Class Action Risk 2022

Class action risk is changing. While filings remain high, consumer claims now dominate and, for the first time in over a decade, the banking sector is not the biggest target.

March 2022 marks 30 years since the introduction of Australia's class action regime. Over the last 20 years in particular, class action risk has become an increasingly relevant factor for companies doing business in Australia.

In this year's edition of Class Action Risk we have provided an update on the current indicators and drivers of class action risk, with a particular focus on the way in which that risk has changed during 2021.

Key points

Filings down in 2021, but still high

While fewer class actions were filed in 2021 than the all-time high of 2020, the longer-term trend of elevated filings over the last five years has continued. Accordingly, class action risk remains high.

How the risk profile develops over the coming years will largely be determined by how current uncertainties surrounding the commercial drivers for class action activity are resolved.

Funding environment more uncertain than ever before

Proposed funding reforms continue to create significant uncertainty for class action promoters. For most of 2021, that uncertainty acted as a brake on class action activity but drove a spike in filings in the last quarter, as promoters rushed to file claims before proposed legislation applying to new claims was passed. Now, however, it seems unlikely the reform agenda will be progressed in advance of the federal election – whether it is progressed at all, and how, will likely depending on the election outcome.

What are the biggest indicators of future risk?

Undoubtedly, the biggest indicator of class action risk is being a consumer-facing business or government agency. The sectors most at risk in 2021 were government, healthcare, and financial services, followed by manufacturers and suppliers of consumer goods and services, particularly in the wake of a product recall or publicised service issue. Listed companies are still at risk from shareholder claims, but this is arguably changing in the wake of regulatory reform and a lack of success for plaintiffs in decided cases. Class actions arising from the response to COVID-19 are a feature of the current landscape but have not been a significant driver of risk.

What's on the horizon?

In addition to consumer claims, the focus continues to be on the increasing scope for class actions concerning climate change issues and environmental damage. The Attorney-General's recently released paper proposing a direct right of action for breach of data privacy significantly increases the possibility of viable data breach class actions in the future.

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 instead engage in an objective risk assessment from day one. As a preventative measure, it is important to be conscious of the types of conduct that may give rise to class action risk in your business and to put appropriate mitigatory systems in place. If something should go awry, adequate planning can help ensure the response is swift and based on an objective assessment of risk.

2021 in review

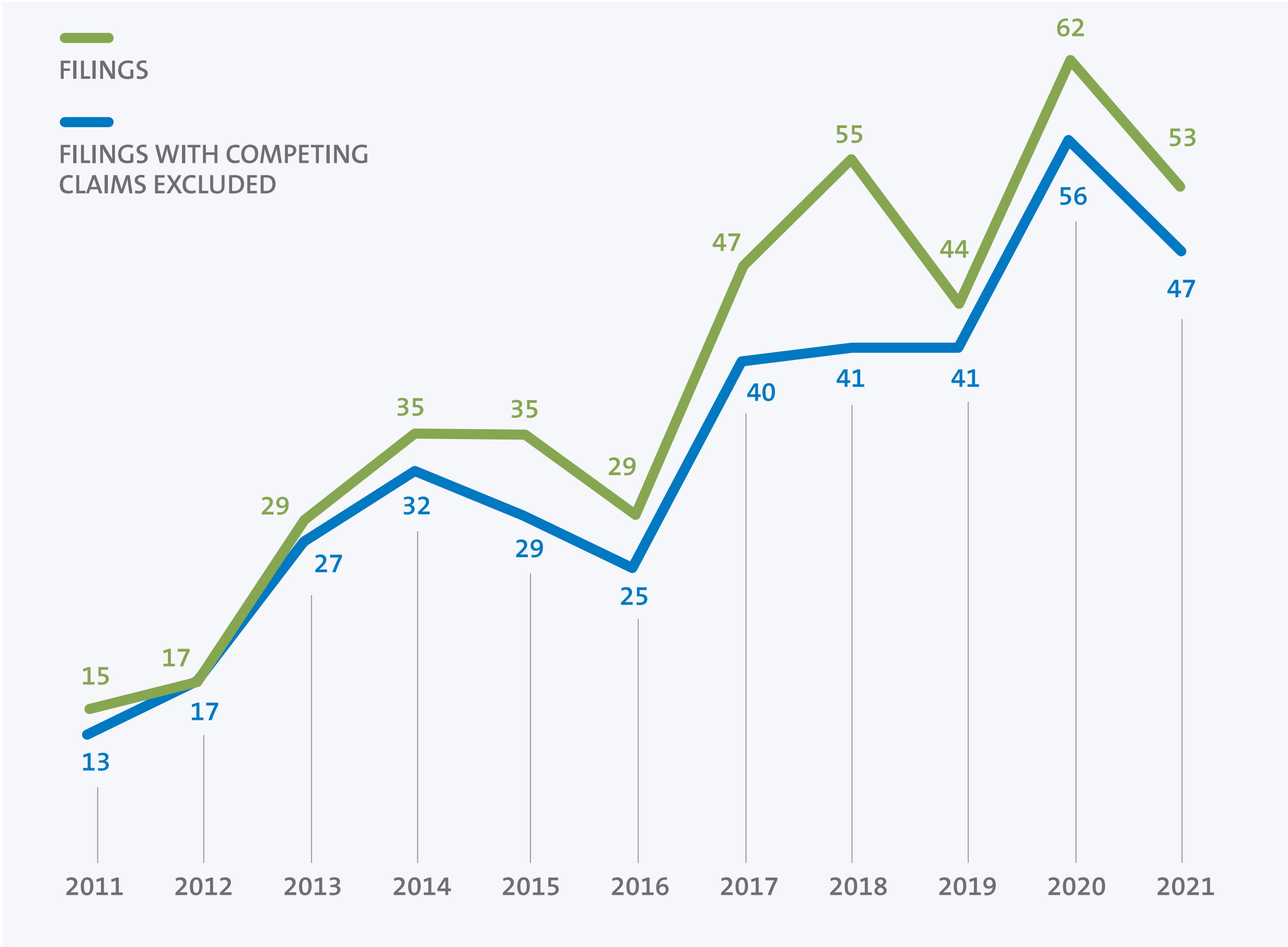
NEW FILINGS ON PAR WITH PREVIOUS YEARS, FOLLOWING A LATE RALLY

New filings in 2021 were down on the peak of 2020, but consistent with a broader trend of increased class action activity over the short to medium term.

As late as the end of September, filings were tracking to be well down on recent years. However, there was a significant spike in the last quarter, with half of all 2021 filings occurring between October and December. All indications are that the late rally was driven by the potential impact on funders of proposed legislative reform, which, if passed, would apply to class actions filed after enactment.

The proportion of competing claims in 2021 was generally in line with the longer-term average.

CLASS ACTION FILINGS



2021 in review

CONSUMER CLAIMS DOMINATE, BUT ALSO A BROAD BASE OF OTHER CLAIMS

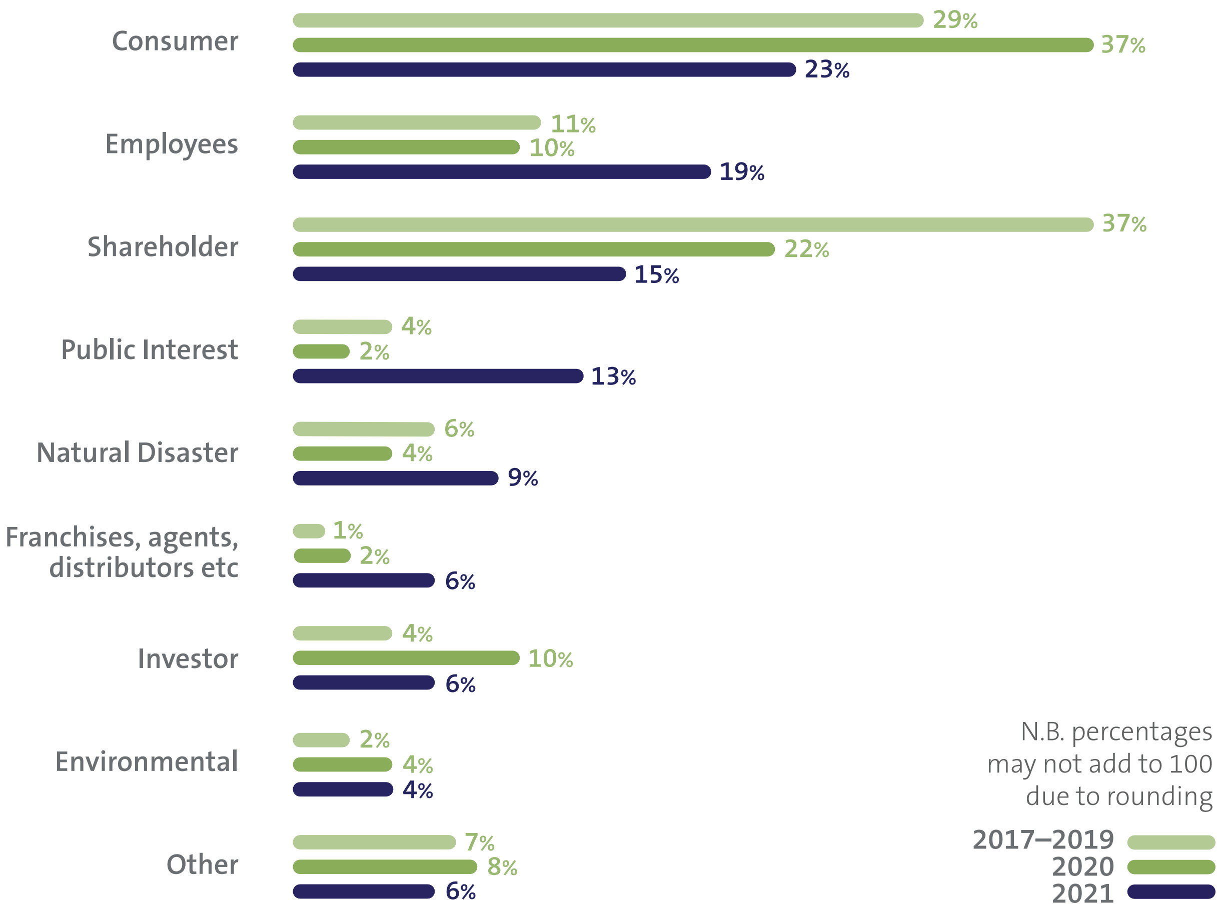
Consumer claims were the most common type of claim filed in 2021. This included claims relating to medical devices, superannuation fees, insurance policies, electricity prices, and freight services.

Employment-related class actions also came to the fore, with claims alleging underpayment of wages in the government, healthcare, mining and industrial sectors.

2021 also saw a broader range of claims overall including in respect to franchisees, treatment of indigenous persons, environmental contamination, bushfires, resumption of land, and outbreaks of COVID-19.

Shareholder claims, once the most common form of class action, have fallen to their lowest levels in over a decade. While this might be attributed to the change in the law in relation to when damages can be claimed for continuous disclosure breaches, it is more likely the result of pressures and uncertainties in the funding environment, and the run of losses for plaintiffs in cases that have gone to trial.

FILINGS BY TYPE (%)



2021 in review

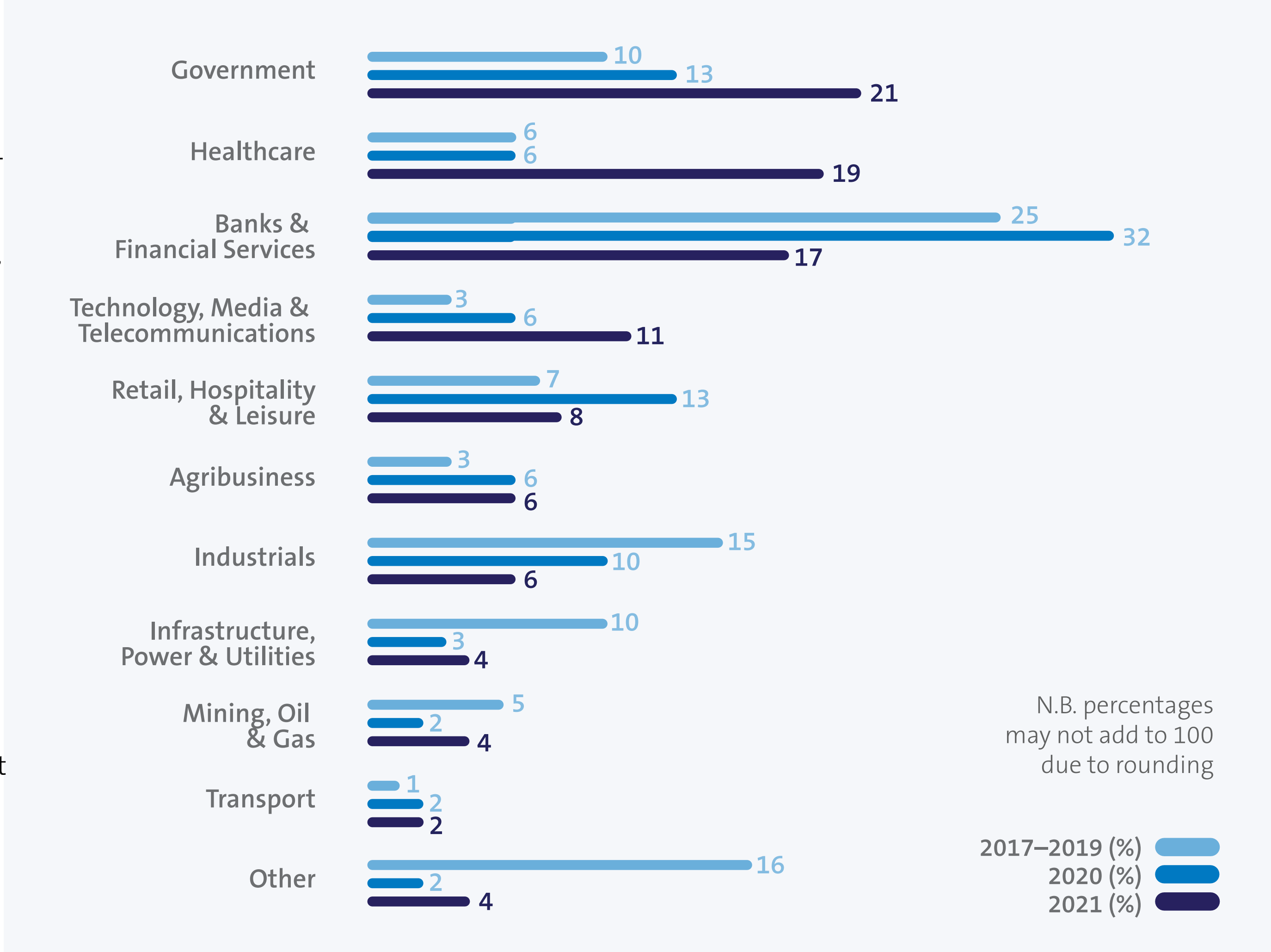
GOVERNMENT SECTOR OVERTAKES BANKING SECTOR AS BIGGEST TARGET

The banking and financial services sector has long been the biggest target for class action filings. However, in 2021 it was the government sector that faced the most claims. This included claims in respect of the treatment of indigenous persons, environmental contamination and damage, biosecurity, underpayment of federal employees, climate change, prisoner safety, and COVID-19 lockdowns.

The healthcare sector also faced a significant increase in claims. All but one of these claims related to one type of medical device (pelvic mesh) or underpayment of junior doctors. Given the concentration in these two types of claims, this may be a momentary uptick for the sector, rather than indicative of a sustained increase in class action risk.

The banking and financial services sector remained a major target, albeit with a marked reduction in claims compared to previous years. This is perhaps an indication that class actions arising from issues exposed in the Royal Commission are beginning to tail off. However, even if that is the case, we think it is too soon to make any predictions about a material decline in class action risk for this sector.

FILINGS BY SECTOR (%)



2021 in review

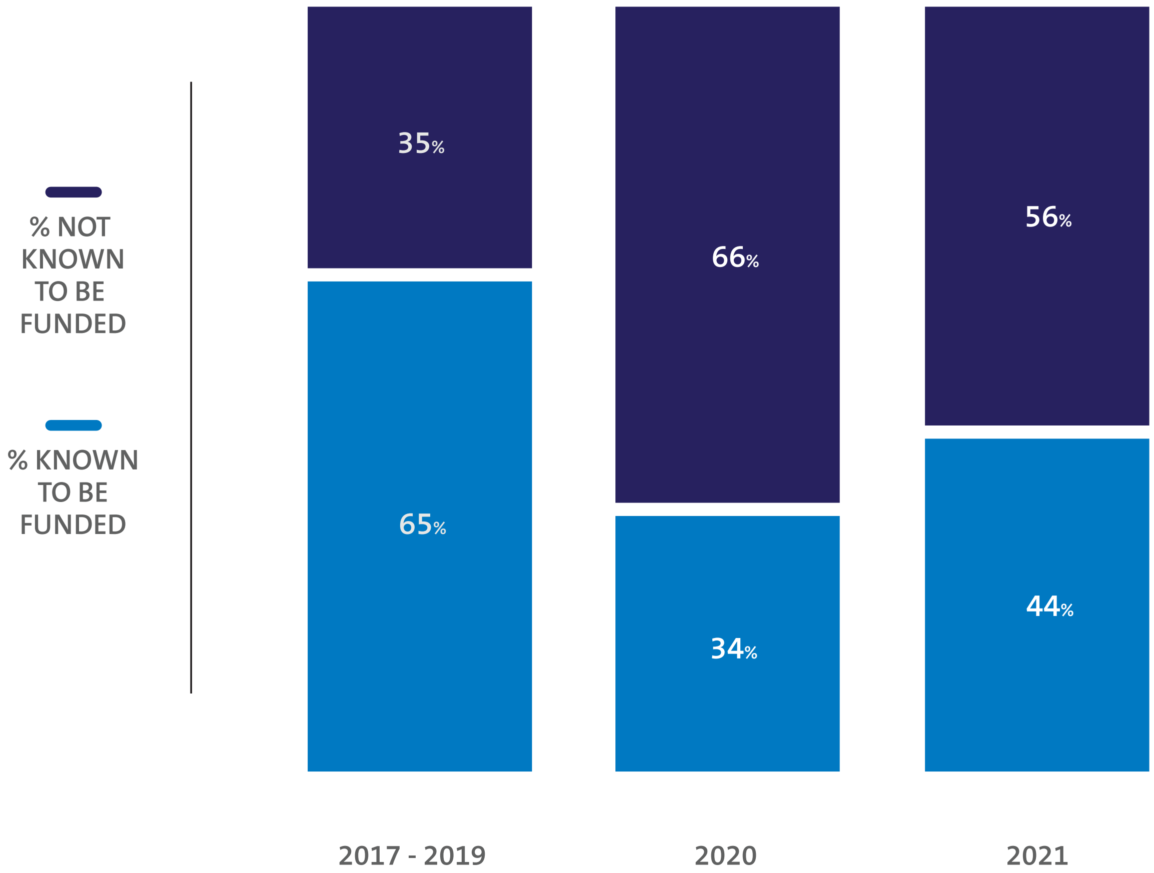
LITIGATION FUNDING – UNCERTAINTY CONTINUES

2021 was another uncertain year for litigation funders. That said, the number of directly funded claims in 2021 was well up on 2020, with most of the cases filed in the last quarter spike referred to above being funded. The numbers are, however, still lower than longer-term trends.

This is likely the result of a combination of pressures on funders, including those discussed in the section below.

It is, however, important to note that these statistics do not capture the extent to which funders may be indirectly funding claims (including, for example, through portfolio funding of a plaintiff firm's book of claims).

THIRD PARTY FUNDING



2021 in review

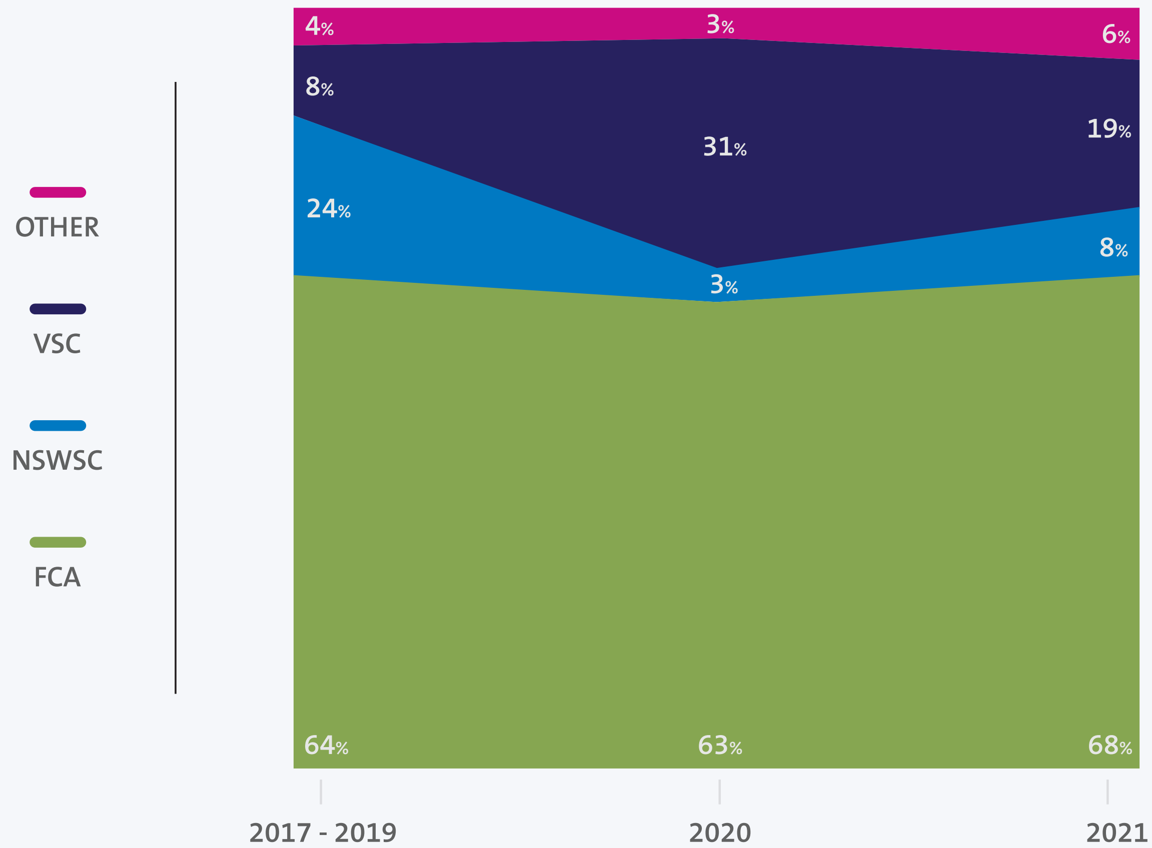
WHERE ARE CLASS ACTIONS BEING FILED?

In our 2021 Year in Review we noted that, while the Federal Court was still attracting the vast majority of class action filings, in 2020 there had been a significant shift away from new filings in the Supreme Court of NSW in favour of the Supreme Court of Victoria – a shift we attributed to the availability of contingency fees for class actions in the Supreme Court of Victoria. While the trend has continued, it is not as pronounced as in 2020. In fact, for the first three quarters of 2021, more claims were filed in NSW than Victoria.

One class action was filed in the Supreme Court of Queensland. Two class actions (both relating to bushfires) were filed in the South Australian Supreme Court under its 'representative action' model.

It seems likely that a class actions regime will finally be introduced into the Supreme Court of Western Australia (after more than a decade of debate and consideration) following the introduction of a bill modelled on the Federal Court regime in August 2021.

FILINGS BY JURISDICTION



N.B. percentages may not add to 100 due to rounding

An uncertain year for litigation funders

CLAIMS ARISING FROM COVID-19 ISSUES

Unsurprisingly, there were a number of class actions directly arising from the pandemic in 2021. These included:

- three class actions brought on behalf of small businesses in respect of business interruption insurance;
- a class action against the NSW Government in relation to the risk of infection in prisons; and
- a class action against the Victorian Government in relation to the lockdown in public housing.

This follows six COVID-19 related class actions filed in 2020 – five in Victoria in respect of outbreaks from hotel quarantine and in aged care facilities, and one in NSW in respect of the Ruby Princess cruise ship outbreak.

The pressure on litigation funders continued to mount throughout 2021 as the Federal Government took steps to further increase the regulation of the Australian funding market. Throughout the year, developments unfolded against a backdrop of recent reforms which have impacted litigation funders, including:

- the requirement for funders to comply with the managed investment scheme provisions in the Corporations Act; and
- legislative reforms which opened the door to lawyers charging on a contingency basis in class action proceedings filed in the Supreme Court of Victoria.

PROPOSED MINIMUM RETURNS REFORM

While funders were still grappling with recent reforms, a Bill was tabled in the Commonwealth Parliament which (if passed) would regulate funding commissions more stringently through a rebuttable presumption that a return to group members of less than 70% of the gross proceeds of a claim is not fair and reasonable (and consequently, impermissible).

The Bill identifies several factors for the court to consider when determining if a proposed distribution is fair and reasonable, including:

- the amount of expected claim proceeds;
- the amount and reasonableness of the legal costs incurred on behalf of group members;
- the extent of the commercial return to the funder relative to the costs incurred in running the proceeding; and
- the risks accepted by the parties to the funding agreement.

The Bill also requires the court to consider a report on the proposed remuneration of a litigation funder and representations from a contradictor representing the interests of group members, unless it is not in the interests of justice to do so.

Given these requirements would only apply to class actions filed after the law comes into effect, when the Bill was tabled in Parliament it sparked a flurry of filings in late 2021 as funders moved swiftly to commence proceedings before the proposed legislation came into effect.

The Bill passed the House of Representatives in late 2021 but the government has indicated it will not be pushed through the Senate before the next federal election.

An uncertain year for litigation funders

OTHER POTENTIAL REFORMS

In October 2021, the Federal Government released a response to recommendations made in two recent class action inquiries. The response indicates the government is poised to further tighten the screws on litigation funding through further reforms, including:

- a requirement that funding agreements provide complete indemnity against adverse costs orders and a presumption the funder will provide security for costs in a form enforceable in Australia; and
- providing the Court with an express statutory power to make costs orders against litigation funders.

As with the proposed minimum returns reform, these reforms are unlikely to be passed into law before the election.

The government also announced that it does not intend to:

- legislate to permit contingency fee arrangements due to the 'unmanageable conflicts of interest' that such arrangements can create; or
- introduce a statutory power to make common fund orders (which require all participating group members to contribute towards a litigation funder's commission, regardless of whether they have signed a funding agreement).

In 2019, the High Court determined courts do not have the power to make common fund orders at an early stage in proceedings. However, question marks remain on the court's power to make common fund orders at the settlement or judgment stage. While the government's response represents a potential missed opportunity to clarify this issue of uncertainty, the outcome of an application for a common fund order as part of the settlement of the 7-Eleven franchisee class action may go a long way towards resolving this issue in early 2022.

EARLY DEVELOPMENTS IN CONTINGENCY FEES

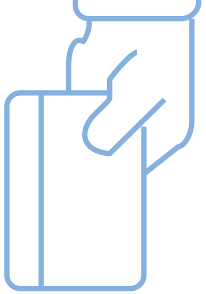
2021 saw the Supreme Court of Victoria hand down its first decisions on applications for so-called 'group costs orders' (or GCOs), allowing a plaintiff firm to be remunerated on a contingency fee basis. Contingency fees are only available in class actions in the Supreme Court of Victoria and only when the Court makes a GCO.

The first bid for a GCO failed when the Court determined the pre-existing 'no win, no fee' retainer in that matter produced a more favourable financial outcome for group members than the GCO in question. However, the Court left the door open for the application to be resubmitted at a later stage in the proceedings.

In the second application to be decided, the Court granted a GCO for 27.5% of any future damages award or settlement amount. This rate may be reduced if it will ultimately result in a disproportionate return for the plaintiff lawyers. A key factor in the Court's decision was the structure of the retainer agreement, which permitted third party funding to be obtained if a GCO was refused.

While 2021 saw a dip in the record rate of filings in the Supreme Court of Victoria in 2020, filings in that Court remained elevated compared to historical figures. In 2022, we expect the Supreme Court of Victoria to remain an attractive jurisdiction for commencing proceedings, as plaintiff firms adjust their proposed GCO models to account for the factors that were relevant to the two recent decisions. This is likely to place additional pressure on litigation funders (and funding commissions) as the competition to finance proceedings intensifies amongst class action promoters.

On the horizon



Continued focus around consumer claims

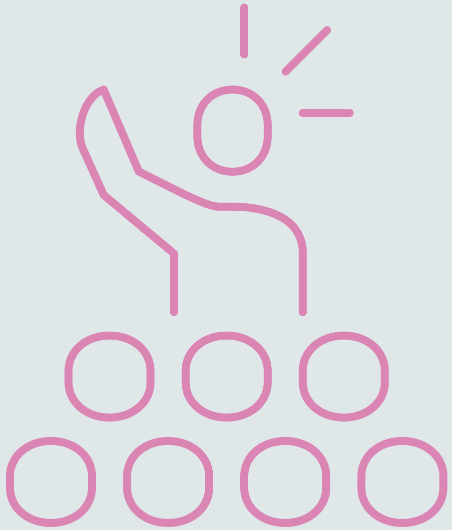
It is highly likely that consumer claims will continue to dominate the class action landscape into 2022. As class action activity resulting from the Financial Services Royal Commission tails off, promoters are likely to shift their focus to emerging issues in a broader range of consumer-facing sectors.

As class actions often follow or accompany regulatory enforcement action, the objectives and priorities of our regulators provide a reliable indicator of class action risk. ASIC and the ACCC continue to have a sharp consumer protection focus, with higher levels of enforcement activity to deter misconduct.

ASIC's stated enforcement priorities for 2021 to 2022 include responding to elevated risks to consumers in areas such as:

- poor product design and governance, mis-selling and failure to comply with conflict of interest requirements and disclosure obligations; and
- digital and other financial sector scams and failure to adequately manage cyber risks that harm consumers,

with a focus on regulated sectors including financial advisers, investment managers, superannuation, and insurance. With class action activity already occurring in many of these areas, we expect this to continue in the near term.



Re-evaluating shareholder class action risk

Over the last few years, there have been a string of judgments and legislative developments that have impacted shareholder class action risk. In particular:

- despite having waited more than two decades for the initial judgment in a shareholder class action, decisions have now been delivered in three proceedings. While none of these decisions have sounded in an award of damages for group members, that may change following the recent successful appeal of the first instance decision in the Worley class action; and
- temporary reforms to continuous disclosure laws have been made permanent in an effort to combat the upward trend of opportunistic class actions. Under the reforms, it must be established that a listed entity acted with 'knowledge, recklessness or negligence' in order to sound a breach of the continuous disclosure provisions of the Corporations Act or a related contravention of the statutory misleading or deceptive conduct laws.

These developments are impacting the dynamics in shareholder class actions, with defendants and their insurers increasing their appetite to run proceedings to judgment. While this may lead some promoters to think twice before commencing proceedings, it is too early to suggest that shareholder class action risk is evaporating. The uptick in filings observed in the final quarter of 2021, which included a number of shareholder class actions, indicates that while promoters may be more carefully scrutinising these claims they remain an attractive form of class action for promoters to pursue.

On the horizon

Climate change

In line with an uptick in climate-related litigation in 2021, climate change issues are looming larger in the potential class action risk equation. For example:

- Litigation by activist shareholders and investors alleging 'greenwashing' (organisations marketing unfounded eco-friendly credentials) increases potential exposure for companies making public net zero emissions commitments and other disclosures associated with managing climate change-related risks. Exposure may arise in the form of a shareholder class action alleging:
  - failure to disclose environmental or climate-related matters that should have been in the context of a company's continuous disclosure obligations; and/or
  - misrepresentation as to the effectiveness of governance systems relating to climate related matters, including how emissions targets will be met.
- There has been an increasing recognition of positive climate-related duties owed by governments and corporations to a broader class of people. In March 2021, a Dutch court held that Shell owed positive duties to Dutch residents to reduce scope 1, 2 and 3 emissions. This follows the 2019 Urgenda decision that the Dutch Government had breached its duty by failing to take adequate steps to reduce emissions. The Federal Court of Australia recently recognised the existence of a duty of care owed by government decision-makers to Australian children to act on climate change. While the Australian duty is at this stage limited to governments, strategic litigants may seek to expand the duty to private entities.
- Success by litigants in traditional environmental damage class actions, including flood-related actions, may embolden claimants to pursue similar claims in future, particularly where climate-related physical impacts are concerned.

Privacy and data breach claims

Although we have seen a small but growing number of data breach claims in recent years, the challenges for plaintiffs in demonstrating a legal basis for their claims and quantifying loss has dampened what might otherwise have been fertile ground for class action activity (following trends in the US and other jurisdictions).

However, with reforms to the Privacy Act on the horizon, privacy and data breach class action risk remains an area to watch. The government's review of the Privacy Act has focussed on strengthening privacy protections for individuals and improving transparency and accountability in data handling practices. The Attorney General's recently released Discussion Paper outlines a proposed model for the introduction of a direct right of action.

If the Privacy Act is amended to include a direct right of action, it would allow plaintiffs to bring a claim in the Federal Court against an entity for interference with their privacy (being a breach by the entity of the Privacy Act). The Court could award a broad range of remedies, including compensation for emotional distress and mental harm.

A direct right of action would remove a key barrier plaintiffs and promoters currently face in taking action against organisations for interferences with their privacy. At present, the Privacy Act's representative complaint regime only permits individuals to complain to the Office of the Australian Information Commissioner, who may then investigate. Notably, data breach class actions have been a feature of the US and UK class action landscape for a number of years, providing Australian class action promoters with a ready blueprint for the running of such claims. This is a high-risk area we all need to watch closely.

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