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Open Lawfare: How Australia became the lawfare capital of the world

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A report of the Menzies Research Centre. We acknowledge the Menzies Research Centre staff who contributed to this report and the many specialist economists and lawyers who provided assistance.

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Introduction

We all have a vested interest in the success of Australian businesses but that is not always clear to see.

86% of Australians work in the private sector and the $153 billion paid in company tax represents 25% of our federal budget. In an environment where businesses thrive, Australians in turn have greater access to jobs and the government becomes less reliant on taxing workers to fund the services we rely on.

Yet there is a growing tendency to demonise all profit, growth and development. Such criticism often ignores the fact that if private enterprises are not employing Australians, generating economic activity and paying tax then someone else will have to step in to fill that void.

This report has identified many emerging impediments faced by Australian industry and highlights the consequences for all Australians.

Obviously, we should not gloss over the failures of corporate Australia, none of them are above the law. We must also acknolodge that large profits can often point to a lack of competition. So while Governments and citizens must continue to hold corporate Australia to account we must also recognise the vital contribution they make to our economic success.

In recent times we have seen an ideolgically motivated crusade against our resource sector and primary industries led by teams of well funded activists groups. Analysis for this report identifies 29,784 Australian jobs currently at risk from such activities. A potential $17.483 billion in industrial output is also being held up. This is money our regional communities desperately need. Taxes and royalties from these projects also help fund roads, schools and hospitals and support our health and education systems.

This report sheds light on these activities and demonstrates how Australia became the lawfare capital of the world.

Key Findings

Part One - Environmental Activism

- Australia is the second-largest jurisdiction for environmental lawfare globally. On a per capita basis, Australia has been home to the largest number of climate lawsuits in the world. Activists launched 127 climate lawsuits in Australia from the 1990s to 2022.
- This has been led by an explosion in the growth of environmental activism groups in Australia. In 2015, Australia's top 25 environmental activist groups had combined revenue of $113 million. In less than a decade revenue of these same groups has more than doubled to $275 million.
- Our economic analysis shows that from August 2022 to June 2024 there have been at least nine major projects held up by environmental lawfare costing the Australian economy $17.483 billion and 29,784 jobs.

Part Two - The Class-Action Industry

- Class actions provide an avenue of redress for people to seek compensation when they have been wronged. There are clear benefits where victims can combine actions to lower legal costs from companies and governments accused of breaking the law.
- Yet an explosion in class-action litigation, underwritten by third-party litigation funders, should give us pause to consider why a nation of only 26 million has become the world's second-largest forum for class-action litigation.
- Last financial year, more than $1 billion in class-action settlements were approved in Australia.
- An ASX 200 company has a one in 10 chance of having a class action launched against it. The average shareholder/investment class-action claim is between $50 million and $75 million.
- In the last five years, the Australian Litigation Funding Industry has grown faster than most comparable sectors. Revenue is now above $200 million this last financial year.
- These profits often come at the expense of victims in class actions. For class actions settled from 2013-18, those underwritten by third-party litigation funders returned a median of just 51 per cent of the settlement to claimants. Meanwhile, in cases pursued by claimants without a litigation-funder partner, a median of 85 per cent of the settlement was returned to them.
- There is a clear structural incentive for litigation funders to invest in Australian class actions. Our system limits risk through the availability of funding mechanisms like common fund orders and group costs orders, lacks transparency for class members over the effects of litigation funding agreements, and holds litigation funders to a lower standard than other firms providing financial assistance to customers. These incentives for litigation funders can overshadow the legitimate rights of class members to access justice.

Introduction (cont.)

All Australians should be concerned with the many emerging risks to business.

Australian businesses are not as profitable as many of their overseas competitors which should concern us for a few reasons.

When profit margins drop below 5 per cent, companies have to start laying off workers. According to the ABS, company gross operating profits were down 5.4 per cent for the year to December 2023.

In Australia, our ageing population is placing a greater reliance on those still in the workforce. The ratio of workers to retirees is shifting and the tax burden on our working-age population is increasing.

As a result, workers look set to face the highest average income tax rate in history. Half of all government revenue will soon come from income tax, as workers will be disproportionately punished. This will coincide with a fall in the proportion of government revenue from company tax, which will represent less than 20 per cent of total government revenue in a few years. This decline comes at the expense of working Australians.

More importantly, when businesses thrive, we all benefit. Australia's 17 million superannuation account holders are among the biggest beneficiaries of corporate profits.

BHP chair Mike Henry offered a simple defence of the important role his company plays: "BHP makes up roughly 10 per cent of the ASX, so on average we're going to find that circa 10 per cent of retirement savings are BHP shares. We paid about 10 per cent of all corporate tax in Australia in the course of the past year, so it's in all of our interests that the sector and company remain competitive."

While much has been made of the regressive Industrial Relations changes that Australian businesses and workers are subjected to there are many other emerging threats to a productive private sector, and the jobs, economic activity and services they support.

This report shines a light on the activities of activist groups and the regulatory regime which has allowed them to prosper. In doing so it demonstrates the consequences for all Australians.

David Hughes

Executive Director

Part One – Environmental Activism

1.1 Environmental Lawfare

Lawfare is the practice of using institutions and the legal system as mechanisms to inflict damage on opponents. Australia is the second-largest jurisdiction for environmental lawfare globally. This emergence has corresponded with the rapid growth of environmental not-for-profit groups in Australia. Table 1 below demonstrates this extraordinary growth. In 2015, Australia's top 25 environmental charities had combined revenue of $112,809,190. In less than a decade, the revenue of these same groups had more than doubled to $274,526,815. Concerningly, a proportion of these funds are being directed to Australian organisations from overseas activists seeking to influence government policy and corporate practices in Australia.

TABLE 1: GROWTH OF ENVIRONMENTAL CHARITIES

	2015	2023	2015	2023
Environmental Group	**Revenue**	**Revenue**	**Staff (FTE)**	**Staff (FTE)**
Environmental Defenders Office	$3,001,005	$13,349, 460	14	105
The Sunrise Project	$4,624,722	$73,822,957	8	44
World Wide Fund for Nature	$27,595,671	$47,686,407	85	136
Greenpeace Australia	$20,708,463	$28,348,180	44	76
Australian Conservation Foundation	$13,497,479	$18,128,201	48	96
The Wilderness Society	$11,804,395	$12,384,754	33	52
The Australia Institute	$2,511,433	$8,993,253	12	34
Australian Marine Conservation Society	$3,242,729	$8,579,466	12	38
Climate Council	$1,824,716	$7,881,784	9	44
Australasian Centre for Corporate Responsibility	$55,639	$6,542,798	1	25
Climate Action Network Aust	$296,415	$6,513,443	2	15
Nature Conservation Council of NSW	$3,564,610	$4,357,794	15	22
Friends of the Earth Aust	$1,369,495	$4,262,765	13	14
Environment Victoria	$3,248,914	$4,579,943	15	22
Lock the Gate	$1,680,052	$3,878,511	0	21
Sea Shepherd Australia Limited	$2,966,839	$3,566,518	12	20
Bob Brown Foundation	$432,203	$3,570,659	2	21
Conservation Council WA	$2,728,212	$3,304,000	4	17
Australian Youth Climate Coalition	$1,558,556	$3,191,972	16	16
Environment Centre NT	$1,844,225	$2,347,423	6	7
Friends of the Earth Melbourne	$1,505,971	$1,961,978	7	13
350 Australia	$763,423	$1,704,015	1	12
Conservation Council SA	$1,389,536	$1,107,837	11	6
Grata Fund	$0	$1,141,664	0	9
Jubilee Australia Research Centre	$17,283	$846,697	0	6
Total	$112,809,190	$274,526,815	374	880

Source: Analysis from ACNC reports

In Australia, the relatively low bar for launching court actions is an obvious vector for activists to pursue corporate and environmental activism. Groups like the Environmental Defenders Office (EDO) have been found to 'coach' witnesses in order to block resources projects in the Northern Territory, deploying underhanded tactics that rely on Indigenous consultation rules as a back door to environmental lawfare. Green lawfare is not limited to class-action cases; all over Australia, activist groups take advantage of laws that purport to protect the environment to block projects – including renewable energy projects – on ideological grounds.

Australia is the second-largest jurisdiction for environmental lawfare globally – behind only the United States. On a per capita basis, we have the largest number of climate lawsuits globally. Activists launched 127 climate lawsuits in Australia from the 1990s to 2022. [1]

As a demonstration of their priorities, the Australian Labor Government will spend $10 million funding environmental lawfare groups between 2022 and 2026. The 2022 Budget included $10 million for the EDO and Environmental Justice Australia (EJA), which are responsible for the majority of environmental lawfare in Australia. [2] The 2024 Budget confirmed ongoing support for green lawfare funding. [3]

1.2 Cost of Delayed Approvals

Green lawfare costs jobs and the economy through delay tactics holding up approvals. In 2016 it was estimated that the economic cost of green lawfare to the Australian economy was $1.2 billion in lost economic output. [4,5] These were the early days of vexatious and frivolous claims made by environmental groups. By 2022 this number had exploded as environmental lawfare became more sophisticated and as seen in Table 1 had substantially more funding and employees.

Menzies Research Analysis for this report shows from August 2022 to June 2024 there have been a further 9 projects held up by environmental lawfare costing the Australian economy a further $17.483 billion and 29,784 jobs.

The continued growth in funding and employees of these environmental charities is having an ongoing and substantial impact on the Australian economy.

TABLE 2: PROJECTS AFFECTED BY ENVIRONMENTAL ACTIVISM - AUGUST 2022 TO JUNE 2024

Project	State	Industrial Output Value ($'m)	Employment
Angus Place Coal Mine	NSW	354.9	613
Baralaba South Coal Mine	QLD	600.0	613
China Stone Coal Mine	QLD	11,323.0	19,564
Glendell Coal Mine	NSW	354.9	613
Hunter Valley Operations North	NSW	845.0	1,460
Hunter Valley Operations South	NSW	845.0	1,460
Mount Pleasant Coal Mine	NSW	1,605.5	2,774
Narrabri Underground Mine	NSW	709.8	1,226
Winchester South Coal Mine	QLD	845.0	1,460
Total		17,483.1	29,784

1.3 Past Case Studies

Prior to August 2022, there were 12 projects at risk in Northern and Central Queensland alone from green lawfare group attacks. These projects would contribute over $37 billion to the Queensland economy and support 30,136 jobs. Two additional projects in South-West Queensland would contribute another $12.17 billion and 19,680 jobs.

In New South Wales, four held-up projects would grow the state economy by 0.9 per cent, increase economic output by $5.85 billion, and contribute 11,063 jobs. In Western Australia, just one blocked major project would increase WA's annual gross state product by 14.2 per cent, $45.65 billion, with 73,800 jobs affected by the ongoing green lawfare. [6]

This is only a small sample of the economic cost of green lawfare in Australia. The introduction of amendments to the *EPBC Act*, the introduction of 'stop-work' orders issued by the EPA, and the as-yet unknown content of Labor's Stage Three 'Nature Positive Plan' reforms, together ratcheted up the ability of activist groups to frustrate Australia's resources industry.

Recent environmental class actions

Woodside Energy Scarborough Gas Project [7]

A member of a traditional owner group, supported by the Australian Conservation Foundation, brought proceedings against the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) for approving an environmental plan relating to seismic surveying works at Woodside Energy's Scarborough Gas offshore project. The claimant alleged NOPSEMA approved the plan despite the fact insufficient traditional owner consultation had taken place. The court agreed and set aside the approval.

The Australian Conservation Foundation sought to block the project on the basis that its greenhouse gas emissions – in Western Australia – could impact the Great Barrier Reef. [8] Like in other recent green lawfare cases, efforts to block the project were successful based only on technical Indigenous consultation shortcomings.

Woodside called for urgent reforms to Australia's offshore approvals process, citing the threat of delay and increased cost to its $16.5 billion Scarborough Gas Project in Western Australia.

Tipakalippa (Santos Barossa Gas Project) [9]

Santos's Barossa Gas Project is an offshore gas project near the Tiwi Islands in the Northern Territory. Lawyers for Mr Tipakalippa alleged the project was approved without sufficient consultation of local traditional owners, particularly in relation to 'sea country', in which a gas pipeline was proposed to lie. There were concerns that the pipeline, which would lay 7 km off the islands, could disturb submerged cultural heritage.

The Environmental Defenders Office funded the case. Justice Charlesworth found Indigenous witnesses had been 'coached' by EDO experts and that Indigenous instructions had been "'distorted and manipulated'" before presentation to the court. EDO evidence was found to be "'so lacking in integrity that no weight [could] be placed on it'".

The $5.8 billion project was finally given the green light in January 2024, after nearly three years of litigation.

Pabai & Anor v Commonwealth of Australia [10]

Pabai Pabai and Guy Paul Kabai, as representative litigants in a class action, allege that the Commonwealth Government has a duty of care to protect Torres Strait Islanders from climate-related harm. The Commonwealth contends it does not owe a duty of care, especially as such a duty is framed at "'too high a level of abstraction'".

The case was developed by Phi Finney McDonald with Dutch not-for-profit group Urgenda Foundation. It is at least partially funded by the Grata Fund. [11]

The class action is ongoing.

Border Rivers Water Sharing Plan – Nature Conservation Council of NSW [12]

In October 2021, the Nature Conservation Council of New South Wales (NCCNSW) filed a case against NSW Government ministers seeking to challenge the validity of the Border Rivers Water Sharing Plan on the grounds that decision-makers failed to properly consider climate change and its impact on communities.

The NCCNSW only discontinued its case in March 2024, only after securing agreement from the NSW Government that the Minister for Water and Minister for Climate Change and the Environment would consider climate change in water sharing agreements for rivers across the State.

The plaintiff's case was run by the Environmental Defenders Office.

Waratah Coal [13]

Waratah Coal applied for a mining lease to develop a thermal coal mine in the Galilee Basin. Two groups – Brimblebox Alliance and Youth Verdict – brought an action with the support of the Environmental Defenders Office, which successfully argued that the proposal risked "'unacceptable climate change impacts'" and the human rights of Indigenous people.

Waratah Coal dropped an appeal against the decision in February 2023, following more than three years of litigation. The project is effectively shelved. [14]

1.4 Recent Developments

One of the fundamental building blocks to a successful Australia is the separation of powers entrenched in the Australian Constitution. This includes an independent judiciary, with the ability to apply the law equally and fairly, as a separate branch alongside the legislature and executive. This separation of powers is fundamental to the rule of law and the ability for people and businesses to have confidence that the law will be applied impartially to all.

Even so, Australian courts increasingly serve as forums for activist groups to pursue ideological agendas.

For the judiciary to be effective in maintaining stability and success, it must command the confidence of the public as an independent interpreter of the law, free of any pressures or bias. By the same token, courts are increasingly asked to decide essentially ideological claims pursued by activists. In *Sharman & Ors v Minister for the Environment* [15], a class action comprising eight 16-year-old Victorian residents asked the court to prevent the approval of the Vickery coal mine extension in northern New South Wales on the basis that the Minister owed them a duty of care to avoid personal harm to children by the effects of climate change.

The Federal Court initially found that there was, indeed, a new duty of care established under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)* to avoid causing injury to children as a result of "emissions of carbon dioxide into the Earth's atmosphere". The Full Federal Court later overruled the absurd decision, noting the matter as a question of policy "unsuitable for the judicial branch to resolve".

In an ongoing 2021 class action developed by Phi Finney Mcdonald and the Dutch environmental group Urgenda Foundation, *Pabai Pabi and Anor v Commonwealth* [16], claimants seek to impose a novel Commonwealth duty of care to take reasonable steps to protect Torres Strait Islanders from the impacts of

climate change. [17] The case alleged the Australian Government breached this alleged duty by failing to implement sufficient measures to reduce Australia's greenhouse gas emissions. [18]

The class action is ongoing. The case is also backed by the Grata Fund. [19]

The success of our country relies on the freedom of the judiciary to interpret and apply the law impartially and free from interference – both from politics and from external influence, including activist groups. As The Hon Susan Kiefel, AC, when she was Chief Justice of Australia, said on the impartiality of courts:

> *"If the public are to have confidence in the judiciary and the courts, they must see the courts as free from influence and pressure. They must believe that they can rely upon the courts fairly and impartially to hear and determine their cases. Our society is intended to provide courts which are independent and impartial forums for the settlement of claims." [20]*

This report is made at a time when there is increasing use of the courts for political purposes and power transferred to unelected bureaucrats. Activist groups, pursuing specific agendas, have identified, promoted and resourced campaigns to employ the power of the courts for their purposes.

This phenomenon has been growing over the last decade.

For example, in 2011, Greenpeace released a prospectus seeking financial support for a campaign to end the Australian coal industry. In that prospectus, it acknowledged that:

> *"Legal challenges can stop projects outright, or can delay them in order to buy time to build a much stronger movement and powerful public campaigns. They can also expose the impacts, increase costs, raise investor uncertainty, and create a powerful platform for public campaigning." [21]*

Justice Bromberg's overturned Federal Court judgment in *Sharman* represents a grave development that undermines public confidence in the impartiality of the judicial system. His judgment, which included sections titled 'The effects of Greenhouse Gases upon the Earth's Surface Temperature', 'The Earth System, Carbon Sinks, Feedbacks, The Tipping Cascade and "Hothouse Earth" ', and 'What Needs to be done to Achieve a 2°C Future World', observed:

> *"On the evidence before me, it is undoubtedly likely that some of the Children, and perhaps many hundreds or thousands of them, will be killed or injured by future climate change-induced bushfires on the Australian continent. However, taking into account the capacity of fire smoke to spread, as demonstrated by evidence of the Black Summer fires, it is reasonably foreseeable that all Australians will be exposed to the risk of ill-health from an atmosphere polluted by smoke from one or more bushfires. That is particularly so in circumstances, which are also reasonably foreseeable, where bushfires induced by climate change will wipe off the face of the Earth most of Australia's eastern eucalypt forests in a 4°C Future World." [22]*

Prior to his appointment to the Federal Court of Australia, Justice Bromberg contested preselection for the seat of Burke for the Australian Labor Party ahead of the 2001 Federal election. Attorney-General Mark Dreyfus KC MP announced his appointment as President of the Australian Law Reform Commission in June 2023. [23]

It is essential that the courts both maintain their independence and be seen to do so. Judicial activism erodes public confidence in the ability for courts to be independent and free from bias. Additionally, the use of courts as forums for political campaigns undermines the primacy of Parliament and the separation of powers.

Professor James Allan of the University of Queensland astutely warned of the consequences of judicial activism in Australia. He noted:

> *"Judicial activism has all sorts of long-term bad consequences not immediately obvious to many people who happen to find congenial the outcomes of particular decisions aligning with their own first-order political preferences. Such short-sightedness can be costly, most obviously in terms of the long-term inroads it makes into Australia's wonderful democratic traditions." [24]*

A survey commissioned by the Menzies Research Centre found that 82 per cent of Australians are concerned that judges may be making decisions based on motives other than a strict interpretation of the law. Among people surveyed, 26 per cent said they were very concerned about judges' decisions being made with motives other than a strict interpretation of the law.

TABLE 3: CONCERNS OVER JUDICIAL INDEPENDENCE*

Gender	Male	Female	Total
Not concerned at all	23%	14%	18%
Somewhat concerned	52%	59%	56%
Very concerned	26%	26%	26%

Source: Menzies Research Centre Submission – Australian Law Reform Commission Review of Judicial Impartiality. [25]
**Figures rounded to nearest 1%*

The recommendations in this report will ensure that Australians can remain confident:

- in the primary role of Parliament in exercising power;
- that the judicial system is impartial and fair;
- and that green lawfare activists are contained to proper channels of influence consistent with the rule of law.

1.5 Nature Positive Plan

In May 2024, Treasurer Jim Chalmers announced additional funding for new measures under the *EPBC Act* to complete the first and second stages of the government's Nature Positive Plan. The $41 million in new spending comes on top of the $214 million announced in the 2023/24 Budget. [26]

The cost of establishing and administering the Nature Positive Plan is currently expected to reach $260 million over five years, based on the government's budget projections. This figure does not include additional funding that may be necessary to ensure the continued operation of the Nature Repair Market by the Clean Energy Regulator. Currently, the government has allocated funding only for 2024/25 and 2025/26 for these purposes and has not indicated if the Regulator is expected to run the Nature Repair Market without expanding its funding envelope from 2026/27.

1.6 Environment Protection Agency

The Australian Labor Government's recent moves to establish the Environment Protection Australia (EPA) provides new avenues for activist groups to stop projects in their tracks. The power to issue 'stop-work' orders is expected to be transferred to the head of the new agency in Labor's Stage Three ***EPBC Act*** reforms. These reforms will take the power to approve or reject nation building projects from parliamentarians and hand them over to an unelected statutory body.

The new 'stop-work' orders introduced by Stage Two of Labor's ***EPBC Act*** reforms enable the Minister to intervene whenever they reasonably believe that a person is, or is 'likely to' contravene the ***EPBC Act***. The Minister can intervene even in circumstances where a person has already completed onerous environmental permit requirements.

Critically, the Minister's discretion enables the Minister to intervene when there is a suspected breach of the Act. This is a significantly lower threshold than what would be required to prosecute or obtain an injunction through a court of law. [27]

Additionally, the Environment Minister – or, in future, the CEO of the Environment Protection Agency – must consider climate-change impacts in decisions to approve large projects falling within the ***EPBC Act***. No such obligation existed before.

This new statutory requirement introduces complexity and uncertainty for Australian businesses. Investment in resources projects – including nationally important critical minerals projects and schemes to lower emissions in existing projects – is likely to slow as a result.

As it stands, Labor's Stage Two and proposed Stage Three ***EPBC Act*** reforms provide outsized power to an unelected and ill-defined bureaucracy.

Whilst the Australian Government has signalled it intends to retain the ability for the Minister to intervene in EPA decisions, the legislation's lack of a requirement to consider broader economic and social aspects of projects suggests that routine decisions of the EPA are unlikely to weigh important factors that contribute to the Australian economy.

In the context of green lawfare concerns, the requirement to consider climate-change impacts in decisions is a new vector for activist groups to challenge decisions of the Minister and, when relevant powers are transferred to the EPA, the CEO of the EPA, through judicial review.

The highly contested and remote nature of climate-change impacts leave them open to the interpretation of individual judges. Accordingly, activists will have ample opportunity to launch judicial review actions that stop resources projects in their tracks.

Groups like the EDO have a long history of launching judicial review applications to block resources projects. For example, the EDO launched a judicial review case against the approval of Santos' Barossa Gas Project in the Northern Territory on environmental grounds that included a requirement to adequately consult with local Indigenous communities.

In her judgment on the case, Justice Charlesworth found that EDO experts had 'coached' Indigenous witnesses to provide evidence that would have supported claims that the environmental approval was inappropriately granted. [28]

In that case, the EDO relied on a key partnership with local Indigenous communities to block the project and subject the decision to approve the project to judicial review. Such actions have the potential to affect the Australian economy at a time when GDP growth is stalling.

Two of the projects the EDO has delayed, and eventually failed to block, since 2023 – the Barossa Gas Project in the Northern Territory and the Woodside Scarborough Gas Project in Western Australia – are together worth $22.3 billion to the Australian economy. [29]

Protecting the environment must be balanced with social and economic concerns. Protecting Australia's natural heritage is, and ought to be, the main objective of the ***EPBC Act***. Under the guise of protecting the environment, the Labor Government has introduced a new mechanism for green lawfare in Australia that only emboldens its activist allies.

1.7 Nature Repair Market

The operation of the Nature Repair Market remains unclear. In a now deleted fact sheet, the Department of Climate Change, Energy, the Environment and Water stated that the purpose of the market would be to "encourage and support biodiversity projects to restore and protect nature". [30] The scheme purports to have similarities with the existing carbon-credit market that is increasingly familiar to agricultural, pastoral and other types of large landholders. [31] Scheme participants would be issued a tradeable biodiversity certificate that is treated as personal property for projects that make a "net positive" impact on biodiversity. The previous Coalition Government sought to implement a similar regime for agricultural landholders.

The Australian Labor Government has put the cart before the horse, as it has yet to define what 'net positive' means in this context, and this is unlikely to be clarified until the government announces the details of its Stage Three ***EPBC Act*** reforms.

The impact of Labor's Nature Repair Market on food production and resources projects remains unclear. Unlike the former Coalition Government proposal, which was a voluntary scheme targeted at landholders, Labor's Nature Repair Market extends the scheme to Crown land and waterways. This paves the way for the Commonwealth to lock up potentially productive land in schemes lasting 25 or 100 years. The parameters and methodologies by which projects may be designed and assessed to allow the grant of certificates remains under development by the Department. [32]

1.8 Background to Key Activists And Green Lawfare Strategies

> *"... so lacking in integrity that no weight can be placed on it."*
>
> Justice Charlesworth on evidence presented by the Environmental Defenders Office in relation to the Santos Barossa class-action case.

> *"The material supports an inference that Indigenous instructions have been distorted and manipulated before being presented to this Court via an expert report, and I so find."*
>
> Justice Charlesworth on a report created by the EDO in relation to the Santos Barossa class-action case.

This report analyses activist groups that partner with the Environmental Defenders Office (EDO) and Environmental Justice Australia (EJA). We found that 29,784 jobs across Australia are currently at risk on account of the actions of activist groups. The groups have partnered with organisations including Greenpeace, the Mackay Conservation Group, the Environmental Council of Central Queensland and the Environment Centre NT to launch legal roadblocks to major projects across Australia.

The EDO is particularly active. It has proceedings before the Queensland Land Court to block a Bowen Basin thermal and metallurgical coal operation, [33] has sought to stop forestry operations in North-Eastern New South Wales, [34] and has held up a significant gas project in Western Australia that would generate an estimated $16 billion in tax revenues annually. [35]

Meanwhile, EJA has worked with the Environment Council of Central Queensland to block five resources projects. [36] Another 11 projects are held up because of their interventions. [37]

As referenced prior, the EDO has used Indigenous consultation requirements as a back door for environmental lawfare, including using dishonest 'coaching' tactics and misrepresentation of local Indigenous knowledge.

Justice Charlesworth's finding that the EDO and its experts produced "lies" that "distorted and manipulated" Indigenous testimony in the Santos Barossa Pipeline case is an indictment on the organisation. The EDO's expert was found to have manipulated Tiwi Island Indigenous groups into holding "genuine" concerns based on maps and evidence that had been "wrongly presented to them". [38]

The case concerned Santos' construction of a gas pipeline 7 km off the coast of the Tiwi Islands in the Northern Territory, part of the $5.8 billion Barossa Gas Project in the Timor Sea. The case had already been delayed in 2022 due to concerns over potential underwater cultural heritage.

A lawyer for the EDO and an anthropologist who ought to have had a "neutral attitude in the ultimate outcome" of the case were found to have urged local groups to recount their cultural heritage to relocate stories into the vicinity of the pipeline. [39] EDO representatives said that a cultural mapping exercise was "Indigenous led". This was found to be false.

The EDO's 'independent' expert was, in fact, found to have a "lack of regard for the truth, lack of independence, and [a] lack of scientific rigour". [40] One of the local Indigenous claimants said he had been "tricked" by Dr Mick O'Leary, the EDO's expert witness. [41] Dr O'Leary "lied" to the Tiwi Islanders because he wanted his work to be used to stop the project. [42]

Meanwhile, in New South Wales, the State Government was pressured to include consideration of the impact of climate change in water use applications following pressure from the Nature Conservation Council of New South Wales. The NCCNSW used the threat of continued legal proceedings to bring about the change, and discontinued litigation against the NSW State Government only when the agreement was reached. [43]

Green lawfare has also put a halt to a Defence Housing Australia (DHA) project in the Northern Territory's Lee Point. In 2023, the project – which would house thousands of people, including many defence personnel stationed at nearby defence installations – was the subject of an application by Environmental Justice Australia on Indigenous heritage grounds. DHA had obtained the necessary environmental permits, including clearance from the Aboriginal Areas Protection Authority, for the project. [44] Despite EJA's claim relying on technical Indigenous heritage grounds, the *Save Lee Point* activist campaign argues the development infringes on animal habitat and threatens forests. [45]

Activists routinely use Indigenous community consultation rules as a backdoor for environmental lawfare. The Barossa Gas Project, Scarborough gas project, and DHA housing project are illustrative of current strategies the EDO and its allies employ.

The EPA's new 'stop-work' powers for suspected breaches of environmental legislation will be yet another vector for activist groups to hold up defence, resources and housing projects across Australia.

Activist organisation case study: The Environmental Defenders Office

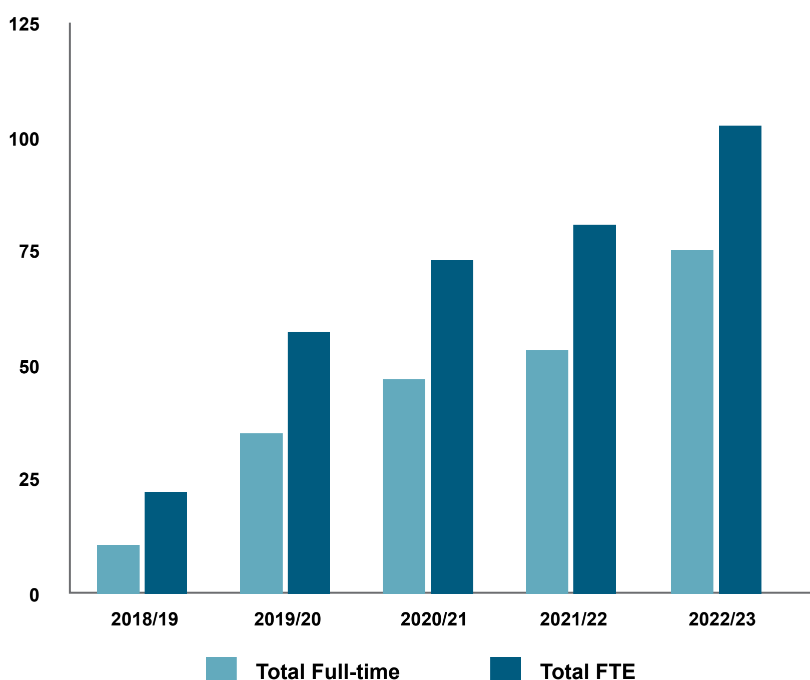
The key activist group pursuing green activism across Australia is the government-funded Environmental Defenders Office. The EDO received the majority of $10 million in green lawfare funding allocated in the 2022 Budget. [46]

At the end of 2019, eight separate Environmental Defenders offices across Australia merged to form a single entity. According to the EDO, the merger created "the largest public interest environmental law legal centre in the Australia-Pacific". [47] The merger resulted in significant pooling of resources in the centralised EDO machine. Prior to the merger, the EDO's funding remained relatively consistent at approximately $1.7 million in financial years 2016/17 and 2017/18. [48]

Since the merger, the total number of full-time equivalent employees has more than quadrupled, from nearly 25 in 2019 to 105 in 2023.

Also notable is the significant increase in the EDO's employee headcount in the 12 months following the election of the Albanese Government in May 2022. The total number of full-time employees increased by nearly 40 per cent, from 56 to 78, while the full-time equivalent headcount increased 25 per cent, from nearly 84 to 105.

FIGURE 1: ENVIRONMENTAL DEFENDERS OFFICE EMPLOYEES



Source: Australian Charities and Not-for-Profits Commission, Environmental Defenders Office Annual Reports 2019-2023

Post-merger, between 2019/20 and 2022/23, the EDO's salary expenses more than doubled, from $3.9 million to $10 million. Growth in average base salaries also significantly outpaced inflation post-merger, rising from $64,833 in 2019/20 to $95,333 in 2022/23, and peaking at $101,111 in 2021/22 (calculated on a full-time equivalent basis, excluding superannuation and leave entitlements).

1.9 International Trends

Environmental lawfare is on the rise globally, but Australia is near the top

Australia is the second-largest forum for environmental lawfare globally – behind only the United States. On a per capita basis, we have had the largest number of climate lawsuits globally. From the time the count started, in the 1990s, to 2022, there were 127 climate lawsuits in Australia. [49]

While Australia remains a leader for environmental lawfare, the trend is on the rise globally. Activist courts abroad are increasingly entertaining environmental claims. In 2017, there were 884 global climate-action cases, which grew to 2,180 in 2022. [50] In 2024, a group of 'Swiss Grannies' successfully sued Switzerland in the European Court of Human Rights to change its emissions standards. The group claimed its members' human rights were violated because Switzerland failed to implement "sufficient" climate policies. Switzerland will now have to increase its 2030 emissions reduction targets. [51]

The Swiss Grannies case is likely to spawn a new wave of environmental lawfare across Europe. [52] Countries whose climate policies do not meet the high bar set in the case are likely to be challenged in the European Court of Human Rights.

In 2022, the United Kingdom group Friends of the Earth sued the UK Government because the government's Net Zero Strategy was 5 per cent off 2037 targets. The responsible minister was forced to revise the UK's Paris Agreement strategy following the decision.

In the UK, one group of activists is working to entrench climate-change considerations in local government planning processes. The Weald Action Group and UK Friends of the Earth are suing the Surrey County Council in the Supreme Court to force it to consider 'downstream' emissions resulting from the hypothetical use of petrochemicals extracted from a local onshore oil well. [53]

In the United States last year, a group of 16 youths successfully sued the state of Montana for violating their state constitutional right to a "clean and healthful environment" by approving oil projects. [54] A similar case currently under way in the Federal District Court alleges that the US Federal Government violated youth claimants' constitutional rights by causing dangerous carbon dioxide concentrations. [55]

While Australia leads the world on a per-capita basis, jurisprudence in activist courts abroad are often persuasive in courts at home.

OVERSEAS DEVELOPMENTS

'Swiss Grannies' ECHR Case [56]

On 9 April 2024, a group of 'Swiss Grannies' won the first ever climate-change victory in the European Court of Human Rights, having successfully argued that Switzerland's efforts to meet emissions reduction targets were inadequate and, therefore, violated their human rights.

Switzerland is now obligated to update its climate-change policies, including revising its 2030 emissions reduction target. [57]

The Swiss Grannies case is likely to lead to a wave of climate litigation across Europe, where state climate goals are pursued by activist groups that believe government action is insufficient.

UK Decarbonisation Case [58]

In 2022, activist group Friends of the Earth successfully claimed that the UK Government's Net Zero Strategy and Heat and Buildings Strategy were unlawfully adopted. They successfully claimed that the Minister had insufficient information before him to adopt the Net Zero Strategy because the quantified policies made up only 95 per cent of the emissions reduction needed to meet 2037 targets, and the strategy did not explain how the 5 per cent shortfall would be made up.

UK Horse Hill Oil Case [59]

A claim brought by activist Sarah Finch on behalf of the Weald Action Group (and supported by UK Friends of the Earth) alleged that the Surrey County Council ought to have considered climate impacts arising from the burning of extracted fossil fuel as part of an environmental impact assessment conducted to decide to grant permission for oil drilling at Horse Hill in Surrey.

In December 2020, the High Court dismissed the claim. On appeal to the High Court, it was also dismissed. Significantly, on appeal to the Supreme Court, the court sought additional evidence from activist groups Friends of the Earth and Greenpeace, among other groups.

The Supreme Court hearing had not progressed to judgment at time of writing.

US Held v Montana [60]

A group of youths aged 2 through 18 alleged that Montana's support of the fossil fuel industry deprived them of their state constitutional right to a "clean and healthful environment". The successful action was supported by activist group Our Children's Trust.

Part Two: The Class-Action Industry In Australia

> *"Litigation funding was pioneered in Australia in the 1990s with the funding of liquidators of insolvent companies."*
>
> Litigation Capital Management Insights [61]

> *"There is no legislation or regulation in Australia that limits the fees that funders can charge."*
>
> Litigation Funding 2020, Woodsford Litigation Funding

In 2024, there is a focus on growing 'Industries of the Future' as economies transition. In Australia, one industry has been able to flourish without the need for a cent in Government subsidies – Australia's Litigation Funding Industry. In the last five years, the industry has grown faster than almost any other comparable sector and is now worth in excess of $200 million.

Litigation funding businesses provide financial support to plaintiffs in legal cases, typically in exchange for a share of any settlement or judgment. Litigation funders focus on complex cases such as class actions.

As this report demonstrates, the Australian legal and regulatory system presents the most attractive market for overseas-based litigation businesses seeking profit. During a recent class action, global litigation funder Omni Bridgeway made a return of 205 per cent. Another multinational litigation funding firm, LCM, made a 230 per cent return from a recent case.

This report will examine why the system appears to favour litigation funders at the expense of victims in class actions.

> *"There is a legitimate policy question as to the use of judicial resources to secure small sums for individual group members while creating enormous returns to lawyers and funders."*
>
> Mr Matt Corrigan, General Counsel, Australian Law Reform Commission [62]

In Australia, it is often the case that an agreement of funding, proceeds and total commission paid to the litigation funder are decided before the action even proceeds. This is despite the fact that class actions represent some of the most complex matters that courts consider.

In 2020 it was estimated that 22 litigation funding companies were operating in Australia, 14 litigation funders were foreign owned or based overseas, six were Australian owned or based, and information on two funders was unknown.

A recent parliamentary inquiry also established that many of these overseas firms operate through tax havens. Accordingly, multinational funders are taking a greater share of the funds, which should be going to ordinary Australians who are the victims in class actions.

In 2020, an ASX 200 company had a one in 10 chance of having a class action launched against it. The average shareholder/investment class action claim is between $50 and $75 million.

The lack of regulations and favourable legal system in Australia make us a target for big law firms and litigation funders looking to extract funds from Australian corporations.

UK-based firm Pogust Goodhead entered the Australian market with a $837 million injection from a US hedge fund. Its founder and chief executive, Thomas Goodhead said the firm was "investigating a number of new cases against Australian multinational corporations".

Teams of lawyers for Australian shareholder companies are using otherwise productive resources to defend against these actions.

Due to the increased number and speculative nature of the class actions being launched in Australia, Directors and Officers Insurance has increased by 600 per cent recently. More importantly, the investments of shareholders and retirees are at risk from this growing industry, as are the employees who work in the Australian businesses targeted by litigation funders and law firms.

2.1 The Role of Class Actions and Litigation Funders

> *The lack of transparency of litigation funding in class actions was a key concern. The operations and ownership of, and returns to, litigation funders in Australia are opaque. Given the excessive profits obtained from class actions, the litigation funding industry requires increased degrees of transparency.*
>
> Parliamentary Joint Committee on Corporations and Financial Services [63]

Class actions provide an avenue of redress for people who, for reasons of practicality and cost, would be unable to seek compensation when they have been wronged. There are clear benefits where claimants can combine actions to lower legal costs and, ultimately, seek compensation from companies and governments accused of breaking the law.

Yet the explosion in class-action litigation, underwritten by third-party litigation funders, should give Australians pause to consider why a nation of only 26 million has become the world's second-largest forum for class-action litigation, behind only the United States. [64]

Judicial resources are scarce and in the case of Australia's class-action regime must be used to achieve the outcome of redressing wrongs committed. There is, however, a growing problem where favourable conditions and low oversight mean that Australia is considered the honey pot of extraordinary investment returns by those in the third-party litigation industry when they invest in class actions.

There has not been an explosion in corporate wrongdoing or widespread corruption leading to an increase in claims. Rather, our acceptance of third-party litigation funding, permissive class-action laws, and the growth of class-action legal practices have driven a disproportionate increase in class-action activity. [65]

Between 2001 and 2020, there were at least 86 class-action settlements in Australia, with a total settlement sum of $4.489 billion inclusive of costs. [66] Of these settlements, published lawyers' fees amounted to

$679.86 million, which equates to almost $37 million per year going to lawyers. As eight of these cases settled confidentially and legal fees were not published, this figure is likely to be much higher. [67]

Between 2009 and 2020, 41 class actions backed by litigation funders were settled in Australia, generating a total settlement sum of $2.389 billion. Of this, the lawyers made $341.84 million and litigation funders received a staggering $642.63 million. This represents an average commission in those actions of over $15.5 million, with victims losing almost $1 billion dollars from the total settlement sum. [68]

In the 2018/19 financial year, annual claims against businesses through class actions exceeded $10 billion, more than double the total settlements paid between 2001 and 2020. [69] It is now estimated that the average shareholder class action seeks between $50 and $75 million in compensation. [70]

Last financial year, more than $1 billion in class-action settlements were approved. [71] While settlement amounts vary widely, the proportion of the settlement amount going directly to claimants also varies wildly.

The Australian Law Reform Commission reports that for class actions settled from 2013-18, those underwritten by third-party litigation funders returned a median of only 51 per cent of the settlement to claimants. Meanwhile, in cases pursued by claimants without a litigation funding partner, a median of 85 per cent of the settlement was returned. [72]

Litigation funding typically consists of either an agreement between claimants and investment firms, or a court-ordered arrangement called a Group Costs Order (GCO) or Common Funds Order (CFO). When a class action is unsuccessful, the funder receives no money and typically indemnifies class members (that is, class members pay nothing for legal costs). When a class action succeeds, the investment firm is entitled to recover payment, which is usually calculated as a percentage of any funds recovered at settlement or by judgement.

Critically, the practice of litigation funding was not widespread until the High Court permitted the arrangement in a 2006 decision. In *Campbells Cash and Carry v Fostif*, the Court decided that an agreement a litigation funder reached with a group of retailers to fund the case in return of one-third of any amounts recovered, plus any costs, was valid. [73] Such agreements were held to be allowed in states that had abolished the torts of champerty and maintenance – the encouragement of a disinterested party to underwrite a lawsuit.

In short, the Court found that third-party funding arrangements were not necessarily contrary to public policy nor an abuse of process.

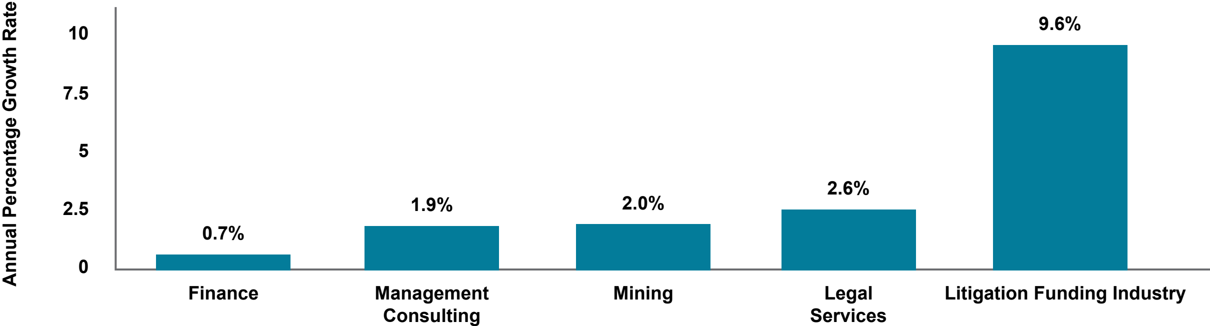
As several leading Australian law firms observed at the time and have since, the decision drove an explosion in litigation funding, both in terms of the number of cases and the expansion of litigation funding into new subject areas. [74]

Initially, class actions in Australia focused on product liability cases. As the class action and litigation funding industries have matured, however, subject matter has expanded to include greater emphasis on shareholder and financial services actions, employment matters, environmental issues, and treatment of Indigenous Australians. [75]

Third-party funding now supports the majority of all class actions in Australia. [76] There is no doubt that litigation funding is big business. One of Australia's largest litigation funders, Omni Bridgeway has recovered $5 billion since 2000. [77]

Under these conditions, the third-party litigation industry is cashed up and thriving. From 2019 through to 2024, the industry showed a compound annual growth rate (CAGR) of 9.6 per cent, to reach an estimated revenue of $199.3 million. [78] The growth rate of the litigation funding industry is more than four times that of the mining and management consulting sector in Australia. As litigation funder Capital Management notes in its 2024 results, the litigation-funding industry is countercyclical, as "dispute levels rise during periods of instability". [79]

FIGURE 2: COMPOUND ANNUAL GROWTH RATE BY INDUSTRY, FIVE YEARS TO 2023

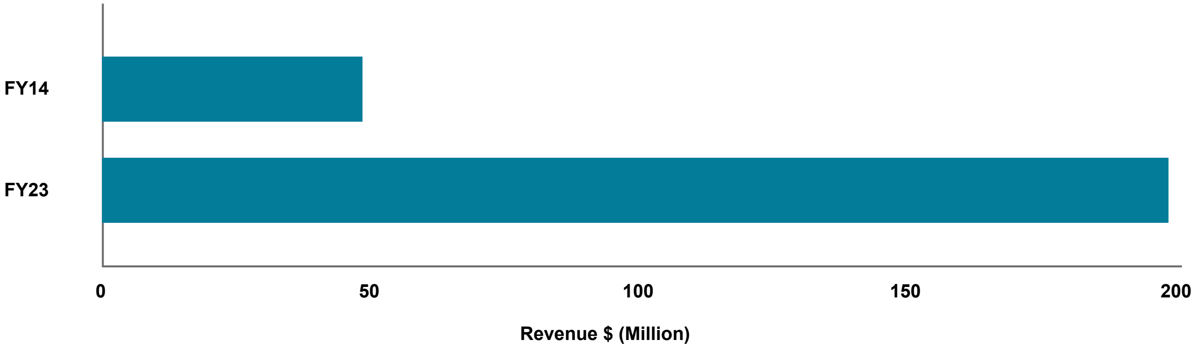


Source: IBIS World

Over the same period, the number of Australian employees in the sector has grown by 13.9 per cent and the combined wages of the sector have experienced almost 10 per cent growth, to $70.1 million. [80]

Compare this with nine years earlier, in 2014, when the revenue of the industry was just $49 million and the overall wages bill was $10.7 million. [81]

FIGURE 3: AUSTRALIAN LITIGATION FUNDING INDUSTRY REVENUE



Source: IBIS World

Australia has a highly concentrated industry with the top four companies making up to 70 per cent of industry revenue. This contrasts with an average concentration in the finance and insurance sector of 15 per cent. [82]

The three main litigation funders operating in Australia are:

- Litigation Lending Services (forecast 2024 revenue of $56.8 million)
- Omni Bridgeway (forecast 2024 revenue of $48.9 million)
- Litigation Capital Management (forecast 2024 revenue of $27.9 million)

In a sign that the Australian litigation market is still a desirable destination for extraordinary profits, the law firm leading the $70 billion class action against BHP over the Samarco mine disaster, Pogust Goodhead, has now entered the Australian market with a $837 million injection from US hedge fund Gramercy. [83] The firm's founder and chief executive, Thomas Goodhead, said it is "investigating a number of new cases against Australian multinational corporations". [84]

A 2020 report from the Menzies Research Centre titled *Litigation Nation* found that:

> *"The returns available for investing in litigation in Australia exceed, by a considerable margin, the returns available in nearly every other alternative asset class in the world. Two of the largest litigation funders operating in Australia, Omni Bridgeway and Litigation Lending Services achieved returns on invested capital of 154% and 165%, respectively. Their success rate is between 89 - 94 per cent."*

There is a clear structural incentive for litigation funders to invest in Australian class actions. Our system limits risk through the availability of funding mechanisms like common fund orders (CFOs) and group costs orders (GCOs), lacks transparency for class members over the effects of litigation funding agreements, and holds litigation funders to a lower standard than other firms providing financial assistance to customers. These incentives for litigation funders could overshadow the legitimate rights of class members to access justice.

The former Coalition Government in Australia sought to pump the breaks on speculative class-action lawsuits. In 2020, following recommendations from the Australian Law Reform Commission's inquiry into class-action litigation, the Morrison Government introduced wide reforms that introduced greater transparency into litigation funding arrangements.

These arrangements included a requirement that percentage-based fee arrangements may be permitted only with the court's permission, and a requirement that litigation funders hold an Australian Financial Services License (AFSL), – bringing funders in line with other financial institutions.

Additionally, funding agreements were to be treated as managed investment schemes (MIS) within the meaning of the *Corporations Act*. As a result, class members would receive a product disclosure statement that provides information about the cost of the scheme, any commissions the funder might charge, and other information that would help claimants make an informed decision.

No doubt, these requirements introduced a level of transparency and regulatory burden for litigation funders. However, these requirements were designed to address the significant level of control or influence that a litigation funder could have over class-action proceedings and the rights of class members. [85]

The former Coalition Government sought further reforms that would have placed a 30 per cent cap on litigation funder and law firm profits, guaranteeing a 70 per cent return of any settlement to claimants. This proposal lapsed when Parliament was dissolved ahead of the 2022 Election.

The reforms likely created significant downward pressure on litigation funding. Litigation funder-backed class actions peaked at 74.1 per cent of all cases in 2017/18, before dropping dramatically to 44.6 per cent in 2019/20. [86]

Opponents of greater regulation of class actions in Australia usually cite concerns over access to justice. Indeed, class actions do and should have the power to provide compensation to large groups of people who have been wronged.

But in a context where last financial year litigation funders received up to 42 per cent of class-action settlements, current policy settings clearly fail to protect claimants from the conflicts that arise among litigation funders, class-action lawyers, and justice. [87]

The funders and law firms that stand to benefit from laissez-faire litigation funding arrangements are, perhaps unsurprisingly, those often identified as being aligned with the current Labor Government, which has sought to relax regulations governing the industry.

Last financial year, just seven legal firms brought over 50 per cent of new class actions. Namely, Maurice Blackburn (6 cases), Shine Lawyers (4 cases), Phi Finney McDonald (4 cases), Piper Alderman (4 cases), Levitt Robinson (3 cases), Quinn Emanuel (3 cases) and Slater and Gordon (3 cases).

Maurice Blackburn has donated $2.49 million to Labor and union causes since 2019/20. [88] Slater and Gordon contributed $1.39 million over the same period. [89] Indeed, Maurice Blackburn recently came under fire for "touting" Labor Attorney-General Mark Dreyfus KC MP as one of its key people to overseas clients. [90]

There are currently six sitting federal Labor MPs or senators who previously worked for the two firms. Five of them are on the front bench. [91]

Deputy Prime Minister and Minister for Defence Richard Marles MP was a solicitor at Slater and Gordon before working for the Transport Workers' Union. Minister for Immigration, Citizenship and Multicultural Affairs Andrew Giles MP was Principal Solicitor for the firm. Senator Murray Watt was Senior Associate at Maurice Blackburn after he lost his Queensland state seat in 2012. Three other Labor parliamentarians – Bill Shorten MP, Anika Wells MP, and Senator Nina Green – worked at Maurice Blackburn.

Maurice Blackburn is also well represented in government appointments. Notably, new Race Discrimination Commissioner Giridharan Sivaraman, appointed by Attorney-General Dreyfus, was Principal Lawyer with Maurice Blackburn in Queensland. Two Maurice Blackburn lawyers were appointed by Minister for Employment and Workplace Relations Tony Burke MP to the Fair Work Commission in 2023, including Deputy President Alexandra Grayson. [92]

Litigation funders are less politically active. Political donations are few and far between. But the alignment of litigation funder profit motives with Labor-aligned plaintiff firms is obvious: so long as firms like Maurice Blackburn and Slater and Gordon use Australia's low bar to commence class actions, litigation funders are willing to underwrite the case.

While Australia's legal system was slow to adopt class actions when compared with similar jurisdictions, it has developed some of the lowest bars to litigation in the world. The United States has had group proceedings in some form for around 200 years, formalised in 1966 with changes to the Federal Rules of Civil Procedure that created a permissive system of opt-out class actions that continues today. [93] The United Kingdom has allowed group proceedings in some form for most of the modern era.

Australia's slow march towards becoming a class action-funder's paradise began in 1977, when the South Australian Law Reform Committee proposed the first opt-out procedure for class actions in Australia. While South Australia did not take up the proposal, it served as the basis of the Federal Court's class-action regime that commenced later that year.

It was not until the late 1990s, however, that class actions in Australia really exploded. New South Wales' regime was construed to allow foreign class actions from 1995. [94] In 2000, class action rules commenced in Victoria. In 2016, the Federal Court opened the gates further, endorsing the use of contingency fees in

2016 in *Money Max Int Pty (Trustee)* v *QBE Insurance Group Ltd*. [95] While these early-stage CFOs were invalidated in *BMW Australia v Brewster* [96] in 2019, the damage had been done: a new industry of litigation speculators began to proliferate. [97] The introduction of GCOs or contingency fees in Victoria in 2020, thought to improve prospects of justice for cash-strapped plaintiffs, had the effect of funnelling cases that might have been more appropriately heard in other forums into a newly speculator-friendly jurisdiction. It is perhaps no surprise that Victorian Supreme Court class-action filings jumped dramatically.

2.2 Developments in Australian Class Actions – who is really benefiting?

> *"Following the change of the federal government in May 2022, a more favourable regulatory landscape emerged."* [98]
>
> Omni Bridgeway FY23 Results Presentation

Recently, the Australian Labor Government has undone the proper oversight of third-party litigation funders by unwinding the former Morrison Government's regulations that required funders to hold an Australian Financial Services Licence (AFSL) and provide proper disclosure of their fees and commissions through a managed investment scheme (MIS).

By undoing these regulations, Labor has exempted litigation funders from the very same rules that apply to other providers of consumer finance. These obligations are inherently reasonable and require litigation funders to provide their services efficiently, honestly and fairly.

Labor first exempted litigation funders from proper oversight in 2013, after two separate court rulings held that litigation finance was both a financial product and a managed investment scheme. Lucrative returns and the absence of proper oversight have meant that offshore financiers have flocked to Australia. Labor's exemptions, in 2013 and again in 2023, have effectively made it harder for members of class actions to understand the lucrative commissions, arrangements and fees payable to the backers of class actions.

Opaque regulatory requirements and rich returns for litigation funders have made Australia the second-most desirable destination for litigation funders in the world.

As findings and admissions of serious and fraudulent misconduct in the *Banksia* class action show, there is a clear need to ensure at all times that third-party litigation funders act honestly, efficiently and fairly.

In the *Banksia* class action, it was found that the conduct of the funder, Australian Funding Partners Limited, (AFPL) and the organising lawyers was so egregious that the barristers involved with the scheme were struck off. The architect of the scheme was found to have "destroyed relevant documents", sworn false affidavits, and attempted to intimidate litigants into pursuing "his own financial interests and [concealing] his wrongdoings". [99]

Due to the soft regulatory framework third-party litigation funders have operated in for many years, not even the Chairman of the Association for Litigation Funders was aware that one of its founding members was previously reported to have been found by ASIC not to be a fit and proper person to serve as an auditor, and was reported to have been found by the Tax Practitioners Board not to be a fit and proper person to act as a tax agent.

The regulatory regime implemented by the previous Coalition Government was a step in the right direction to ensure the integrity of litigation funders operating in Australia. It protected the Australian legal system and the members involved in class actions. It now seems like the Labor Party is caught trying to protect the dodgy practices of some litigation funders at the behest of some of its major donors.

Prior to 2016, most funded class actions in Australia required funders to 'book-build' to identify a group of clients and enter into percentage-based funding arrangements that outlined the funder's return in the event of a settlement or judgment.

In 2016, a landmark decision of the Federal Court endorsed the use of Common Fund Orders (CFOs). [100] These CFOs were agreements, often approved at the early stages of litigation, that allowed litigation funders to secure a defined percentage of any settlement or judgment amounts (as well as any costs). Critically, these agreements covered all class members in opt-out actions, which sought to solve the 'free-riding' issue where non-joiners gained the benefit of a court judgment in their favour without incurring costly litigation fees. [101]

In effect, CFOs let litigation funders avoid costly 'book-building' processes, allowing opt-out proceedings to commence and fee structures to be decided as soon as one representative claimant was found.

The availability of CFOs contributed to a significant increase in filings in 2017, as 54 class actions were filed, compared with 36 in the previous year.

So-called 'early-stage' CFOs were struck down in a 2019 High Court decision. [102] The status of 'late-stage' CFOs – that is, percentage-based funding agreements made late in the proceedings (settlement stage) – was uncertain until a 2024 Full Federal Court decision in ***Elliott-Carde v McDonald's***. [103] The Full Court held that CFOs were allowed at the settlement stage.

The ***McDonald's*** decision is a boon for litigation funders. Third-party litigation funders can now have greater confidence that they can secure a return from class-action group members, regardless of whether they have signed a funding agreement.

Not only does this secure potentially greater returns for litigation funders, it has also lowered the bar for entry. Funders can avoid the need to engage in expensive 'book-building' processes to attempt to contact and register class members. [104]

The court in ***McDonald's*** reserved the right to reject CFOs in certain circumstances; for example, where they are seen to be unfair or excessive.

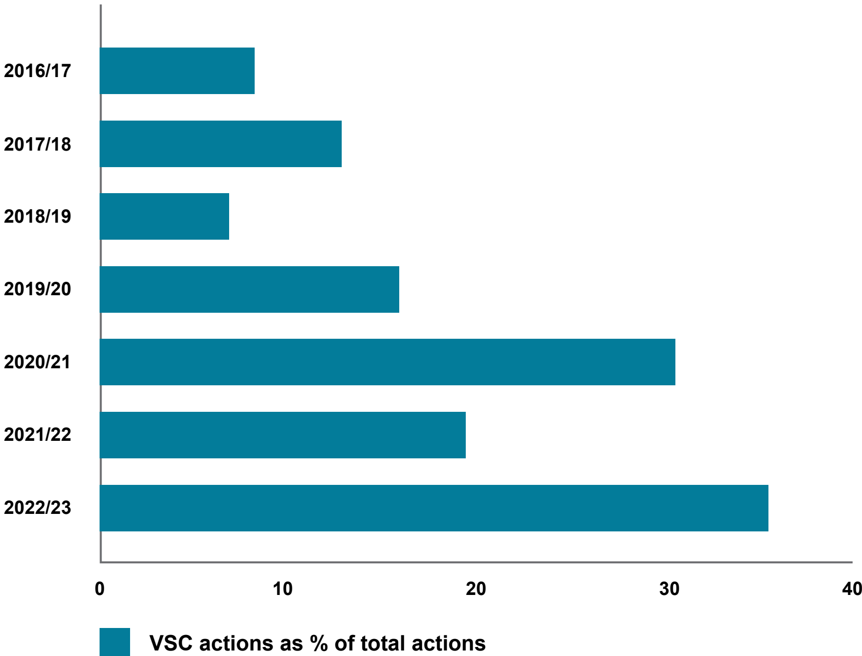
It is too soon to understand the impact of settlement-stage CFOs on the number of class actions filed in the Federal Court, but a similar type of fee agreement – Group Costs Orders (GCOs) – has been available in the Victorian Supreme Court since 2020. Claims in Victoria rose dramatically on the introduction of GCOs. Section 33ZDA of the ***Supreme Court Act 1986 (Vic)***, introduced in 2020, allows law firms to act both as litigation funders and legal representatives for plaintiffs and also enables lawyers to receive fees on a contingency basis – that is, as a percentage of the settlement amount or damages award.

In 2016/17, while early-stage CFOs were still available in the Federal Court, only 8.3 per cent of all Australian class actions were filed in the Victorian Supreme Court. Following the introduction of GCOs, this number skyrocketed. In 2022/23, 35.8 per cent of all class actions in Australia were filed in the Victorian Supreme Court. [105]

The routine use of GCOs in Victoria is likely to continue fuelling growth in litigation funder-backed actions in that jurisdiction. Alarmingly, activist groups advocate for the expansion of the GCO regime to other Australian jurisdictions. In a May 2024 review of Victoria's regime, the McKell Institute argues that "the GCO model should, in the interests of access to justice, be replicated across all of the Commonwealth's class-action regimes". [106]

Data shows that since 2020, when GCOs were established in Victoria, a majority of securities actions have been filed in the Victorian Supreme Court. [107] Of all class actions filed in Australia last financial year, over 35 per cent were filed in Victoria. [108]

FIGURE 4: SUPREME COURT OF VICTORIA CLASS ACTIONS AS A PERCENTAGE OF ALL AUSTRALIAN CLASS ACTIONS



Source: King and Wood Mallesons, The Review: Class Actions in Australia 2022/23, p.11

An expansion of GCOs to other Australian jurisdictions is likely to fuel forum shopping across other jurisdictions.

GCOs are contingency fee arrangements. Class actions researcher Professor Vince Morabito noted that contingency fees are an "American-style" legal fee structure. [109] Contingency fees are arrangements whereby legal fees are calculated as a proportion of any judgment award or settlement, rather than on the hourly rate of a lawyer for the work completed.

There exists a golden rule in law proceedings going back more than 200 years.

King Henry's son, Edward I, returned from the Ninth Crusade to take the throne upon his father's death. Understandably, he was keen to avoid further conflicts with the English barons. To quell their angst, Edward focused heavily on common law reforms. First among these was the Statute of Westminster of 1275 which, apart from establishing our modern parliamentary democracy, also established the laws of maintenance and champerty. These laws prohibited agreements to "intermeddle with litigation in which the intermeddler has no concern" and thus were interpreted as your lawyer not having a financial incentive 'contingency' outcome in a legal case. Champerty and maintenance was largely abolished by statute in Australian jurisdictions over the last 40 years.

Contingency fees are effectively banned across Australia, except in the case of class actions in the Federal Court and in the Victorian Supreme Court.

As it stands, the Australian CFO and GCO regimes encourage a 'race to court' culture because litigation funders can bring a class action almost as soon as they identify one class member to be a representative plaintiff, on the understanding that they are likely to be able to eventually secure a contingency-fee arrangement at the point of settlement. When prospective class-action claimants believe they are likely to find at least six people with similar claims, they can commence proceedings.

Critically, CFO and GCO funding arrangements are not finalised until the settlement (or judgment) phase of class-action lawsuits. If the expected compensation or damages amount is much larger than anticipated at the outset of a case, claimants have little recourse to change the agreed amount, unless the court makes a decision to alter the funding arrangement at the point of finalisation. In the case of GCOs in the Victorian Supreme Court, interim decisions can be made to provide certainty for litigation funders and indemnity for claimants.

Nevertheless, the availability of CFOs and GCOs is attractive to investors. The 2020/21 peak in class actions represents an increasing trend of class-action litigants conducting 'follow-on' class actions. Where regulators and other government bodies – both here and overseas – make findings of wrongdoing, class-action firms and litigation funders move fast to launch representative actions here and abroad. In consumer cases, such actions are launched before businesses have the opportunity to compensate consumers directly. Increasingly, follow-on actions are immediately launched as shareholder class actions.

At the recent Maurice Blackburn 2024 Class Actions Symposium, American shareholder class-action firm partner Mark S. Willis remarked, "You have a historic system of recoveries here that other jurisdictions don't have." For shareholder class actions, Mr Willis noted, his clients "love it because the uplift at their end is effectively nothing [...] There's almost nothing that our clients don't like about the Australian class-action system." Plaintiff class-action firms like the Australian class-action system because of the loose regulation of litigation funding, high potential recoveries from actions, and the availability of GCOs in the Supreme Court of Victoria that can include early approval of percentage-based costs returnable to plaintiff firms and, therefore, their funders.

As has been stated above, the incentives for investors to speculate on Australian class actions are supercharged by Labor's move to scrap AFSL and MIS requirements for litigation funders and their funding schemes. The floodgates are open, and the extension of GCOs to other states would be akin to endorsing Australian legal cases as a legitimate asset class for speculation. [110]

2.3 What Litigation Funders Want: a bigger cut for law firms and their backers

"... It is one matter for a 'litigation funder' as they are known, to bargain for a percentage of the proceeds but in my opinion, it is an entirely different matter for a legal practitioner, with the obligations thereby imposed, to enter into an arrangement which contemplates significant financial benefits beyond anything contemplated as costs, if the litigation succeeds."

Justice McClellan, Smits & Ors v Roach & Ors [111]

"Enabling lawyers to hold a direct financial interest in the outcome of their client's case creates a serious risk of compromising a practitioner's fundamental ethical obligations to the court and their clients."

Law Council of Australia [112]

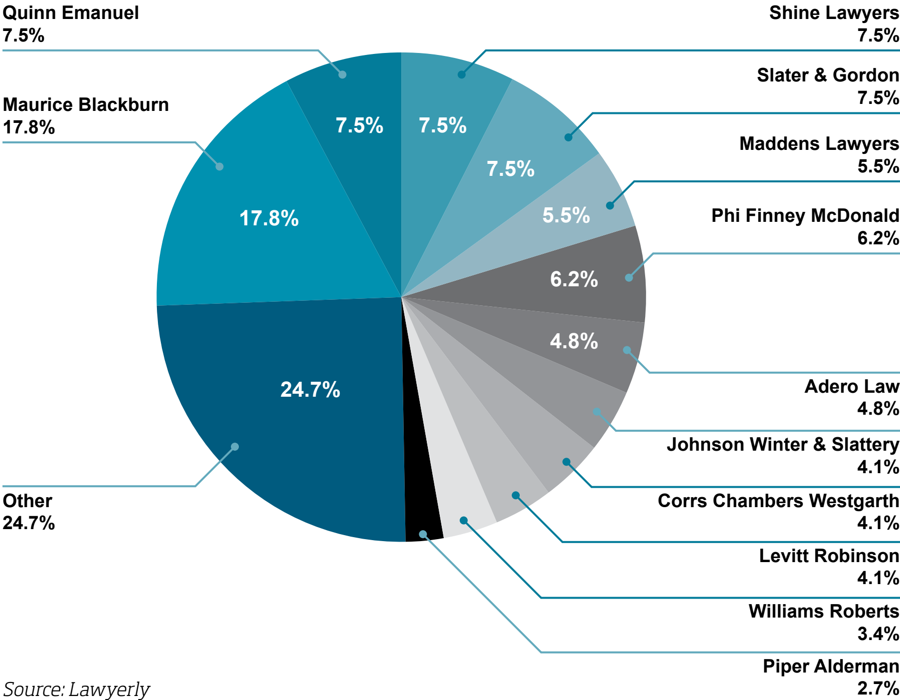
Seeking recourse on behalf of a class of homeowners with dodgy insurance policies or on behalf of patients injured by a product defect is the point of class-action regimes; where an identifiable group of people suffer an injustice, such regimes significantly reduce costs and improve access to justice.

But Australia's permissive contingency-fee arrangements – CFOs and GCOs – have created an opportunity for law firms to chip away at class member rights. The fight over the 'correct' proportion of settlement funds to distribute to law firms and their investors revealed how firms and their backers seek to profit from class member misery.

As has already been outlined earlier in this report, the Albanese Government scrapped requirements that forced the litigation funding industry to provide more transparency to class members, and dropped proposals to cap settlement claims at 30 per cent.

One of the biggest winners from this change is Maurice Blackburn. The firm launched the greatest number of class actions of any firm in 2019/20. Notably, it's also the third-largest donor to the ALP and affiliates in 2019, donating $554,805. In 2021, Maurice Blackburn donated $105,973 to federal and state divisions of the Labor Party. [113] Maurice Blackburn had a 17.8 per cent share of the class-action market in Australia as of 2019/20.

FIGURE 5: CLASS ACTION LEGAL SERVICES MARKET, PLAINTIFF SIDE 2019/20



Source: Lawyerly

Historical context for Maurice Blackburn's donations to the ALP is important to note. In 2009, the Federal Court ruled that funder-backed class actions were managed investment schemes for the purposes of corporations law. [114] This occurred in the *Brookfield Multiplex* class action run by Maurice Blackburn.

Between February and April 2010, Maurice Blackburn made donations totalling $160,000 to the Labor Party. At the time, this was its largest donation on record.

In May 2010, then-Labor Minister Chris Bowen announced a carve-out to get around the *Brookfield Multiplex* judgment. This announcement exempted litigation funders from the managed investment scheme regime and meaningful regulatory oversight. [115]

In its submission to the Victorian Law Reform Commission's *Access to Justice* report in 2017, Maurice Blackburn advocated for being able to charge up to 35 per cent commission on class actions. Slater and Gordon advocated for an even larger cut of up to 40 per cent. [116]

Unsurprisingly, Maurice Blackburn continued to advocate for larger contingency fees. In an ABC Radio interview in January 2020, former head of class actions Andrew Watson debated the matter with former President of the Law Council of Australia Stuart Clark AM. When pressed by Mr Clark on the Black Saturday bushfire class action and whether Maurice Blackburn would have charged an additional percentage, Mr Watson's response was telling:

> **Clark:** One question I would ask Andrew is if you had the right to run on a contingency-fee basis, would you have run the bushfire case on a contingency-fee basis?
>
> **Watson:** Yes. But I'd run it on the basis that the contingency-fee basis was probably no different to what we took anyway. I mean, that's the point.
>
> **Clark:** But what you have asked the Victorian Law Reform Commission is – you and Slater and Gordon have asked for the right to charge up to a 40% commission.

Watson: No we haven't.

Clark: Yes you have. It's in the VLRC report…

Watson: What we have asked for is the right to charge an amount that's set by the court as a fair amount…

Clark: …and you've suggested up to 40%.

Watson: Well. I mean … what I…

Clark: …It's in your submission. You wrote it.

While Mr Clark mistook Maurice Blackburn's submission for Slater and Gordon's higher fee proposal, Mr Watson's response illustrates the broader point: Labor's friends in legal practice stand to benefit from contingency fees, and firms like Maurice Blackburn are aware of the potential public outcry over price gouging people who have often suffered unimaginable loss.

In practice, if Maurice Blackburn had been allowed to levy a 35 per cent contingency fee, the firm would have made at least an additional $170 million from bushfire victims.

CONTINGENCY FEE CHANGES IN CONTEXT: BLACK SATURDAY BUSHFIRE CLASS ACTION

After the Black Saturday Bushfires, thousands of bushfire survivors signed up with Maurice Blackburn to launch two class actions: one against power distributor AusNet and the other against asset manager Utility Services Group. The below table shows total settlement amounts and fees charged. [117]

Settlement achieved by survivors in class actions	$794 million
Maurice Blackburn's legal fees	$100 million
Tax liability	$20 million

The Black Saturday Bushfire class actions commenced prior to the introduction of GCOs in Victoria. In submissions to the Victorian Law Reform Commission, Maurice Blackburn and Slater and Gordon argued contingency fees of up to 40% were appropriate in Victorian class actions. [118]

The table below shows what fees Maurice Blackburn may have been able to charge the victims of the Black Saturday Bushfires if contingency fees were legal at the time and Maurice Blackburn and Slater and Gordon's proposals were implemented by the Victorian Government.

Contingency fees chargeable by Maurice Blackburn (Under GCO regime proposed by Maurice Blackburn and Slater and Gordon)	$278 million – $318 million (35%-40% of the $794 million in settlements secured by survivors)
Additional windfall for Maurice Blackburn (Under GCO regime proposed by Maurice Blackburn and Slater and Gordon)	$178 million to $218 million

Plaintiff firms were already positioning themselves for the introduction of GCOs in the Victorian Supreme Court in 2020. Maurice Blackburn almost always filed banking and superannuation class actions in the Federal Court. During the period immediately before the introduction of GCOs, however, the firm departed from its standard strategy and lodged a class action against NAB in the Victorian Supreme Court.

The Bill amending the *Supreme Court Act 1986 (Vic)* to allow contingency fees was progressing through the Victorian Parliament at the time. On the Maurice Blackburn website advertising the NAB class action, the firm posted under its FAQs that "in the event that the Supreme Court of Victoria has power to make a group costs order in relation to these proceedings, the Representative may at a future time apply to the Court for such an order". Clearly, a strategic choice had been made to take advantage of the new contingency-fee regime. Forum shopping had come to class-action lawfare.

With the removal of regulatory oversight and the introduction of contingency fee arrangements in Victoria the line between litigation funding, GCOs and private equity has become blurred. Earning returns on investments has clearly become one of the chief motivators for litigation funders and their law firm partners.

Compelling arguments are made that litigation funders improve access to justice for those who need it most. Yet meritorious claims have always been supported by 'no-win-no-fee' funding models that reduce the potential conflicts of interest that arise in litigation-funding contexts.

As the Law Council of Australia and Justice McClellan have noted, allowing law firms the ability to charge a commission on the settlement could give rise to conflicts-of-interest that may incentivise firms to settle actions quickly at the expense of the very people they are representing. Those advocating for the expansion of contingency-fee orders may use the language of expanding access to justice for plaintiffs, but in fact many would be seeking a bigger cut of the damages owed to the people they purport to represent.

THE VICTORIAN SUPREME COURT AND GROUP COSTS ORDERS (GCOs)

The introduction of Section 33ZDA of the *Supreme Court Act 1986 (Vic)* in 2020 enabled class-action claimants to seek a GCO. As of January 2024, the court had considered the following GCO applications: [119]

1. In September 2021, in *Fox v. Westpac Banking Corporation*
2. In February 2022, *in Allen v. G8 Education Ltd*
3. In April 2022, in *Bogan v. The Estate of Peter John Smedley (Deceased)*
4. In August 2022, in *Nelson v. Beach Energy and Sanders v. Beach Energy*
5. In August 2022, in *Lay v. Nuix Ltd, Batchelor v. Nuix Ltd and Bahtiyar v. Nuix Ltd*
6. In November 2022, in *Gehrke v. Noumi Ltd*
7. In December 2022, in *Mumford v. EML Payment*s
8. In December 2022, in *Lieberman v. Crown Resorts Ltd*
9. In March 2023, in *Fox v. Westpac Banking Corporation (No. 2)* and
10. In September 2023, in *DA Lynch v. Star Entertainment Group, Drake v. Star Entertainment Group, Huang v. Star Entertainment Group, and Jowene v. Star Entertainment Group*

2.4 Rate of Return on Funded Class Actions

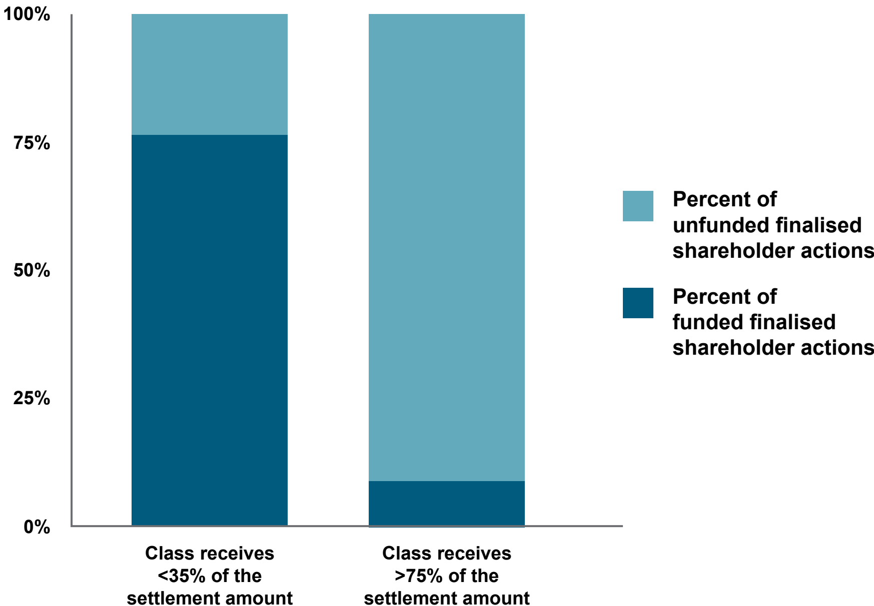
There are some encouraging signs that courts are increasingly taking a dim view of speculative third-party litigation funders maximising profits over plaintiff returns. In *Wigmans*, the High Court affirmed a multifactorial approach to deciding a carriage dispute (that is, a dispute over which competing class actions would be stayed in favour of another that would serve as a test case). The effect was that the NSW Supreme Court would continue the practice of considering factors including the proposed returns to plaintiffs and whether security for costs was proposed, among other factors that related to the parties and counsel running the case. [120]

Litigation funders appear to be taking a more cautious approach to choosing cases to progress. The Coalition's 2020 reforms were a significant nail in the coffin for unfair contingency fees in the Federal Court. The reforms, which placed greater transparency obligations on litigation funders, reduced the number of funded class actions from a peak in 2017/18, when 74.1 per cent of class-action litigation was backed by law firm funding or litigation funders (compared with 41.5 per cent last financial year). [121]

Prior to the introduction of the Coalition's 2020 reforms, the median receipts for claimants in litigation-funded cases were just 51 per cent of the total claim. [122]

The Australian Law Reform Commission found that across all shareholder class-action cases – that is, Part IVA cases – from 1997 to October 2018, class members received significantly different proportions of the overall settlement amount depending on whether they were self-funded or funded by third-party litigation funders. While the Commission was particularly focused on Federal Court matters, which are disproportionately composed of shareholder disputes, the insight that self-funded class actions tend to result in greater returns to class members holds in other examples.

FIGURE 6: PROPORTION OF RETURNS TO CLASS MEMBERS OF SHAREHOLDER ACTIONS (1997 - OCTOBER 2018)



Source: ALRC, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, p 86

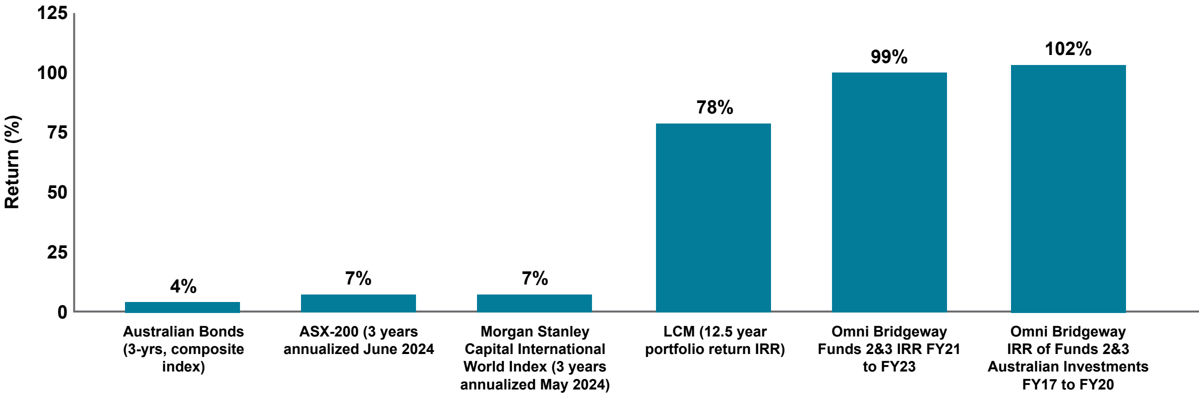
Of all tax class-action cases over that period, less than 10 per cent of third-party litigation funder-backed cases resulted in more than 75 per cent of the settlement amount being returned to class members. In contrast, over 90 per cent of self-funded class-action litigants received more than 75 per cent of the settlement amount. Meanwhile, the vast majority of litigation funder-backed cases resulted in less than half of the settlement funds being returned to class members. Notably, all shareholder cases from 2013 to 2018 involved third-party litigation funding. [123]

> *"Giving the litigation funder a percentage of the settlement does not explicitly consider what the litigation funder contributed. There are no underlying financial principles involved in the percentage split of a settlement between a litigation funder and a plaintiff."*
>
> Sean McGing, Actuary Advisor [124]

> *"Since 2000, we have realised $5.0bn for clients, of which $1.7bn in investment proceeds have flowed to the Group."*
>
> Omni Bridgeway FY23 Annual Report

The Association of Litigation Funders of Australia lists 19 members and associate members. [125] Established in 2018, the Association's board is composed of private funds rather than legal practitioners. In this section, we analyse the returns of two of the largest operators in Australia – Omni Bridgeway and Litigation Capital Management – to illustrate the enormous returns that litigation funding generates in Australia.

FIGURE 7: PERFORMANCE OF LITIGATION FUNDING INDUSTRY AVERAGE RETURNS AGAINST INDUSTRY BENCHMARKS

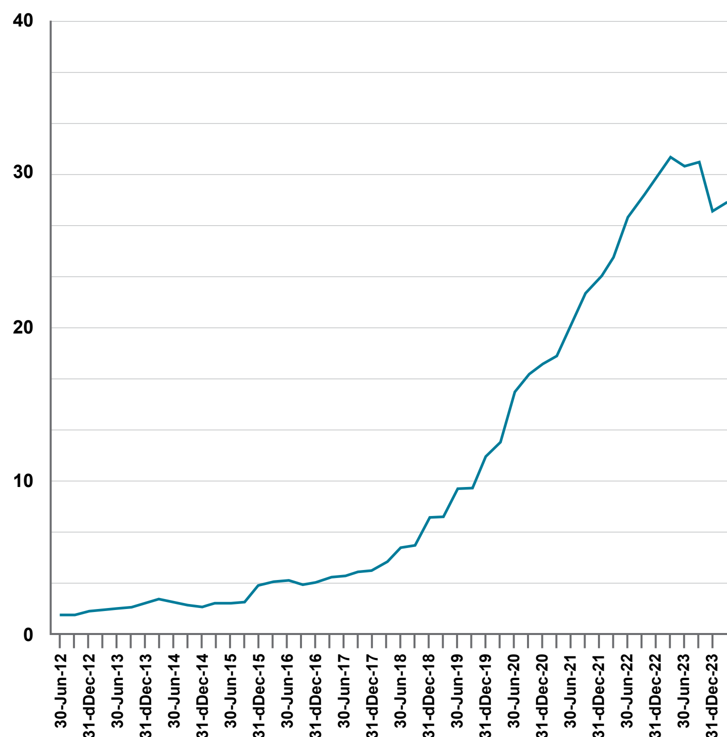


Sources:
Australian Bonds: Yield Report
ASX 200: S&P Global
International World Index: MSCI
LCM:Half Year Results Presentation FY23
Omni Bridgeway Funds 2&3 IRR: Results Presentations FY21,22,23
Omni Bridgeway Funds 2&3 Australian Returns: Question on Notice 05-07 Australian Returns Funds 2&3

Case Study – Omni Bridgeway

After merging with IMF Bentham in 2019, Omni Bridgeway (Omni) has grown to diversify its portfolio globally and expand from class actions to other types of litigation funding. Of its global estimated portfolio value of $30.5 billion, Asia Pacific makes up 31 per cent of its portfolio. Australia is Omni's predominant Asia-Pacific market. Class actions make up 26 per cent of this investment. [126]

FIGURE 8: OMNI BRIDGEWAY EARNINGS POWER VALUE ($ BILLION)



Source: Omni Bridgeway, Amended FY23 Annual Report

Total gross income and revenue for the company grew by 51 per cent in the 12 months ending June 2023, reaching $333 million.

Establishment of investment funds 2 and 3

Established in 2017, Omni's funds 2 and 3 [127] raised $180 million to deploy in non-US cases. These funds are predominantly used to back Australian class actions. Omni's FY19 Annual Report states that 32 per cent of expected portfolio value (EPV) by geography was based in Australia and that 40% of EPV by investment type was in 'multiparty' matters (i.e. class actions). On this information released to shareholders, Australian class actions comprise in excess of a majority of the investments by these funds.

The returns of funds 2 and 3 demonstrate that Omni has been able to achieve sustained and excessive returns via the Australian legal funding market.

During the Parliamentary Inquiry into Litigation Funding and Regulation of the Class Action System, Omni was asked to declare **'the returns (profit, ROIC and IRR) that Omni Bridgeway has achieved on class actions in Australia since 2010 shown between balance sheet, Funds 2&3 and Fund 5'.** [128]

Omni responded:

Balance sheet investments: [129]

- Investment Profit before allowing for any capitalised internal costs, or allowance for indirect operational cost of running the business, and tax is $320.2m. **Profit after including capitalised internal costs is $275.8m.**
- **ROIC is 192%** (excluding capitalised internal costs and indirect operational cost). Whereas ROIC is 131% after including the internal costs that are capitalised into the investments.
- **IRR is 70%** (excluding capitalised internal costs and indirect operational cost). Whereas IRR after capitalised internal costs is 54%.

Funds 2&3 [130] Investments:

- Investment profit before allowing for capitalised internal costs, or allowance for indirect operational cost of running the business, and tax, is $32.6m. Return profit including capitalised internal costs is $31.0m.
- **ROIC is 326%** (excluding capitalised internal costs and indirect operational cost of running the business). Whereas ROIC is 269% after including the internal costs that are capitalised into the investments.
- **IRR is 305%** (excluding capitalised internal costs and indirect operational cost of running the business). Whereas IRR after capitalised internal costs is 252%. [131]

Loss risk – Omni has boasted that it has extensive vetting procedures in place that ensure it funds only cases with a high probability of success. Over the years, it has asserted that it rejects most applications it receives. This vetting process significantly reduces the risk of a failure and subsequent adverse costs orders.

- It claims to have an 89% success rate in its FY2019 Annual Report. [132]
- An examination of Omni's corporate filings with the ASX reveal that failures in Australia are rare.

In any event, Omni has mitigated risk through the use of insurance policies. ASX announcements following the establishment of Omni's Funds 2 & 3 and Fund 5 reveal that Omni is in fact "insulated" from this risk through the use of 'After the Event' (ATE) insurance.

ATE Policy [Fund 5 – ASX announcement 20 June 2019]:

> *"IMF has secured for Fund 5 an After-the-Event (ATE) insurance policy, that will respond to claims up to the indemnity limit for adverse costs exceeding a self-insured retention of US$20 million. The policy contains a cap on individual claims as well as the aggregate indemnity cap. The initial premium under the policy is approximately US$17 million and will be paid by Fund 5 and subject to hurdle return to the investors like all non-establishment partnership expenses. Further premium payments will be made when capital commitments to investments by Fund 5 exceed US$300 million.*

The policy is provided by insurers with a minimum AM Best rating of A- (excellent). IMF is of the view that assuming a level of performance in line with IMF's historic record, the policy should fully insulate Fund 5 from claims for adverse costs above the self-insured retention level, save that individual investments of a material size may require top-up cover should the adverse cost-risk exposure exceed the applicable cap.

The policy will enable Fund 5 to deploy funds without reserving above the retention level for adverse cost risks. This "wrapper" policy will apply to all investments made by Fund 5, which will expedite the investment process as individual ATE cover will not be required on a case-by-case basis."

In any case, the IRR of funds 2 & 3, and prior to 2017 that of IMF Bentham, are extraordinary and considering that these profits come from the pockets of the members wronged in a class action should warrant legislative intervention.

Case Study – Litigation Capital Management

Established in Sydney in 1998, Litigation Capital Management (LCM) initially provided litigation funding for commercial and statutory claims. As with most companies in this sector, LCM has experienced an extraordinary rise since 2006 "when the High Court determined that the provision of disputes finance and financial support to a litigant did not constitute an abuse of process of the court". [133] LCM listed on the Australian Stock Exchange in 2016. In 2018, it left the ASX for the London Stock Exchange. In a 2020 funding round targeted at financing litigation, it raised US$150 million. More recently, in 2023, the firm raised US$281 million.

LCM delivered vast returns from both legal wins and settlements, and demonstrated an ability to recover capital from legal losses, decreasing the downside of investment.

The investments' return from settlements of 2.7x multiple on invested capital (MOIC) and 203 per cent IRR are particularly strong. These figures demonstrate that LCM does not need a favourable legal outcome to receive an extremely high financial return. The IRR of settlements is greater than the IRR from legal wins, likely due to the shorter period of time needed to secure a settlement versus damages from a court decision. Firms like LCM are incentivised to reach settlement over judgment to improve returns over time.

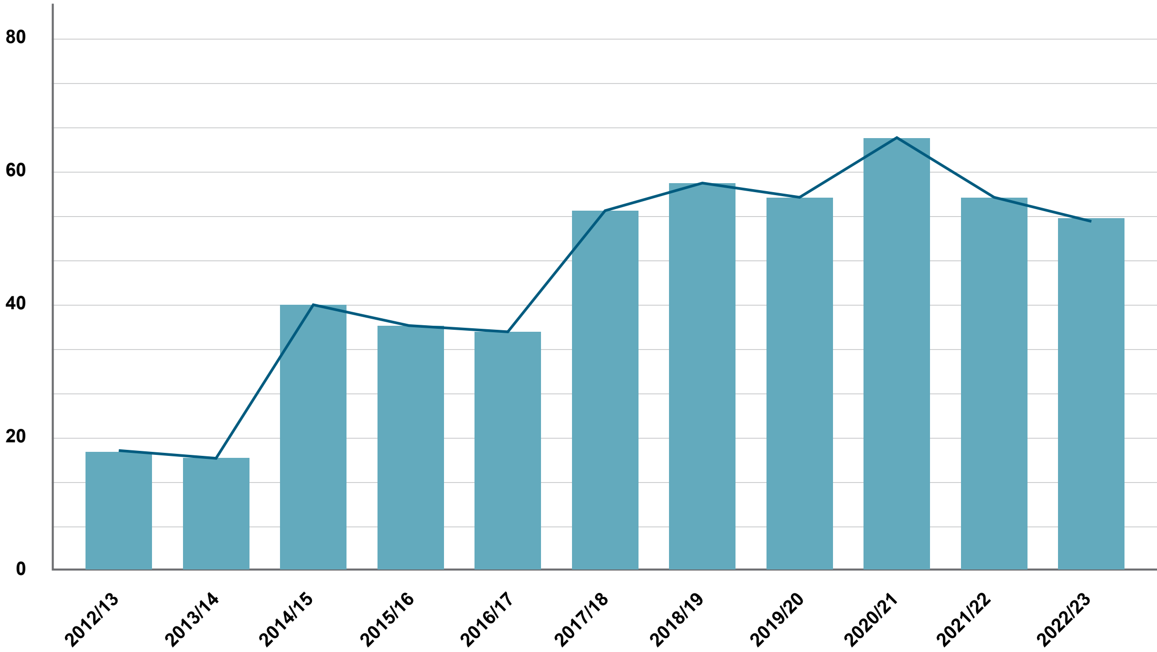
As at February 29 2024, LCM's portfolio had class-action investments as its single largest investment by industry sector, representing 25 per cent of its portfolio and $83 million in estimated capital commitments. The Asia-Pacific region (predominantly Australia) made up 52 per cent of its total investments, at $119 million. [134]

2.5 Trajectory of Class-Action Industry

Our analysis shows that an additional 35 class actions were filed across Australian jurisdictions to the end of May this financial year. Analysis by King & Wood Mallesons showed at least 53 new class actions were filed across Australia last financial year. The figures represent a significant increase from 2012/13 when just 18 class actions were filed.

Figure 9, below, shows the total number of class actions filed from 2012/13 through 2022/23.

FIGURE 9: CLASS ACTIONS FILED



Source: King and Wood Mallesons, The Review: Class Actions in Australia 2022/23, p.6 (2012 to 2022/23).

As of May 2024, there are 146 class actions before the Federal Court and 66 before State Supreme courts. A total of 212 class actions are currently on foot across all Australian jurisdictions. Table 4, below, shows that Victoria is overwhelmingly the most relevant city for class actions in Australia, with 113 cases filed in either the Victorian Supreme Court or the Melbourne registry of the Federal Court.

TABLE 4: CLASS ACTIONS ON FOOT ACROSS AUSTRALIA

Jurisdiction		Total number of class actions on foot	Shareholder actions	Consumer protection	Competition and market access	Administrative (Planning, Constitutional, and Human Rights)	Employment and industrial relations	Other (maritime, taxation, other Federal jurisdiction)
Federal Court (by registry)	**Vic**	76	27	12	3	9	22	3
	NSW	55	19	21	2	4	6	3
	Qld	5	2	1	1	0	0	1
	WA	5	0	0	0	4	1	0
	SA	1	0	0	0	0	1	0
	NT	3	0	1	0	2	0	0
	ACT	1	0	0	0	1	0	0
	Tas	0	0	0	0	0	0	0
	Total (FCA)	**146**	**48**	**35**	**6**	**20**	**30**	**7**
Victoria (VSC)		37	14	17	0	3	1	2
New South Wales (NSWSC)		24	6	9	0	6	2	1
Queensland (QSC)		4~	-	-	-	-	-	-
Western Australia (WASC)		0	0	0	0	0	0	0
South Australia (SASC)		0	0	0	0	0	0	0
Tasmania (TASSC)		1~	0	0	0	1	0	0
Total class actions: Australia		**212**	**68**	**60**	**6**	**29**	**33**	**10**

Sources:
Federal Court of Australia, Current Class Actions. Accessed 7 May 2024.
Supreme Court of Victoria, Current Group Proceedings. Accessed 7 May 2024.
Supreme Court of New South Wales, Current Class Actions. Accessed 7 May 2024.
Supreme Court of Western Australia, Representative Proceedings (Class Actions). Accessed 7 May 2024.
~-The supreme courts of Queensland and Tasmania do not publish consolidated class actions (representative proceedings) lists.
Data sourced from The Mercury, 'Genuine intention to settle': Mediation hoped to resolve Ashley Youth Detention Centre class action.
8 December 2023.; Clayton Utz, New Class Actions List in Queensland, 5 April 2023.

Despite the increase in the number of class actions on foot, an increasing proportion of new cases have not received litigation funding in recent years. Last financial year, for example, 31 of 53 – 41.5 per cent – of new cases received third-party litigation funding, compared with a peak of 74.1 per cent of cases in 2017/18. While the absolute yearly numbers of new class actions has reduced slightly, the cumulative number of on-foot class actions remains high. Additionally, the availability of GCOs and CFOs has introduced a broader range of matters receiving funding from litigation funders. [135] For example, prior to the introduction of CFOs in 2016, just 9 per cent of proceedings were consumer protection claims. Last financial year alone, consumer protection claims represented around 20 per cent of all claims. [136]

The continuing number of unfunded class actions suggests that the availability of litigation funding has not completely displaced the ability of group members to seek redress through class action procedures.

2.6 Notable Cases

Class actions enable a group of people with similar claims who share questions of law or fact to progress claims on behalf of the group. The purpose of those actions is to ensure groups of people are able to seek redress efficiently. While this legitimate purpose of class actions has the potential to deliver increased access to justice and a reduced burden on the courts, too often law firms and third-party litigation funders are found to abuse available cost mechanisms, including CFOs and GCOs.

Examples of egregious claims made by firms and litigation funders have been included below.

In December 2023, Federal Court Justice Bernard Murphy labelled the conduct of law firm Levitt Robinson in its action against Aveo Group "seriously derelict" and "beggaring belief". Justice Murphy disallowed $1.3 million in legal costs for not being reasonable, and denied an additional $1.4 million because the costs were avoidable. [137] Levitt Robinson pursued the claim with support from American litigation funder Galactic. [138] The Plaintiffs ultimately received just 17 per cent of the settlement, with Justice Murphy suggesting the case was "weak and always likely to fail":

> *"They might think that a settlement under which the only winners are lawyers indicates that something is terribly amiss in the operation of the class-action regime … Every day, in courts around the country, litigants are forced to confront the reality that their claims or defences are not as strong as they thought. That is what happened here…"*

In February 2024, Federal Court Justice Natalie Charlesworth slammed the conduct of the Environmental Defenders Office and its appointed experts in a class action against the Barossa Gas Project in the Northern Territory. Justice Charlesworth found that the EDO manipulated Indigenous testimony to support findings that a traditional owners' 'songline' intersected with a Santos pipeline off the Tiwi Islands. She found evidence that Indigenous witnesses had been 'coached'. Of evidence presented in the class action, Justice Charlesworth noted:

> *"The material supports an inference that Indigenous instructions have been distorted and manipulated before being presented to this Court via an expert report, and I so find."*

In August 2023, Federal Court Justice Michael Lee knocked back an attempt by Shine Lawyers to take an additional $32 million from a $300 million settlement between Ethicon (a subsidiary of Johnson & Johnson) and women affected by defective pelvic mesh implants. [139] The case was the largest product liability class action in Australia to date, with an estimated $174.4 million remaining for class-action members after third parties and lawyers' fees had been paid (that is, approximately 42 per cent of the settlement would go to lawyers and funders). Shine had already been paid out $82 million from the settlement, which ran for 11 years. Justice Lee made the following observation:

> *"The settlement cannot be characterised as a good one from the perspective of group members, whatever belated attempts are made to put lipstick on a pig…"*
>
> *"I am not satisfied that the net sum left over for group members will be sufficient if the deduction [that is] sought is made. This is fatal to characterising the deduction now sought as 'just'."*

In October 2021, Victorian Supreme Court Justice John Dixon slapped the lawyers and funder Australian Funding Partners Limited (AFPL) involved in the Banksia Securities class action with an $11.2 million compensation bill, as well as around $10 million in costs. [140] In his judgment – in which the word 'egregious' appeared 16 times – Justice Dixon struck off the barristers involved in the scheme, Norman O'Bryan and Michael Symons. The case is only just being settled. Of the architect of the securities scheme, Mark Elliott, Justice Dixon said:

> *"Mark Elliott was the architect of one of the darkest chapters in the legal history of the state [...] He fraudulently inflated his claim for fees at the time of the partial settlement [...] He destroyed relevant documents to avoid disclosure of his conduct. He swore false affidavits. He attempted to intimidate litigants, unrepresented group members and other officers of the court, to pursue his own financial interests and conceal his wrongdoing."*

The fraudulent conduct in the Banksia case only came to light because Wendy Botsman (a class member) took the extraordinary step of appealing the class-action judge's approval of the lawyers' and funders' fees as "fair and reasonable". The court subsequently found that Elliott sought to intimidate Ms Botsman as a result of her decision to appeal.

The lawyers involved in the scandal admitted to fraudulent billing – significantly inflating fees that enabled the litigation funder to justify significant commissions charged in the case. [141] The same legal team and funders were involved in a number of other resolved class actions, indicating that the conduct could have been systemic.

Other class actions and misconduct by AFPL:

- **Myer:** AFPL brought a shareholder class action against Myer. This was the only shareholder class action at the time that went all the way to judgment. This class action involved the same legal team as the Banksia class action, including Portfolio Law and Mr O'Bryan.

- **Murray Goulburn:** Mark Elliott's firm, Elliott Legal, brought a class action against Murray Goulburn, which was funded personally by Mr William Crothers (who is a director of AFPL and who was chairman of ASX-listed Globe International). Mr O'Bryan acted as the barrister for the class action. Ultimately, the case settled for $37.5 million. Justice Murphy approved the settlement in April 2020, resulting in payment of legal fees of $5.2 million and funder commissions of $8.6 million. Just five months later, in September 2020, Justice Murphy released another judgment acknowledging the developments in Banksia and stating concern about having approved the settlement as "fair and reasonable":

  > *"As a result of those developments I became concerned about the possibility that the Court may have been misled when approving the legal costs and litigation funding charges in the present case."[142]*

- **Treasury Wine Estates, Worley Parsons and Leighton Holdings:** Mr Elliott brought a class action against Treasury Wine. It was revealed that the plaintiff shareholder (Melbourne City Investments) was a company that was owned and controlled by Mr Elliott. The case was thrown out as an abuse of process because the predominant purpose was enriching Mr Elliott. The judge was reported in The Australian as saying, "In this case, there is a palpable unfairness in a defendant being brought to court for the predominant purpose of enriching the plaintiff's solicitor, and the community's confidence would undoubtedly be shaken if that were held to be a legitimate purpose for bringing proceedings." [143]

2.7 Managing conflict: Acting in the interests of class members

> *"The duty of legal practitioners where conflict arises between the interests of the client and those of a funder is quite clear: the interests of the client must prevail."*
>
> Justice Jim Delany (VSC) at Maurice Blackburn Class Actions Conference 2024.

When class actions settle, as they most often do, the settlement must be approved by the court. [144] The problem is that the terms of that settlement may not necessarily be in the best interests of the class, due to conflicts of interests between legal representatives, class members and litigation funders. Even with the best will in the world, legal representatives have some conflict of interest or duty that "limits their ability to present and represent all relevant interests". [145]

One solution to this problem is for the relevant court to appoint a contradictor to assist the court by representing the interests of class members during the settlement phase of proceedings. Contradictors could be suitably qualified lawyers or, where appropriate, financial professionals or regulators, whose role is to consider proposed class-action settlements free from the conflicts that often arise in class-action contexts.

The Victorian Law Reform Commission actually proposed the appointment of contradictors to become the "default position in Common Law Division class actions" in the Victorian Supreme Court in 2018. [146] Jeremy Kirk SC (as he then was, before his appointment to the NSW Supreme Court), writing for the ***Australian Law Journal*** in 2018, noted that this had not become the case. In practice, the VSC appoints contradictors sporadically.

Conflicts can arise between lawyers, litigation funders and class members in circumstances including:

1) Where there is a temptation to settle early if a claim has low prospects of success so that lawyers and/or funders may obtain a return on what might become a losing investment;

2) Where there is some decision to be made as to whether some class members ought to be excluded if they fail to register on time (but subsequently seek to be included); or

3) Where there is some decision as to what share of settlement proceeds should go to a litigation funder.

In class actions backed by litigation funders, the risk that the interests of group members come second or third behind the interests of lawyers and funders is high. [147] The increasing use of CFOs and GCOs ought to attract the requirement for a contradictor to represent the interests of class-action group members. Mr Kirk SC (again, as he was at the time) suggested a contradictor could be used at both 'early-stage' CFOs (which have since fallen out of use) and 'late-stage' CFOs to reach an equitable outcome for class members.

Class actions can take anywhere between six months and several years to run to completion.

During settlement proceedings, neither the lawyers, nor funders have any incentive to hold up proceedings, as they have an incentive to reach agreement swiftly and, therefore, get paid. They are both active participants in the proceedings, whereas most class members have little to no direct interaction with their lawyers or the funders.

Agreements entered into with litigation funders prior to the beginning of proceedings are complex, full of legalese and in some cases would require the opinion of a lay person's lawyer to understand. The level of disclosure provided to potential members and the terms of the agreements vary widely, as there are no minimum terms or Product Disclosure Statement (PDS) requirements.

To categorise this another way, we could think of members of a class action borrowing against future earnings to essentially obtain credit for the proceedings to run. Generally, when taking out a loan or applying for a credit card, there is a requirement for a PDS to be provided to the applicant. In the case of third-party litigation funding, there is not and it means that this is one of the most expensive form of credit in the country.

While that may be a simplification of the complex processes involved in running class actions, litigation funder-backed class actions often cost plaintiffs well in excess of other forms of consumer credit.

TABLE 5: WORKED EXAMPLE OF FEE STRUCTURE

Law firm worked example	
Court decision or settlement	$100.00
Plaintiff receives	$50.00
Total payment for legal services	$50.00
of which:	
• **Law firm's revenue**	$20.00
• **Litigation funder's revenue**	$30.00
Litigation funder's initial investment	$20.00
Law firms initial overdraft (= above)	$20.00
Cost of law firm's overdraft	$30.00
Cost of law firm's overdraft (% of total payment for legal services)	60%

Plaintiff worked example	
Court decision	$100
Plaintiff Legal costs	$20
Plaintiff receives	$80
Plaintiff pay Litigation Funder	$30
Plaintiff cost of capital	37.5%

The litigation industry commonly insists that if the court has approved a settlement, then of course it is in the best interests of members. Whilst courts do have a supervisory and protective role in relation to class-action settlements, the above costs of credit and the extraordinary returns of litigation funders backing class actions in Australia should demonstrate that more must be done to ensure that a greater proportion of class-action settlement funds are returned to class members.

Judges tend to focus on the percentage a funder is claiming rather than the return on investment made by the funder. Generally this figure also incorporates risk factors owing to the litigation funder. With success rates between 80 to 95 per cent in the case of most funders, and with the use of ATE insurance policies that are taken out by the funder, there is hardly the proven risk to legitimately claim such high amounts from proceeds awarded to class members.

2.8 Appointing Contradictors to Advocate for Class Members

A contradictor's role is to seek to represent the interests of particular parties whose interests would not otherwise be represented, and to do so in a manner that assists the court. [148]

This role can include the review of a settlement on offer alongside the costs and the proposed commission from the settlement sum. Put simply, they can act to determine if the commissions requested by the litigation funder are fair to the class members and make recommendations to the court as to any adjustments that ought to be made in the interests of those class members.

This role is important for one key reason – the process for a group member to challenge any proposed settlement is otherwise extremely difficult. It would require the hiring of their own independent lawyer (at their own expense) separate to the lawyer representing them in the class action, and then appearing at the approval hearing and thus starting another process of indeterminate length and cost to the class member. Challenges to settlement arrangements are rarely made by ordinary class members.

A contradictor also has the power to propose to the court that advice be sought from a finance or capital-market expert.

Despite the merits of the appointment of contradictors, the use of a contradictor is rare in Australian class actions. [149] Where contradictors have been appointed by courts, the commissions secured by litigation funders have often been significantly reduced. [150]

TABLE 6: EFFECT OF CONTRADICTOR INVOLVEMENT IN CLASS ACTION CASES, SELECTED EXAMPLES

Class action example	Contingency fee sought by litigation funder	Percentage approved by court following advice of contradictor	Reduction in litigation funder commission	Overall benefit to class members following contradictor appointment
Endeavour River Class Action (Murray Goulburn)	32%	25%	7% pts	$3,500,000
Webster Class Action	28%	23%	5% pts	$1,875,000
Peterson Class Action	25%	13.7%	11.3% pts	$2,000,000

Source: Joint Committee on Corporations and Financial Services, Parliament of Australia, Litigation funding and the regulation of the class action industry, (Final Report, December 2020), 176.

In these three examples, the average amount reduced by the contradictor from the litigation funders' commission is 7.77 percentage points. The settlements returned an additional $7,375,000 to class members rather than contributing to litigation funder profit margins and return on invested capital.

If the appointment of a contradictor was an automatic requirement of settlement and their appointment were consistent with the average reduction above, of the more than $642 million paid to litigation funders from 2009 to 2020, $49,932,351 more could have been returned to the pockets of class members.

Class members aren't large, global corporations seeking to profit off the Australian class-action regime. They are people seeking just compensation for wrongs committed. These cases often run for years; however, given the incentive the active parties, including the funders and lawyers, have to expedite the settlement and, therefore, their payday, there should be just a little extra time taken at the end of the case to have members represented by a contradictor to ensure that the commission sought by the funder is reasonable in the circumstances.

CONTRADICTOR CASE STUDY

> a) *"There is a great variability in the rates of return IMF (now Omni Bridgeway) achieved in different shareholder class actions, with some high returns, some modest returns, and some low returns, although no losses; and*
>
> b) *while the rates of return achieved by IMF (now Omni Bridgeway) in funded shareholder class actions in Australia are quite variable, it has achieved a significantly better average rate of return in such cases compared with its average rate of return across its entire portfolio."*
>
> Justice Bernard Murphy, in ***Endeavour River No.2*** [151]

The ***Murray Goulburn*** case is instructive of the potential impact a contradictor can have on settlement proceedings. The case was a securities class action comprising class members who held an interest in the

Murray Goulburn Unit Trust between May 2015 and April 2016. The class members, who were members of a dairy cooperative, alleged that they suffered loss due to the conduct of trustees.

On 9 July 2020 Justice Murphy published his decision on the settlement approval hearing dealing with the commission to be paid to litigation funder Omni Bridgeway (then known as IMF Bentham).

Omni had originally sought a variable commission of 30 or 35 per cent, depending upon class-member characteristics. The court held that the proposed funding rates were excessive and indicated that it would appoint a contradictor to represent the class members to assist in deciding whether the rate claimed by Omni was fair and reasonable. The court eventually concluded that 25 per cent was fair and reasonable.

Omni opposed the court's approach, arguing that it did not have the power to require that litigation funding be reasonable – an extraordinary proposition, given that litigation funders often position themselves as heroes of class-action plaintiffs.

Additionally, Omni opposed the appointment of a contradictor for its funded clients, and subsequently frustrated the work of the contradictor. The firm opposed access to documents, attempting to keep material out of evidence.

Omni subsequently proposed a compromise rate of 28 per cent. This was effectively rejected by the contradictor and Omni subsequently acquiesced to the court's determination of 25 per cent.

While Omni resisted disclosure of much of the data about potential returns from the case, Justice Murphy's decision discloses the returns that Omni would have earned under the different proposals:

- 32.1% (as initially sought) means that IMF's return would've been 6.32 times investment,
- 28% (as IMF later offered) means that IMF's return would've been 5.62 times investment, and
- 25% (which was approved) means that IMF's return would've been 5.02 times investment.
- Thus, Omni received a return of 502% on its investment over a period of 1.2 years.

The decision does not provide any detailed reasoning to explain the basis on which a return of 502 per cent over 1.2 years could be considered fair and reasonable, nor indeed whether ROI was considered as a factor in deciding the appropriate amount.

It is clear from the *Murray Goulburn* proceedings that an adversarial process in which the funder resists involvement of a contradictor and limits the evidence relating to its operations appearing before the court may not be an appropriate way to determine a fair and reasonable return.

The case also highlights that litigation funders are driven by maximising returns on investment – not, as suggested by many funders, to act in the best interests of class members. Lawyers who are retained to represent class members in proceedings are often dependent on litigation-funder partners to cover legal fees and seek to continue lucrative funding partnerships for future cases.

The routine appointment of contradictors would significantly improve the status quo, balancing the significant conflicts of interest that arise in class-action settlements. The contradictor ought to be appointed by the judge to minimise conflict concerns or, in the alternative, be chosen by the judge from a panel of candidates put forth by the plaintiff and defendant.

Contradictors should be appropriately qualified, such as senior counsel or a senior junior with relevant experience. It may be appropriate in specialist cases to appoint suitably qualified financial services professionals or similar. The contradictor ought to have leave to address whatever issue they think relevant to protect the interests of group members. Finally, the contradictor ought to be appointed at a time that a judge considers appropriate in order to assess the appropriateness of costs orders. [152]

2.9 Policy Solutions

Australian class-action regimes need to ensure access to justice and fair and equitable outcomes. Regulating the litigation-funding market is a key component of ensuring fair outcomes for plaintiffs. Indeed, many plaintiffs often do not have a complete understanding of the funding arrangements they enter into with litigation funders. This has been exacerbated by recent moves by the Federal Labor Government to remove litigation funders from AFSL and MIS requirements that forced funders to disclose a greater amount of information to prospective group members.

Additionally, as noted by the Australian Law Reform Commission in its 2020 review of the litigation-funding sector, the potential for plaintiffs to be left with an adverse costs order is a possible outcome of some funding arrangements. There is a risk that funding relationships can affect how the legal matter is conducted, especially in relation to key decisions concerning settlements. In that review, the ALRC found that the median return to group members in funded matters was just 51 per cent, whereas in unfunded matters, the median return was much higher, at 85 per cent. [153]

Our recommendations balance the need to secure access to justice for plaintiffs with reasonable constraints on litigation funders to ensure the profit motive of funders does not interfere with fair outcomes for plaintiffs. We have taken care to make recommendations that uphold the rule of law, promote efficient justice, and provide certainty for plaintiffs and defendants. While our recommendations are primarily oriented towards the federal class-action regime, they are instructive for burgeoning State class-action jurisdictions and, occasionally, targeted at improving the GCO regime in the Victorian Supreme Court.

Capping lawyer and litigation funder fees at 30 per cent

Last financial year, the Victorian Supreme Court approved GCOs ranging from 16.5 per cent to 27.5 per cent across nine cases. In one of those cases, 30 per cent was sought by lawyers for the plaintiffs but that was reduced to 24.5 per cent by the court. In ***Lieberman v Crown Resorts***, the court saw fit to approve a 'tiered' GCO ranging from 16.5 per cent to 27.5 per cent, to prevent plaintiff lawyers from recovering a disproportionate or unreasonable sum. [154] Capping funding arrangements in the Federal Court, and where appropriate State courts, would regularise best practices and protect class-member interests.

- Cap funding arrangements at 30 per cent in the Federal Court and, where able, in State courts, to provide certainty to plaintiffs and defendants and restrict the ability of litigation-funders to push for outsized returns.
- Returns to funders in excess of 30 per cent should be approved by a court only in truly exceptional circumstances.

Securing the rights of claimants through court-appointed contradictors

Courts should be required to appoint an independent contradictor when determining the fairness of litigation-funding arrangements. The *Federal Court of Australia Act 1976* should be amended to include a presumption in favour of the court appointing a contradictor at the costs order stage where class members are not self-funded.

The routine appointment of contradictors would significantly improve the status quo, balancing the significant conflicts of interest that arise in class-action settlements.

- The contradictor ought to be appointed by the judge to minimise conflict concerns or, in the alternative, be chosen by the judge from a panel of candidates put forth by the plaintiff and defendant.
- Contradictors should be appropriately qualified, such as senior counsel or a senior junior with relevant experience. It may be appropriate in specialist cases to appoint suitably qualified financial services professionals or similar.
- Contradictors ought to have leave to address whatever issue they think relevant to protect the interests of group members.
- Contradictors ought to be appointed at a time that a judge considers appropriate in order to assess the appropriateness of costs orders.

Ensuring efficient case management through soft close orders

Soft close orders are usually sought as an efficient way to achieve settlement in open class actions. They require group members to register their interest to participate in a mediation process to expedite settlement. If the mediation fails, the action reverts to an open class action and proceeds as usual.

If the parties come to an agreement during the mediation process, a settlement progresses with the registered class members. Care must be taken to consider how such orders could extinguish the rights of group members who failed to register.

- Improving access to soft close orders would help minimise 'tail risk' for insurers and businesses by providing greater certainty over the expected class size. While the Victorian Supreme Court has an express power to make soft close orders, other jurisdictions including the Commonwealth continue to regulate soft close orders through common law. [155]
- Soft close orders ought to be regularised in Commonwealth and State law.

Robust disclosure requirements to inform prospective class members

The Coalition's reforms to bring litigation funders within the scope of AFSL and MIS scheme requirements introduced a heightened level of transparency and accountability for class action members. It introduced an obligation on litigation funders to act honestly, efficiently and fairly, maintain an appropriate level of competence to provide financial services, and have adequate organisational resources to provide those services. In effect, the reforms required greater transparency around the operations of litigation funders in Australia.

- Where litigation funders are supporting open class actions, detailed information ought to be made available broadly, including wherever the litigation funder or law firm advertises the class action online.

Litigation funders ought to be subject to regulation that requires them to:

- be led by fit and proper persons;
- act honestly, efficiently and fairly;
- maintain an appropriate level of competence to provide financial services;
- provide detail of funding agreements in plain language similar to the requirement of financial service providers to provide Product Disclosure Statements to prospective clients, including:
    - Information about the prospects of success;
    - Information about the proposed funding model;
    - Individualised estimates of expected returns, and
    - Information about previous outcomes secured by the firm and/or litigation funder.

Disclosure of litigation funder profits and conflicts of interest

The special case of the interaction between the profit motive of litigation funders and the rights of class members to access justice merits a higher level of disclosure from litigation funders relating to profit margins. To that end:

- Litigation funders ought to be required to disclose disaggregated settlement amounts in annual corporate reporting.
- They should be made to report three previous years of corporate tax paid in Australia.
- This information should include the amount recovered by the funding on a settlement-by-settlement (or judgment) basis, including disclosure of the percentage of the overall settlement recovered by the litigation funder.
- Prohibit lawyers from acting as directors of litigation funders whilst maintaining an interest in a law firm acting on a case funded by that funder.
- Review conflict of interest rules to ensure class members have appropriate control over the conduct of a case, including decisions to settle.

Avoid legal disputes by ensuring competition law is fit-for-purpose

The current class-action system introduces inefficiency that only enriches 'no-win-no-fee' law firms and litigation funders. In particular, follow-on actions that emerge after regulators make adverse findings is leading to a 'race to court' culture. Greater clarity over the obligations of business to consumers and shareholders following an adverse regulatory finding would remove these inefficiencies.

- Consider introducing a restriction on class actions arising from follow-on actions while businesses are seeking an appeal of a regulatory finding.
- Require businesses to introduce a clear redress mechanism following the exhaustion of any regulatory appeals process, thereby short circuiting efforts to launch class actions by providing reasonable access to recompense for affected consumers.

Legislative basis for consideration of funding arrangements in carriage disputes

The New South Wales Supreme Court has indicated that it may prefer self-funded and 'no-win-no-fee' funding arrangements over litigation funder-backed cases due to the potential for greater returns to claimants and the lower risk of conflicts of interest emerging. [156] Adopting this approach would improve the chance that claimants with meritorious claims will secure a greater proportion of the overall settlement.

- Courts should be required to consider the funding arrangements of claimants in so-called 'carriage disputes' (where courts consider competing class-action claims and which cases are to proceed as representative actions).
- This ought to include the nature of any indemnities between litigation funders and plaintiff law firms.

End incentives for forum shopping

The two favoured forums for class actions in Australia are, by far, the Federal Court and the Victorian Supreme Court, followed by the New South Wales Supreme Court. There are presently 146 class actions before the Federal Court, the majority of which were commenced in the Victorian registry. Meanwhile, there are 37 cases before the Victorian Supreme Court and another 24 before the New South Wales Supreme Court.

Naturally, those before State supreme courts primarily relate to State issues. Occasionally, there is a dispute as to whether a class action ought to be heard in a Federal or State jurisdiction, and those disputes are appropriately dealt with by those courts. The New South Wales Supreme Court, for example, is presently developing a process of joint case-management hearings with the Federal Court to determine these matters of State and Federal conflict of laws issues. [157] This procedure was developed following a series of recent cases involving AMP where overlapping class actions filed a series of anti-suit injunctions in State and Federal courts. [158]

In the context of State issues appropriately heard by State supreme court judges, however, the concentration of class actions in the Victorian Supreme Court and, to a slightly lesser extent, the New South Wales Supreme Court, raises the question of why class action applicants choose these forums over others. Queensland, which developed a class action list only last year, has only four class-action proceedings on foot. Western Australia and South Australia have none, and Tasmania has only one.

The concentration of population and business activity in Australia's two largest cities explains some of this concentration of State-issue class action activity. Another contributing factor is the inadequacy of some states' class-action regimes to resolve class actions. The 2014 Queensland floods class-action litigation, for example, was heard in the New South Wales Supreme Court because at that time Queensland did not have an appropriate basis to resolve that dispute. [159]

The availability of GCOs in Victoria is a likely driver of significant litigation funder-backed class-action activity in that jurisdiction. Section 33ZDA of the ***Supreme Court Act 1986 (Vic)*** enables law firms to enter into contingency-fee arrangements – that is, fee arrangements that return a proportion of the overall settlement or damages award. As discussed elsewhere in this report, this creates a constellation of perverse incentives for litigation funders and plaintiff law firms to bring class actions on behalf of disinterested – or worse, unsuspecting – class members, which serves only to disproportionately enrich litigation funders while creating a burden on the justice system.

Recommendations:

- Ensure states have appropriate mechanisms in place to hear State-issues class actions in their natural forum.
- Review cross-vesting rules to ensure class actions are heard in their natural forum and prohibit the consideration of the availability of group costs orders as a relevant consideration.
- Harmonise, where possible, class-action mechanisms across jurisdictions, to reduce forum shopping behaviour, including by introducing 30 per cent caps on litigation-funder proceeds from settlements or awarded damages.

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