AN EVIDENCE-BASED APPROACH TO CLASS ACTION REFORM IN AUSTRALIA

Shareholder class actions in Australia - myths v facts

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CHAPTER 1

OVERVIEW

Shareholder class action litigation is the most discussed and controversial category of class actions but, unfortunately, much of the analysis and commentary on shareholder class actions has been inaccurate. The purpose of this report is to provide comprehensive and accurate data with respect to the first 27 years and four months of shareholder class actions in Australia so as to facilitate an accurate evaluation of (or even an accurate general dialogue with respect to) shareholder class actions. The period in question - the review period - goes from 4 March 1992 to 30 June 2019.

In light of the claims that have been made on numerous occasions over the last few weeks that there has been an explosion of class actions over the last 12 months or so, I will also provide some data on all Australian class actions filed over the review period.

I. ORIGINAL EXPECTATIONS

It is useful to start this report by considering what role, if any, the creators of Australia's first and most important class action regime expected this regime to play with respect to the grievances of shareholders. This type of discussion is particularly useful in light of the fact that some of the inaccurate reporting on, and analysis of, shareholder class actions adverted to above, stems from an incorrect understanding of what was envisaged by the creators of the federal class action regime, which came into operation in March 1992 through the enactment of Part IVA of the *Federal Court of Australia Act 1976* (Cth).

For instance, critics of shareholder class actions regularly make the comment that it was never intended that the federal class action regime be employed to enable aggrieved shareholders, and the solicitors and/or commercial funders that fund the litigation, to receive payments as a result of pleading that the companies and/or the directors in question did not comply with the many obligations imposed on them by various statutes and, in particular, the *Corporations Act 2001*. This line of reasoning usually leads to the conclusion that illegal conduct, such as contraventions of the continuous disclosure regime, should be addressed only through the public enforcement regime, namely, one or more enforcement steps undertaken by the public regulator, the Australian Securities and Investments Commission ("ASIC").

A review of relevant materials reveals the existence of a somewhat different state of affairs.[1] The Part IVA regime was substantially based on the recommendations made by the Australian Law Reform Commission ("ALRC") in a report that was tabled in

[1] This discussion draws on the analysis contained in M Welsh and V Morabito, "Public v Private Enforcement of Securities Laws: An Australian Empirical Study" (2014) 14 *Journal of Corporate Law Studies* 39, 41-43.

Parliament in 1988. The ALRC provided these, as examples of some of the types of claims that might be advanced pursuant to the regime that it was calling for:

> *Actions by shareholders in respect of misleading conduct.* A group of small shareholders suffer considerable financial loss as a result of misleading advice received from stockbrokers and the directors of the company in which significant amounts of their savings were invested. The shareholders also **claim that the company failed to comply with the Australian Stock Exchange listing rules by neglecting to inform the market of factors likely to materially affect the market price of shares.** Apart from rights in negligence against the stockbrokers, the shareholders would have had rights against the directors arising from the Companies Codes and the Securities Industry Codes. A grouping procedure could facilitate the recovery of loss by those affected and would offer the advantage of helping to ensure that all concerned were informed of the claim and shared in the result without having to commence individual proceedings [emphasis added].[2]

Similarly, the Second Reading Speech for the Bill that contained Part IVA revealed the expectation, on the part of the government responsible for this legislative initiative, that "[t]he new procedure will mean that groups of persons, whether they be **shareholders** or investors, or people pursuing consumer claims will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions" (emphasis added).[3]

The then Minister for Justice and Consumer Affairs also revealed, in the Senate, how private shareholder class actions were envisaged to interact with the activities of ASIC:

> [t]he enhancement of the rights of many shareholders to take this sort of representative proceeding will be a great aid to the more formal regulators, such as the Australian Securities Commission [now ASIC], in ensuring compliance with the corporations law … **This procedure will be of great assistance in ensuring that**, in the area of corporations law, not only the Australian Securities Commission but **shareholders will be given an enhanced capacity to ensure that they can get those remedies which flow from contravention of the corporations law** [emphasis added].[4]

As a result, there is no basis at all for the claim that the employment of the class action regime by shareholders was not envisaged, intended or anticipated by the creators of Part IVA. The fact that, as we will see, shareholder class actions have become the most popular form of class actions in Australia largely because they are extremely compatible with the funding models adopted by litigation funders, a group of class action protagonists not envisaged by the ALRC and the drafters of Part IVA, does not in any way alter the validity or relevance of the conclusion set out above. Nor does it provide a persuasive argument in favour of a restriction on the ability of shareholders to bring class action proceedings or in support of a reduction in the substantive legal rights of shareholders.

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[2] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report no 46; 1988), para 65 ("ALRC 1988 Report").

[3] *Commonwealth Parliamentary Debates*, House of Representatives, 14 November 1991, 3174-3175 (Michael Duffy, Commonwealth Attorney-General).

[4] *Commonwealth Parliamentary Debates,* Senate, 13 November 1991, 3026 (Senator Tate).

Pointing to alleged instances of abuse or unsatisfactory conduct by those running or supporting shareholder class actions, if substantiated, does not alter the conclusion set out in the preceding sentence. Such a scenario would only support providing stronger powers to courts presiding over such proceedings to enable them to deal effectively with any instances of unacceptable conduct. Particularly unpersuasive are calls for reform of this area based on the argument that the fear of being on the receiving end of a shareholder class action will adversely affect the future strategies adopted by numerous company directors and, as a result, adversely affect Australia's economy.

This line of reasoning displays an unwillingness to accept the **behaviour modification/deterrence of illegal conduct goal of class actions**. Knowledge that victims of illegal behavior have at their disposal an effective procedural device for seeking legal redress is intended to make company directors, manufacturers, suppliers of services, employees and others take far greater care (than would otherwise be the case) in ensuring that their activities do not contravene the law and cause harm or loss to others. Furthermore, as this report will show, only a miniscule proportion of listed companies and their directors have been on the receiving end of shareholder class actions.

II. METHODOLOGY

In this report (and many previous reports) I have used the terms shareholder class actions and investor class actions with the latter term covering litigation brought with respect to managed investment schemes and other types of investment schemes, unit trusts, financial advice and financial instruments or products. Recently, the ALRC adopted a similar approach when classifying the substantive claims advanced in settled federal class actions.[5]

The figures that many persons and entities have put forward, with respect to the volume of class action litigation and the settlements that they have generated, have included threatened class actions. That is, class action proceedings that were threatened but never filed as a settlement was secured without the need for litigation. In this report, I only deal with filed class actions. To be included in this report's data, a shareholder class action need only be filed in a class action court. It does not need to be subsequently served on the respondents/defendants.

When a class action proceeding is transferred to another class action court/jurisdiction, as a result of a court order (including consent orders), the transfer of the proceeding is itself treated as the filing of a class action in the court where the proceeding has been transferred.

III. AN EXPLOSION OF CLASS ACTIONS?

[5] Australian Law Reform Commission, *Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings* (Report 134; January 2019), 302-316.

Throughout the last 27 years or so, claims have regularly been made that an excessive number of class actions have been filed. These attacks have intensified over the last few weeks and reliance has also been placed on the alleged explosion of shareholder class actions.

In the table below, I set out the data with respect to all the Australian class actions that, to my knowledge, were filed during the review period. It is convenient to remember that the Victorian regime came into operation in 2000, the NSW regime in 2011 and the Queensland regime in 2017.

Table 1
The first 27 years and four months of class actions

Financial Year	Federal, Victorian, NSW & Queensland class actions = total number of class actions
Year 1 (from 4/3/1992 to 30/6/1992)	**1**
Year 2 (from 1/7/1992 to 30/6/1993)	**12**
Year 3 (from 1/7/1993 to 30/6/1994)	**4**
Year 4 (from 1/7/1994 to 30/6/1995)	**13**
Year 5 (from 1/7/1995 to 30/6/1996)	**7**
Year 6 (from 1/7/1996 to 30/6/1997)	**18**
Year 7 (from 1/7/1997 to 30/6/1998)	**22**
Year 8 (from 1/7/1998 to 30/6/1999)	**30**
Year 9 (from 1/7/1999 to 30/6/2000)[6]	21 + 4 = **25**
Year 10 (from 1/7/2000 to 30/6/2001)	17 + 3 = **20**
Year 11 (from 1/7/2001 to 30/6/2002)	14 + 2 = **16**
Year 12 (from 1/7/2002 to 30/6/2003)	22 + 6 = **28**
Year 13 (from 1/7/2003 to 30/6/2004)	12 + 3 = **15**
Year 14 (from 1/7/2004 to 30/6/2005)	4 + 1 = **5**
Year 15 (from 1/7/2005 to 30/6/2006)	6 + 3 = **9**
Year 16 (from 1/7/2006 to 30/6/2007)	19 + 0 = **19**
Year 17 (from 1/7/2007 to 30/6/2008)	21 + 0 = **21**
Year 18 (from 1/7/2008 to 30/6/2009)	11 + 3 = **14**
Year 19 (from 1/7/2009 to 30/6/2010)	11 + 6 = **17**
Year 20 (from 1/7/2010 to 30/6/2011)[7]	19 + 4 + 3 = **26**
Year 21 (from 1/7/2011 to 30/6/2012)	17 +18 + 0 = **35**
Year 22 (from 1/7/2012 to 30/6/2013)	17 + 4 + 1 = **22**
Year 23 (from 1/7/2013 to 30/6/2014)	15 + 4 + 2 = **21**
Year 24 (from 1/7/2014 to 30/6/2015)	20 + 15 + 9 = **44**
Year 25 (from 1/7/2015 to 30/6/2016)	24 + 3 + 10 = **37**
Year 26 (from 1/7/2016 to 30/6/2017)[8]	29 + 3 + 4 + 2 = **38**
Year 27 (from 1/7/2017 to 30/6/2018)	32 + 7 + 15 + 2 = **56**
Year 28 (from 1/7/2018 to 30/6/2019)	33 + 4 + 17 + 5 = **59**
Totals	**471 + 93 + 61 + 9 = 634**

Does the filing of **634 class actions** over a period of 27 years and 4 months support the claim that there has been an explosion of class actions? This represents **an annual average of 23 class actions**. No objective or balanced assessment of this figure could lead to the conclusion that over the 27 years in question, the floodgates have opened.

[6] The Victorian regime commenced in this financial year.
[7] The New South Wales regime commenced in this financial year.
[8] The Queensland regime commenced in this financial year.

What about the last five years? Similarly, an **annual average of 46.6 class actions** does not support the claim that there has been an explosion of class actions. It must not be forgotten that in the last three years four class action regimes were in operation and three operated in the preceding two years.

What about 56 class actions in 2017-2018 and 59 class actions in 2018-2019? In dealing with this question I am forced to provide again data which I provided last year and which has been conveniently forgotten or ignored by those who claim that Australian class actions are out of control.[9]

In the nine years from **2007 to 2015, 5,687 class actions** were filed in **Israel**.[10] This is almost **nine times more** than the total number of class actions that have been filed in Australia over the review period. And this is despite the fact that in Israel class actions may be brought only with respect to certain categories of substantive claims[11] and that Israel has a population of just over 8 million people.[12]

Professor Catherine Piché has recently revealed that she has "identified **1306 cases** filed in **Quebec** since 1993. This number constitutes an **average** of **50 cases per year**".[13] Quebec has an overall population of just over 8 million people.

In the same report mentioned above, Piché has also revealed that over the same period (that is 1993-2017), she identified in the province of Ontario "a total number of **1459 cases** filed … for an average of **54 cases per year**".[14] Piché has also drawn attention to the fact that in **Ontario**, "there has been a steady increase in the number of case filings, with the year 2014 toping at **130 cases**, the year 2015 at **110 cases** and the year 2017 at **108 cases"**.[15] Ontario has a population of just over 14 million people.

It is crucial to note that these statistics refer to **just one class action court** for each of Israel, Quebec and Ontario whilst the Australian data refers to class actions in **four class action courts.** The difference between Australia's population (over 24 million people) and the populations of these three jurisdictions is also striking.

In evaluating the last two years, it is also important to bear in mind the phenomena of related and competing class actions, as a result of which, the mentioned 634 class actions concerned only a total of **420 different legal disputes**. Related and competing class actions were even more prevalent in the last two years as highlighted by the seven class

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[9] V Morabito, *Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia* (An Evidence-Based Approach to Class Action Reform in Australia; July 2018), available at https://ssrn.com/abstract=3212527

[10] A Klement and R Klonoff, "Class Actions in the United States and Israel: A Comparative Approach" (2018) 19 *Theoretical Inquiries in Law* 151, 190.

[11] Ibid 173.

[12] Ibid 189 ("on a per capita basis it indicates a much higher frequency of class actions than in the United States").

[13] C Piché, *Class Actions in Quebec: First Empirical Report of the Class Actions Lab* (May 2018), 19.

[14] Ibid 20.

[15] Ibid.

actions filed by Quinn Emanuel Urquhart & Sullivan with respect to dangerous airbags and fourteen instances of competing class actions. As a result, the 115 class actions filed over the last two financial years concerned a total of 82 different legal disputes.

It is also crucial to note that during the last financial year interim and final reports were issued by the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*. Numerous instances of misconduct were revealed in these reports. A failure to bring class action proceedings on behalf at least some of the victims of these identified instances of misconduct would have raised legitimate questions as to the effectiveness of our class action regimes.

In light of the above, **no balanced or objective assessment** of Australia's class action landscape could possibly lead to the conclusion that there has been an explosion of class actions in recent years.

IV. AN EXPLOSION OF SHAREHOLDER CLASS ACTIONS?

Table 2
The first 27 years and four months of shareholder class actions

Financial Year	**Federal, Victorian, NSW & Queensland shareholder class actions = total number & percentage of shareholder class actions**
Year 1 (from 4/3/1992 to 30/6/1992)	**0**
Year 2 (from 1/7/1992 to 30/6/1993)	**0**
Year 3 (from 1/7/1993 to 30/6/1994)	**1 (25% of all class actions)**
Year 4 (from 1/7/1994 to 30/6/1995)	**0**
Year 5 (from 1/7/1995 to 30/6/1996)	**0**
Year 6 (from 1/7/1996 to 30/6/1997)	**0**
Year 7 (from 1/7/1997 to 30/6/1998)	**0**
Year 8 (from 1/7/1998 to 30/6/1999)	**0**
Year 9 (from 1/7/1999 to 30/6/2000)	1 + 0 = **1 (4% of all class actions**)
Year 10 (from 1/7/2000 to 30/6/2001)	**0**
Year 11 (from 1/7/2001 to 30/6/2002)	2 + 0 = **2 (12.5% of all class actions**)
Year 12 (from 1/7/2002 to 30/6/2003)	**0**
Year 13 (from 1/7/2003 to 30/6/2004)	1 + 1 = **2 (13.3% of all class actions**)
Year 14 (from 1/7/2004 to 30/6/2005)	1 + 1 = **2 (40% of all class actions**)
Year 15 (from 1/7/2005 to 30/6/2006)	1 + 0 = **1 (11.1% of all class actions**)
Year 16 (from 1/7/2006 to 30/6/2007)	4 + 0 = **4 (21% of all class actions**)
Year 17 (from 1/7/2007 to 30/6/2008)	7 + 0 = **7 (33.3% of all class actions**)
Year 18 (from 1/7/2008 to 30/6/2009)	2 + 0 = **2 (14.2% of all class actions**)
Year 19 (from 1/7/2009 to 30/6/2010)	1 + 0 = **1 (5.8% of all class actions)**
Year 20 (from 1/7/2010 to 30/6/2011)	7 + 1 + 0 = **8 (30.7% of all class actions**)
Year 21 (from 1/7/2011 to 30/6/2012)	2 + 0 + 0 = **2 (5.7% of all class actions**)
Year 22 (from 1/7/2012 to 30/6/2013)	3 + 0 + 0 = **3 (13.6% of all class actions**)
Year 23 (from 1/7/2013 to 30/6/2014)	4 + 4 + 0 = **8 (38% of all class actions**)
Year 24 (from 1/7/2014 to 30/6/2015)	5 + 7 + 0 = **12 (27% of all class actions**)
Year 25 (from 1/7/2015 to 30/6/2016)	6 + 0 + 0 = **6 (16.2% of all class actions**)
Year 26 (from 1/7/2016 to 30/6/2017)	15 + 0 + 1 + 1 = **17 (44.7% of all class actions)**
Year 27 (from 1/7/2017 to 30/6/2018)	18 + 0 + 5 + 1 = **24 (42.8% of all class actions**)
Year 28 (from 1/7/2018 to 30/6/2019)	8 + 0 + 11 + 0 = **19 (32.28% of all class actions**)
Totals	**89 + 14 + 17 + 2 = 122** (**19.2% of all class actions**)

The total of 122, set out above, makes shareholder class actions the most popular category of class actions in Australia during the review period. Claims that shareholder class actions have been out of control have frequently relied on the significant percentage increase in the number of shareholders class actions filed in the last ten years or so compared with the previous ten years or so. But as the data contained in Table 2 reveals, such headline-grabbing statistics are partly attributable to the fact that only a handful of shareholder class actions were filed for many years. As a result, the base or starting point for these comparisons is very low.

It cannot be denied that a fairly significant number of shareholder class actions have been filed during the review period. But can it be said that there has been an explosion of shareholder class actions? Attention has already been drawn to the fact that related and competing class actions have been filed frequently in Australia and that this phenomenon has increased in the last few years. Competing class actions have been witnessed more frequently in shareholder class actions, than in any other type of class actions, both throughout the review period and in recent years. Related class actions have also been prevalent in the shareholder class actions arena.

The outcome of the state of the affairs described above is that these 122 shareholder class actions have been filed by the shareholders of **only 63 companies or groups of companies** and not all of these companies were on the receiving end of the class actions filed by their shareholders: these are the nine companies whose names are italicised in Table 3.

Table 3 also reveals the areas in which these companies and groups of companies operate. Twenty-three (36.5%) of these 63 companies or groups of companies are among ASX's top 200 companies. An important fact, which is not revealed by either table, is that the shareholders of 22, or 34%, of these 63 companies or groups of companies filed competing class actions.

An important development which also emerges from the data contained in Table 2 is the declining importance of shareholder class actions overall over the last three financial years. In the 2016-2017 financial year shareholder class actions constituted 44.7% of all the class actions filed in Australia in those 12 months. This percentage went down to 42.8% in the following 12 months and 32.2% in the last financial year.

Looking at the data on shareholder class actions over the last five financial years, we find that the shareholders of 34 companies or groups of companies filed class actions in the period from 1 July 2014 to 30 July 2019. That provides an annual average of 6.8 companies or groups of companies whose shareholders resorted to the class action device.

In light of the information provided above, it can be confidently concluded that there has been no explosion of shareholder class actions in Australia either over the last 27 years or so or in recent years.

Table 3
Companies or groups of companies whose conduct led to their shareholders filing class actions during the review period

Company	Principal activities
1. *Interchase Corporation Ltd*	Property investment company
2. GIO/AG Australia Holdings Ltd	Insurance company
3. HIH Insurance Group companies	Insurance group
4. *Harris Scarfe Holdings Ltd*	Owner and operator of retail department stores
5. Aristocrat Leisure Ltd	Gambling machines manufacturer
6. Concept Sports Ltd	Sporting goods retailer
7. Media World Group	Media technology group
8. Telstra Corporation Ltd	Telecommunications company
9. Brookfield Multiplex Ltd	Construction contractor
10. *Evans & Tate Ltd*	Wine producer & distributor
11. AWB Ltd	Grain marketing company
12. Village Life Ltd	Retirement living company
13. Centro Group companies	Owner and manager of shopping centres
14. Credit Corp Group Ltd	Debt buyer
15. Oz Minerals Ltd	Mining company
16. Sigma Pharmaceuticals Ltd	Pharmaceutical wholesale company
17. National Australia Bank	Bank
18. Nufarm Limited	Agricultural chemical company
19. Gunns Limited	Woodchip company
20. GPT Management Holdings Ltd	Owner and manager of retail assets
21. Macarthur Coal Ltd	Mining company
22. *White Sands Petroleum Ltd*	Mining company
23. *Arasor International Ltd*	Laser technology company
24. Allco Finance Group Ltd	Financial services company
25. Leighton Holdings Ltd (2)[16]	Contractor
26. Treasury Wines Estates Ltd	Winemaker
27. WorleyParsons Ltd	Provider of professional services to the resource and energy sectors and complex process industries
28. Downer EDI Ltd	Integrated services company
29. Tamaya Resources Ltd	Mining company
30. Newcrest Mining Ltd	Gold mining company
31. Vocation Ltd	Provider of vocational education and training services

[16] Separate shareholder class actions were filed by the shareholders of this company with respect to two different disputes.

32. Forge Group Ltd	Mining services company
33. Billabong International Ltd	Surf-wear and action sports apparel wholesaler and retailer company
34. Myer Holdings Ltd	Department store group
35. UGL Ltd	Engineering company
36. QBE Insurance Group Ltd	Insurance company
37. Macmahon Holdings Ltd	Mining and construction company
38. *QRxPharma Limited*	Engaged in pharmaceutical development
39. *Kagara Ltd*	Mining company
40. Slater & Gordon	Law firm
41. Ashley Services Group Ltd	Provider of training, recruitment and labor hire services
42. Sirtex Medical Ltd	Medical devices company
43. Bellamy's Australia Ltd	Food and beverage company
44. Spotless Ltd	Provider of integrated services
45. SurfStitch Group	Online retailer
46. *Hastie Group Ltd*	Building services company
47. *Discovery Metals Ltd*	Mining company
48. Quintis Ltd	Forestry management company
49. DSHE Holdings Ltd	Retail group
50. Shine Corporate Ltd	Law firm
51. Commonwealth Bank of Australia	Bank
52. Crown Resorts Ltd	Gaming and entertainment group
53. GetSwift Ltd	Delivery management software company
54. Iluka Resources Ltd	Resources company
55. AMP Ltd	Financial services company
56. BHP Billition Ltd	Mining, metals and petroleum company
57. Brambles Ltd	Supply-chain logistics company
58. Woolworths Group Ltd	Supermarket group
59. RCR Tomlinson Ltd	Engineering company
60. SIMS Metal Management Ltd	Metals and electronics recycling company
61. IOOF Holdings Ltd	Wealth company
62. Lendlease Corporation Ltd	Construction company
63. Vocus Group Ltd	Telecommunications company

I will let the readers of this report draw their own conclusions as to whether the information contained in Table 3 above reveals the practice of filing **politicised shareholder class actions.**

V. WHO HAS BEEN ON THE RECEIVING END OF SHAREHOLDER CLASS ACTIONS?

An important question is whether shareholder class actions have been brought against the companies in question or against their directors.[17] I discovered the data set out below.

1. In 82 or 67% of the 122 shareholder class actions, the shareholder class actions were brought only against the relevant companies.

2. In another 23 or 18.8% of the 122 shareholder class actions, the relevant companies were not the only respondents/defendants.

3. In the remaining 17 or 13.9% of the 122 shareholder class actions, the companies in question were not among the respondents/defendants.

4. In 6 or 4.9% of the 122 shareholder class actions, directors were the only respondents/defendants.

5. In 23 or 18.8% of the 122 shareholder class actions, directors were not the only respondents/defendants.

6. In 7 or 5.7% of the 122 shareholder class actions, the auditors of the relevant companies were the only respondents/defendants.

7. In 7 or 5.7% of the 122 shareholder class actions, the auditors of the relevant companies were not the only respondents/defendants.

8. In 6 or 4.9% of the 122 shareholder class actions, the respondents/defendants included one or more of the following: property valuers, leasing agents, insurers, reinsurers, solicitors, financial advisors and lead manager of the relevant capital raisings.

The vigorous and regular attacks on shareholder class actions put forward on behalf of company directors have created the perception that they are invariably or frequently among the respondents/defendants in shareholder class actions. But, as the data set out above demonstrates, in just over three out of every four shareholder class actions no action was taken against the individual directors. This practice has become even more prevalent in recent times. For instance, in only 10% of the shareholder class actions filed in the 2018-2019 financial year were directors included among the respondents/defendants.

VI. FUNDING OF SHAREHOLDER CLASS ACTIONS

It is widely believed that the vast majority of shareholder class actions are supported by litigation funders. The data I compiled confirms, to a large extent, this understanding as I found that 101 or 82.8% of shareholder class actions filed during the review period were supported by litigation funders. Most of the remaining 21 class actions were funded through no win - no fee arrangements.

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[17] See Welsh & Morabito, above n 1, 60-68.

VII. OUTCOMES OF SHAREHOLDER CLASS ACTIONS

In recent years it has been increasingly argued that all or most shareholder class actions settle and therefore little or no risk is faced by those running and/or funding them. But this is not an accurate statement, as the data set out below will show. As at 8 November 2019, a total of 84 shareholder class actions were resolved. With respect to another four shareholder class actions, settlement approval applications will be heard over the next few weeks. The risk of not securing monetary compensation in shareholder class actions has of course been increased significantly by the outstanding judgment handed down last month by Justice Beach of the Federal Court in the Myer Holdings Limited class action.[18] The recent judgment of Justice Foster in the Babcock & Brown Limited litigation (although not a class action proceeding) will also increase the risks for shareholders and those who fund them.[19]

Seven of the 84 resolved proceedings were resolved by being consolidated with other class action proceedings dealing with the same or similar disputes. This leaves us with 77 resolved class action proceedings. The outcomes of these 77 shareholder class action proceedings are set out below:

1. Settled (41 - 53.2%)
2. Permanently stayed (13 - 16.8%)
3. Transferred to another jurisdiction (9 - 11.6%)
4. Discontinued by the class representative (6 - 7.7%)
5. Summarily dismissed (4 - 5.1%)
6. Discontinued by the class representative as a class action proceeding (2 - 2.5%)
7. Discontinued by the court as a class action proceeding (1 - 1.2%)
8. Dismissed for want of prosecution (1 - 1.2%)

If the four settlement approval applications mentioned above are granted, the settlement rate for shareholder class actions will increase to 55.5%. Even this imminent higher settlement rate would be lower than the current settlement rate for: product liability class actions (57%); mass torts class actions (60.8%); employment class actions (62.9%); and investor class actions (73%).

[18] *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.
[19] *Masters v Lombe (Liquidator); In the Matter of Babcock & Brown Limited (In Liq)* [2019] FCA 1720.

It is fascinating to note that the GIO shareholder class action has, to date, been the only unfunded class action that has produced monetary relief for shareholders.[20] Some of the defendants in the Victorian Media World class action made payments, which were just over $400,000, pursuant to a judicially-approved settlement agreement but the settlement notice distributed to class members advised them that these funds would be applied towards the significant disbursements incurred in running this class action.

VIII. HAVE SHAREHOLDERS BENEFITTED FROM SETTLED SHAREHOLDER CLASS ACTIONS?

So much attention has been placed on the significant settlement sums paid by companies and their insurers and on how much funders have received in settled shareholder class actions, that the most important question has been almost ignored: have shareholders received some monetary compensation from settled shareholder class actions? Thanks to the support of class action protagonists I was able to secure this data with respect to 84% of settlement agreements covering shareholder class actions in which the distribution of the settlement funds has been completed.

I found that **at least $888,605,232 has been paid to at least 94,984 shareholders**, thus providing an individual compensation of **$9,362** per class member. Looking at the average compensation per class member for each shareholder class action, I found that the lowest average payment was $263 whilst the highest average payment was $327,418. **The median figure for these average payments per class member was $12,829**. Contrary to what one would reasonably expect the class action that produced the very modest average compensation of $263 per class member was unfunded whilst the impressive average compensation of $327,418 was secured in a funded class action.

IX. CONCLUDING OBSERVATIONS

I would like to conclude this report by giving further consideration to the monetary compensation received by shareholders, as a result of class action litigation, and revealed in Part VIII above. Could the overall compensation of close to $900 million mentioned above be achieved through orthodox or individual proceedings? I doubt whether anyone, including opponents of class actions, would say "yes".

If, as some appear to advocate, the rights of shareholders to seek monetary compensation for their losses are completely removed or substantially reduced - whether directly (by removing or reducing their substantive rights) or indirectly (by reducing the ability to bring shareholder class actions or by restricting or discouraging the involvement of litigation funders in such proceedings) - would ASIC be able to secure a similar level of compensation for shareholders?

Not one of the 122 shareholder class actions filed during the review period were filed by ASIC. It may certainly be said that the extensive employment of the class action device by litigation funders and plaintiff solicitors rendered ASIC's involvement in shareholder

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[20] See *King v AG Australia Holdings Ltd* [2003] FCA 980.

class actions unnecessary. But ASIC did file nine investor class actions in the Federal Court on behalf of investors in the Westfield Group. This was done despite the fact that "private" representative proceedings had been filed in the Supreme Court of New South Wales on behalf of some of these investors.

Coupled with the support for shareholder class actions expressed by successive ASIC Chairs, this appears to demonstrate very little appetite on the part of ASIC for using class actions to secure monetary relief for shareholders. It is not difficult to think of reasons for this state of affairs such as ASIC's limited resources and the fact that compensation for victims of illegal conduct is not among its top priorities or responsibilities.

But if this scenario were to change, would ASIC be able to secure results comparable to, or indeed better than, those secured by plaintiff lawyers and litigation funders? The compensation secured through an enforceable undertaking on behalf of Multiplex shareholders does not, with respect, inspire great confidence given that it was very modest when compared with what these shareholders received from the settlement in the class action proceedings run by Maurice Blackburn; and this was notwithstanding the significant legal costs and funding fees incurred in this hard-fought litigation and deducted from the gross settlement sum.[21]

Finally, I would like to draw attention to the fact that the receipt of monetary compensation by over 94,000 shareholders from class action litigation tends to demonstrate rather strongly the fact that it is not true, as some have argued, that very few shareholders have displayed any interest in class actions brought on their behalves. Each of these recipients had to take several positive steps before being able to receive their share of the settlement proceedings; and usually most of these steps were required to be taken well before any settlement was in sight.

[21] Welsh & Morabito, above n 1, 72-73.