In Conversation Series

Professor Vince Morabito & Vannin Capital

No. 3: September 2017

Pip Murphy
Investment Director,
Vannin Capital
+61 (0)4 3826 0712
pjm@vannin.com

Vince Morabito
Professor,
Monash Business School
+61 (0)3 9903 1422
vince.morabito@monash.edu

2017 marks the 25th anniversary of the commencement of the federal legislative class action regime in Australia. During this time, Australia has witnessed significant developments and changes to its class action landscape. In this edition of our In Conversation Series, Melbourne-based Pip Murphy, Investment Director at Vannin Capital, interviews Vince Morabito, Professor of the Monash Business School, about some of these developments and what the future of class action litigation might look like in Australia.

Pip Murphy (PM): You have a long and distinguished history of study and research on the topic of class actions in Australia. I can't think of a person better qualified to discuss this subject. I'd also like to congratulate you on your latest research '[An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia][1]'.

Your study highlighted some interesting data and analytics that I don't think people have fully understood until now. Before we look at some of these in detail could you touch briefly on what you regard as the most important and/or interesting developments in class actions that Australia has witnessed over the last 25 years?

[1] An Empirical Study of Australia's Class Action Regimes, Fifth Report, The First Twenty-Five Years of Class Actions in Australia, by Professor Vince Morabito, Monash University, July 2017

Pip Murphy

Investment Director, Vannin Capital

+61 (0)4 3826 0712

pjm@vannin.com

Pip Murphy is an Investment Director at global dispute resolution funder, Vannin Capital. She is a solicitor entitled to practice in all Australian jurisdictions (Commonwealth, State and Territory) and, before joining Vannin, Pip was a partner in the dispute resolution team of Baker McKenzie and head of the firm's Asia Pacific Risk and Crisis Management Practice Group.

Pip has extensive experience in corporate and commercial disputes in Australia and internationally, both as a solicitor and as a third party dispute resolution funder, and she has managed and advised on all types of dispute resolution including investigations, negotiation, mediation, expert determination, litigation (including class actions) and arbitration.

Pip holds a Masters of Law from the University of Melbourne, is a Graduate of the Australian Institute of Company Directors and a Certified Practicing Risk Associate with the Risk Management Institution of Australasia.

Vince Morabito

Professor, Monash Business School

+61 (0)3 9903 1422

vince.morabito@monash.edu

Vince has been a professor in the Monash Business School since 2009. He has written numerous articles on access to justice which have evaluated, among other things, numerous aspects of class actions, litigation funding and legal costs. His research has been published in Australia, the UK, Canada, the US, Israel, the Netherlands, Singapore and New Zealand. He has been undertaking empirical work, with respect to Australia's class action regimes, since 2008.

Vince Morabito (VM): First of all, thanks for the undeserved praise and for choosing me for this "Conversation". Probably the most significant development in Australia's class action landscape over the last 25 years has been the extensive involvement of litigation funders. Until December 2006 only one litigation funder had been funding class actions. Over the last ten years we have seen over 100 Australian class actions supported by numerous local and overseas litigation funders. Another significant development has been the growth in the number of class actions filed on behalf of shareholders. The first success in a shareholder class action was not witnessed until 2003 but now they are the most popular category of class actions.

(PM): Reading your study I noted that the Federal Court was the first to introduce the class action regime in 1992, but that this was not followed by Victoria until 2000, New South Wales in 2011 and Queensland more recently in 2017. Western Australia looked at the introduction of a class action regime in 2015, but is yet to implement one. Is it likely that we will see changes in Western Australia soon? Are there any claims under State regimes exceeding the Federal regime? Is there a developing trend towards parties utilizing State regimes over the Federal regime or is claim specific?

(VM): It is highly likely that Western Australia will introduce a legislative class action regime; what is not clear is when this legislation will be unveiled. Mass tort claims constitute the only category of substantive claims where the State regimes dominate over their federal counterpart. This state of affairs is highlighted, for instance, by class actions filed on behalf of the victims of bushfires and floods: most of these class actions were filed in State courts. I expect that this trend will continue in the future.

(PM): You have already commented on the growth in the number of investor and shareholder class actions being brought in Australia in recent years. There is a perception that this will only continue to rise with the introduction of new law firms working in this area (i.e. firms with no prior experience in running class actions) and new dispute resolution funders (some of which are 'enthusiastic amateurs'). Did your research show that this perception is well founded or is the reality somewhat different to this?

(VM): In my last empirical report that you kindly referred to, I revealed that – in the three year period from 1 June 2014 to 31 May 2017 - a total of 22 plaintiff law firms acted for lead plaintiffs in class actions for the first time. But I also revealed that in each of the three preceding three-year periods, the percentage of all plaintiff law firms operating in the class actions space – that had no prior experience in acting for lead plaintiffs – was actually higher than in the June 2014 – May 2017 period. As noted above, there has been an increase in the volume of shareholder class actions and in the number of class actions supported by litigation funders. But, as I revealed in my last report, there was also a decrease in the last five years in the number of investor class actions.

I would also like to draw to your readers' attention the fact that my empirical research has revealed something which was not previously known, namely, the fact that a substantial number of class actions have been filed (outside of the investor and shareholder arena) on behalf **of various categories of vulnerable claimants** (see V Morabito and J Ekstein, "Class Actions Filed for the Benefit of Vulnerable Persons – An Australian

Study" (2016) 35 ***Civil Justice Quarterly*** 61-89). In the last couple of years litigation funders have also commenced to support "social justice" class actions; the best example of this extremely positive development is *Pearson v Queensland*, a class action filed in September 2016 in the Federal Court on behalf of Aboriginal and Torres Strait workers (and their deceased estates) who claim that wages earned in the period between October 1939 and 4 December 1972 were held in trust accounts controlled by the Queensland Government and were never paid out in full to the workers.

(PM): In Chapter 5 of your empirical study you discussed the recent decision of *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 (**Money Max**). In this decision, we saw the Full Federal Court endorse the concept of a common fund order against all members of the represented group, not just those who have signed a Litigation Funding Agreement. As you noted in your study, the Full Federal Court had hoped that the operation of the common fund doctrine would see a decrease in the number of competing class actions. What is the experience post the Money Max decision (or expectation) particularly in light of the recent decision handed down on 18 August 2017 in *McKay Super Solutions Pty Ltd (trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (**Bellamy's**).

(VM): It is probably too early to make any meaningful assessment of the long-term consequences of **Money Max**. To date, since **Money Max**, there have been three instances of competing class actions in the Federal Court. The six competing class actions in question, filed with respect to three different legal disputes, were all supported by litigation funders and all adopted an "open class" device pursuant to which all victims of the conduct that was challenged in the class action were "covered" by the class action litigation. If this trend continues in the future, we will see an increase, rather than a decrease, in the number and frequency of competing class actions filed in the Federal Court.

(PM): I noted with interest in Bellamy's, that one of the factors that the Court looked at in deciding which class action to immediately close, and which to keep open, was the position adopted by each dispute resolution funder on the question of security for costs and their resources to meet any adverse costs order. I recently published an article[2] with my colleague, Tom McDonald, which discussed the need for plaintiffs to only access funding from professional funders with sufficient capital who can "stand by their man" and meet their contractual obligations in respect to security for costs and adverse costs orders. This topic now seems to be even more important with it becoming an important factor in whether one class action will prevail over another. Do you see this as an important issue for dispute resolution funders, lawyers and plaintiffs?

[2] Funding in Focus, Issue Five, 2017: "Stand by your Man": A reminder of the need to choose your funder wisely by Pip Murphy, Investment Director at Vannin Capital and Tom McDonald, Investment Director at Vannin Capital

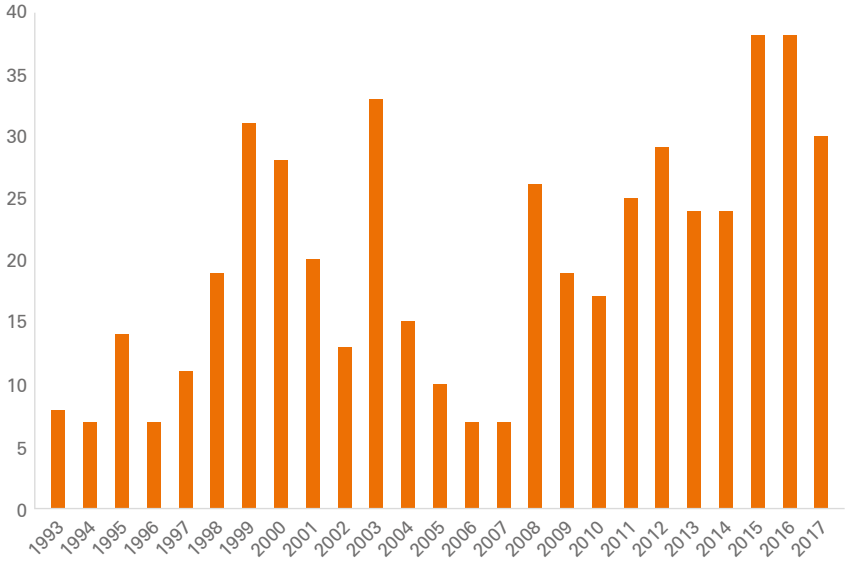
(VM): I agree completely with you Pip. The question of whether a lead plaintiff – or more accurately, the entities that are funding the litigation – can meet adverse costs orders and, in particular, security for costs orders, is becoming increasingly important and this trend is likely to continue in the future. It should also be noted that the 2013 ruling of the Full Federal Court in *Madgwick v Kelly* (2013) 212 FCR 1- where it was essentially held that in class actions not supported by litigation funders, in deciding whether to make a security for costs order against a lead plaintiff, the Court can take into account the resources of the class members – will lead to a greater reliance on the support of commercial litigation funders that have sufficient resources to meet security for costs and adverse costs orders. And, as you have noted, if *Bellamy's* is followed by other Australian judges, the financial resources of commercial litigation funders will also be a factor of significant importance when a Court is asked to choose between competing class actions.

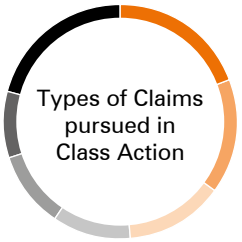
Thank you Vince for these wonderful insights into the last 25 years of class actions and, what the future of class action litigation might look like in Australia.

It is with interest that I read your comments about the rise of social justice actions and the increasing involvement of third party dispute resolution funders. I agree that with the increasing involvement of funders in cases in Australia we will see this type of philanthropic behavior take hold. In fact, we have already seen the start of this with funders, including Vannin Capital, supporting public interest litigation including human rights, discrimination and police accountability cases, run by Public Interest Advocacy Centre Ltd. (PIAC) in Australia.

It will also be interesting to see the effect of the recent Bellamy's decision on other competing class actions in Australia.

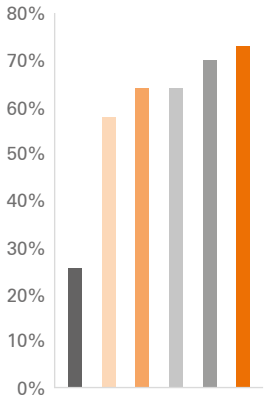
Number of Class Actions Filed in Australia*





- Investor
- Shareholder
- Product Liability
- Industrial
- Mass Tort
- Consumer Protection
- Other

Settlement Rates



Source: An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia by Vince Morabito

* Year = 4/3/Prior Year to 3/3/Year

About Vannin Capital

Vannin Capital is one of the world's largest and most experienced professional dispute resolution funders with quantum under management consistently in the billions.

We provide bespoke funding solutions in high value commercial litigation and international arbitration disputes which can eliminate the inherent cost risks of legal proceedings.

We are flexible, innovative, responsive and able to make quick funding decisions not constrained by a rigid investment mandate, and have an excellent success rate.

Our experienced, multi-disciplinary team comprises successful UK, Australian and US-admitted lawyers, judges, QCs, barristers, solicitors, advocates, arbitrators, financial experts, entrepreneurs and technology professionals who work seamlessly together to originate, evaluate, fund and monitor a diverse portfolio of complex international claims.

Vannin Capital is a funder member of The Association of Litigation Funders of England & Wales ("ALF"), the UK regulatory body responsible for litigation funding and strictly adheres to the ALF Code of Conduct.

Correct at time of publication: September 2017.

Vannin Capital PCC is registered in Jersey with registration number 119327 and having its registered office at 13-14 Esplanade, St Helier, Jersey JE1 1EE.

vannin.com

Jersey
+44 (0)1624 615 111
sthelier@vannin.com

London
+44 (0)20 7139 8401
london@vannin.com

Melbourne
+61 (0)3 8375 6845
melbourne@vannin.com

Washington, DC
+1 202 350 9206
washington@vannin.com

Isle of Man
+44 (0)1624 615 111
douglas@vannin.com

Paris
+33 (0)9 75 12 95 80
paris@vannin.com

Sydney
+62 (0)2 8310 5583
sydney@vannin.com

New York
+1 212 951-0957
newyork@vannin.com

VANNINCAPITAL