

# Class action risk 2023

Class action risk is evolving. While filings are down, the risk remains real.

Consumer and shareholder claims, across a broad range of industry sectors, accounted for the majority of filings in 2022. Third party funding was at its lowest level in many years, amid the uncertainty of a changing regulatory environment.

Thirty years after the introduction of Australia's class action regime, the class action landscape continues to adapt to changing market conditions and remains a core feature of the risk of doing business.

This year's edition of *Class action risk* is an update on the current indicators and drivers of class action risk, with a particular focus on how that risk changed during 2022.

# Key trends



## Filings down, but risk remains real

Class action filings were down in 2022 compared with the peaks of recent years, for a range of reasons – some enduring, some temporary. However, the risk for corporate Australia remains real and, for some sectors, is hitting new highs.



## Changing funding environment

The changing regulatory environment for third party funders is a factor in the reduced filings. The change of Federal Government in mid-2022 has, however, led to the resolution of some of that uncertainty and a reduced regulatory burden for funders. Anecdotally, there are clear indicators that the funding industry remains active and more funded claims are likely in 2023.



## What are the biggest indicators of future risk?

For many years, the undeniable biggest risk factor was being a retail bank – in a paradigm shift, no class actions were filed against the banks in 2022. While the trends in 2022 are less obvious, the biggest indicator of risk is being a consumer-facing business (particularly in the wake of a product recall or publicised service (or data) issue) and/or a listed company.



## What's on the horizon?

The spotlight is on data security, following the various high-profile breaches in 2022, and the first class action filed against Medibank in early 2023. There is also a focus on the increasing scope for class actions concerning environmental and broader ESG issues, and a wider range of issues giving rise to shareholder class actions.



## 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 its merits). 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 also important to be conscious of the types of conduct that may give rise to class action risk and to put appropriate mitigatory systems in place.

# 2022 in review

## CLASS ACTION FILINGS WELL DOWN ON RECENT YEARS

The headline trend is that class action filings in 2022 were materially down compared with prior years.

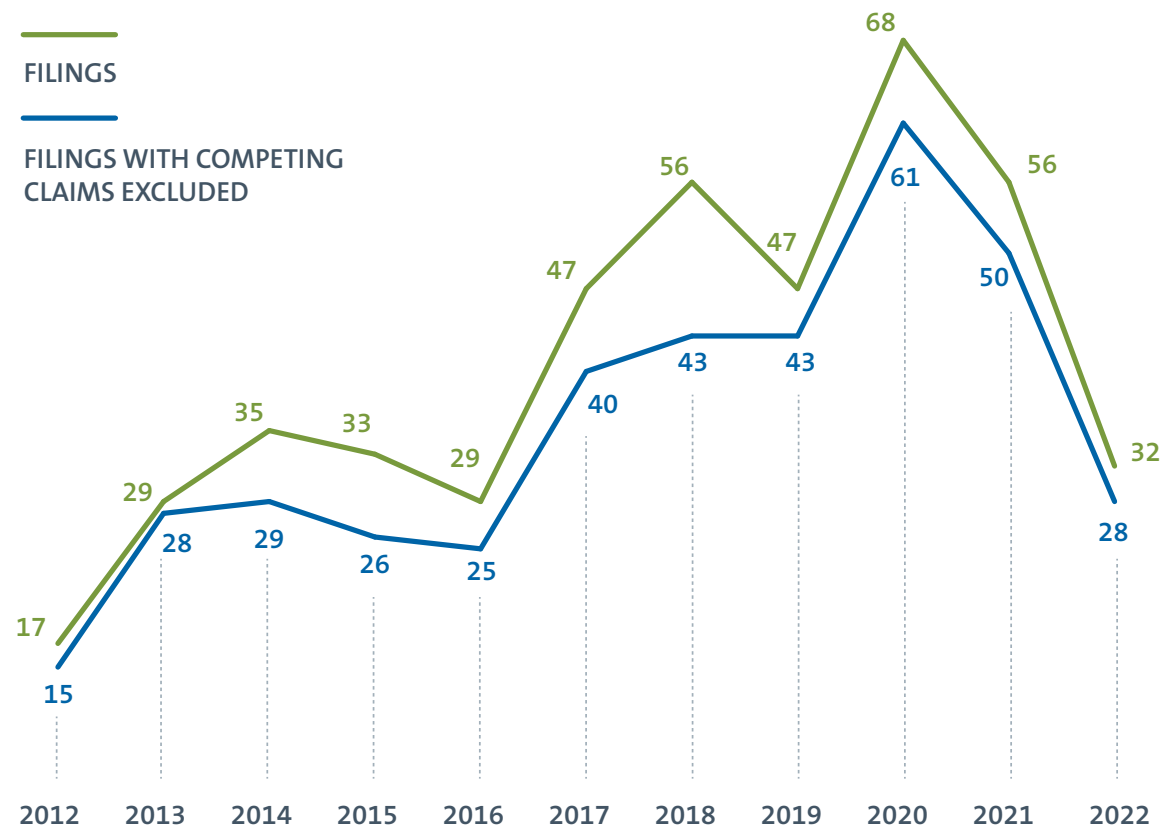
As can be seen from Figure 1, filings in 2022 were roughly equivalent to the level of activity seen in the early to mid-2010s—well below the heights of the past five years.

In part, this downturn is an anomaly caused by the fact a number of claims that, in the ordinary course, would have been filed in 2022 were fast-tracked to filing in late 2021, to get ahead of proposed legislative reform that would adversely affect litigation funders.

However, even accounting for that timing anomaly, there has undoubtedly been a marked downturn in filings across 2021 and 2022. Likely reasons include:

- the apparent end of the pipeline of class actions filed against banks and other financial services providers following the Financial Services Royal Commission;
- a transitional period for litigation funders – last year’s change of government is expected to bring more favourable conditions for funders, but that process is not yet complete; and
- fewer competing class actions (ie multiple claims against the same defendant regarding the same or similar issues) than in prior years.

Figure 1. Class action filings





# 2022 in review

## CONSUMER AND SHAREHOLDER CLAIMS DOMINATE A SMALLER POOL

In 2022, consumer and shareholder claims accounted (in roughly equal proportions) for about 60% of class action filings.

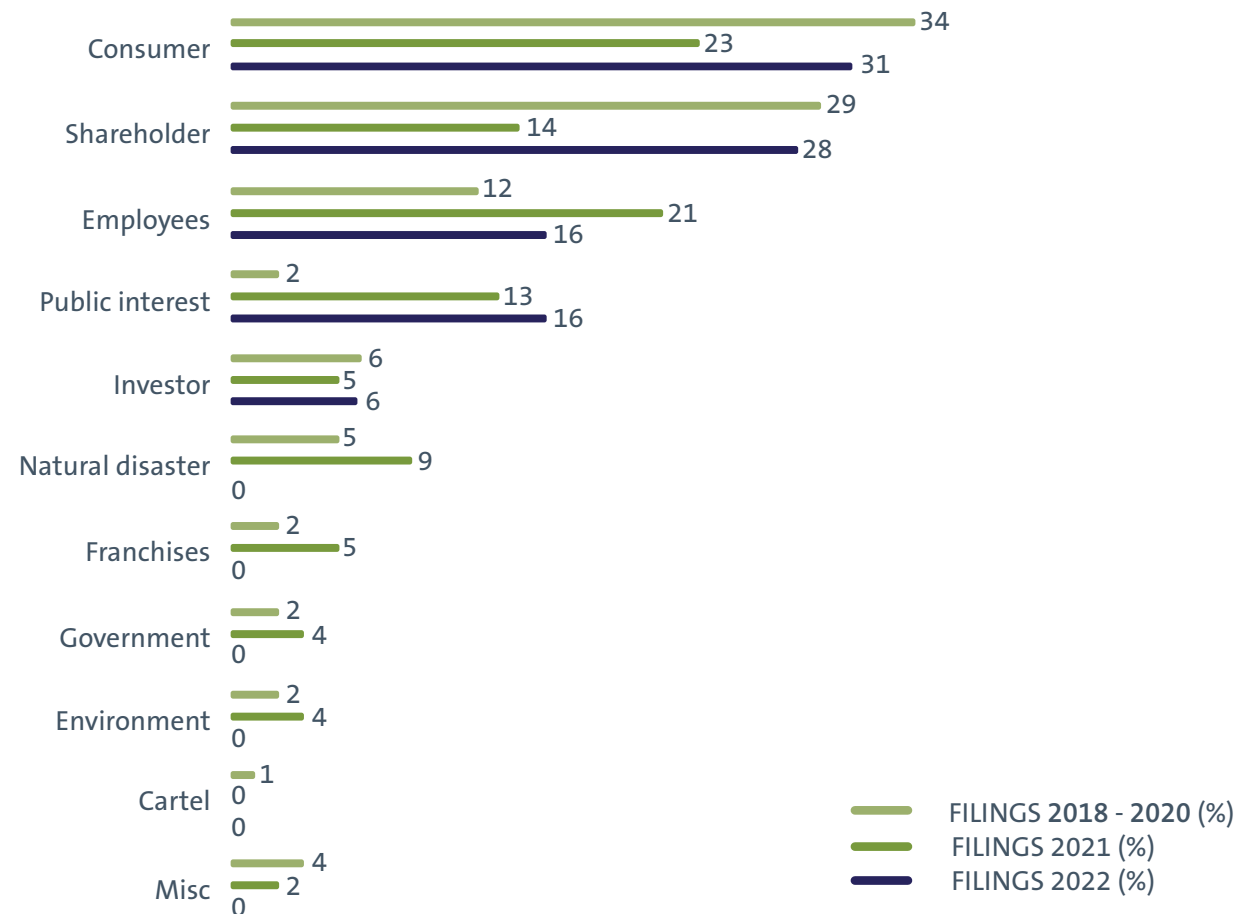
The biggest driver of consumer claims is alleged defects in motor vehicles – this is a clear trend that we expect to continue for the foreseeable future. The subjects of other consumer claims include travel experiences, alleged building defects, app store commissions and cosmetic surgery outcomes.

While shareholder class actions accounted for an increased percentage of filings compared with prior years, the actual number of shareholder claims filed has remained steady year on year. Moreover, just under half of all shareholder class actions filed in 2022 were the second (or third) claim against the defendant as to the same or similar issues (ie a competing claim).

The other notable contributors to 2022 filings were:

- employees' claims regarding alleged underpayments, rest breaks and vaccination policies; and
- public interest claims, including as to public housing, the use of capsicum spray by police, strip searches at music festivals, imprisonment for unpaid fines and treatment of young detainees.

Figure 2. Filings by type (%)



# 2022 in review

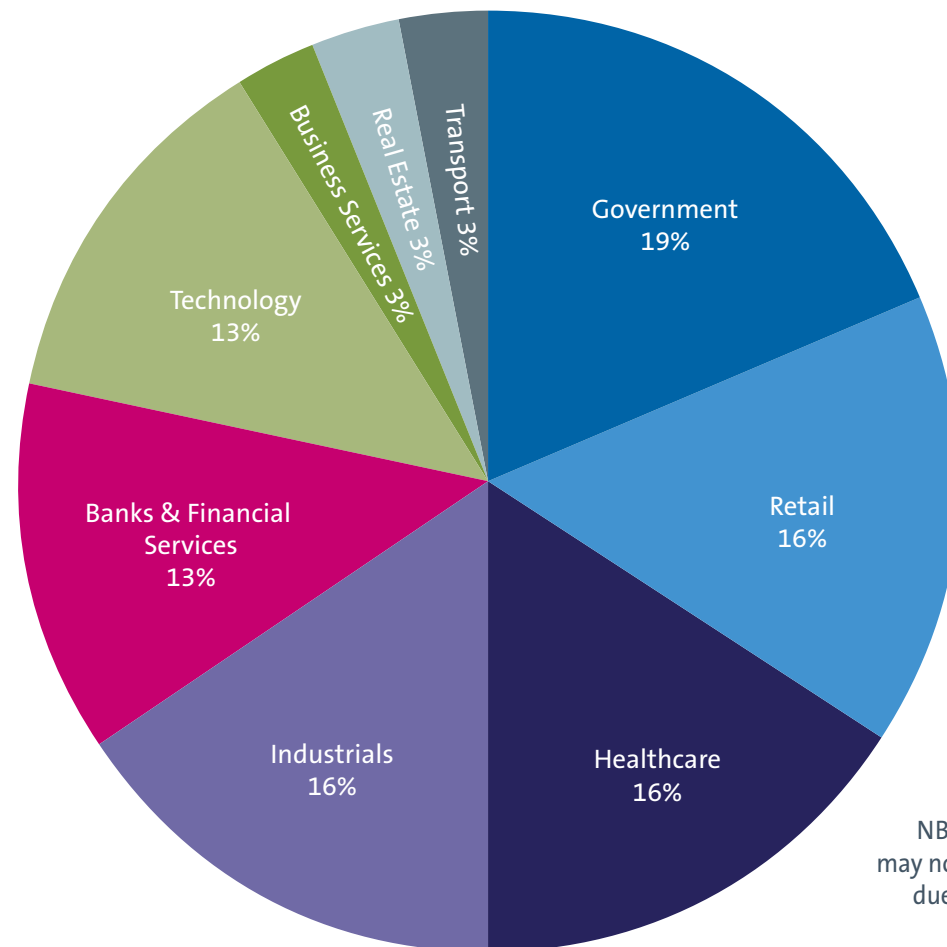
## A BROAD RANGE OF SECTORS TARGETED

In 2021, the government sector overtook the banking and financial services sector as the long-running biggest target for class action filings. While the government sector remained the biggest target in 2022, it and the healthcare, industrials, retail, and financial services and technology sectors experienced similar filing levels.

All the same, there are some broader trends to note, including:

- Perhaps most notably, there were no class actions filed against the banks during 2022 – a very significant change from prior years.
- There appears to be a clear trend of increasing claims against auto manufacturers – with these claims accounting for 80% of filings in the industrials sector in 2022.
- We have seen a steady increase in the proportion of class actions filed in the technology sector over the past few years – this is a trend we expect to continue, given the increasing focus on data/privacy issues, and also that many businesses in this sector are mass consumer-facing businesses.

Figure 3. Filings by sector (%)



NB percentages may not add to 100 due to rounding

# 2022 in review

## CONTINGENCY FEES ATTRACTING MORE CLASS ACTIONS TO VICTORIA

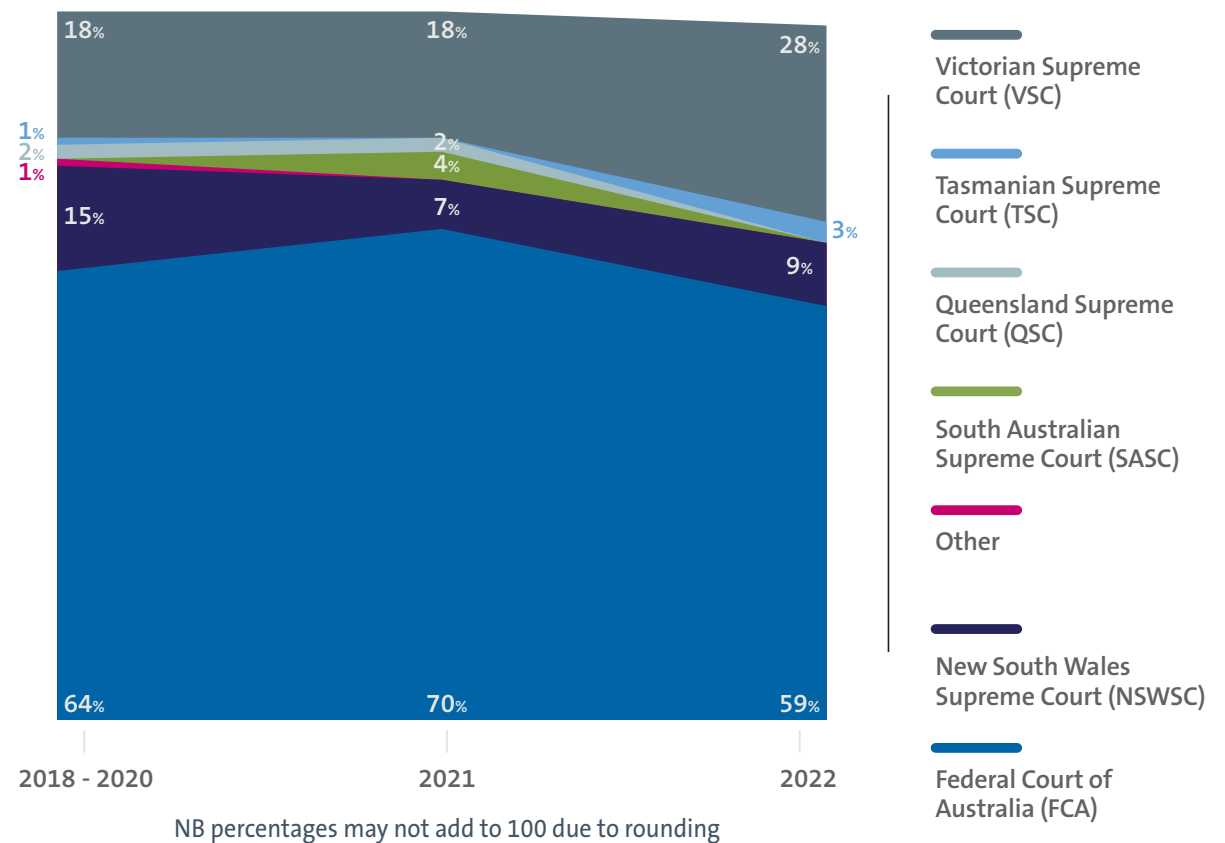
The Federal Court continues to attract the majority of class action filings – roughly 60% in 2022, which is slightly down on prior years.

The slight reduction in Federal Court claims is matched by a corresponding increase in claims filed in the Supreme Court of Victoria – just under 30% in 2022, a jump of about 10% on prior years. While there may be other factors at play, one obvious reason for this trend is the availability of group costs orders (**GCOs**) – orders allowing the law firm bringing the case to recover a percentage of the outcome (ie a contingency fee) – in class actions in that court.

The balance of claims were filed in the Supreme Court of NSW, save for one claim in the Supreme Court of Tasmania (the first case filed under that court’s class action regime since it was introduced in late 2019).

In late 2022, a class action regime was introduced into the Supreme Court of Western Australia. That leaves South Australia as the only state not to enact a class action regime modelled on the Federal Court regime (although there is a ‘representative model’ available in South Australia that has been used from time to time for representative claims).

Figure 4. Filings by jurisdiction





## 2022 in review

### *What does it all mean for class action risk in 2023?*



It would be unwise to rush to conclusions about the changing nature of class action risk based on the events of a single year. This is particularly the case when it comes to the types of claims and the sectors facing heightened risk, given the small filings pool in 2022.

There are, however, broader indicators that the class action landscape is evolving to adapt to changes in the market. While filings are down, the types and targets of class actions are broad. Indeed, for some sectors, class action risk is hitting new peaks. The tailing off of Financial Services Royal Commission claims is obviously a significant factor. It remains to be seen whether the reduced regulatory burden (and increased certainty) for litigation funders under the current Government will reignite entrepreneurial funding of a broader range of class actions. There are, of course, a range of other factors at play, including the availability of contingency fees for lawyers in class actions in the Supreme Court of Victoria, important legal developments in shareholder class actions, and emerging areas of risk (in particular, data security and ESG) – all of which have the potential to materially impact class action risk in the coming years. These issues, and other new developments, are addressed in this report.

## Privacy and data breach claims

Cyber risk was catapulted to the top of the agenda for both government and corporates from October 2022, when large-scale data breach incidents impacted two of Australia's biggest companies, Optus and Medibank.

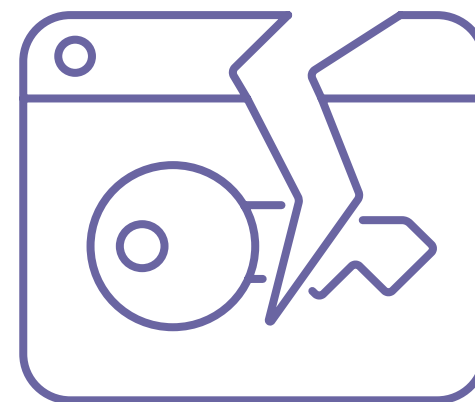
Multiple class action firms immediately announced investigations of privacy breaches, as well as a potential shareholder class action in the case of ASX-listed Medibank.

Initially, plaintiff firms opted to file representative complaints with the Office of the Australian Information Commissioner (the **OAIC**), utilising the existing *Privacy Act 1988* (Cth) mechanism. Then, in February 2023, Baker & McKenzie filed a class action in the Federal Court against Medibank, alleging breach of contract, contraventions of the Australian Consumer Law and breach of confidence.

The use of both the OAIC process and a class action suggests plaintiff firms are still grappling with the difficulties associated with seeking private redress under Australia's current privacy regime. There is presently no direct cause of action available to individuals for breaches of the Privacy Act, and more general causes of actions (eg for breach of confidence) are potentially ill-suited to responding to data breach incidents impacting personal information – particularly regarding establishing loss or damage. It is notable that a class action has only been brought against Medibank, and not Optus – this may be due to the different contractual circumstances and/or the type of information involved.

Australia's privacy regime is set to change significantly in 2023, substantially increasing the risk profile for organisations in relation to cyber incidents. The Attorney-General has already increased the maximum penalties under the Privacy Act for serious or repeated infringements on the privacy of an individual. The current Government is expected to propose draft legislation this year to, among other reforms to the Privacy Act, introduce a new direct right of action for individuals. This would allow individuals to seek court-based redress for certain types of breaches of the Privacy Act.

A separate tort of privacy is also under consideration as part of the Attorney-General's review, although this is less certain to proceed and continues to be vigorously opposed by major media organisations.





## Class action funding

The change in government in May 2022 led to the unwinding of some of the recent regulation of third party litigation funders and the shelving of other proposed reforms, reducing some of the recent uncertainty affecting litigation funding. However, the Federal Government has flagged potential further reforms in this space as it considers the Australian Law Reform Commission recommendations from 2018.

This period of uncertainty may provide some context for the reduced levels of third party funding in recent years. Between 2018 and 2020, roughly 55% of total filings were publicly disclosed as funded, compared with roughly 45% in 2021 and 40% in 2022. It is possible that these figures understate the actual number of claims that were third party funded because that information is not always disclosed at the beginning of the case (in that respect, almost half of the 2022 filings not publicly disclosed as funded were filed in November or December). Even so, the fact remains that funding levels have been subdued in recent years.

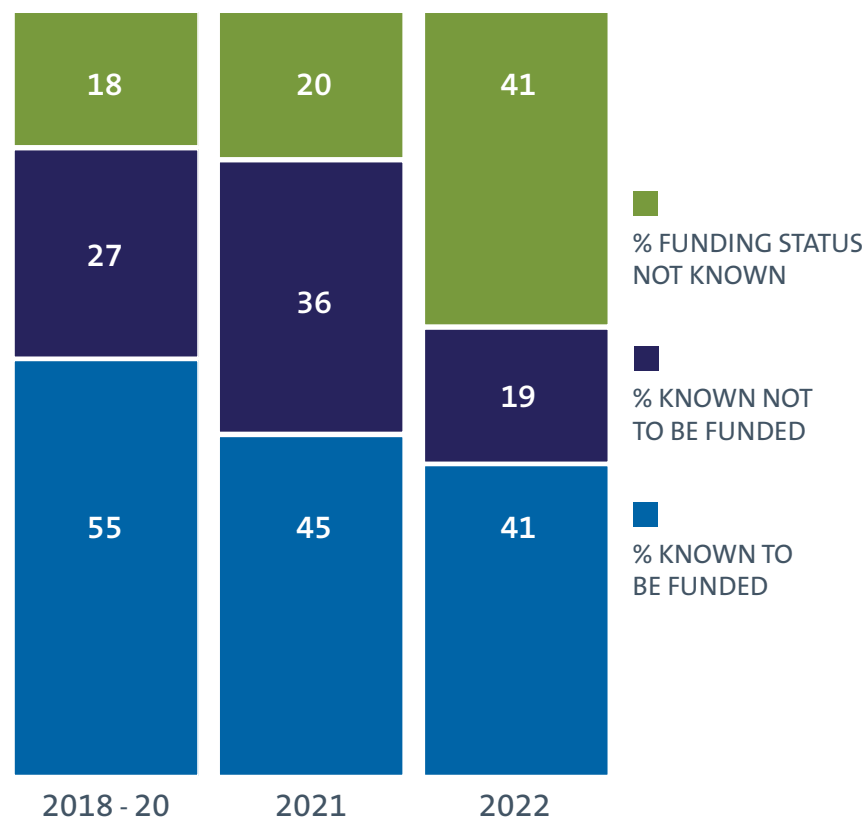
An important issue to watch in 2023 will be whether funding levels bounce back as the regulatory environment for funders becomes more certain. An imminent Full Court hearing, which has been tasked with determining the question of whether the Court has power to make a 'common fund order' at the point of settlement – permitting a litigation funder to extract a commission from any claim proceeds without having executed funding agreements

with group members – will also resolve an element of uncertainty which may have impacted recent funding activity.

The Victorian Supreme Court has continued to attract a growing number of filings, at least in part because of the availability of GCOs. With GCOs now having been available for over two years, there is a developing body of case law about how the court will assess applications and the percentage fee likely to be awarded – that fee has ranged from roughly 20% to 40%. That said, the orders made at this stage have all been provisional and subject to reconsideration (and potential adjustment of the percentage) at the conclusion of the proceeding – none of the cases in which a GCO has been made have reached that stage yet.

While the availability of GCOs has undoubtedly played a role in the downturn in third party funding, it has not been the death knell for funders. In addition to continuing to fund class actions directly, funders are increasingly funding plaintiff law firms (often on a portfolio basis) in the background.

### THIRD PARTY FUNDING



## Consumer and automotive claims

Consumer claims have dominated the class action landscape in 2021 and 2022, and it is likely that trend will continue into 2023.

We expect claims against automotive manufacturers and suppliers to continue to drive that dominance. There have been three judgments in class actions targeting the automotive sector ([Recent class action decisions set high bar for automakers](#)) in the past 18 months. In addition to a surge in claims overseas, these decisions have made the automotive sector a key target for promoters, with a flurry of claims filed late in 2022, and further claims foreshadowed or already filed in 2023. All three judgments are the subject of appeals that are likely to be decided this year, which could have broader ramifications for the standard of acceptable quality under the Australian Consumer Law and the attractiveness of consumer claims for class action promoters.

Other than the automotive sector, consumer claims in 2022 targeted a 'mixed bag' of sectors and we expect that variety of claims will continue in 2023.

A recent decision of the Full Federal Court in the *Ruby Princess* case, which held that class action waiver clauses are not inherently unlawful, also has implications for the class action landscape. The impact of the decision on Australian consumer contracts remains uncertain. An application to the High Court for special leave to appeal is currently pending and could have significant ramifications for the long-term viability of consumer claims.



## Employee claims

Employment class action risk has been on the rise since 2018. Employment claims accounted for just over 10% of all class action filings in 2018–2020, about 20% in 2021 and about 16% in 2022.

Employment class actions generally fall into three broad categories: breach of employment terms (eg regarding rest breaks or vaccination requirements), misclassification of relationships (mainly whether workers are employees or contractors), and underpayments.

Underpayment claims on behalf of junior doctors have accounted for a significant number of filings in recent years, but the claims have impacted a range of other sectors, including government, mining, technology and industrial.

Some recent developments may, however, have an impact on the prevalence of employment class actions going forward, including:

- recent statutory reform and High Court decisions that have provided greater certainty around contractor/employee and casual/full-time employee relationships; and
- increased court scrutiny of funding arrangements because of the different risk profile for funders in the generally 'no costs' jurisdiction of the *Fair Work Act 2009* (Cth). In one Federal Court case, a judge considering an employment class action settlement approval application reduced the funder's commission by 33%, saying 'significantly lower' commission rates are warranted in employment class actions.

All of this means there may be some cooling of the recent trend of increasing employment class actions, and we may see a shift in the types of claims being filed. In particular, there could be fewer misclassification claims, a continued focus on underpayment claims, and an increasing focus on employment terms claims.



## Shareholder claims

Shareholder claims continue to account for a substantial proportion of class action filings. Speculation that these claims would fall out of favour following reforms to the continuous disclosure framework implemented by the previous Federal Government appear to have been misplaced.

When dissecting the current state of shareholder class action risk, there are several trends that emerge, including:

- a growing appetite to commence proceedings based on a wide range of subject matters, with class action promoters more prone to venturing beyond the conventional catalysts for these claims (such as revisions to earnings guidance and accounting issues). ESG disclosures and representations regarding the adequacy of safeguards protecting against data breach risks loom large as issues that may come under the microscope in future claims;
- all instances of competing class actions filed in 2022 were shareholder claims, with just under half of the shareholder class action filings accounted for by 'copycat' claims. There is no sign of this trend abating in the year ahead, and companies that are the subject to a shareholder class action should be alive to the risk and issues associated with navigating a multiplicity of proceedings; and
- while the majority of shareholder class actions continue to resolve by settlement, trials are becoming more common. Before 2022, only two shareholder class actions had progressed to judgment. That number increased to three in 2022, and with judgment currently reserved in two further proceedings, it appears that perceptions of shareholder class action risk are continuing to shift as more matters work their way through the courts.



## ESG claims

While there are a number of well-established forms of class actions based on ESG issues (particularly in relation to environmental damage), the scope of ESG considerations that may feature in class actions is continuing to expand.

One area we anticipate that ESG issues may feature more prominently is in the context of shareholder class actions. Hand in hand with an increase in regulatory scrutiny of 'greenwashing' and 'bluewashing', we expect a heightened focus by class action promoters on disclosures relating to climate change and the transition to net zero, and on social and governance factors such as the management and reporting of modern slavery risks in supply chains. Australian corporates should take care to ensure that reporting on these issues is accurate, robust and defensible, and has proper regard to all available and relevant information.

Local and overseas trends also suggest that claimants will continue to pursue novel forms of class actions directed to bringing about changes in the law or conduct, and that seek to hold government, corporations and their boards accountable for losses attributable to ESG-related risks. One Australian example is the class action against the Commonwealth related to the alleged non-disclosure of climate change risks to sovereign bond holders.

These factors, combined with the evolving scope of ESG issues that may trigger claims, mean that all sectors need to be vigilant against this increasingly important risk.



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