Number and type of class actions in Australia
- Class action basics
- Current Issues
 - Litigation funding
 - Competing claims
 - Reliance and damages in shareholder class actions
 - Banking Royal Commission fallout
- Emerging types of class actions
- Watch list for 2020



Class action basics

- Part of the Australian legal landscape since 1992
 - Allows small claims to be aggregated
 - Aim is access to justice and efficiency
- Over 600 class actions filed
- Jurisdictions: Federal Court (1992), Victoria (2000), NSW (2011), QLD (2017), TAS (2019)
- Australia more plaintiff friendly than US
 - Wide prohibition on misleading and deceptive conduct
 - Continuous disclosure regime
 - Very difficult to strike out a class action at an early stage
 - No requirement for class certification



Class actions reach record levels

Class actions filed in Australia





Common Types of Class Actions

- Shareholder class actions (most common)
- Medical/Health
- Product liability
- Natural disasters
- Claims involving Governments
- Employment law (incl. underpayments)
- Consumer protection

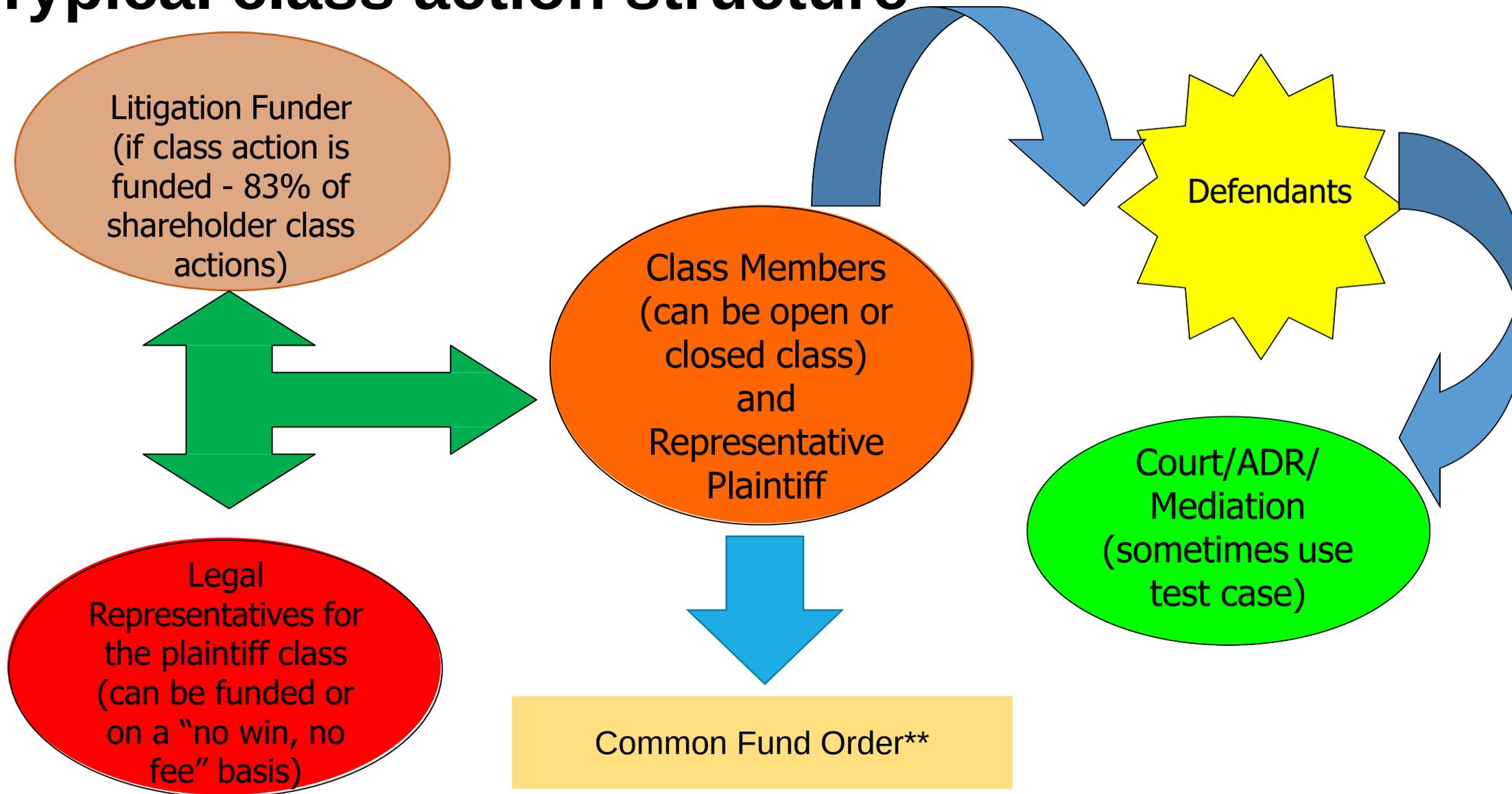


Requirements for a class action in Australia

- At least **7 persons have claims** against the same person or persons
- The claims arise out of the **same, similar or related circumstances**
- The claims of all those person give rise to at least one **substantial common issue of law or fact**
- All class members must have **claims against at least one defendant**
- Must **describe or identify group members** to the degree a person can determine if they are a member of the group
 - *Example:* Myer shareholders who purchased shares on or after 1 September 2014 and still held their shares on 19 March 2015.



Typical class action structure





Funding a class action

- **Litigation funder:**
 - Litigation funder pays lawyer's fees and provides an indemnity for adverse costs order
 - Provides security for costs if necessary
 - Out of any favourable settlement or judgment, litigation funder has all costs and disbursements paid and a fee of between 20% to 40% of the recovery.
 - No statutory cap on the amount of fee which can be charged
 - Fee normally reduces the earlier the litigation is resolved
 - Often selects the lawyers to act for the class
 - If plaintiff unsuccessful, litigation funder pays adverse costs order and doesn't receive fee.
- **"No Win No Fee"**
 - Plaintiff's lawyers carry the costs of the litigation and obtain fees from recovery (plus an uplift if permitted)
 - If there is no recovery, then the lawyer's cannot recovery their fees from the class.
- **No contingency fees (yet)**



Differences between closed and open classes

- **Open classes** include everyone meeting the class description. *Example:*
 - All persons who were member of the MLC Super Fund and charged a fee by NULIS Nominees (Australia) Limited (**NULIS**) from 1 July 2016 onwards
- Notice will be given to class members and those not wishing to participate can opt out
 - Important because judgment on or settlement of claims will extinguish all class members' rights
- **Closed classes** limit the class to those who have signed a retainer agreement with the litigation funder prior to the class action commencing.
 - Pre-filing book building
 - Prevents “free riding”
 - Only extinguishes claims of claimants who have signed a retainer agreement
 - leaves way open for additional claims



What is a Common Fund Order (CFO)?

- The aim of a common fund order is to minimise “free riding”
- Closed classes can also result in potential multiple lawsuits about the same facts
- A common fund order requires all group members (whether funded or not) to pay their recoveries into a common fund.
- Legal costs and a funder’s commission is taken out of the fund before distribution.
- Court’s rely on broad statutory power to make orders to ensure justice is done: section 33ZF(1)
- Common fund orders provide greater certainty and returns for litigation funders.
- Since CFO started to be approved, the number of class actions per annum (mostly funded) has doubled.
- Common fund orders allow the court to have the ability to protect group members from litigation funds who charge high fees.
- High Court has now struck out common fund orders made under section 33ZF(1)



Current issue: Reform to Litigation Funding

- Two recent reports: Victorian Law Reform Commission (March 2018) & Australian Law Reform Commission (Jan 2019)
- **Contingency fees** = lawyers fees are set at a percentage of any settlement or judgment. Currently banned in Australia
- Both report **recommended** allowing solicitors to enter into percentage fee arrangements
- Provisos include:
 - % must include all professional fees and disbursements
 - Solicitor can't recover % base fee if litigation funder is also charging on a contingency basis
- Court control: recommended that % fees to be approved by court (could be CFO)
- **National regulation of litigation funders:** ALRC did not recommend licensing for capital adequacy



Current issues: Litigation funding & CFOs

- Dec 2019: *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall [2019] HCA 45*
- HC rejected Fed Court and Supreme Court of NSW ability to make CFOs under sect. 33ZF(1) and NSW equivalent
- By 5:2 majority held that courts had no power to make CFOs
- Blow for litigation funders and plaintiffs' lawyers
 - Back to book-building and closed classes
- In light of decision, existing CFO's revoked
- Fed Court new Class Action Practice Note
 - Leaves door open for CFO type orders



Current issues: Competing claims

- Concurrent class actions arising from the same conduct
 - Most common in shareholder class actions
- US style “beauty parades” assessing who is best suited to be “lead plaintiff”
- Banking Royal Commission has spawned multiple competing class actions
 - IOOF
 - AMP
- Decision of CJ in Equity Ward on competing class actions (affirmed on appeal)
 - No win, no pay – selected



Current issues: Reliance in shareholder class actions

- “*fraud on the market*” doctrine in US securities class actions
- Uncertainty if the “*fraud on the market*” presumption would be applied in Australia
- *TPT Patrol ATF Amies Superannuation Fund v Myer Holdings Limited [2019] FCA 1747*
 - First shareholder class action to reach judgement in Australia
 - Confirmed that market based causation is available in Australia for both cases based on contravention of continuous disclosure laws and misleading and deceptive conduct cases
 - Did not result in damages being suffered.
 - Also important commentary on continuous disclosure
- Ultimately will be decided by High Court



Current issues: Banking Royal Commission Fallout

- **Responsible lending case:** Westpac use of HEM in suitability assessment
 - ASIC lost case at first instance. On appeal.
- **Fees for no service cases:** NAB and AMP
 - ASIC prosecutions
- **Add on insurance cases:** various add-on insurance products
 - NAB settlement, proposed cases against ANZ and Westpac
 - Remediation via ASIC
- **Shareholder class actions:** IOOF, AMP (5), Westpac AMP
- **Excessive superannuation fees**
 - Breach of duty to members
 - by failing to monitor fees
 - charging excessive fees
 - conflicts of interest
 - “channelling” money to gain maximum management fees for no valuable service
- Others based on **BRC case studies** currently being investigated



Current issues: Emerging types of class actions

- Climate change
 - Abrahams v Commonwealth Bank
 - REST superannuation
 - US case struck out
- Privacy and data breaches
 - More common overseas (Target and LifeLabs)
 - Mandatory breach reporting in Australia
 - First settlement in Australia: ***Evans v NSW Ambulance Service***
 - ***Ring*** class action in US – failure to prevent/warn of hacking threat
- Royal Commission into Aged Care
- Cartel and Market Power
 - Sec 83 of Competition and Consumer Act 2010 now allows admissions of fact in civil penalty proceedings and guilty pleas to be used in subsequent litigation.
- Claims arising from governance failures: Westpac AML



2020 watch list

- WA to get class action regime
- Continued participation of institutional investors
- More “coat-tails” actions arising from more aggressive regulatory enforcement
 - Less settlements, more admissions which can be used in litigation
- Courts will need to cooperate and development case management principles dealing with competing claims across jurisdictions
- Back to book building or will common fund orders emerge in another form.
- Public v private enforcement
 - *Cy pres* distributions (?)
- Litigation funding
 - Funding for defendants (incl. equity models)
 - Securitisation of funders’ fees (?)