Nicholas Andreatidis QC (NA): Welcome to our session on managing class actions. Before I introduce our panellists, I'll just mention very briefly that the video and the slides will be posted out. So for those of you who are keen to rewatch it and to get the slides that will be available shortly after we finish in the next few days.

Now, if I can turn to our panel. I will start with Alexandra McVay. We are beyond delighted that McVay agreed to come along and assist us today in a little discussion about class actions. McVay's official title is Investment Manager for Omni Bridgeway. Her role involves identifying and assessing, and the official term is investment opportunities, and project management for funding. McVay is a very experienced solicitor, before joining Omni Bridgeway she was a commercial litigator and has a lot of experience that she has transferred into her new role, which you have held for about five or six years now.

Alexandra McVay (AM): Five years in September.

NA: There you go.

O'Brien, and in order of seniority, it is nothing deeper than that, it is a singularity thing. O'Brien, to my immediate right. Prior to joining us here at Level Twenty Seven he was in leading chambers in Sydney and in the UK. O'Brien graduated from UQ with Honours. He attended Cambridge where he did his masters of law and also graduated with Honours. He was Associate to the Honourable Justice Kiefel, who is now of course our Chief Justice. And he has relevant experience in class actions.

There is immediately to O'Brien's right Mei Barnes. Hi, Mei. Before joining us here at Level Twenty Seven Mei worked at an international law firm. She was Associate to the Honourable and fabulous Margaret Wilson of the Queensland Supreme Court. She graduated from ANU with Honours in her law degree. She chose Columbia to do her masters where she graduated as a James Kent Scholar. As with Angus, Mei has experience in class actions, most recently of which was against me. I was on the other side. Of course, I was on the side of good and righteousness, Mei was just on the other side. That is still reserved so I am not sure who is right yet.

Mei Ying Barnes (MYB): We'll find out.

NA: We will find out.

I am just going to briefly mention what we are talking about. In effect, we are going to be focusing on the concept of what is a class and the impacts of being in a class and some

handy tips and tricks that you should have regard to. We will also at some point have a discussion about some differences between the different jurisdictions that we are in.

WHAT IS A REPRESENTATIVE CLASS ACTION PROCEEDING INTENDED TO ACHIEVE?

Now Barnes, if I could start with you, please. What is a representative proceeding intended to achieve?

MYB: The idea is basically about judicial economy. So the idea that you could try claims where you've got multiple plaintiffs or multiple defendants are all heard together so that issues that are common can be decided in an efficient way by one judge to bind multiple people. We talk about them having been around for a relatively recent time, since the 90s, but in fact we have had this kind of action for over 100 years since English times because there is an interest in people having claims resolved efficiently. All states and territories in fact can have representative actions, that is an action against multiple defendants or by multiple plaintiffs. But it wasn't until around the 90s that you started to see regimes that would facilitate those kinds of claims. In every jurisdiction you can bring them but it is only in the Federal Court of Victoria, New South Wales, and now Queensland that there are orders that will facilitate that process.

WHEN IS THE REGIME ENGAGED FOR CLASS ACTIONS?

NA: And when is the regime engaged for the class actions? You can commence in every jurisdiction?

MYB: You can, as long as you've got seven plaintiffs. Basically, seven is the starting point for this specific regime, you can have two or more in the representative proceeding in any other state. But if you want to trigger the actual Federal Court, or Victorian or New South Wales provisions, they require you to have seven people. The oldest one is the Commonwealth one. And that is one that has the most use, probably about 80% of class actions on file are there still today, despite the fact that there are these other forums now. That came in in the 90s. Victoria came in the year 2000, pretty much five years after the Commonwealth regime. Then New South Wales five years later, and then Queensland's regime just came in in 2016. We have had the first case now run all the way to trial, which is the one that you and I had the pleasure of hearing against one another in and that one is reserved. We are all waiting to see whether there is going to be a big take up in Queensland. I think at this stage there are only two or three filed. But we are all curious to see how it will go.

WHO IS BOUND BY A DECISION OR SETTLEMENT IN A CLASS ACTION?

NA: And Mei, who is bound by a decision or a settlement in a class action, does it matter? Does the jurisdiction make any difference?

MYB: The question of who is bound is partly the big issue that we want to talk about today, because it is very contentious. Obviously, the reason why, as I said, as a matter of judicial economy you would want to bring these proceedings is that you can bind multiple people. You do away with the need to have a trial for a lot of different people to participate. But the starting principle is that everybody who is captured by the definition, as the way that the class is defined in the court documents, is going to be captured by that judgment. That means that there is a huge capacity for people who did not want to be in there to be in there, and also for people to be excluded from the judgment if they are not included in the definition. For that reason, this question of, how should a class be defined? And how can we narrow it to really accurately to capture people who we think need to be captured? is an important class action issue.

HOW DOES LITIGATION FINANCE WORK?

NA: Now, McVay. I should say for those of you who think I am being rude, McVay has asked me to call her McVay because she is worried that if I call her 'Alexandra' it will sound like she is in trouble. So we settled on McVay being the least troublesome way of referring to you, if that is okay. So McVay, litigation finance, how does it work?

Alexandra McVay (AM): At its simplest, litigation finance is where a third party financier such as Omni Bridgeway agrees to pay the legal fees and disbursements to prosecute the claim of the applicant or other group members prosecuting a claim, as well as taking all the risks of any adverse cost orders should the claimant be unsuccessful at any event. In exchange for this, the financier such as Omni Bridgeway, receives back their investment they have paid, along with a commission for advancing those funds, as well as an amount to recognise the mitigation risk.

NA: When do funders, such as Omni bridgeway, become involved generally?

AM: The answer is at any time but in a class action I think the best time to get a financier involved is at the very outset.

NA: What are the strategic considerations that you take into account in considering whether to fund?

AM: Many, but there really are five key considerations. One, whether it is a viable claim and whether it is the sort of claim a litigation financier would consider funding. Secondly, what is the likely claim size? It needs to be a claim big enough to support not only the recovery of the project costs that are being paid, but also the commission. The number of respondents and defendants, that is always a key thing as well as their capacity or their insurer's capacity to pay any settlement or judgment. Four, how much is it likely to cost? And then finally, how long

are proceedings likely to take? Generally in class actions 3-4 years. There are many other considerations but those are the key five.

NA: With each of those five considerations, is the contemplation of them done in house? Or do you generally ask the legal team that is retained in the matter? Or do you go to a completely different separate body for each of those considerations and ask for effectively a third party review for an assessment of those things?

AM: I think it is a combination of all those three things.

NA: Does it depend on the size of the matter?

AM: No, I think it would depend on the type of matter. Obviously, all of the investment managers at Omni Bridgeway, formerly IMF Bentham, are all former lawyers or barristers. So we generally have quite a good understanding of how litigation works. Then we work closely with the lawyers because they are the ones who truly know the case as well as we do. Then quite often, maybe with a sticky situation, you would actually engage with the Bar, or just to get some comfort around an issue that we feel we want that little bit more comfort on. So we would get an advice from counsel on certain things. But it is definitely a combination of Omni Bridgeway, the lawyers and also counsel, or even a financial expert sometimes.

NA: And who is in control of the matter when a funder is involved?

AM: I think it is a good question, and one that comes up all the time. I suppose we need to think about how does the relationship begin. Let's talk about the lead applicant, because it is their case, they have an agreement with Omni Bridgeway, but they also have an agreement with their lawyers - being their retainer - and the lawyers take instructions from their client – who is the applicant.

When a financier is involved, such as Omni Bridgeway, there is a litigation funding agreement. In that agreement, Omni Bridgeway, not just providing the money to run the action, we also provide strategic services dealing with group members, as well as interacting with the lawyers and counsel and experts to try and do day-to-day instructions. The purpose of that is to try and streamline the action, reduce costs, and have it run as effectively as possible.

Of course, there is always a clause in the litigation funding agreement where the group member or the lead applicant at any time can seek to provide their own instructions which would override the instructions of Omni Bridgeway, but it is very collaborative. The lead applicant is involved at many steps in the litigation such as which claims will be run if a claim is to be withdrawn, settlement, whether a common unknown should be sought, all these things but it is generally thought that the litigation financier, because our business is litigation, that we

can assist group members in running the action as effectively as possible. I also try and manage the budget so that we don't have overspend.

HOW TO IDENTIFY A CLASS FOR A CLASS ACTION

NA: Now, if we can turn on to what we are focusing on in this discussion, and that is the question of class actions. O'Brien, can you give some insight and point out the relevant considerations in identifying a class please?

Angus O'Brien (AO): Sure. The starting point, as Mei mentioned, is that you need a group of at least seven people to fit within the statutory class action regime. There is a degree of commonality that is required as between those seven people but no identity. It is necessary that seven or more people have claims against the same person that are in respect of or arise out of the same, similar, or related circumstances and give rise to a substantial common issue of law or fact. So that is relatively broad. The requirement is only that the claims be similar or related, not that they be the same or identical.

One of the early challenges that the legal team faces is how to define that group of people in the best way possible. Now, as you might imagine, the statutory provisions require that that definition, once it is selected, be included in the originating process, but that requirement is also relatively loose. The requirement is only to describe or otherwise identify the group members to whom the proceeding relates. There is not a requirement to name or specify the number of group members and nor is it necessary to obtain consent from people who fall within the group definition.

In principle, it is possible that a group could be defined very broadly so as to capture many thousands of people, many of whom may have no idea that proceedings have been commenced.

In practice, usually the group is defined in one of two ways, either as an open group or a closed group.

An Open Group is where the definition just includes everyone who has suffered loss or damage as a result of a particular conduct.

A closed group is where, in addition to that, the group member has to have entered into a funding agreement with a particular funder. There is an example of that on the next slide [slide 7]. This is taken from the so called *Stolen Wages Class Action*, which has recently concluded. This is an extract from a judgment which Justice Murphy gave in 2017 where there was an application for orders to open the class. The proceedings were commenced as a closed class proceeding, as you can see from subparagraph g of the definition of the class there. So the application to open the class was, in essence, one to strike through that particular paragraph

so that the class was defined in terms which captured everyone who had a potential claim, even if they had not entered into an agreement with the funder.

CLOSED OR OPEN CLASS ACTION?

NA: Now turning to you McVay. You are going to give us some insight as to the commercial and strategic considerations that one should consider in determining whether to go with an open class or with a closed class.

AM: Let's start with open class. It is on the slide there [slide 8]. If it is not possible to identify or contact the potential group members concerning the proceedings at issue. I think *Stolen Wages* is a good example of that, it is difficult to identify and contact those people. So in having the best interest in having everybody who could have been subject to some sort of compensation included it is better to open the class.

Second point, it reduces the possibility of competing class actions. And I am sure everybody here has heard about this, particularly down south where there will be a number of cases being filed with potentially a slightly different time period. And then the court, not to mention, the lawyers and funders, spend a lot of time and money in a beauty parade trying to see who will win the right to run the action.

I think the last point there is most important. It allows the defendant to really understand the scope of what is the case and possible in terms of the number of people and potential liability. That has always been our system, which is the opt out system, that I am sure you are all aware of. That is not as in vogue right now, for a number of reasons. But I don't think you should discount open classes just because of recent case law.

Then the second one, closed class. It is only the people who wish to be involved. That is really important because sometimes there will be issues that are quite prevalent in a community, where people are very aware of the potential action as well as the positives and negatives of joining. So it would be, I'd say, a little bit unfair to make people opt out of an action when they are very much aware of it, it should only be those people who want to participate. It could strengthen your overall case as you may have people whose classes are so similar it reduces the need for sending group members, expert referees, so it may reduce the costs and the time to run. Then this is a very key point, again, when you get to settlement or mediation, you know, exactly who is in and you can quantify the potential compensation, which makes it better for settling when you come to settlement.

NA: A question that has come up McVay on the back of what you have just commented on. Competing class actions, did that involve the competing proceedings effectively having to front up before a judge and submit why theirs should go first and the other one effectively wait for the outcome?

AM: Yes, we have seen that down south where it is basically the race to the court. We had some funders turning up with no group members signed up, just the lead applicant, and working on an open class basis, not even signing a funding agreement. You had others that have done financial reporting, trying to work out how big the claim is and things like that. It takes more resources, particularly for court, to sift through to decide who is going to win the right to proceed with the claim. In a way, an open class action could do away with that, but in the ones that I am referring to all of them were open class actions, and they were all competing, so it may not be a perfect solution.

NA: But it is the one that is there.

AM: It is the one that is there.

NA: Barnes, still on the topic of commercial and strategic considerations. Does it matter whether you have got an open or closed class in the context of settlement?

MYB: It does. I think, as Alex said, there are reasons why at commencement you might want to cast the net quite broadly, particularly at the beginning. But once you are talking about settling the action and bringing some kind of resolution you really want to know who is at the table, what are they bringing, and what do they want. It is very difficult to do that unless you know who the class is.

Alex mentioned before that the defendant is going to want to know what the extent of their liability is. That is very helpful for them because they can quantify on a per person or per plaintiffs basis what figures we are looking at. But when you think about it, I mean, it is also in the interest of the plaintiffs because they are the ones going to divide the pie at the end of the day. It is almost impossible to divide a pie if you don't know how many shares there are going to be and how many people are going to want a slice. And if someone is going to come late to the party and say, "Actually, I'd like one too" quite late in the proceedings. It will be hard to then equitably divide up what you had before. For that reason, it is in both the plaintiffs' and the defendants' interest, from a certainty perspective, to try and narrow who is going to be bound by this judgment.

But they are not the only people who have an interest. The slide [slide 10] that is currently on the screen shows each of the relevant parties and how they interact, and they do all interact in a complicated way. One of the features of class actions is that we have gone with an opt out regime, which means that plaintiffs can just hang on for the ride. They are captured by the class definition at the beginning, and at settlement or the time when the class is starting to be closed, is the first time they actually have to take a step in the proceeding or make a decision that might affect their possible options in the future. That for them can be difficult. If you are a

plaintiff and you feel like you have quite a strong claim but you are being asked to now negotiate together with other plaintiffs who have weaker claims, your personal bargaining power is lessened by that and you always otherwise would have had the option of picking off or approaching the defendant individually to try and have your particular parts settled. It is difficult for plaintiffs trying to decide whether they should allow class closure or be in favour of it. For defendants, as Angus mentioned before, you can have a class that is closed and the defendants can get a little bit of certainty, conducting negotiations on that basis. Then the court will say "Actually, we'd like to reopen the class before we finally approve a settlement in this matter". So in that way, it does matter when they are trying to do negotiations, and then reopen the class to see, because they don't want people to miss out obviously, on a benefit that is been negotiated.

It is more efficient to have more potential clients captured by the settlement. So even that certainty that defendants get from it can be limited in some cases and defendants need to weigh that up. As Alex mentioned, there conflict issues. There will be a conflict issues for lawyers because they may act for a lead applicant but now people are starting to come out of the woodwork who had not previously expressed some interest in the class action. And they might want to know, I would like to be part of negotiations. I don't know whether I'd like to retain a particular plaintiff's law firm or the lead applicant's law firm. Do I have to be represented? And if so, who is the best person to do it? Then, of course, for the lawyers who are doing it, it is efficient to have lawyers conducted and to have fewer lawyers in the room. Basically, we slowed things down immensely.

NA: It depends on whose side you are on.

MYB: That is probably true.

There are issues then with whose interests people were presenting. You have to be very clear about it, whether they are for the group members who registered or who have not.

Then the last factor is, of course, that courts will want to have a view. There will come a point because all settlements have to be approved by the court, they will want to know that it was handled properly, that all of these issues that are raised on the slide there have been canvassed and addressed adequately. That means, unfortunately for us, if you are acting in this space, these issues are things that you have to be thinking about right from the time that you start thinking about closing the class.

NA: I think our collective experience, when we talked about this in the preparation for today's discussion, each of us have experienced a level of interest and a level of seriousness from the bench, which reflects effectively, what is the complexity of what is involved. They are very, appropriately and correctly, driven by the by the desire to achieve a result that is fair. It is

something that the judges have done very well in what can only be described as really complex cases. No matter what we are talking about, these are quite difficult. They are doing a wonderful job, I think, for what that is worth.

As one of them mentioned at the end of a rather lengthy trial, he happened to be a male judge, thanked us all as they always do, and noticed how we were all smiling, and he goes, "You look and smile, I now have to go write the judgment". So that is something we should remember.

HOW TO CLOSE A CLASS IN AN ACTION

NA: Now O'Brien, you are going to talk about how to close a class.

AO: Yes. There are broadly two ways to do that. The first is by amending the originating process and pleading. That is essentially the opposite of what occurred in the *Stolen Wages Class Action* example that I referred to earlier. Instead of striking through subparagraph g you could insert it so that the class again becomes limited to a more defined group of people. Where that occurs, the people who become excluded cannot issue a claim through the class action, but their claims are not extinguished. They can still pursue them in separate proceedings. One of the points we will come to is, you know, how does that affect the dynamics of a settlement when there are still potential claims which could be brought in the future.

The second way to close the class is through a notice and registration process. Essentially, that involves the court making orders that require publicity of the proceedings as a way to attract interest from potential group members, who then have to register their interest and sign up to participate in the proceedings. Usually those orders, in addition to requiring that the group members be given notice of the proceedings, then set out consequences if potential group members do not register. Those consequences can broadly fall into two categories, and this is a bit of lingo, there is soft closure and hard closure. Soft closure is where the effect on an unregistered group member depends on whether or not a settlement is achieved. So if a settlement is achieved, a group member that fails to register is bound by the settlement and barred from participating in the proceeds of the settlement. But if there is no settlement, the class in effect springs back open, so they can continue to participate in the proceedings. Hard closure is a more extreme version where the court's orders have the effect of extinguishing the group members rights, even if no settlement is achieved. So hard closure is a much more drastic option. I would suggest it is very unlikely that the court could ever be persuaded that a hard closure was appropriate. In practice, it has been much more common to apply for soft closure orders.

THE COURT'S POWER & APPROACH TO CLASS CLOSURE

NA: Now Barnes, what is the court's power and approach to class closure?

MYB: We used to be quite straightforward because there were cases in Victoria and also in the Federal Court which uncontroversially said that the court has the power to close the class and that is an order that is appropriate in the interest of justice. There was a case in the Federal Court called *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited*, and the decision of *Matthews v AusNet Electricity Services Pty Ltd & Ors* in Victoria, which set out the authorities and pretty clearly said this is something that both parties have an interest in. And while we are concerned that we want to make sure that people understand what is happening so that no one is unjustifiably excluded, this is a good thing, for all the reasons that we talked about understanding the scope of liability.

I guess the difficult thing to under to understand at the outset is that the whole regime is premised on plaintiffs being allowed to coast in on an action, so that the starting point should always be the plaintiff is entitled to be a part of the action without having to take positive steps. And the High Court in *Mobil Aviation Oil* was clear to say that they have that right and that is the bedrock of how this kind of action proceeds. And so requiring a class closure order, in requiring people to register, does require plaintiffs to take a step. And so it is against the general philosophy of the action to be forced with the legislation that provides for all of these orders to be made. But the court will do it in Victoria and in the Federal Court, if it is in the interest of justice to facilitate a settlement. But it depends on some of the factors.

You can see on the slide there [slide 12] that it can depend a little bit on the interests of the class as a whole. Obviously, one of the big ones is the interest in obtaining a settlement because the court doesn't really want to hear a five year protracted trial that may or may not result in an outcome that isn't easy to understand, that gets appealed and then has to come back. So everybody has an interest in there being an equitable settlement, but that has to be weighed against other considerations.

One of the big ones is the point at which the litigation is reached. The earlier that you are trying to close the class, the more the court is going to be concerned that the issues aren't clearly defined and that you are possibly going to be excluding someone who hasn't had the chance to be a part of the action.

Publicity can be effective. So if the court thinks that plaintiffs aren't going to be aware of the regime that has been established, or proposed to be established, and then be closed, particularly in a hard closure scenario. But even in a soft closure, where they are potentially missing out on the value of a settlement and the benefits there.

Attitude of the parties is interesting in that the courts say that some defendants will say "I'm not even going to talk to these plaintiffs unless I know who I'm talking to and exactly what it is that they want from me or us". And the court says, that's not good enough, you should be. There is

always going to be an element of uncertainty in any proceedings in which you are a defendant. For that reason you can't hijack the process and say, we won't negotiate unless a class closure order is made. For that reason, you need to show a little bit more than that. So ideally, that the proceeding has started, pleadings have closed, potentially that there are sample group members who have started to come forward as potential people whose claims could be determined, and convince the court that you are really bona fide about this negotiation, it is going to happen and it is going to result in a good possible outcome for the group members.

Then the last thing is about the complexity and likely duration of the case. As Alex said, it might take two to four years to hear it, there is going to be an appeal, it is going to be a huge drain on judicial resources. As Nick said, the judges are trying very hard to come up with the procedural laws to deal with it. But there is no doubt that in the Federal Court and in the jurisdictions where they have got this regime, complex litigation is expensive. And it is expensive for the court, it takes up judicial resources, a lot of parties who are having to agree to draft orders and consents and getting them out of moving forward. So the complexity and likely duration of the case, the more complex generally, the more likely it is that the court is going to see settlement as a desirable thing that is going to save everybody time and money. So that was the traditional approach, what we thought was the law.

BREADTH OF COURT POWERS TO BIND UNREGISTERED CLASS ACTION GROUP MEMBERS – DIFFERENT VIEWS

NA: O'Brien, you are going to touch on now the question of the different views that are taken by different jurisdictions as to the breadth of the court's power to bind unregistered group members.

AO: As Mei has mentioned, the power to make these orders for closing a class was uncontroversial in the Federal Court and in Victoria. The power has been identified as arising under s 33ZF of the *Federal Court Act* and its analogued, which is the court's general power to make any order that it thinks appropriate or necessary to ensure that justice is done in a proceeding.

Now in Victoria, but only in Victoria, there is a further provision in their regime which allows the court to set a step that a group member is required to take, failing which, he or she is not entitled to any relief, payment or other benefit. So in Victoria, that makes the power to make these sorts of orders all the more clear.

That power of that provision is not in the other statutory regimes. That is significant because the New South Wales Court of Appeal has recently held that the general power, which I referred to, is not in fact broad enough to allow a court to make an order that binds unregistered group members to a settlement and therefore bars them from making any further claim. And

that was the Court of Appeal's decision in the *Haselhurst v Toyota Motor Corporation Australia Ltd* decision. The principal reason given by the court was that there are specific statutory provisions in the regime that address the barring of a group member. So that it would be incongruous to read into that general provision a power to make class closure orders other than at the conclusion of the proceeding, i.e. after the matter has already settled or upon giving judgment.

About six weeks after *Haselhurst* the Court of Appeal handed down a further decision in *Wigmans v AMP Ltd* where it held further that it was beyond power for the court to order that notices be given prior to a mediation stating that the parties had an intention to apply for orders to extinguish the claims of unregistered group members. So even just foreshadowing an intention to apply for class closure was beyond power. The court's reasoning was that the notion of group members should be prevailed upon to register or else lose their rights was contrary to the fundamental opt out nature of the regime that Mei in particular has already referred to.

THE IMPLICATIONS OF THE DECISION IN HASELHURST V TOYOTA MOTOR CORPORATION AUSTRALIA LTD

NA: And O'Brien what are the implications of *Haselhurst*?

AO: The first thing to say is that the reasoning in *Haselhurst* doesn't prevent class closure after a settlement has already been achieved. What we are talking about here is really a tool that had been used in class actions to try and achieve settlement. The significance of *Haselhurst* is that settlement perhaps becomes more difficult because the quantum of the group members' claims becomes more uncertain.

That then I guess raises an issue as to what alternative strategies can be used to try and achieve a settlement. Broadly, it seems to me, that there are two options.

The first is to go ahead with closing the class prior to settlement negotiations, but to do so by amending the group definition in the originating process or pleadings, rather than by the notice and registration process. Now, this does allow a degree of clarity to be achieved. But the downside, for the defendant in particular, is that those who fall outside the narrow definition can pursue their claims in separate proceedings, including possibly in a further class action.

The second option is to, it seems, is just to go into a mediation with an open class. But in the meantime, to have done your best to try to identify the group members, and then to try and agree settlement terms that allow the risks of some new people coming out of the woodwork to be managed. for example, a settlement amount can be capped, and there can be rules on both the settlement distributions that allow that sum to be distributed equitably. But even

with an agreement of that kind you would still, I think, want to do your best to try and identify as many group members as possible before heading into mediation.

THE FUTURE OF CLASS ACTIONS IN AUSTRALIA

NA: Now finally Barnes, in the context of what we have been discussing, what do you see as the key takeaways?

MYB: A starting point is to say that class action jurisprudence is still evolving. We are still getting decisions that are conflicting, at intermediate and appellate court level. Normally with issues of practice and procedure you wouldn't think that the High Court would usually but they have been taking these cases. The *BMW* case last year and other cases that are essentially matters of practice and procedure, but because of the interesting way that class actions merge ideas about justice and what is equitable, and the way that litigation is run and the consequences for people.

NA: And a broader group of people, not just a particular litigant. It is a broader group.

MYB: And policy questions. Questions about the policy behind legislation at the federal level, policy and legislation at the state level. The Victorians obviously having a particular provision to address this exact issue that the New South Wales Court of Appeal says is not in the interest of justice. It is really interesting to see how the courts are grappling with this issue. I think we would expect that there will be further cases as people try to run the arguments that were in New South Wales in *Haselhurst*, the *Takata Airbags* case in the federal court, because the provisions are quite similar. So that will be interesting.

I suppose the other issue is just that we should not assume then if we have a general provision that class closure will necessarily be easily available and it will be a matter of having to take the steps that you can to show that you are serious about settlement and trying to make it something that is attractive to the court, if you think it is in the interest of all parties. But for all the reasons we have discussed, each individual party has to sit down and think about, is it in my interest to be part of a closed class or having this process so it can be closed off? That in itself is difficult and has to be done on a case by case basis.

Did either of you have other takeaways?

AO: The only thing, I think, further to mention is what appears on the next slide [slide 16], which is the importance of planning.

NA: I had to Google this guy I'm afraid. I was embarrassed to read that he is a well known author on personal time management, and he has sold millions of books on that.

AM: I think you have each case, specifically and individually. And while we have this melting pot of different ways to approach it, you have got to find out what is the best thing for your case. It may be that you mediate on an open class basis and other safeguards, as you said, to ensure settlement. You have just got to look at it individually and plan at the outset. Because if you don't you waste time, which may be detrimental to you.

NA: And that is a process involving all the players.

AM: All players, on all sides, and even counsel.

NA: And even counsel, particularly counsel.

AM: Counsel has to sign off and give and advice to the court on whether they think settlement is good. So it is at all levels, on both sides.

NA: Well, thank you McVay. Thank you very, very much. It has been our absolute pleasure.

AM: Sorry, I didn't bring much magic.

NA: You did. It was so magical you didn't even notice. So thank you, and to my two chamber mates, thank you so very, very much for your contributions and your efforts. The discussion was great, thank you.

MYB: And thank you Nic for hosting.

NA: No, that is the easy job to sit here and make sure I don't stuff up, as I did more than once, which is always embarrassing, that I can't do something as basic press a button. There you go.

MYB: Are there any questions?

NA: I'm not sure. Can we see questions? No.

Lots of information. For those who would like to ask some questions later, please feel free to email and our three panellists will respond to you, in a united way of course.

Thank you all very much for joining us. Thank you again McVay, O'Brien and Barnes. Have a great afternoon everyone. Ciao.