

Class Actions in Australia

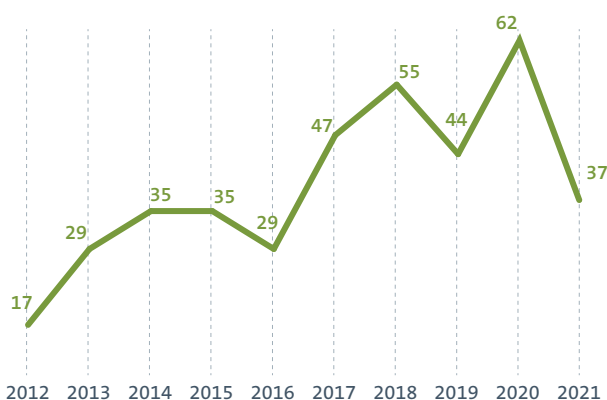
2021 UPDATE

Class action litigation in Australia continues to be active and highly complex. Over the past 10 to 15 years, class actions have become an increasingly entrenched and accepted aspect of commercial life for organisations conducting business in Australia. In parallel, the business of class actions has become ever more entrepreneurial for both plaintiff lawyers and third party litigation funders.

This brief update provides a high-level overview of the trends, and of the risks for our international clients and contacts. A more general overview of how class actions operate in Australia can be found [here](#).

FILING TRENDS

CLAIMS FILED



2021 figures are based on filings to 30 September 2021

Figure 1: Filings graph from 2012 to 2021

There has been a steady increase in class action filings over the past decade – although, based on filings to 30 September, it is looking like 2021 will be below trend.

The actual number of claims (peaking at 62 in 2020) is not consistent with the ‘explosion’ that was predicted after the acceptance of the legality of third party litigation funding in the late 2000s. It is, however, sufficient to generate ongoing debate

about the impact of class action risk on businesses operating in Australia; and, in recent times, has led to legislative reform intended to impose additional checks and balances on the entrepreneurial pursuit of class actions.

TYPES OF CLAIMS

The types of class actions filed in Australia have subtly changed over time. Initially, there was a focus on product liability cases – particularly for products affecting human health. However, as the class action and litigation funding industries matured, the focus shifted to securities and financial services class actions (the latter often arising from the alleged mis-selling of financial products that failed during the 2007/8 credit crisis). More recently, we have seen a broader base of claims – with an increasing concentration of claims brought on behalf of consumers of goods or services. Other common types of claims include those concerning: the underpayment of employees, disgruntled franchisees, treatment of Indigenous persons, environmental contamination, bushfires and (in recent years) outbreaks of COVID-19.

The form of claim most likely to impact offshore organisations is that related to allegedly defective products. In recent years, there has been a noticeable uptick of claims against automotive companies and medical device companies, often following a product recall. Those claims are usually underpinned by statutory guarantees that impose strict liability in respect of consumer product that does not meet minimum acceptable quality standards.

CLASS ACTION FUNDING

Third party litigation funding has played an integral role in the development of the Australian class actions industry: at least 60% of class actions filed in the last decade were third party funded. A key factor in this trend is that Australian lawyers cannot be paid a percentage of any recovery (save for one recent exception noted below).

Most class actions are funded by:

- a third funding party arrangement that involves payment of legal fees and an indemnity for any adverse costs orders (given Australia's 'loser pays' system) in return for a percentage of any proceeds (generally 20-40%). While funding has traditionally been a matter of contract between the funder and class members, there are circumstances in which the courts have made orders granting funders a commission of the total recovery – although the law around the power to do so is not yet settled; and
- lawyers acting on a 'no win, no fee' basis, often with after the event insurance to cover the possibility of an adverse costs order.

In 2020, legislation was enacted to permit contingency fees to be charged by lawyers in class actions in the Supreme Court of Victoria but only when approved by the court. While there have been an increased number of filings in that court in recent times, no such approval orders have been made at this stage (with the only determined application declined as not in the interests of group members). Further applications are, however, pending and we expect that orders of this kind will be made in the short to medium term.

SECTORS MOST AT RISK

The banking and financial services sector has long been the biggest target for class action filings. This is due to a range of factors, including the size and consumer-facing nature of the sector; losses sustained from financial products in the credit crisis; and issues exposed in the 2018 Royal Commission into misconduct in the banking, superannuation and financial services industry.

However, there is now an increasing stream of claims affecting other sectors, including healthcare, government, manufacturing, infrastructure and technology.

A more detailed analysis of 2021 filing trends is available [here](#). Our Class Action Risk 2021 publication is available [here](#).

OTHER FACTORS AFFECTING CLASS ACTION RISK

UNCERTAINTY AND INCREASED REGULATORY BURDEN FOR LITIGATION FUNDERS

About a decade ago, legislation was introduced to expressly relieve funders of the obligation to hold a financial services licence (and also to comply with the regulatory requirements for managed investment schemes) because of the role funders were seen to play in facilitating access to justice through their support of class actions. In more recent times (under a different government), things have come full circle with concerns around the impact of class action risk on Australian business (and also the entrepreneurial pursuits of funders at the expense of class members), leading to:

- the repeal in 2020 of the earlier exemptions to the requirements for funders to be licensed, and for the funding of class actions to be regulated as managed investments schemes; and
- more recent proposals for further legislative reform, including the introduction of a rebuttable presumption that a return to class members in a funded class action of less than 70% of the gross proceeds of a claim is not 'fair and reasonable'.

Aside from legislative reform, the courts are more closely scrutinising funding arrangements and, in particular, the amount of funding commissions – which has also increased uncertainty in the funding market.

As a result of these developments and uncertainties, the number of cases funded in the past two years is substantially below the longer-term average. It remains to be seen whether this is a temporary adjustment during this transitional period or indicative of a longer-term trend.

MOVING GOALPOSTS FOR SECURITIES CLASS ACTIONS

Securities class actions were the most common type of class action in Australia for over a decade, before they were overtaken by consumer class actions in 2019.

Australian securities class actions are based on the market disclosures of listed companies, with claims alleging a breach of the 'continuous disclosure' requirements and/or misleading conduct in respect of market disclosures.

In an effort to combat opportunistic shareholder class actions and the associated impact on premiums for directors and officers' insurance, the law relating to claims for damages in these types of claims was amended earlier this year, to introduce a requirement to prove the listed company acted with 'knowledge, recklessness or negligence'.

While this change was welcomed by listed entities and introduced an appropriate fault element into the matters that need to be proved in a securities class action, we do not expect

the amendment to significantly curb shareholder class action risk – it may, however, result in more securities class actions going to trial.

REGULATOR FOCUS AND ACTIVITY

The focus and priorities of Australian regulators are key indicators of future class action risk. There is a long-term trend of class actions being commenced following regulatory investigations or enforcement action (especially penalty proceedings).

The core regulators' current stated focus and priorities suggest increased class action risk in the following areas:

- high-value and mass-market consumer goods, often following product recalls;
- listed companies from securities class actions – particularly in respect of market disclosures re alleged misconduct that is the subject of a regulatory investigation, and/or failure to disclose inadequate corporate governance and risk policies, systems or controls;
- the treatment of data, including the circumstances of its use and its protection; and
- the superannuation and insurance sectors, with a particular focus on the appropriateness of disclosure statements and member communications.

NEW FRONTIERS

Corporate governance and risk management claims: Typically, securities class actions have focused on specific events and statements (for example, earnings guidance). We are expecting to see an increase in securities class actions focusing on more generalised governance and culture issues, and the adequacy of systems and controls.

Climate change: An increasingly relevant new frontier of class action risk is claims made against companies and government relating to the non-disclosure and management of climate change risks.

Data breach and privacy claims: While there are significant obstacles in the identification and quantification of financial loss relating to data breach and privacy claims, we are seeing a small but growing number of class actions seeking a remedy for breach of privacy arising from a data breach and/or mishandling of private information.

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