OPENING KEYNOTE ADDRESS TO ASSOCIATION OF LITIGATION FUNDERS OF AUSTRALIA

Sydney

13 August 2024

The Hon. A S Bell

Chief Justice of New South Wales[1]

1 I am delighted to deliver the opening address to the 2024 Association of Litigation Funders of Australia Commercial Disputes Conference.

2 Australia has been described as a "global innovator" in litigation finance and as having "one of the largest litigation funding markets … in the world", especially in relation to class actions.[2] Professor Michael Legg, a leading academic in the areas of litigation funding and class actions, has also described litigation funding as an "Australian export".[3]

3 The rise and growth of litigation funding coincides more or less chronologically with my life in the law, and, in preparing these remarks, I have drawn on my experience as a commercial barrister for 24 years as well as the last five and a half years as a judge during which I have participated in a number of appeals relating to class actions.[4]

4 Australia has been home to many of the developments in this area. A number of Australian jurisdictions were amongst the first internationally to abolish the

---

[1] The Chief Justice acknowledges the assistance of his Director of Research, Ms Meghan Malone, in the preparation of this paper.

[2] Harvard Law School, "A Brief History of Litigation Finance: The cases of Australia and the United Kingdom" *The Practice* (online, September/October 2019) <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/a-brief-history-of-litigation-finance/>.

[3] M Legg et al, "The Rise and Regulation of Litigation Funding in Australia" (2011) 38 *Northern Kentucky law Review* 626 at 629.

[4] *Wigmans v AMP Ltd* [2019] NSWCA 243; *Haselhurst v Toyota Motor Corporation Australia Ltd (t/as Toyota Australia)* (2020) 101 NSWLR 890; [2020] NSWCA 66; *Augusta Pool 1 UK Ltd v Williamson* [2023] NSWCA 93;*David William Pallas & Julie Ann Pallas as trustee for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd* [2024] NSWCA 83.

tort and crime of maintenance (and champerty)[5] which had historically prohibited third parties unconnected to litigation from providing financial assistance to maintain litigation and from doing so with the motive of sharing in the proceeds of that litigation.[6]

5 In 1992, Australia's first "opt out" class actions regime was enacted in the Federal Court.[7] Opt out class action regimes later came into force in New South Wales in 2011, Victoria in 2000 and Queensland in 2017.[8]

6 In 1995, directions were first given allowing statutory powers of sale for insolvency practitioners to be exercised with the benefit of litigation funding on the basis that property of a company included the proceeds of an action belonging to a company.[9] In *Re Tosich Construction Pty Ltd; Ex parte Wily* (1997) 73 FCR 219, Lindgren J directed that the liquidator had power to enter into a funding agreement styled as an insurance agreement in circumstances where there was no suggestion that the insurer would intervene or have any direct interest in the conduct of litigation, with the liquidator retaining ultimate control of the proceedings.

7 It was in this area that litigation funders in Australia first began to operate,[10] enabling liquidators to pursue civil proceedings with a view to increasing the assets of an insolvent estate, to the advantage of its creditors[11] and with very high returns to funders, as recognised by Brereton J in *Re City Pacific Ltd* [2017] NSWSC 784 at [20], where higher funder fees were said to be justifiable on the basis that "[e]ven if the funder receives more than 50 per cent of any judgment, 40 per cent of such if any judgment as might be obtained is a better result for

---

[5] *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), ss 3-4, noting that the doctrine were statutorily abolished earlier in Victoria by the *Wrongs Act 1958* (Vic), s 32.
[6] See, generally, A H Dennis, "Law of Maintenance and Champerty" (1890) 6 *Law Quarterly Review* 169; *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW).
[7] *Federal Court of Australia Act 1976* (Cth), Pt IVA.
[8] *Civil Procedure Act 2005* (NSW), Pt 10; *Supreme Court Act 1986* (Vic), Pt 4A; *Civil Proceedings Act 2011* (Qld), Pt 13A.
[9] See, *Re Motivor Pty Ltd (in liq) v Sims* (1995) 19 ACSR 440; *Corporations Act 2001* (Cth), ss 420(2)(b) and (g), 477(2)(c).
[10] See, e.g., G R Barker, "Third-Party Litigation Funding in Australia and Europe" (2012) 8 *Journal of Law, Economics and Policy* 451 at 480-481.
[11] See, eg, S Lombard and A Boraine, "Comparative Notes on the Use of Commercial Litigation Funding in Insolvency: Australia and South Africa" (2023) 26(1) *Potchefstroom Electronic Law Journal* 2

the company's creditors than nothing" such that there is "no downside for the creditors" or "risk of the liquidators or creditors having to bear an adverse costs order".[12]

8 Due to high levels of government assistance during the COVID-19 pandemic, levels of external administrations were kept at record lows throughout 2020 and 2021. However, in 2022, corporate insolvency appointments returned to pre-COVID levels leading to a higher demand for legal services and litigation funding.[13]

9 Returning to class actions, at least initially, there were very few group representatives willing to expose themselves to the risks of adverse costs orders and few legal representatives willing to conduct risky representative proceeding on a "no win, no fee" basis.[14] It also took the profession some time to adjust to the brave new world of class actions, with the enthusiasm and take-up varying between firms. A number of relatively early decisions, such as those in relation to the Multiplex class action,[15] saw the scope of the class action legislative scheme and the legitimacy of litigation funding being explored in the courts.

10 Law firms were prohibited from charging fees on a contingency basis in all state and federal jurisdictions at the outset.[16] This paved the way for litigation funding agreements to be reached in respect of class actions. The first litigation funding in relation to a class action was provided in December 2001 in respect of two class actions filed in the Federal Court in 1998 and 2000 which concerned the

[12] While the standard fee in relation to most other actions is in the region of 20-30%, in relation to insolvency matters, it is usually in the order of 50% and there have been reported fees of as high as 75%: Victorian Law Reform Commission, Access to Justice – Litigation Funding and Group Proceedings (Report, March 2018) at [2.74].
[13] J Geisker and D Luff, "The Third Party Litigation Funding Law Review 6th edition: Australia" *Claims Funding Australia* (online, 8 December 2022) <https://www.claimsfunding.com.au/news-and-insights/the-third-party-litigation-funding-law-review-australia/>.
[14] Justice B Murphy, "The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?" [2017] *Federal Judicial Scholarship* 27.
[15] See, *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.
[16] See, e.g., Legal Profession Uniform Law (NSW), s 183.

recruiting and training of a non-union workforce for the Australian waterfront industry.[17]

11 Litigation funding was not, however, confined to class actions. I well remember the dynamics in the *Idoport Pty Ltd v National Australia Bank Ltd* litigation changing significantly once Justice Einstein learnt, through a security for costs application brought after the case had been on foot for some time, that Idoport in fact had the benefit of significant litigation funding. His Honour no longer viewed the matter as a David vs Goliath contest.[18]

12 In 2005, prior to the High Court's landmark decision in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; [2006] HCA 41 in which it was held that a proceeding could not be dismissed as an abuse of process purely on the basis that a litigation funder had been engaged, there were only five litigation funders in Australia.[19] By 2018, this number had grown to 25 and only two years later, to 33.[20]

13 Strong demand for litigation funding, particularly in relation to class actions, in the years since 2020 has seen the industry grow even further with revenues having risen an estimated 9.6% over the last five years.[21] There have also been interesting developments in the world of litigation finance beyond class actions, and, in this context, litigation funding is increasingly being relied upon by

---

[17] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018) at [2.5]; V Morabito, "Empirical Perspectives on Twenty-One Years of Funded Class Actions in Australia (online, Report, 18 May 2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4422278> referring to *Batten v CTMS Ltd* [1999] FCA 1576.

[18] [2001] NSWSC 744.

[19] Standing Committee of Attorneys-General, *Litigation funding in Australia* (Discussion Paper, May 2006) <https://dcj.nsw.gov.au/documents/about-us/engage-with-us/public-consultations/unsorted/litigationfundingdiscussionpapermay06.pdf>.

[20] Australian Law Reform Commission, Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, Report No. 134 (December 2018) [2.66]; Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry (December 2020), [4.25].

[21] See, generally IBISWorld, "Litigation Funding in Australia – Market Size, Industry Analysis, Trends and Forecasts (2024-2029)" <https://www.ibisworld.com/au/industry/litigation-funding/5446/#IndustryStatisticsAndTrends>.

corporates, even where capital is otherwise available.[22] Insurance-backed litigation funding is also emerging as a new model of hybrid litigation finance.

14 Insurance-backed litigation funding involves a law firm or plaintiff securing an insurance policy insuring a minimum level of recovery in proceedings and then raising nonrecourse capital from a traditional funder to support the litigation. The funding is secured by damages from the financed litigation or the proceeds of the insurance policy if the litigation does not produce damages sufficient to repay the funder. Where an insured law firm or plaintiff recovers less than the policy limit (a pre-negotiated portion of the estimated expenditure), the insurer will pay the difference between any recovery and the policy limit. Because insurance-backed funders face less risk, they will typically charge interest only, as opposed to a percentage of damages or multiples of their capital. The interest is repayable upon a successful outcome in the case or a payout under the insurance policy.[23]

15 The role of litigation finance, particularly in relation to commercial disputes, including class actions, insolvency and arbitration proceedings, continues to grow and there have been a number of important developments in each of these areas in recent years that have shaped the litigation funding market in Australia and globally.

---

[22] See, e.g., G Carminati, "Litigation Finance: A Modern Financial Tool for Corporate Counsel" *American Bar Association* (online, 12 December 2022) <https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-december/a-modern-financial-tool-for-corporate-counsel/>; B Koneck and A Lempiner, "Forum: Litigation finance as a multi-tool for corporate law departments" (online, 7 November 2022) <https://www.thomsonreuters.com/en-us/posts/legal/forum-fall2022-litigation-finance/>.

[23] Insurance-backed litigation funding has opened the door for litigation funding to be used as an alternative source of funding, and a low-risk investment opportunity, for small claims, especially consumer protection cases associated with set points of law, relatively short court proceedings and high odds of success. This kind of litigation finance, whereby investment funds partner with law firms to support small claims which meet a strict set of criteria, has been posited as a lower risk alternative to higher risk, higher return litigation funding opportunities, typically in the class actions space, and has been advertised to individual high-net worth or family investors, as opposed to large institutional investors: Heirloom Investing, "Uncorrelated return, insured risk, quick payback: small litigation finance as a genuine alternative" (online, 25 May 2023) <https://heirloominvesting.com/small-litigation-finance-as-a-genuine-alternative/>.

16 One of the most significant developments of recent times was the decision just over a year ago of the UK Supreme Court in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 (**PACCAR**). By a majority of 4;1, the Court held that litigation funding agreements based on the funder receiving a share of damages, even where the funder's role was passive, were "Damages-Based Agreements" and were unenforceable unless they complied with the relatively strict scheme of regulation provided for by the Damages Based Agreements Regulations 2013. In the instant case, it meant that the agreement in question could not be used at all to fund opt-out "collective proceedings" before the Competition Appeal Tribunal. My understanding is that this decision, which allowed an appeal from the Court of Appeal, was not anticipated.

17 Subsequent to this decision, the former UK Government had introduced the *Litigation Funding Agreements (Enforceability) Bill 2024* which sought to reverse the effects of the Supreme Court's decision in *PACCAR*. However, the legislation was not passed before Parliament was prorogued in advance of the 4 July 2024 election. The new Government has indicated that, following the *PACCAR* judgment, concerns have been raised about the need for greater regulation of litigation funding agreements and as such, the Civil Justice Council will conduct a review of third-party funding with a report, and a more comprehensive view of any legislation to address these issues, to be returned in mid-2025.[24] I should note parenthetically that the dissenting judgment of Lady Rose contains an extremely interesting review of the history of litigation funding in the United Kingdom.

18 It is perhaps not surprising that, with the growth of litigation funding and an increasing awareness of the potential profitability and size of judgment and settlement sums, there have been calls for increased regulation of the litigation funding industry. Other concerns have also been raised, as reflected in a recent short article published in Bloomberg Law entitled "*As Litigation Funders*

[24] UK Parliament, "Civil Proceedings: Finance – Question for Ministry of Justice" (online, 29 July 2024) (Lord Ponsonby of Shulbrede) <https://questions-statements.parliament.uk/written-questions/detail/2024-07-29/hl449>.

Skirt Sanctions, It's Time for Disclosure."[25] In it, the author, the General Counsel of Unified Patents, addressing the need for greater transparency and disclosure of traditionally veiled litigation funding arrangements, writes:

> "If no one is aware it's happening, couldn't foreign governments, money launderers, or other bad actors take advantage? What about judicial conflicts? Or companies funding suits against strategic competitors or key industries?
>
> And if there were some fraud upon the court, how would it ever be identified? The Judicial Conference, the self-governing body of the US Federal Courts—which reports to the Supreme Court—began considering modest disclosure requirements as far back as 2014.
>
> Funders responded vociferously to these modest calls for transparency, arguing such concerns were overblown, irrelevant, or some kind of sideshow.
>
> They rejoined that funding cases increased access to justice, so the risk was worth it. And they argued that conflicts of interest would be rare—that there were other, better ways for others to interfere in industry, and there were no national security concerns. They wrote dozens of letters to the Judicial Conference arguing against disclosure.
>
> But you can't know what you don't know. And that ignorance rightfully unnerved our national security officials, Congress, and courts.
>
> So it should no surprise that just last month, investigative reporters revealed that sanctioned Russian oligarchs have been using litigation funding to evade US sanctions in US courts."

19 Pursuant to order 9A of the Rules of the Supreme Court of Western Australia 1971, there are broad disclosure requirements imposed upon parties to litigation who are assisted by an "interested non-party". An interested non-party includes a person, other than a legal practitioner, who provides funding or financial assistance or exercises any direct or indirect control over the way in which the case is conducted. Rule 3 imposes duties upon interested non-parties while order 4 provides for the case manager to, at any time, order that a copy of any litigation funding agreement be provided to the court. Within class action world, there are also disclosure requirements in relation to litigation funding in the Practice Notes of the Supreme Courts of New South Wales, Victoria and the Federal Court.[26]

---

[25] J Stroud, "As Litigation Funders Skirt Sanctions, It's Time for Disclosure" *Bloomberg Law* (online, 10 April 2024) <https://news.bloomberglaw.com/us-law-week/as-litigation-funders-skirt-sanctions-its-time-for-disclosure>.

[26] See, e.g., Supreme Court Practice Note SC Gen 17 – Supreme Court Representative Proceedings ("Class Actions"), available at https://supremecourt.nsw.gov.au/documents/Practice-and-

20 One can also see this trend towards increased disclosure and transparency in the field of international arbitration into which litigation or, I should say, arbitration funding has extended.[27] Funders involved in international arbitration proceedings include not only specialised litigation funding firms but also insurance companies, investment banks and hedge funds. Many of these funders have reported that as much as 10% of their investments are in international arbitration disputes, including both commercial and investor-state arbitrations.[28]

21 The potential for conflicts of interest produced by the involvement of a litigation funder is perhaps even more acute in respect of arbitration proceedings than other proceedings due to the role that arbitral parties play in appointing arbitrators and the relatively small pool of practitioners who work in this space as both arbitrators and advocates. There has been a broad trend among arbitral institutions to amend their practices to reflect a growing consensus that disclosure of a party's funded status and the identity of the funder, but not necessarily the terms of the funding agreement, is necessary to promote transparency in arbitrations and avoid potential conflicts.

22 Since July 2022, the International Centre for Settlement of Investment Disputes has required that parties to conciliation and arbitration proceedings disclose the identity of any third-party funder.[29] The Tribunal has also been given powers to order the disclosure of further information regarding the funding agreement. The Tribunal may take into account the fact that a party has entered into a litigation funding agreement in determining whether to order a party to provide security for costs.[30] Likewise, prospective conciliators and arbitrators are

Procedure/Practice-Notes/general/current/2024_08_01_PN_SC_GEN_17_-_Representative_Proceedings.pdf (discussed below).

[27] See, eg, R Wheal and O Dean, "The Growth of Third-Party Funding: A Global Perspective" *White & Case* (online, 17 July 2023) <https://www.whitecase.com/insight-alert/growth-third-party-funding-global-perspective> and S Dubash, "Developments in key jurisdictions show third-party funding integral in international arbitration" *Pinset Masons* (online, 14 March 2024) <https://www.pinsentmasons.com/out-law/analysis/developments-jurisdictions-third-party-funding-integral-international-arbitration>.

[28] W Park and C Rogers, "Third-party Funding in International Arbitration: The ICCA Queen-Mary Task Force" (Legal Studies Research Paper No 42-2014, 2014) at 1.

[29] See, eg, *ICSID Arbitration Rules*, r 14(1).

[30] Ibid r 53(4).

required to disclose any "professional, business and other significant relationships, within the past five years" with "any third-party funder disclosed" by the parties.[31]

23 While the Singapore International Arbitration Centre's Investment Arbitration Rules 2017 do not mandate disclosure, r 24(l) gives the Tribunal power to order the disclosure of the existence of a third-party funding arrangement, the identity of the funder and, where appropriate, details of the third-party's interest in the outcome of the proceedings.[32] The International Bar Association Guidelines, which are regularly adopted in arbitrations, also include rules in relation to disclosure of the identity of litigation funders with a particular focus on regulating conflicts of interest.[33]

24 Pursuant to the *Corporations Act 2001* (Cth), most litigation funding agreements are disclosed to the Court by liquidators in insolvency proceedings.[34] The policy rationale for this level of transparency is to ensure that courts sanction contracts between liquidators and funders to assist creditors in being appropriately compensated for the sale of company assets. It has long been argued that a similar degree of transparency as to litigation funding arrangements in relation to other kinds of commercial, funded matters would provide for better oversight of funding arrangements as well as competition in the legal services and litigation funding markets.[35]

25 An important form of judicial scrutiny and "back-end" regulation of litigation funding in class actions comes with the need for judicial approval of

---

[31] ICSID, *Arbitrator Declaration* (15 February 2023) and ICSID, *Conciliator Declaration* (15 February 2023).

[32] See, also, a comparison of the various rules in relation to disclosure of third-party funders in different arbitration hubs in C Morris, A Erusalimsky and J Howells, "Third-party funding in international arbitration" in S Friel and Jonathan Barnes, *Litigation Funding 2023* (Woodsford, 2023) <https://woodsford.com/wp-content/uploads/2023/02/LexGTDT-Litigation-Funding-2023-Full-book.pdf>.

[33] See, eg, International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (online, 25 May 2024) <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024>.

[34] Section 477(2B) requires liquidators to seek court approval of litigation funding agreements where the proceedings may be resolved in more than three months.

[35] Standing Committee of Attorneys-General, *Litigation funding in Australia* (Discussion Paper, May 2006) at 12.

settlements. The Court of Appeal's decision in *Augusta Pool 1 UK Ltd v Williamson* [2023] NSWCA 93 (**Augusta Pool**) concerned a class action brought by owners of units in the Opal Tower against the Sydney Park Olympic Authority in relation to the construction and partial failure of the units. The class action was funded by a litigation funder who informed the group members that, subject to the Court's approval, it would receive the greater of 12.5% of any compensation received or 2.6 times the funds deployed by it and that "typical funding agreements are usually around 30%". When a settlement agreement was reached, the funder agreed to reduce its commission to 2.3 times the project costs, an amount equivalent to 36.4% of the settlement sum. No objections were received from the group members in relation to those deductions.

26 The primary judge found that, in order to achieve a fair and reasonable settlement, the funder's commission should be further reduced to 25% of the gross settlement amount. The primary judge's decision was upheld on appeal with the Court being assisted by submissions of a court appointed contradictor. The Court held that, in assessing whether a proposed settlement is fair and reasonable, it is permissible for the Court of consider whether a litigation funder is receiving a reasonable rate of return. The Court also held that the primary judge did not err in holding that the inadequacy of disclosure to group members about the effect of adverse costs insurance on the funder's commission undermined the weight that could be placed on the lack of objection by group members to those deductions.

27 Turning from questions of regulation of funding agreements more generally to a closer focus on class actions but starting abroad, many at this conference will be aware of developments in relation to a class action claim brought in the United Kingdom against BHP in relation to the 2015 Mariana dam disaster in

Brazil.[36] Only last Friday, the Australian Financial Review[37] reported that the plaintiff's estimated legal costs for the class action could be as high as $481 million.[38]

28 The litigation is funded by Gramercy, which reportedly stands to make $135 million per year from a $550 million USD loan provided to the plaintiff law firm. The plaintiff law firm is running the action on a "no win, no fee basis" but will share in as much as 30% of any successful judgment or settlement. In the event that the plaintiff law firm does not increase the value of its "insurance", it has been reported that BHP will seek full disclosure of the details of the funding agreement.[39]

29 The proceedings were originally struck out as an abuse of process in 2020, largely due to the existence of parallel proceedings in the Brazilian courts and the fact that the size of the claim was said to make it "unmanageable",[40] but that decision was later overturned by the Court of Appeal.[41] In assessing the nature of the proceedings in Brazil and the availability of redress in that jurisdiction, the Court of Appeal noted, under the heading "Access to justice", the claimants' evidence that third party litigation funding which could support the claim was not available at all in Brazil and the defendants' evidence that it would be "uncommon".[42]

30 Turning to Australia, prior to 2020, it was common for class actions to have been commenced either in the Federal Court or in one of the State Supreme

---

[36] The class action has been brought on behalf of approximately 600,000 class members, including individuals, municipalities, religious institutions and members of indigenous and traditional communities affected by the collapse of the Fundao tailings dam at the Germano iron ore mine, and subsequent mudslide, which killed 19 people, destroyed homes and damaged the surrounding environment with pollution: BHP, *Fact sheet: UK Class Action* (online) <https://www.bhp.com/-/media/project/bhp1ip/bhp-com-en/documents/about/our-business/minerals-americas/240619_brazil_uk_factsheet_eng.pdf>

[37] R Mizen, "Legal fees for BHP class action top $680m" *Australian Financial Review* (9 August 2024) at 3.

[38] See, also, S Johnson, "Lawyer claims Brazil dam disaster evidence will expose BHP safety failures" *Sydney Morning Herald* (online, 17 July 2024) <https://www.smh.com.au/business/companies/lawyer-claims-brazil-dam-disaster-evidence-will-expose-bhp-safety-failures-20240717-p5juc2.html>.

[39] R Mizen, "Legal fees for BHP class action top $680m" *Australian Financial Review* (9 August 2024) at 3.

[40] *In the Matter of the Fundao Dam Disaster* [2020] EWHC 2930.

[41] *Municipio de Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951.

[42] Ibid at [85].

Courts. Prior to 2020, the Supreme Court of NSW typically received 20 to 30% of class action filings in Australia[43] and a number of important matters went to the Court of Appeal including, of course, the intermediate appeal in *BMW Australia Ltd v Brewster* [2019] NSWCA 35; (2019) 366 ALR 171 (**Brewster**) which was heard concurrently with the Full Court of the Federal Court of Australia.

31 The New South Wales Court of Appeal has continued to hear important class action appeals which deal with important aspects of class action procedure. In addition to *Augusta Pool,* such cases include:

(1) *Wigmans v AMP Ltd* [2019] NSWCA (**Wigmans**) which was brought by shareholders in AMP who had made investments during a period of time in which it was said that AMP should have disclosed information to the market and concerned the powers of the Court to stay and counter-stay a multiplicity of open representative proceedings. This is sometimes referred to colloquially as the "beauty parade case" as it dealt with the situation of overlapping claims and legal firms competing to represent the class or group;

(2) *Wigmans v AMP Ltd* [2020] NSWCA 104 dealing with and rejecting "soft class closures" as incompatible with the opt out model underpinning the legislative scheme;

(3) *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWCA 66, which involved seven representative proceedings concerning defective Takata airbags subject to compulsory recalls, dealt with the power of the Court to make a soft "class closure" order which would have the effect of extinguishing the causes of action held by Group Members who neither registered nor opted out of the class action prior to a nominated date in the event of any pre-trial settlement, as well as their rights to share that settlement amount;

[43] Allens, "Class Action Risk 2024: 2023 in review" (online) <https://www.allens.com.au/insights-news/explore/2024/class-action-risk-2024/2023-in-review/>.

(4) *David William Pallas & Julie Ann Pallas as trustee for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd* [2024] NSWCA 83 (**Pallas**), which is a shareholder class action in which the plaintiffs allege that Lendlease breached its continuous disclosure obligations and engaged in misleading or deceptive conduct during a period of over 12 months during which over 445 million shares were traded. The case concerned questions of power in relation to the issue of notices to class members prior to settlement negotiations.

32 Important class action decisions have been given by judges of the Supreme Court including that of Justice Beech-Jones in the Queensland Floods litigation (see *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater (No 22)* [2019] NSWSC 1657 and on appeal)[44], the Sydney light rail claim (see *Hunt Leather Pty Ltd v Transport for NSW* [2023] NSWSC 840 in which an appeal is currently reserved) and the Cosmetic Institute Class Action which involved claims for negligence and breaches of the Australian Consumer Law arising out of breast augmentation surgeries performed by several medical practitioners which settled earlier this year after being skilfully case managed by Weinstein J (see, for example, *Raad & Ors v The Cosmetic Institute Pty Limited* [2024] NSWSC 650).

33 The Supreme Court currently has approximately 17 class actions in its lists in both the Equity and Common Law Divisions of the Court.[45] Completed class actions from recent years include the European River Cruise (Flooding) Class Action[46] which resulted in Scenic Group being ordered to pay $26 million in compensation and costs as a result of claims being brought against it pursuant to the Australian Consumer Law after heavy rainfall in Europe in 2013 resulted

[44] *Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd* [2021] NSWCA 206.

[45] Current class actions not otherwise mentioned are the Camden Land Subsidence Class Action; Dillwynia Centre Class Action, European River Cruise Class Action, Hardi Australia Class Action, Lang Centre Trust Class Action, Murray Darling Basin Authority Class Action, Music Festival Searches Class Action, Navy Training Class Action, Newmarch House Class Action, Third William Street Class Action, Westconnex Resumption Class Action and Whitehaven Class Action (see, Supreme Court of New South Wales, *Current Class Actions* <https://supremecourt.nsw.gov.au/cases/class-actions/current-class-actions.html>.

[46] See, *Moore v Scenic Tours Pty Ltd (No 4)* [2022] NSWSC 270. See, also, on appeal *Scenic Tours Pty Ltd v Moore* [2023] NSWCA 74.

in the cancellation of numerous river cruises and tours being run which did not resemble what had been advertised.[47] Settlement of the Junior Doctors Underpayment class action has recently been approved.

34 Notwithstanding the ongoing class action work in the Supreme Court of New South Wales, there is no doubt that the "market" in terms of available courts has been affected significantly in the last five years by reason of the passage in the Victorian Parliament of the *Justice Legislation Miscellaneous Amendments Bills 2019* (Vic) which permitted "group costs orders" to be made in class actions filed in the Victorian Supreme Court, thereby removing a blanket prohibition on Australian lawyers charging contingency fees. Thus, s 33ZDA of the Supreme Court Act was amended to provide:

> "**33ZDA Group costs orders**
>
> (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order—
>
> (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and
>
> (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.
>
> (2) If a group costs order is made—
>
> (a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and
>
> (b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

[47] Other completed class actions not otherwise mentioned include Armidale Investment Default Class Action, Australian Executor Trustees Class Action, Australian Retirement Group Class Action, Carnival Cruise Class Action, Carwoola Bushfire Class Action, Christmas Island Sinking of SIEV221 Class Action, Currandooley Bushfire Class Action, Dick Smith Holdings Class Actions, Discovery Metals Limited Class Action, Dumping of Harmful Fill Class Action, Fairbridge Farm Class Action, False Imprisonment of Young People Class Action, Famularo Advice Class Action, Gunns Class Action, Local Councils Class Action, Mount Victoria Bushire Class Action, Opal Towers Class Action, Public Hospital Service Charges Class Action, Quakers Hill Nursing Home Class Action, Rolls Aricraft Engine Class Action, St George Bank Employee Bonus Class Action, Sports Trading Club Class Action, Springwood Bushfire Class Action, Suncorp Super Class Action, Super Turstees IOOF Class Action, SurfStich Group Class Action, Walla Walla Rubbish Tip Fire Class Action, Winwalee Bush Fire Class Action, Wollongong Payday Advance Class Action and Stolen Generation Class Action (see, Supreme Court of New South Wales, *Completed Class Actions* (online, 2 July 2024) <https://supremecourt.nsw.gov.au/cases/class-actions/completed-class-actions.html>.

> (3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).
>
> (4) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).
>
> (5) In this section—
>
> ***group costs order*** means an order made under subsection (1);
>
> ***legal costs*** has the same meaning as in the Legal Profession Uniform Law (Victoria)."

35 Section 33ZDA(4) expressly overrode the Legal Profession Uniform Law (**LPUL**) and one might be forgiven for thinking that it was entirely inconsistent with the intended spirit of uniform legislation regulating the legal profession and the traditional antipathy in Australia to solicitors charging contingency fees in what I might describe as the "American" sense of the term. But that is water under the bridge.

36 The conflict of interest that such fee arrangements may give rise to has traditionally been a matter of genuine concern, and examples of professional greed and avarice, leading to grave dishonesty, have been seen in high profile class action litigation in Victoria, even before the legislative changes of 2019: see, *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666. In that case, Dixon J observed (at [3]):

> "The conduct in winning and dividing them was dishonourable. The truth was obfuscated. The perpetrators went to extraordinary lengths to conceal their misdeeds. Others stood by, failing in their duty to protect. About 16,000 elderly investors in a failed company had suffered substantial financial loss. The process of exposing these misdeeds was laborious, costly and delayed. The victim was the proper administration of justice".

It has been reported that criminal charges in relation to this matter have recently been laid.

37 There can be no doubt that the effect of the Victorian legislative amendments of 2019 has been to make the Victorian Supreme Court an attractive venue for class actions because of the opportunity afforded to plaintiffs' firms of solicitors to take a proportionate slice of any outcome obtained, and there has been a documented flight of such actions to Victoria from both the Federal Court and

the Supreme Court of New South Wales since the legislative amendments. Thus, whereas six class actions were filed in the Supreme Court of Victoria in 2019, 24 were filed in 2020, 10 in 2021, 14 in 2022 and 23 in 2023. As the Victorian Court of Appeal itself candidly recognised in *Bogan v The Estate of Peter John Smedley (Deceased)* [2023] VSCA 256 (**Bogan**) at [6]:

> "It would be naïve to think that the existence of an additional funding mechanism in Victoria by way of a GCO would not provide a magnet to Victoria, leading to actions being brought in this Court that are more appropriately litigated elsewhere. That does not mean that the Court should adopt a more cynical view when considering questions of forum."

38 This is a candid judicial acknowledgement of the "skewing" of the market: notwithstanding that the legislative regime for class actions is otherwise almost identical between New South Wales, Victoria and the Federal Court (although there have been some differences in interpretation as between courts), Victoria appears now to be (at least numerically) the preferred forum for the hearing of class actions, driven by plaintiff lawyer funded claims. This is not, I respectfully venture to suggest, by reason of any perceived superiority of Victorian judges or the expedition of Victorian case management and civil appeals when compared to other jurisdictions but, rather and principally, because of the opportunity for solicitors to take a slice of the outcome of litigation which, as is well known, will frequently be settled for very large sums, depending on the nature of the claims. One might well think that this only illustrates the conflict of interest at play in circumstances where forums other than Victoria are available where cases with no particular connection to Victoria may be managed and resolved with equal or superior despatch and efficiency and with greater convenience.

39 This skewing of forum choice by reasons related to the availability of returns for legal firms who are prepared to fund class action litigation is unfortunate as a level of competition between courts is, in my view, both healthy and useful where courts share concurrent jurisdiction. Such competition provides claimants with the opportunity to select a forum where their disputes are most efficiently dealt with and where there is also an expeditious right of appeal, including on interlocutory issues.

40 As is well known, the Commercial List of the Supreme Court of New South Wales has long had an outstanding reputation for the efficient disposition of commercial disputes, as does the New South Wales Court of Appeal in respect of civil appeals. Over the last five years, the average time from hearing date to disposal of matter in the Court of Appeal was 2.7 months and the median time from the hearing date to the disposal of the matter was 1.9 months. Over the same period, the average and median times from the filing of an appeal to its hearing were approximately 5 months. To take the *Augusta Pool* case as an example, Justice Black delivered his judgment on 28 November 2022. A notice of appeal was filed on 15 February 2023. The appeal was heard within a month, on 14 March 2023, and a decision was given less than two months later.

41 Returning to the impact of the Victorian legislation on the class action "market", one may view the recent decision of the Full Court of the Federal Court in in *R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)* [2024] FCAFC 89 (**Blue Sky**) as in part at least a reaction to the flight of class actions driven by the Victorian solicitor GCO regime permitting contingency fees.

42 That decision was, in jurisprudential terms, surprising to many and has also been seen as controversial given the historical antipathy to contingency fees, the recognition, hitherto, that the regulation of the legal profession, including importantly in relation to costs, has properly been the domain of State legislatures and the self-confidence expressed in the judgment that conflicts of interest created by a contingency fee regime can be adequately managed by judges. On another level, the decision was entirely unsurprising.

43 The High Court will tell us in due course whether it was open to the Federal Court to construe its class action legislation as permitting true solicitor contingency fees notwithstanding rule 12.2 of the Australian Solicitors' Conduct Rules and s 183 of the LPUL which could not be more explicit in stating that a "law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates."

This is a civil penalty offence. In addition, s 183(3) of the LPUL provides that a contravention of s 183(1) by a law practice is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved. It will be interesting to observe whether plaintiff law firms will be prepared to enter into such arrangements in New South Wales, even in proceedings brought in the Federal Court, prior to the High Court determining the correctness of *Blue Sky*.

44 The High Court is also due to hear this week an appeal in *Bogan*. In that case, the Victorian Court of Appeal held that the availability of a group costs order permitting the charging of contingency fees was relevant to the discretion to transfer proceedings under the cross-vesting legislation which the Court held were otherwise more closely connected with New South Wales than Victoria. It will also be very interesting to "watch this space".

45 The High Court has also recently granted special leave from the New South Wales Court of Appeal's decision in *Pallas*, where(consistent with its earlier decision in *Wigmans* in which it was held that the Court did not have the power to make soft class closure orders), we held that the Supreme Court also does not have the power to approve a notice to group members as to their right to register to participate in a settlement or opt out of the proceedings which includes a notation to the effect that any group member who has neither registered nor opted out will remain a group member but shall not, without leave of the Court, be permitted to seek any benefit pursuant to any settlement of the proceedings that occurs before final judgment.

46 The principal focus of the majority in *Pallas* was on the fact that providing the proposed notification to group members would promote a conflict of interest for the representative party who would be constrained to participate in any mediation on the basis that registered group members would share in compensation obtained through settlement; but unregistered group members would not only not obtain any benefit from settlement, but would be likely to have their causes of action extinguished.

47 In this respect, the Court of Appeal is at odds with the Full Court of the Federal Court which reached the opposite conclusion in *Parkin v Boral Ltd* [2022] FCAFC 47 and considered that the Court of Appeal's decision in *Wigmans* was "plainly wrong". One reason why the outcome of this case will be particularly interesting is because the decision in *Pallas* hewed closely to the High Court's earlier decision in *Brewster*. Three of the members of the majority in that case, Kiefel CJ, Bell and Keane JJ have subsequently retired.

48 Finally on the subject of class actions, I should make reference to the Supreme Court of New South Wales' recently published revised Class Actions Practice Note which came into effect on 1 August 2024.[48] Overall, the Practice Note aims to provide for the just, quick and cost effective resolution of the issues in dispute in class action proceedings, whilst recognising that these proceedings have unique attributes, including the increasing involvement of litigation funders.

49 The Practice Note now provides that all commercial class actions should be commenced in the Commercial List or Construction and Technology List where they will thereafter be case managed in the expeditious way for which those Lists are known and respected. It also requires that a plaintiff's solicitor file a Class Action Summary Statement with an originating process. That Statement must set out details including:

(a) the identity of any litigation funder and how the defendant(s) and any group members can obtain further information about that funder;

(b) how the litigation funding charges are to be calculated, the basis upon which litigation funding charges will be charged and whether the litigation funder will provide security for costs; and

(c) how and to whom legal fees and disbursements will be charged including the impact of any funding arrangement.

[48] Supreme Court Practice Note SC Gen 17 – Supreme Court Representative Proceedings ("Class Actions"), available at <https://supremecourt.nsw.gov.au/documents/Practice-and-Procedure/Practice-Notes/general/current/2024_08_01_PN_SC_GEN_17_-_Representative_Proceedings.pdf>.

50 The Statement should also annex any litigation funding agreement, although it is permissible for that agreement to have any commercially sensitive information redacted.

51 Additionally, the Practice Note requires that a notice to group members advising of any proposed settlement, which must be approved by the Court, must include information such as any order sought in relation to the conduct or funding of the class action which would impose any obligation on group members. It also obliges the material filed by a plaintiff in support of an application to approve a settlement in class action to address, at minimum, matters including the reasonableness of any amounts proposed to be deducted from the settlement amount, including on account of legal fees or amounts paid to any litigation funder.

52 Where any proposed settlement contemplates that any part of the payments to be made to group members will be applied towards the payment of litigation funding charges, the Court will now, pursuant to the updated Practice Note, usually require that the material filed in support of the application demonstrates that reasonable steps were taken to alert group members to the likelihood of such deductions as soon as practicable such that group members were able to take such steps as may have been practicably available to them to negotiate as to legal costs and litigation funding charges or to remove themselves from the class action. The Court may also appoint a referee to determine whether, in relation to litigation funding charges, the charges ought reasonably and properly to be allowed, as well as a contradictor or amicus curiae.