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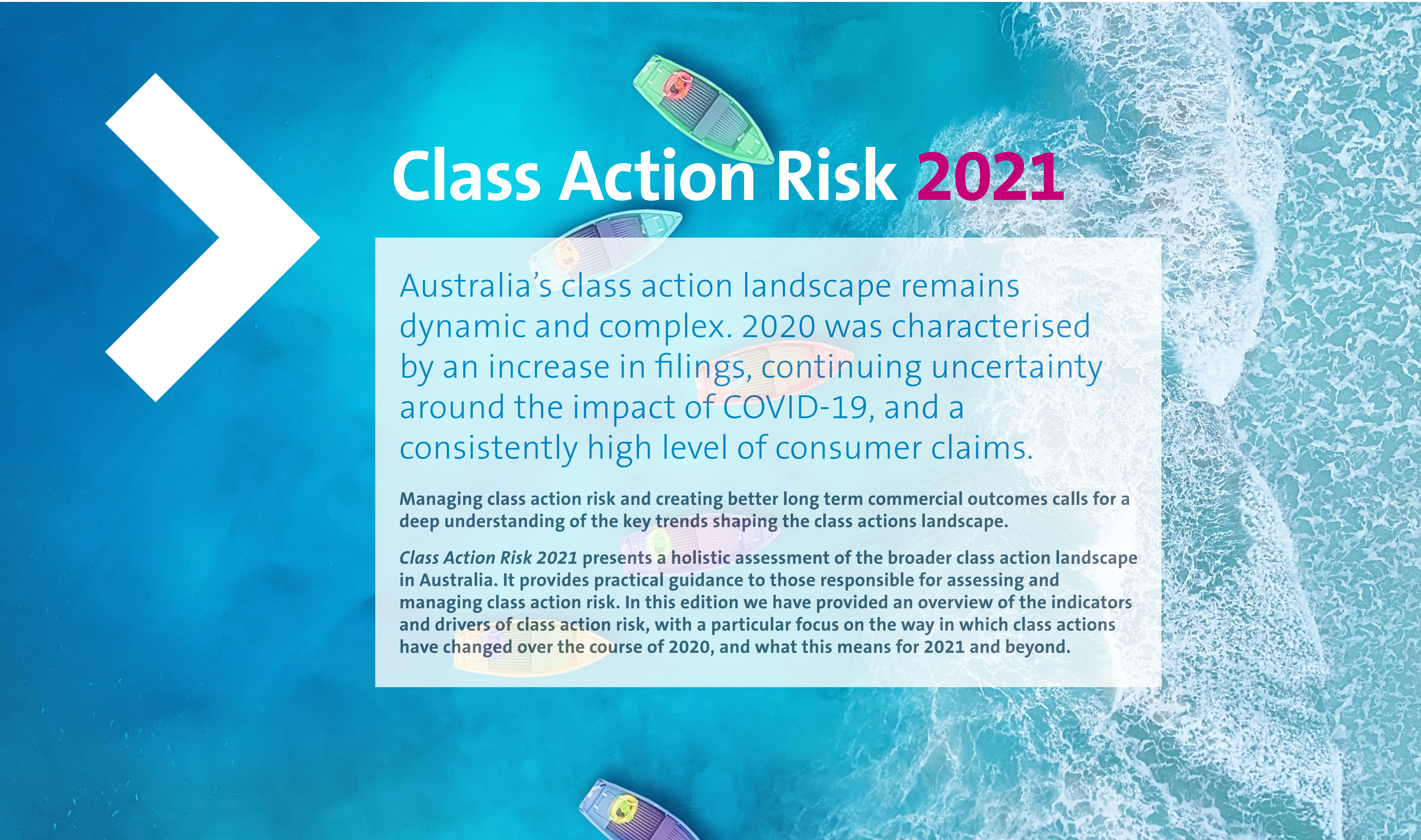


Class Action Risk 2021

Australia's class action landscape remains dynamic and complex. 2020 was characterised by an increase in filings, continuing uncertainty around the impact of COVID-19, and a consistently high level of consumer claims.

Managing class action risk and creating better long term commercial outcomes calls for a deep understanding of the key trends shaping the class actions landscape.

Class Action Risk 2021 **presents a holistic assessment of the broader class action landscape in Australia. It provides practical guidance to those responsible for assessing and managing class action risk. In this edition we have provided an overview of the indicators and drivers of class action risk, with a particular focus on the way in which class actions have changed over the course of 2020, and what this means for 2021 and beyond.**

Key points

FILINGS HAVE INCREASED, AND SO HAS CLASS ACTION RISK

More class actions were filed in 2020 than in any prior year. This reflects a consistent trend of higher levels of activity since 2017, even when taking into account 'competing' filings.

THE COVID DIMENSION

Employment related claims will continue to form a part of the class action landscape, especially as the potential economic implications of COVID-19 are not fully known. COVID claims are a new feature of our class action environment, but there has not been a deluge. However, we do expect to see business interruption class actions emerge as a new frontier shaped by COVID-19.

FUNDING: ONGOING UNCERTAINTY, VICTORIAN SPIKE

Litigation funding reforms and procedural uncertainly has resulted in a slow-down in funded class actions – only one-third of 2020 filings are known to have received third-party funding, down from 59% in 2019. However this slow-down has been offset by the Victorian reforms permitting contingency fee arrangements.

WHAT ARE THE BIGGEST INDICATORS OF FUTURE RISK?

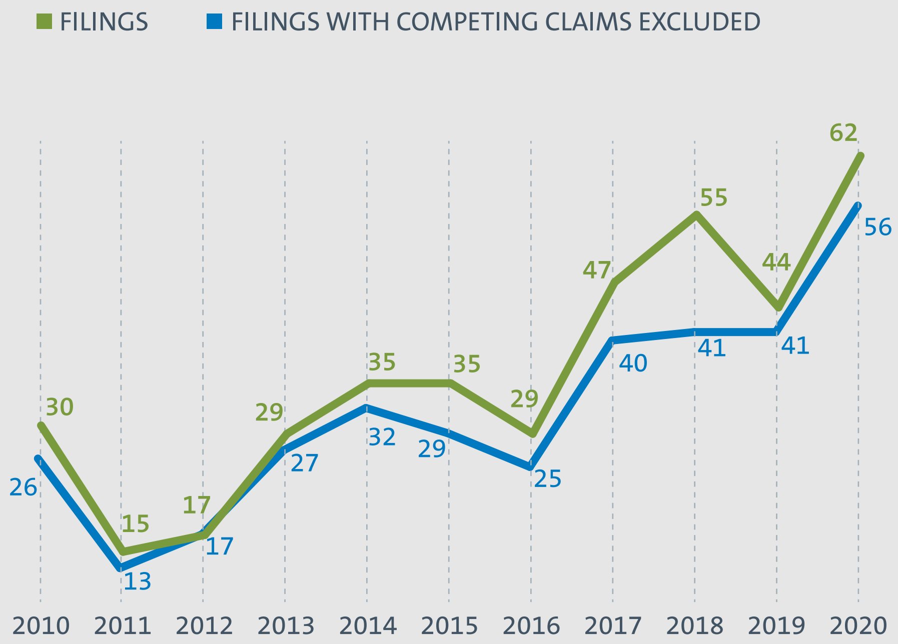
We expect to see a continued dominance of consumer claims class actions followed by securities class actions (notwithstanding recent disclosure reforms). In particular, financial services businesses, which continue to be impacted by issues arising from the Royal Commission, and the industrials sector will continue to face significant class action risk. Further, while the impact of the continuous disclosure reforms are yet to be fully realised, listed companies will continue to face heightened class action risk.

RESPONDING TO CLASS ACTION RISK

If a class action is commenced against your organisation, you are likely to face a period of difficult and sustained litigation (irrespective of the merits). Even in this entrepreneurial environment, it is important to resist knee jerk reactions and to instead engage in an objective assessment of risk from day one. As a preventative measure, it is also important to be conscious of the types of conduct that may give rise to class action risk in your business and to ensure appropriate systems are in place to minimise the risk of that conduct occurring. It is also prudent to have plans in place so that, should something go awry, the response can be swift and based on an objective assessment of risk.

2020 in review

FIGURE 1 CLASS ACTION FILINGS



2020: A YEAR OF RECORD FILINGS

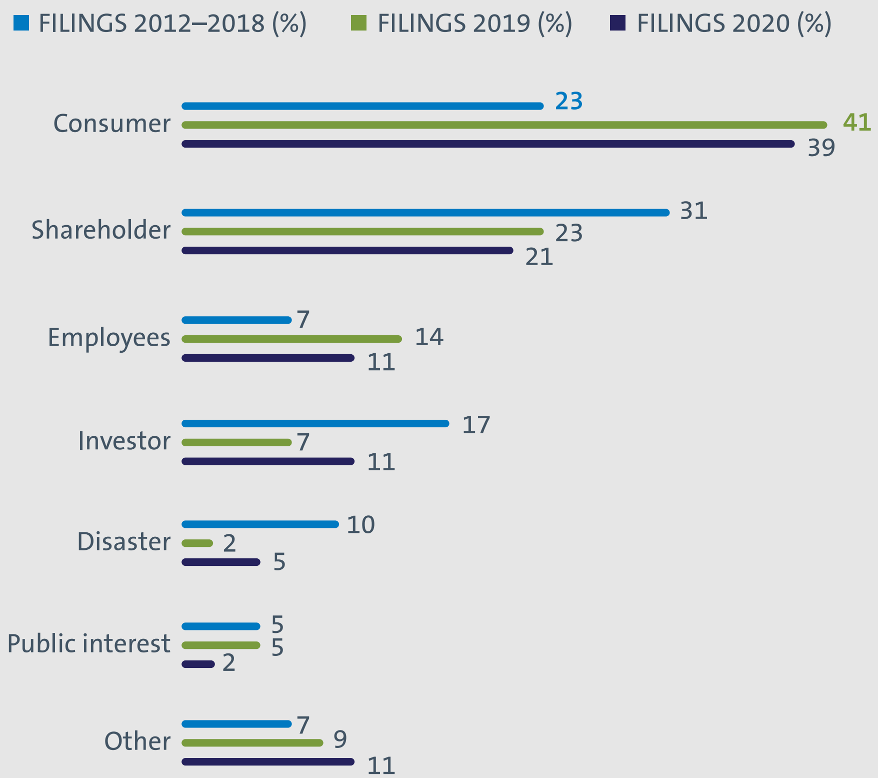
More class actions were filed in 2020 than in any prior year. This reflects a consistent trend of higher levels of activity since 2017. We are not inclined to draw conclusions about class action risk based on the statistics in any single year, particularly one as anomalous as 2020, but the longer-term trend is indicative of a rise in class action risk.

Unlike in some prior years, the spike in filings cannot be explained by reference to competing filings (ie two or more claims filed against the same company for the same or similar issues). The proportion of competing claims in 2020 was generally in line with the longer-term average.

Our analysis of the claims filed indicates that the record filings appear to have been driven by a broad base of activity, with spikes in claims against financial institutions (which continue to draw heavily on issues arising from the Royal Commission) and worker underpayment claims. The availability of contingency fees in class actions in the Supreme Court of Victoria may also have been a factor.

2020 in review

FIGURE 2 FILINGS BY TYPE

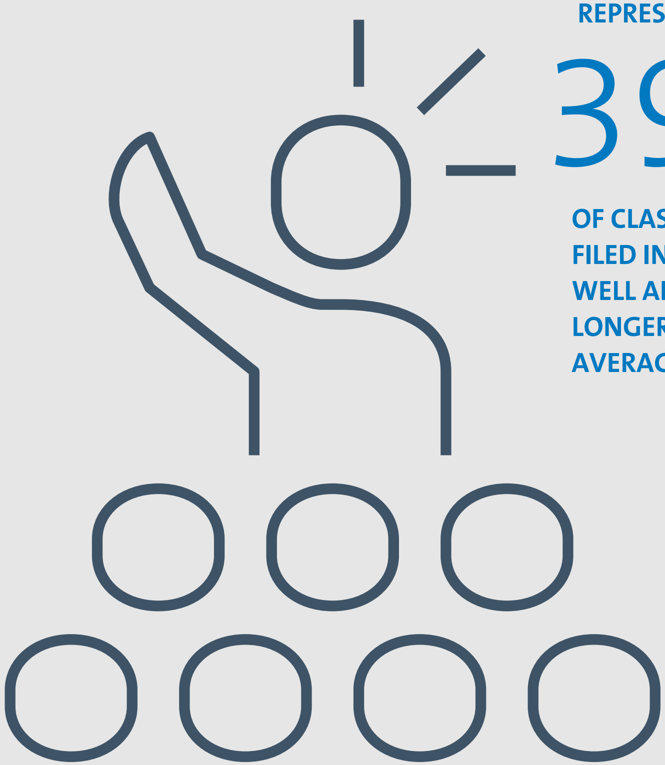


CONSUMER CLAIMS REMAIN HIGH – SHAREHOLDER CLAIMS STEADY

For the second consecutive year consumer claims have dominated the class actions landscape – supplanting shareholder class actions as the most common type of claim. Figure 2 highlights the continued prominence of consumer class actions in 2020, consolidating an initial rise in 2019.

Consumer claims represented 39% of class actions filed in 2020, just below the high of 41% in 2019 and well above the longer-term average of 23%. This continuing trend was largely driven by the long tail of consumer filings against banks, superannuation trustees and insurers following the Financial Services Royal Commission. 2020 also saw several product liability claims, as well as some COVID-related consumer claims alleging a failure to prevent infection or address infection risks.

2020 in review



CONSUMER CLAIMS REPRESENTED

39%

OF CLASS ACTIONS FILED IN 2020... WELL ABOVE THE LONGER-TERM AVERAGE OF 23%.

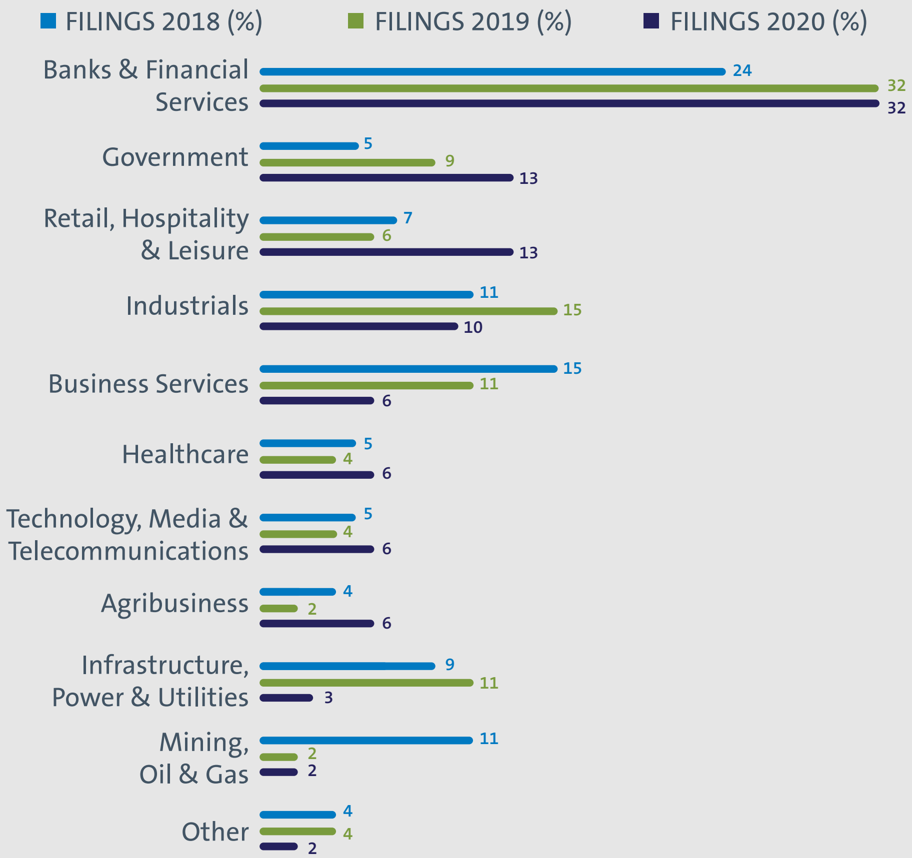
Shareholder claims represented 21% of filings, making them the second most common type of claim. The majority of these claims were brought against listed companies in the industrials and agribusiness sectors.

There was, however, some diversification in filings in 2020. Key contributors to the remaining 40% were:

- **Employment**: The vast majority of which were underpayment claims, a trend that has continued from 2019.
- **Investor**: Most of these claims allege negligence or misleading conduct by advisors or promoters in relation to specific investments. These cases tend to be fact-specific rather than representative of any broader themes.
- **Disaster**: The claims in this category in 2020 all relate to losses allegedly sustained by members of the community due to the spread of COVID-19 from hotel quarantine in Victoria. In many respects, these claims are analogous to claims we have seen in previous years against governments or electricity companies for actions that allegedly caused, or for allegedly failing to take actions to prevent, the ignition or spread of bushfires.

2020 in review

FIGURE 3 FILINGS BY SECTOR



BANKS AND FINANCIAL SERVICES SECTOR STILL THE MOST AT RISK

Unsurprisingly, there is a strong correlation between the types of claims filed and the sectors most at risk.

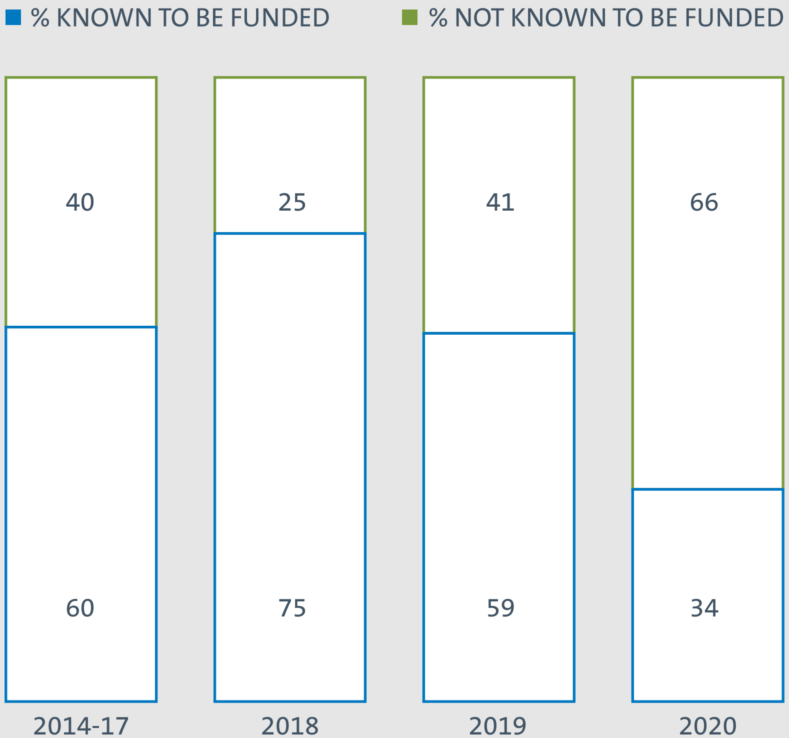
The banking and financial services sector has again been the biggest target for class action filings, accounting for roughly one-third of all claims (up from approximately one-quarter of claims in recent years). This is reflective of the complex regulatory landscape faced by businesses in the sector, as well as the ongoing flow of consumer claims following the Financial Services Royal Commission.

Other major target sectors in 2020 were:

- **Government:** This sector was the target for a range of claim types in 2020, some of which are new (such as COVID-19 hotel quarantine class actions and climate change-related claims against the Commonwealth), and some of which are similar to claims seen in previous years (for example, in relation to alleged stolen wages or allegedly toxic foam used at Defence facilities).
- **Retail, Hospitality and Leisure:** This sector has seen a doubling of its share of claims compared to 2019, the majority of which are claims against retailers for alleged underpayment of employees.

2020 in review

FIGURE 4 THIRD PARTY FUNDING



UNCERTAIN TIME FOR LITIGATION FUNDERS

While 2020 saw more new filings than ever before, far fewer of those filings were backed by third party funding. Only one-third of 2020 filings are known to have received third-party funding, down from 59% in 2019, 75% in 2018 and an average of 60% in the four years prior.

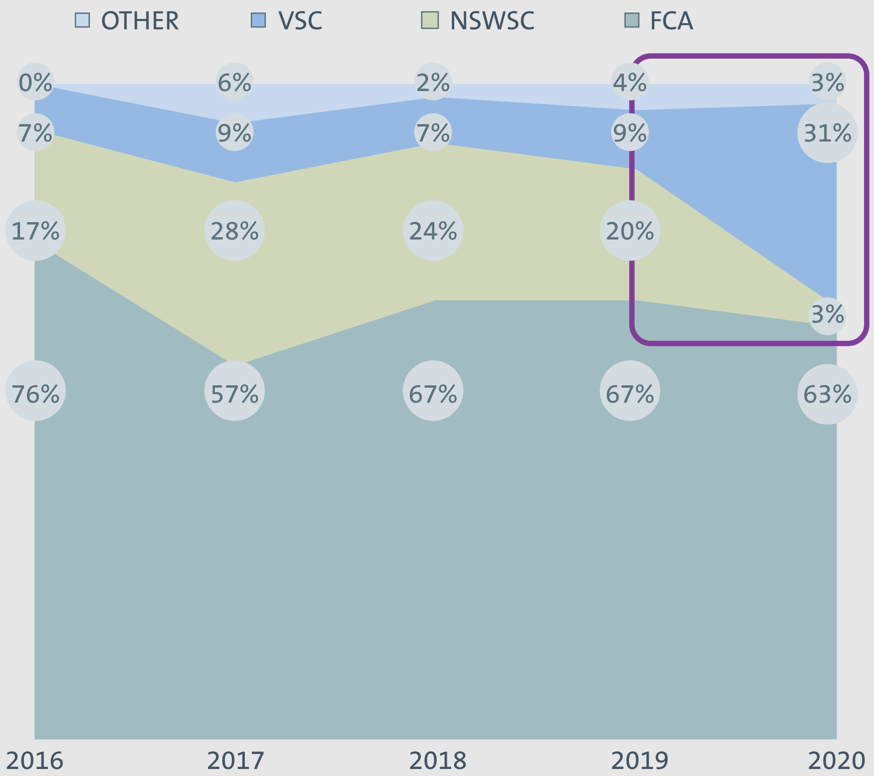
Several factors are likely to have contributed to this marked drop-off in 2020 including: changes in the regulatory environment for funders (as discussed further below), uncertainty following the High Court's decision on the common fund model, competitive pressures on funding commissions as courts consider which competing class action they will permit to proceed (when that is the course they opt to take), and additional judicial scrutiny of funding commissions.

Anecdotally, we understand that the current uncertainty created by those developments is causing some funders to take a 'wait and see' approach or allocate their resources to other cases. It remains to be seen what impact these issues will have in the long run.

However, perhaps the biggest factor in this shift is the availability of contingency fees for lawyers in class actions in the Supreme Court of Victoria (see next page).

2020 in review

FIGURE 5 FILINGS BY JURISDICTION



THE IMPACT OF CONTINGENCY FEES

In August 2020, the law was changed to permit lawyers acting in class actions in the Supreme Court of Victoria to seek an order which would see them remunerated by reference to a percentage of any judgment recovered – an option which had previously been unavailable to lawyers, and remains so in all other jurisdictions. There is little doubt that this is a more attractive proposition for plaintiff law firms than the 'no win, no fee' model.

It might safely be assumed that this change is a partial contributor to the record number of filings and the marked reduction in the number of third party funded class actions. The most stark impact is, however, the effect on where the new claims are being filed.

Figure 5 shows the percentages of filings across the Federal Court and various state Supreme Courts in the last five years. While the percentage of filings in the Federal Court and Queensland have remained steady, there was a sharp increase in the percentage of filings in the Victorian Supreme Court in 2020 and a corresponding sharp decrease in the NSW Supreme Court.

Having represented between 7% and 9% of filings in 2016–2019, the Supreme Court of Victoria received 31% of filings in 2020. While some of this increase can be attributed to COVID-19 claims, there is undoubtedly a strong shift to Victoria that can only be explained by the lure of contingency fees.

COVID class actions – is the avalanche on its way?

At the beginning of 2020, no one could have predicted the impact the COVID-19 pandemic would have on every aspect of our lives. While there have been a number of COVID-19-related class actions during the year, early fears of an avalanche of filings have not materialised so far. However, as the impact of COVID-19 continues to evolve in 2021, a number of key risk areas are emerging.

At the beginning of the pandemic there was concern that the rapid deterioration of the Australian economy would result in a wave of class actions as multiple sectors were severely impacted by the economic downturn. The risks of shareholder class actions and employee class actions were of particular concern as companies were forced to downgrade profit projections and stand down staff. However, the anticipated wave has not yet materialised. Further, where claims were commenced in 2020, they were not in the areas initially expected.

COVID-19 CLASS ACTIONS IN 2020

Of the 62 class actions filed in 2020, only six were a direct consequence of COVID-19. Five of these related to COVID-19 outbreaks in Victoria. In summary:

- In the Victorian Supreme Court:
  - Two were brought against the Victorian Government, seeking compensation for businesses that suffered loss alleged to have been caused by negligence in the management of the state's Hotel Quarantine Program, and for those who lost income or suffered psychiatric illness or injury in Victoria's stage three and four lockdowns.
  - One was brought against two security providers involved in Victoria's Hotel Quarantine Program, alleging that their failings led to the state's second wave of COVID-19 infections from May.
  - Two were filed against aged care providers, alleging they failed to adequately protect their residents from COVID-19, causing death and serious injury to residents and mental or nervous shock to those who had a close relationship with a resident.
- In the NSW Registry of the Federal Court, one was filed against a cruise operator alleging negligence, breach of consumer guarantees and misleading or deceptive conduct, as a result of its handling of a COVID-19 outbreak onboard the vessel.

62 *OF THE*

class actions filed in 2020

ONLY 6

were a direct consequence of COVID-19.

Further, each of the five Victorian class actions was commenced on a contingency fee basis in the state's Supreme Court – reflecting the broader trend of an increase in filings in the jurisdiction as a result of this recent reform.

No COVID-19-related shareholder class actions were commenced in 2020.

Several plaintiff law firms have announced that they are investigating further potential COVID-19 class actions, as discussed below.

No COVID-19-related shareholder class actions were commenced in 2020. While it's too early to draw conclusions given there is often a lag between the relevant event and the filing of a claim, it may be a reflection of how well Australia's economy has so far weathered the pandemic. Also relevant may be the continuous disclosure amendments introduced by the Federal Government to curb the threat of opportunistic class actions amid the potentially volatile environment created by the pandemic, now proposed to be made permanent. However, with the economic impacts of COVID-19 far from over, the risk of shareholder class actions stemming from COVID-19-affected profit projections will persist, particularly in industries suffering long-term effects of the pandemic.[1]

IMPLICATIONS FOR FUTURE COVID-19 CLASS ACTION RISK

In this section we have done some horizon-spotting in relation to the types of potential claims that we may see in 2021 (in addition to shareholder claims). The risk of such claims being brought in Australia is obviously less than in the United States given Australia's largely successful response to the pandemic to date. Nevertheless, there is a 'tail risk' from events which occurred in 2020 and a forward-looking risk based on what might transpire in the year ahead. It is difficult to predict this with any certainty, but a successful public health response in 2021, including the roll out of the vaccine, will reduce class action risk.

EMPLOYMENT CLAIMS

Employers may face class action risk in two key areas. First, in cases where there are outbreaks among employees, claims may be brought against employers for failing to provide a safe workplace, including inadequate personal protective equipment and/or training. A number of these types of claims have been brought in the United States, including against large companies such as McDonald's and Amazon. Closer to home, Qantas employees were reportedly exploring a potential class action against the airline for failure to protect them from COVID-19, after more than 59 employees and their family members became infected.

Second, employers face a heightened risk of class action claims for wrongful termination or breach of employment terms as a result of reduced hours or changed employment conditions due to COVID-19. Legal action has been brought against Qantas by multiple workers' unions for its outsourcing of jobs and alleged underpayment of staff under the Federal Government's JobKeeper scheme. These claims are not class actions, but they are indicative of the types of cases that could be brought as a class action.

As the above examples show, sectors most impacted by COVID-19 face the greatest risk of employment class actions, namely: tourism (airlines in particular), hospitality and retail.

CLAIMS AGAINST GOVERNMENT

Any future COVID-19 outbreaks that occur as a result of state government-operated hotel quarantine programs could lead to further class actions against the governments and third party contractors.

We have already seen numerous inquiries and reviews into government handling of COVID-19, such as the Victorian Hotel Quarantine Program. Further inquiries or reviews that result in adverse findings would also increase class action risk.

A number of state governments have also faced non-class action lawsuits challenging the legality of, or seeking compensation for, losses suffered as a result of COVID-19 restrictions such as border closures. While a number of class actions of this type have been brought in the United States, legal action in Australia has so far been unsuccessful, and we expect this will diminish the attractiveness of such claims for plaintiff law firms and litigation funders.

CONSUMER CLAIMS

We expect the pandemic to contribute to the recent trend of increasing consumer filings.

First, claims may be brought against service providers for failing to adequately protect consumers against COVID-19.

- **Aged care** – The clearest examples of such filings are the multiple class actions that have been brought against aged care facilities, particularly in Victoria, where COVID-19 outbreaks have sadly resulted in deaths of residents. With two claims already on foot and others currently being investigated, we continue to view aged care as an at-risk sector, although, as public health responses continue to evolve, this risk may diminish.
- **Tourism operators and, to a lesser extent, retailers** – We have already seen a consumer claim brought against the operators of the Ruby Princess cruise ship, and plaintiff law firms are reportedly investigating a similar class action against Aurora Expeditions, the operator of a cruise ship that suffered a COVID-19 outbreak after departing Argentina in March 2020.

The tourism and hospitality sectors are also at increased risk of class actions brought by consumers who have continued to be charged for services that were not provided during COVID-19 restrictions or where refunds for cancelled services have not been provided. While we have not seen any claims of this nature filed in Australia, plaintiff firms are reportedly investigating potential claims against Flight Centre, Qantas and Jetstar as a result of their refund policies during the pandemic.

These investigations align with a number of class action filings that have been made in the United States against airlines such as Delta Airlines and American Airlines, as well as ticket sellers such as Ticketmaster and Ticket Nation. As discussed in our US trends section below, we may also see claims regarding the mislabelling or mis-selling of COVID-19 related products and services. This follows similar claims in the US and recent regulatory scrutiny and enforcement in Australia.

INSURANCE

There is a heightened risk of class actions against insurers that decline to pay out business interruption claims stemming from COVID-19 and associated government restrictions on trade. A number of these claims have already been brought in the United States, and at least three separate investigations are reportedly being undertaken into such claims by law firms and litigation funders in Australia.

These investigations follow a test case brought by the Insurance Council of Australia and the Australian Financial Complaints Authority in NSW in August 2020.[2] In that case, the NSW Court of Appeal held that exclusions in an insurance policy that referred to obsolete quarantine legislation do not apply to COVID-19, and insurers cannot rely on such clauses to refuse COVID-19 claims. It is likely we will see class action filings in 2021 on the back of this decision.

COVID-19 – AN INSOLVENCY PERSPECTIVE

The predicted immediate and significant increase in the number of Australian companies facing corporate distress has (with some notable exceptions) yet to occur. This is largely due to the stimulus and relief measures implemented by the Federal and State Governments to protect Australia's economy, including: temporary relief from insolvent trading liability; temporary changes to the creditors' statutory demand regime; and the JobKeeper program.

Contrary to expectations, and due in large part to these measures, we've seen a very significant reduction in the number of insolvency appointments over the course of the pandemic, when compared to previous years. Company directors were able to avoid most of the usual concerns about insolvent trading; debt recovery became more difficult; and JobKeeper, and other programs relating to commercial rent relief, relaxed the pressure that might otherwise have prompted directors to appoint a voluntary administrator or secured creditors to take action.

However, the temporary insolvent trading and statutory demand relief measures have now come to an end, with JobKeeper and the remaining commercial rent relief programs soon to follow. In addition, the Federal Government's new debt restructuring process for distressed corporates is only available to small businesses with debts of less than $1 million.

For those reasons, we expect to see an increase in insolvency appointments and financial distress in the months and years ahead, particularly in sectors with the most significant and prolonged impacts from the pandemic.

While financial distress or insolvency does not, of itself, increase the risk of a class action claim being made, companies facing financial distress can often find that their financial difficulties snowball into a whole range of increasingly significant issues. Directors will inevitably find themselves facing competing priorities as the interests of the company's shareholders, creditors (including secured lenders) and other stakeholders are brought into sharp focus. These factors can create an environment ripe for claims as those stakeholders look for ways to recover losses from the company, its directors, officers and insurers.

Similarly, the existence of shareholder or other class action claims against companies facing the impact of the pandemic may in turn increase the financial pressure on the company's directors to the point where they have no real alternative but to pursue restructuring or insolvency options.

History has shown that significant litigation, including class actions, often follows periods of economic distress. The extent to which this occurs as Australian corporations emerge from the pandemic in the coming months remains to be seen.

A year of major legislative reform – is it in the right direction?

In 2020, we saw significant legislative reform of some key features of Australia's class action landscape. This was in part spurred by the COVID-19 pandemic and the desire of the Federal Government to protect businesses from what the Treasurer described as 'the threat of opportunistic class actions'.

2020 saw a number of legislative changes that were predicted to have a significant impact on class action filings:

- the Federal Government's temporary changes to the continuous disclosure regime (which the Treasurer has recently announced will be made permanent);
- the removal of the exemption for litigation funders from the requirements of holding an Australian Financial Services Licence (***AFSL***) and complying with the managed investment scheme (***MIS***) regime under the Corporations Act; and
- Victoria becoming the first Australian jurisdiction to allow lawyers bringing class actions to be remunerated on a contingency fee basis.

Of these changes, the lifting of the ban on contingency fees in Victoria has had the most stark impact on class action filings.

CHANGES TO THE CONTINUOUS DISCLOSURE REGIME

In May 2020, the Federal Treasurer announced temporary changes to Australia's continuous disclosure laws under the Corporations Act. Last month the Treasurer announced that these changes will be made permanent, in line with the recommendations of the Parliamentary Joint Committee for Corporations and Financial Services (the ***Parliamentary Joint Committee***).

Under the Corporations Act and the ASX Listing Rules, where a disclosing entity has information that is (1) not generally available and (2) information that a reasonable person would expect, if it were generally available, to have a material effect on the company's share price, then the entity has an ongoing obligation to disclose that information to the market. Failure to comply leads to civil and criminal liability, and may give rise to shareholder class action claims.

Frequently when shareholder class actions are commenced, the claims rely on both alleged breaches of the continuous disclosure regime and misleading or deceptive conduct provisions in the Corporations Act and ASIC Act.

Australia is considered one of the most favourable jurisdictions in the world for shareholder class actions. This is in part due to how our continuous disclosure and misleading or deceptive conduct regimes have operated and, in particular, that the civil liability provisions have been essentially 'strict liability' regimes not requiring proof of intentional wrongdoing, recklessness or negligence.

The temporary amendments made in May 2020 amended the civil penalty provisions in the continuous disclosure regime by introducing a mental element – so that companies, directors and officers are only liable for failing to disclose market-sensitive information where they knew, or were reckless or negligent as to whether, that information would have a material effect on the share price.

Whilst we welcomed the temporary changes, we also made submissions to the Parliamentary Joint Committee about some limitations to the temporary changes, including importantly that they did not assist a listed entity with claims for misleading or deceptive conduct connected with breaches of the continuous disclosure requirements.

The bill currently before Parliament which would introduce permanent reforms goes materially further than the temporary changes, not only introducing a mental element (knowledge, recklessness or negligence) for the continuous disclosure civil penalty provisions, but also providing that companies and their officers are not exposed to civil liability for misleading or deceptive conduct under the Corporations Act or the ASIC Act in connection with contraventions of the continuous disclosure obligations, unless the required mental element has been proven.

The bill has been referred by the House of Representatives to the Senate Economics Legislation Committee, which is due to provide its report by 30 June 2021.

In our view, these are important changes with the potential to have a real impact on shareholder class action risk. We are watching the progress of the bill closely.

INTRODUCTION OF CONTINGENCY FEES IN VICTORIA

In July, Victoria removed the prohibition on lawyers charging contingency fees in class action proceedings in the state's Supreme Court, allowing plaintiff firms to recover a percentage of a successful claim via a 'group costs order'. This is a move in the direction of other entrepreneurial class action regimes around the world, including the United States.

There is no statutory limit on the percentage that a plaintiff firm can recover, with a proposed amendment to the bill to introduce a 35% cap defeated in Parliament. However, the court sets the fee percentage when making the group costs order and is able to amend a group costs order, including the fee percentage, at any time during the proceeding, acting as a control on the amount of fees charged.

As discussed above, we have seen a stark increase in the number of class actions filed in the Victorian Supreme Court since the introduction of contingency fees in the state (up from 9% of all class actions filed in 2019, to 31% in 2020), and a corresponding decrease in the number of class actions filed in the NSW Supreme Court (down from 20% in 2019 to just 3% in 2020). Filings in the Federal Court have remained relatively constant.

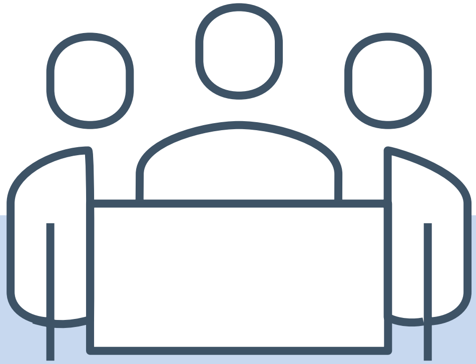
At this stage, no other Australian jurisdictions have foreshadowed removing the prohibition on contingency fees. Of note in that respect is that the recommendations made by the Parliamentary Joint Committee following its recent review included that exclusive jurisdiction be conferred on the Federal Court for class actions arising under the ASIC Act and the Corporations Act. The Parliamentary Joint Committee also noted more generally the importance of achieving jurisdictional consistency for class actions across Australia, to prevent instances of 'forum shopping' – something that the data certainly indicates plaintiff firms may be doing.

REGULATION OF LITIGATION FUNDERS

Litigation funders were previously exempt from holding an AFSL and complying with the MIS regime under the Corporations Act. As a result, funders did not face the same regulatory scrutiny and accountability as other financial service providers.

We have long advocated for the regulation of litigation funders — an issue that was becoming more urgent with the increasingly entrepreneurial nature of the litigation funding market in Australia. This issue has been addressed by law reform commissions over many years, and by a number of significant court judgments that considered the appropriate characterisation of litigation funding arrangements under the Corporations Act. This led to legislative change in 2013 to expressly carve litigation funding out from the AFSL and MIS requirements.

In August 2020, amendments to the Corporations Regulations came into effect that effectively reverse these carve-outs for new funding arrangements.



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As a result, most new class action funding arrangements now qualify as managed investment schemes. If the registration requirements at Chapter 5C of the Corporations Act are met (and for any class action with over 20 group members, they will be), funding arrangements will need to have a constitution and compliance plan, and be operated by a responsible entity subject to the duty to act in the best interests of the members. If there is a conflict between the members' interests and the funder's own interests, priority must be given to the members' interests.

Consequently, most funders will now also be required to hold an AFSL and:

- act efficiently, honestly and fairly — an obligation that came under particular scrutiny during the Financial Services Royal Commission;
- maintain the appropriate level of competence to provide financial services; and
- have adequate organisational resources to provide the financial services.

There was a brief spike in class action filings immediately before these changes came into effect – 14 class actions were filed in the week prior (eight of which were filed on the day before), with approximately 50% of those involving a litigation funder. After these changes were introduced, a further 14 class actions were filed in 2020, with only one involving a litigation funder. This may suggest a slowing in the number of funded class actions being brought – probably driven by a combination of these requirements and a move by plaintiff firms to the Supreme Court of Victoria. Nonetheless, some funders have announced they are obtaining, or have already obtained, an AFSL, so this will by no means be the end of the litigation funding market in Australia.

The long-term impact on the industry remains to be seen and will also somewhat depend on ASIC's enforcement of the requirements.

While these changes are a move in the right direction, we think further steps should be taken to tailor the AFSL and MIS regimes to the bespoke challenges posed by the litigation funding industry, rather than attempting to impose a 'one-size-fits-all' solution. The Parliamentary Joint Committee also recommended following its recent review a legislated, fit-for-purpose MIS regime for funders.

We have long advocated for the regulation of litigation funders — an issue that was becoming more urgent with the increasingly entrepreneurial nature of the litigation funding market in Australia.

Other causes of uncertainty for funders

The past year has seen a shift in the funding market for class actions in Australia, with increased regulation of litigation funders and the introduction of contingency fees for class actions in the Supreme Court of Victoria. We have also seen an increasing willingness of defendants to take class actions through to trial, shifting the balance of Australia's class action dynamics.

The undercurrent of class action developments over the past year saw a recalibration of the class action landscape, but has brought with it some uncertainty for class action stakeholders. As we look forward to 2021 and beyond, we expect this uncertainty to continue, with judicial developments likely to focus on the following interrelated aspects of class action mechanics:

■ CLASS CLOSURE

In April 2020, the NSW Court of Appeal determined that interlocutory class closure orders extinguishing the rights of group members before settlement or trial are not permitted (such orders were commonly described as 'soft class closure' orders). Soft class closure orders were seen as key to facilitating settlement negotiations, not least because, by providing certainty around class participation levels, they enabled the parties to more accurately estimate the actual quantum of the claim.

Going forward, there is some residual uncertainty around how courts will navigate the settlement approval process; and whether the decision may cast doubt on their ability to extinguish the rights of 'inactive' or passive group members at settlement, which is key to achieving finality for defendants. To date, the courts have not quibbled with the extinguishment of group members' rights at class action settlement approval hearings. However, more certainty is expected with the Supreme Court of NSW due to consider this question in March this year in the Dick Smith Holdings class action.

■ COMMON FUND ORDERS AND COMPETING CLASS ACTIONS

Following the High Court's decision in late 2019 that interlocutory or 'early-stage' common fund orders were not consistent with Australia's class action regime, 2020 saw a flurry of divergent positions emerge as to whether or not common fund orders could be made in a class action at settlement or judgment.

In an attempt to resolve the position, the NSW Court of Appeal and the Full Federal Court separately heard appeals to consider it. Neither court provided a definitive answer and a special leave application from the Full Federal Court decision remains pending. Until this uncertainty is resolved, either through the courts or legislative reform, it is likely funders will need to 'build a book' to have comfort about the economic viability of claims they are financing.

Common fund orders have been lamented as underpinning the increase in competing or 'copy-cat' class actions in recent years – particularly in relation to shareholder class actions. The High Court is poised to deliver a judgment regarding the appropriate approach to resolving competing class actions, providing a potential light at the end of the tunnel on this vexed issue. If the High Court offers a clear way forward, we may see a slight readjustment of class action risk, with shareholder class actions potentially reassuming the mantle of the most common form of claim.

US trends – a sign of what might be to come?

COVID-19 is the main story in the US, but there are other emerging trends.

Perhaps unsurprisingly, the main focus of US class action litigation over the past 12 months has been COVID-19 and its ramifications for consumers and securityholders. As noted in our COVID-19 section, there has been a large number of claims filed in the US, arising both directly and indirectly from the pandemic. But there are other emerging trends in US class action litigation, which may foreshadow the types of claims on which Australian plaintiff firms and litigation funders will focus as we emerge from this period of significant economic uncertainty.

COVID-19 CLAIMS

The spread of COVID-19 throughout the United States over the past year saw the disturbance of supply chains and the shuttering of businesses, resulting in record levels of unemployment and unprecedented market volatility. Plaintiff firms (and litigation funders – an increasing presence in the US legal market) were quick to capitalise on the disruption, resulting in a variety of COVID-19-related class action filings, including shareholder claims; claims relating to cancelled services or events and consumer claims.

The class actions filed included:

- **securities class actions against life sciences companies** (which already comprise a growing percentage of all such claims in the United States) for exaggerating the prospects of COVID-19 vaccine candidates or the demonstrated efficacy of COVID-19 tests;[3]
- **claims against colleges and universities** – both public and private – by students seeking tuition refunds due to campus closures in response to the pandemic, where, the students argued, those schools promoted and advertised the value of in-person, on-campus experiences;[4]
- **claims against airlines** by passengers whose flights were cancelled due to the pandemic and whose requests for refunds were not granted but, instead, met with only the offer of a credit voucher or the opportunity to rebook on another flight;[5] and
- **consumer law actions against retailers and retail platforms alleging the charging of excessive prices for basic necessities** – including toilet paper and hand sanitiser – during the pandemic; and the increase in price of certain high-demand items – including face masks – in violation of unfair trade practices and unfair competition legislation.[6]

MISLABELLING AND MISLEADING ADVERTISING CLAIMS

A number of claims have been brought in US courts alleging product mislabelling and misleading advertising (consumer deception), particularly in the life sciences and pharmaceutical sectors. Unsurprisingly, some of these were COVID-19 related.

One consumer claim brought against Target Corporation alleged the company had misrepresented that its hand sanitiser product killed '99.99% of germs,' a claim that was allegedly not backed up by any reliable scientific studies. Similar claims were brought against major sanitiser manufacturers Germ-X and Purell, following regulatory action by the Food and Drug Administration, in an example of how plaintiff firms frequently leverage off regulatory investigations when bringing class action claims.

Other claims of this kind centred on the 'wellness' sector, including:

- a claim against Colgate-Palmolive regarding allegedly misleading labelling of its 'Tom's of Maine' toothpaste and deodorant products, where it is alleged those products contained a number of non-natural chemicals, including propylene glycol and aluminium chlorohydrate, and where the product commanded a higher price due to the advertised 'natural' formula;[7]

- claims against Walgreens and Murad LLC for falsely stating that certain skincare products were oil-free when, in fact, they contained oils – allegedly violating consumer fraud and deceptive business practices legislation;[8]
- a claim against Arizona Beverages USA LLC's 'Lite' Arnold Palmer product, alleging that customers were misled by the use of the world 'Lite' where the beverage in question had almost as many calories as a can of regular soft drink;[9] and
- claims accusing a company of misleading the public about the origins and growing conditions of its 'thoughtfully raised' turkeys when, in reality, the birds were alleged to have been housed in crowded conditions and purchased from lower-grade commercial suppliers.[10]

Australian regulators have signalled their impatience with mislabelling or misleading advertising, with the Therapeutic Goods Administration (the ***TGA***) warning consumers to be aware of false and misleading products and, more particularly, of those seeking to take advantage of the COVID-19 pandemic by advertising products that claim to prevent or cure COVID-19.[11]

The TGA issued an infringement notice to one prominent supplier in relation to advertising breaches arising from the use of a device known as the 'BioCharger' that was said to cure COVID-19[12] and fined another supplier more than $39,000 over claims of 'anti-virus activewear' that could protect against infectious disease.[13] In the case of the latter, the ACCC has instituted proceedings in the Federal Court for misleading or deceptive conduct.[14] Where regulators go, plaintiff firms may well follow.

EMPLOYEE AND WORKPLACE-RELATED CLAIMS

While a more recent trend in Australia, the prosecution of workplace claims through group proceedings is an established part of the US class actions landscape.

In that regard, the continued prevalence of wage and hour claims in the US may be a sign that the growing trend of underpayment / contractor classification claims being prosecuted through class actions is here to stay. In the US in 2020, wage and hour class actions were certified more than any other workplace claim. Also, while claims brought under the Fair Labor Standards Act (legislation that establishes minimum entitlements) were down year-on-year, more claims have been filed in each of the past eight years than any year in the preceding decades.[15] In Australia, we await the decision of the High Court in the appeal from the Full Federal Court's decision in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84, and any legislative response that may follow. However, with the issue of classifications and underpayments remaining in the spotlight, and the favourable result for funders in *Augusta Ventures Limited v Mt Arthur Coal Pty Limited* [2020] FCAFC 194, it appears that underpayment claims will remain a key theme in the Australian workplace class action space in 2021.

2020 also saw the continued impact of the #MeToo movement, with three of the five largest workplace settlements in the US being for sexual misconduct or harassment-related claims. Notably, while the wrongdoing at the heart of the two largest settlements was sexual misconduct by executives, both proceedings were brought as derivative shareholder actions against the companies – one against Google's parent company Alphabet, the other against hotel operator Wynn Resorts. The Alphabet settlement included a commitment to spend US$310 million on widespread workplace and corporate governance reforms, and an end to mandatory arbitration in harassment, discrimination and retaliation-related disputes.[16]

It remains to be seen if securities class actions will be used to prosecute similar issues in Australia, as part of class action promoters' ongoing focus on disclosure relating to ESG issues. As always, careful consideration of market disclosure requirements, corporate governance processes and reporting remain vital risk mitigation tools.

Regulator activity – a bellwether for class action risk?

The focus and priorities of Australian regulators are key indicators of future class action risk. In recent years, it has become common to see class actions commenced following regulatory investigations or enforcement action (especially penalty proceedings). The numerous 'fees for no service' and Takata air bags class actions are just two examples of the intensive class action activity that often follows regulatory action.

Defendants may therefore find themselves responding to regulatory action as well as a related class action – in some cases simultaneously, giving rise to further complications.

With some Australian regulators now adopting a harder stance on enforcement, resulting in a greater number of investigations and court proceedings, this area of class action risk is only increasing. In this section we address the stated priorities of those regulators over the next year, and what it means for future class action risk.

REGULATOR PRIORITIES FOR 2021

ASIC

ASIC remains committed to its 'Why not litigate?' strategy of pursuing court-based action. It has indicated that, in 2021, it will broadly focus on:[17]

- market misconduct (typical breaches of continuous disclosure obligations and insider trading);
- misconduct involving large market participants or entities;
- cases that engage ASIC's powers, or engage new or higher penalties, such as higher penalties for corporate misconduct (including failure to act efficiently, honestly and fairly, and failure to report breaches and defective disclosure);
- misconduct that relates to superannuation or insurance;
- illegal phoenix activity; and
- new types of misconduct (such as those using emerging technologies).

ASIC's strategic priority is to protect consumers from harm during a time of heightened vulnerability as a result of the pandemic. This will include an emphasis on:

- financial advisers, with ASIC monitoring financial advice to ensure its temporary relief measures are not abused, and expanding its unlicensed advice regulatory toolkit to include enforcement action;
- investment managers, who will be targeted to ensure that funds are true-to-label and consumers are accurately informed. ASIC will test advertising against funds' disclosure documents, constitutions and underlying assets, and take action where there is inconsistency;
- insurance, where claims handling and mis-selling of insurance products and associated improper commercial practice will be of particular interest;
- superannuation funds, where communications of funds to members about insurance, intra-fund advice and trustee communications will be surveyed for appropriateness; and
- the credit sector, which will be scrutinised in the areas of predatory short-term lending and hardship assistance.

ACCC

The ACCC publishes an annual list of compliance and enforcement priorities,[18] indicating where it intends to direct resources. The ACCC's priorities for 2021 include:

- **COVID-19 consumer issues**, such as the promotion and sale of products in the context of COVID-19 and travel and event cancellations. Additionally, the ACCC will focus on competition issues arising from the COVID-19 pandemic, including in the domestic air travel industry;
- **digital platforms**, following on from the establishment of the ACCC's permanent Digital Platforms Branch in 2020 and the instigation of several multi-year reviews of competition and consumer issues in the digital platform sector. These investigations encompass search engines, social media, electronic marketplaces and digital content aggregation services;
- **essential services**, including consumer issues arising from the pricing and selling of energy and telecommunications. This work follows the ACCC's public inquiry into

- the electricity market, where it monitored wholesale and consumer prices;
- **financial services**, in particular competition and consumer issues in home loan providers. The ACCC has indicated it will be following through with recommendations from its Home Loan Price Inquiry final report released in December 2020;
- **industry compliance with consumer guarantees**, with a focus on high value goods; and
- **product safety**, including continuing and monitoring the implementation of new safety standards.

Product recalls can also give rise to class action risk. Recalls throughout 2020 primarily impacted the automotive sector, but an increasing number of children's products, such as toys and rockers, have been recalled. The ACCC is yet to publish its separate product safety priorities for 2021, but its 2020 priorities included finalising the mandatory recall of Takata airbags, pursuing regulatory options for button batteries, preventing injuries to infants caused by unsafe sleeping products, and improving product safety in e-commerce.

AUSTRAC

While AUSTRAC doesn't expressly state its focus and priorities for the upcoming year, it has recently prioritised investigation and enforcement in the banking, gambling and remittance services sectors.

It has been very active in recent years, with a number of high-profile investigations and penalty proceedings. In some cases, these enforcement actions have given rise to subsequent shareholder class actions.

APRA

APRA suspended much of its planned policy and supervision agenda for 2020, to focus on the impacts of COVID-19; however, in 2021 the regulator has indicated that it will seek to return to its focus of 'facilitating a competitive and innovative financial sector'.

APRA says its key policy and supervision priorities for 2021 include:[19]

- strengthening crisis preparedness for various industries, including recovery and resolution planning for the general insurance industry;
- sharpening its supervisory approach to the superannuation industry;
- increased scrutiny of entities' cybersecurity capabilities; and
- updating prudential standards on operational risk, governance and risk management, and consulting with industry on guidance for climate change financial risk.

The Financial Services Royal Commission recommended that ASIC and APRA engage more closely, cooperate and share information to achieve common objectives, strengthening the 'twin peaks' model for financial regulation. The agencies have been working together to align APRA's reporting standards with ASIC's fees and costs disclosure regime, particularly to improve superannuation industry data consistency and transparency. We anticipate increased prudential supervision, collaboration and subsequent investigation into potential non-compliance.

Implications for future class action risk

Taken together, the regulators' stated focus and priorities for 2021 suggest increased class action risk in the following areas:

- continued high risk for listed companies from shareholder class actions, formulated as claims for breach of continuous disclosure obligations for failing to disclose the alleged misconduct that is the subject of a regulatory investigation, and/or failure to disclose inadequate corporate governance and risk policies, systems or controls, or misleading representations as to the policies, systems and controls in place, to prevent the alleged misconduct;
- the superannuation and insurance sectors, with a particular focus on the appropriateness of disclosure statements and member communications;
- high-value and mass-market consumer goods, relating to consumer guarantees and product recalls; and
- possible claims concerning the treatment of data, including the circumstances of its use and its protection.

Our analysis of trends at the beginning of this report confirms high levels of activity in many of these areas already, and we expect this to continue in light of the regulators' stated intentions. Two years of significant regulatory attention has driven claims against banks, superannuation trustees and insurers; product liability class actions have also seen an increase in filings; and shareholder class action filings remain high. We expect that regulator activity will continue to act as a bellwether for class action risk throughout 2021.

What to expect in 2021 and beyond

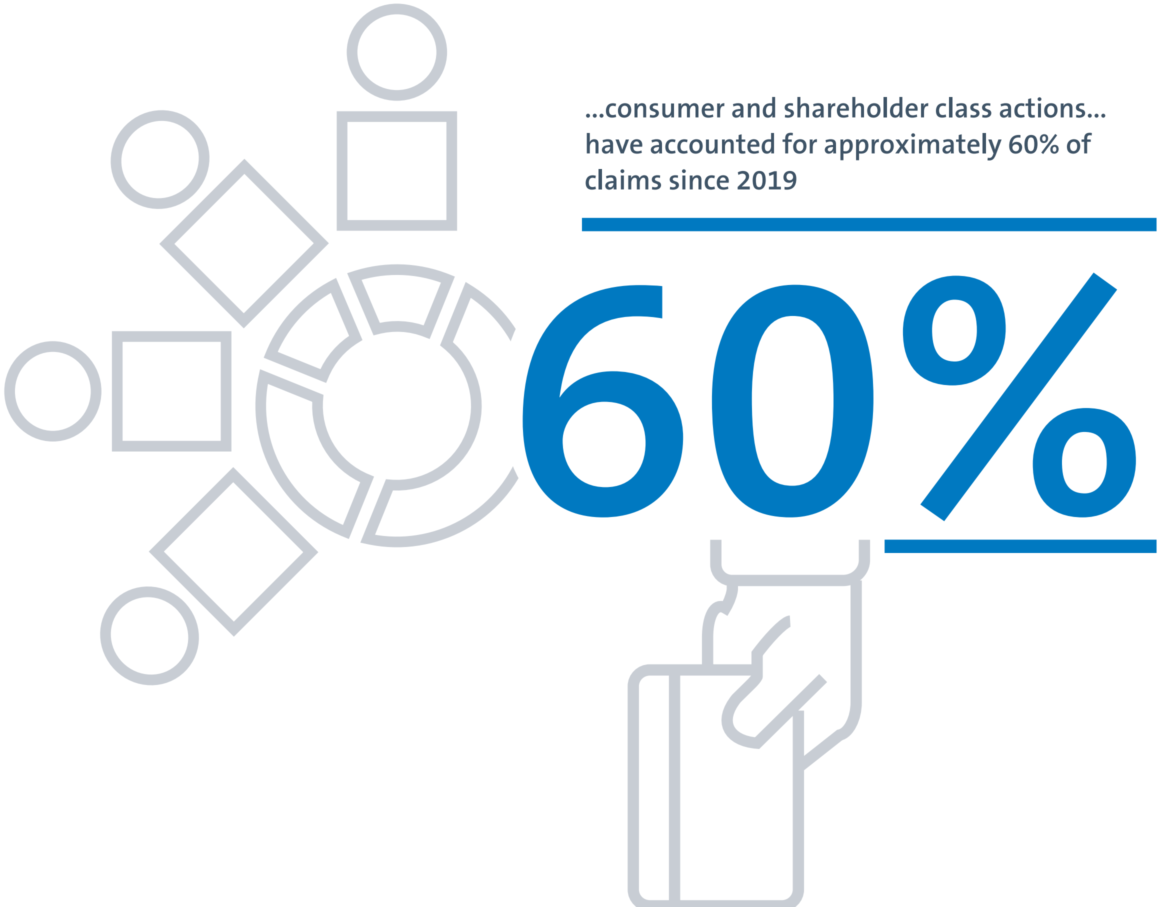
Class action risk remains at an elevated level, with the number of claims filed continuing to rise. Over recent years, the growth in filings has been fuelled by consumer and shareholder class actions which have accounted for approximately 60% of claims since 2019, with other types of class actions remaining reasonably steady (aside from a few select pockets of risk).

In 2021, we expect to see a continuation of this risk environment, with a pattern of claims similar to recent years, continuing to place sustained pressure on the banking and financial services sector, with some emerging risks slowly starting to crystallise.

Class action filings in the United States – which are a reliable marker for claims in Australia – indicate that over the year ahead we can expect a focus on further COVID-19 class actions and employee or workplace claims.

We also expect that the Australian regulator priorities for 2021, and the harder stance on enforcement adopted by some regulators, may serve as a catalyst for class actions focusing on alleged market misconduct, superannuation funds, COVID-19 consumer issues and digital platforms.

...consumer and shareholder class actions... have accounted for approximately 60% of claims since 2019



CONTINUATION OF TRENDS

We expect the class action landscape will continue to be dominated by consumer and shareholder claims, with the following types of class actions making headlines in the year ahead:

Royal Commission and Inquiry claims: Last year saw a continued steady stream of class actions arising from conduct exposed during the Financial Services Royal Commission. With no indication of a slowdown in the regulatory response to the issues exposed during the Royal Commission, we expect the trend of class actions concerning these issues will continue.

Pandemic-related claims: As discussed above, depending on how the impact of the pandemic evolves in 2021, possible areas of risk include shareholder and employee claims, claims against government in relation to its handling of the pandemic, consumer claims and the new horizon of COVID-19 business interruption claims. It is also possible that we may see some insolvency related claims.

Employment claims: Recent data shows an upward trend in employment class action filings, with employment class actions comprising 11% of all class actions filed in 2020 (up from 7% in the period 2012–2018). Adding fuel to the fire, a recent judgment held that requiring a litigation funder to pay security for costs was not consistent with the 'no costs' regime under the Fair Work Act, and we expect that employment class actions – particularly underpayment claims – will continue to be fertile ground for class action promoters.

Corporate governance and risk management claims: Shareholder claims relating to governance issues are a well-trodden path, with class actions of this kind a hallmark of the Australian class action landscape for more than a decade. In 2021, we expect to see increased interest in these claims, dove-tailing from an uptick in enforcement activity by regulators including ASIC and AUSTRAC.

NEW HORIZONS FOR CLASS ACTION PROMOTERS

Climate change: An increasingly relevant new frontier of class action risk is claims made against companies relating to the non-disclosure and management of climate change risks. There have been a number of recent developments that make climate change an ever-more important consideration for corporations looking to mitigate class action risk. These include:

- increased regulatory focus on climate related-risk disclosures. ASIC and the ASX have provided guidance on climate-related risk disclosures, and APRA has announced its intention to develop a prudential practice guide focused on climate-related financial risks; and
- the commencement of a novel class action against the Federal Government (and two of its officers) on behalf of retail investors and holders of Australian Government Bonds, for an alleged failure to disclose climate change-related risks in term sheets and information memoranda issued by the Government in relation to the bonds. The action is the first of its kind and, notwithstanding the difficulties in successfully pursuing such a claim (particularly one sounding in damages), it is likely to be seen as a bridge to more commercially focused climate change class actions against corporations.

Data breach and privacy claims: An emerging area of class action risk where we expect to see more activity in the year ahead concerns data breaches and privacy claims. There are significant obstacles in the identification and quantification of financial loss relating to such claims and, consequently, there is a question whether the appetite for bringing such claims is ripe. However, a small but growing number of claims have been initiated seeking a remedy for breach of privacy, including:

- a data breach class action relating to the disclosure of confidential information of NSW Ambulance Service employees (which settled in late 2019);
- a determination by the Office of the Australian Information Commissioner (the OAIC) requiring the Federal Government to pay compensation to a class of more than 1200 individuals, relating to the disclosure of personal information by the Department of Home Affairs on a publicly available website; and
- an ongoing representative claim before the OAIC relating to a privacy breach of customers of a major telecommunications provider.

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ENDNOTES

1 See section on class action reform for a more detailed discussion of amendments to the continuous disclosure regime.

2 *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296.

3 See eg *McDermid v. Inovio Pharmaceuticals, Inc* 2020 ED Pa No. 2:20-CV-01402; *Himmelberg v Vaxart, Inc* ND Cal 3:20-CV-05949.

4 See eg *Student A v. The Board of Trustees of Columbia University in the City of New York* 2020 1:20-CV-03208.

5 See eg *Sweet v. Frontier Airlines* 2020 CO US Dist 1:20-CV-0134OC; *Boucher v. Spirit Airlines, Inc* 2020 FL US Dist Ct South 0:20-CV-60829.

6 See eg *McQueen v Amazon.com Inc* 4:20-CV-02782.

7 *Munsell v. Colgate-Palmolive Co* 2020 1:19-CV-12512.

8 *Flaherty v. Wallgreens Boots Alliance, Inc* 2020 CH 7176; *Daly v. Murad LLC* 220 CH 7174.

9 *Prater v. Arizona Beverages USA LLC* 2020 1:20-CV-09108.

10 *Wetzel v. Diestel Turkey Ranch* 2020 20-CV-1213; *Donovoan v Diestel Turkey Ranch* 4:20-CV-07125.

11 TGA Media Release, 'TGA issues warning about illegal advertising relating to COVID-19' (24 March 2020).

12 TGA Media Release, 'Pete Evans' company fined for alleged COVID-19 advertising breaches' (24 April 2020).

13 TGA Media Release, 'Lorna Jane fined almost $40,000 for alleged advertising breaches in relation to COVID-19 and "anti-virus activewear"' (17 July 2020).

14 ACCC Media Release, 'ACCC takes Lorna Jane to court over 'Anti-virus Activewear' claims' (21 December 2020).

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16 https://www.nytimes.com/2020/09/25/technology/google-sexual-harassment-lawsuit-settlement.html.

17 ASIC Interim Corporate Plan 2020 – 21: Strategic Priorities responding to the impact of the COVID-19 pandemic.

18 ACCC Compliance and Enforcement Priorities, 23 February 2021 (https://www.accc.gov.au/system/files/2021%20Compliance%20and%20Enforcement%20Priorities.pdf).

19 APRA press release, 'APRA releases its policy and supervision priorities for 2021', 1 February 2021 (https://www.apra.gov.au/news-and-publications/apra-releases-its-policy-and-supervision-priorities-for-2021).