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CLASS ACTIONS: A TEN YEAR SURVEY

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Class action risk has become a major issue for boards, senior management and general counsel. A key question often asked in that context is whether the changing nature of the class actions landscape poses an increasing area of risk for Australian corporates.

Assessment of class action risk requires an understanding of objective data and trends. With that in mind, we have conducted a survey of the class actions filed in the Federal and Supreme Courts over the last ten years.

Surprisingly, this sort of ten year survey has not been readily available to inform the debate in relation to class action risk. This research will provide practical guidance to people responsible for understanding and managing class action risk and who want to be able to address the topic armed with an understanding of the data and trends.

Key findings

- Significantly more class actions have been filed in recent years and the trend is clearly upwards.
- Despite that increase, the number of class action filings is still lower than might have been expected having regard to the level of attention class actions receive.
- Shareholder and other investor class actions account for approximately 47 per cent of all class actions filed in the last decade.
- There have been no significant changes in the types of class actions filed over the last decade, aside from the emergence of natural disaster and public interest claims.
- More firms are filing class actions – more than one-third of filings in the last three years have come from firms who filed only one or two claims in that period.
- A third party funder was involved in approximately 35 per cent of the class actions filed in the last five years (compared with 20 per cent in the five years prior).
- Approximately two-thirds of class actions resolved in the last ten years have been settled.

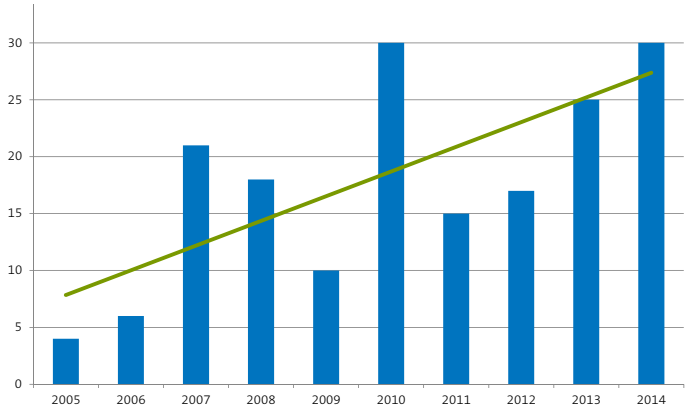
Class action filings

Figure 1 shows the number of class action filings in the period from 2005 to 2014 that were identified in the course of our research.

While filings might be described as 'lumpy', there is a clear upward trend. Indeed, we identified twice as many class actions filed in the last five years (2010 to 2014) than in the prior five years (2005 to 2009).

Despite the significant increase, the number of class actions filed is, in our opinion, lower than might have been expected having regard to the size of the Australian market and the level of attention class actions receive. The peaks were in 2010 and 2014, with 30 class actions filed in each of those years. This is not the 'explosion' or 'epidemic' of claims some commentators predicted when the High Court gave the 'green light' to third party funding in 2006. Nor, incidentally, does it match the number of claims filed in the late 1990s.

Figure 1: Class action filings 2005-2014



Other points of interest arising from our research into filings include:

- The number of filings in the last five years has been significantly affected by claims relating to the same or similar issues. For example, at least 11 bank fees class actions have been filed (with each of the major banks facing two or three separate claims) and at least six class actions have been commenced in relation to the Black Saturday bush fires. These clusters have a significant effect on the overall trend.
- It has become more common in recent years for a company to face multiple class actions arising from the same or similar conduct. This has occurred most frequently (but not exclusively) in the shareholder class action context – for example, the claims against Centro, Nufarm, Treasury Wine Estates, WorleyParsons and Vocation.

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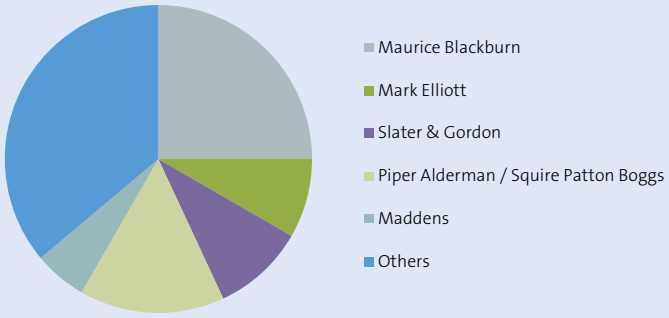
- While class actions are often considered to be high-profile claims involving hundreds or thousands of group members, there need only be seven group members. Our research has highlighted the fact that a significant number of class actions are relatively minor claims with a relatively small number of group members, that attract little (if any) public attention.
- Class action filings are increasing in an environment in which there has been a moderate, but sustained, decline in the number of civil filings in superior courts. This is most likely a reflection of the fact that the potential economies of scale of a class action create a viable risk-reward proposition for class action promoters in circumstances in which the costs of litigation are becoming an increasing deterrent for non-representative litigation.
- A higher proportion of class actions are now being filed in the Supreme Courts – Supreme Court filings accounted for more than 30 per cent of class action filings in the period from 2010 to 2014; compared with about 10 per cent of filings in the period from 2005 to 2009. This is partly a reflection of the fact that the Supreme Court of NSW did not have an equivalent (ie Part IVA style) class action regime until 2010.

Who is bringing the claims?

Maurice Blackburn and Slater & Gordon have long been considered the main (perhaps only) plaintiff class action firms. Maurice Blackburn has clearly retained that position, but there are now a number of firms who are just as active as Slater & Gordon – including Piper Alderman,[1] Mark Elliott and Maddens.

Figure 2: Applicants' lawyers – class actions commenced between 2012 and 2014



In our opinion, the most significant change in recent years is the large number of other firms who have entered the class actions market. Indeed, more than a third of the market is now made up of claims filed by firms who have filed only one or two claims in the last three years.

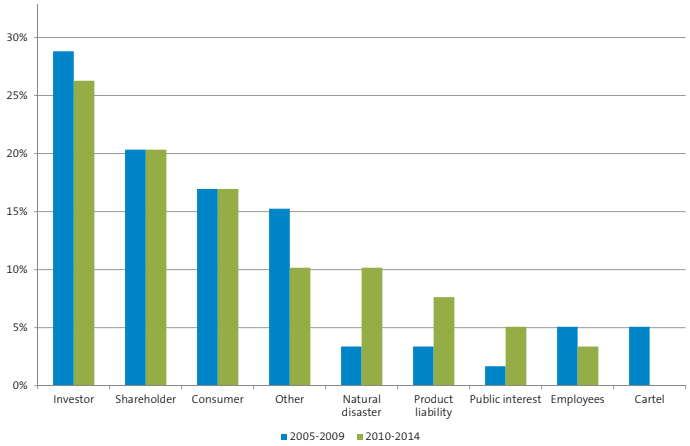
The increase in the number of firms who are willing to commence class actions is clearly one of the reasons for the increase in the number of class actions being filed. The trend may, however, also have a further impact on class action defendants – in our experience, the relative inexperience of these firms in the class actions context has the potential to create significant practical and reputational issues for the defendants they sue. To a large extent, these issues arise from the fact that class actions law and practice is now heavily embedded in hundreds of interlocutory judgments and orders to the point where even the most careful reading of the legislation will give rise to misconceptions as to accepted and required practice.

1 The major class actions element of that practice has now moved to Squire Patton Boggs.

Types of class actions filed

With a view to identifying any trends in respect of the types of class actions filed, we compared the types of claims filed in the last five years (2010 to 2014) to the types of claims filed in the prior five years (2005 to 2009).

Figure 3: Filings by type



As can be seen from Figure 3, natural disaster (largely bush fire), product liability and public interest class actions account for a more significant percentage of total filings in the last five years than previously. The other categories are relatively steady (save that there have been no new cartel class action filings in recent years).[2]

There has been a perception that shareholder and investor claims have assumed a new significance in the market as a result of the losses sustained in the wake of the global financial crisis and the new plaintiff practices that have focussed on these claims. However, as can be seen from Figure 3, shareholder claims have remained steady and investor claims have fallen slightly in recent years. That said, shareholder and investor class actions:

- have almost doubled in number in the last five years compared to the prior five years (in line with the general filing trends discussed above);
- remain the two most common types of class actions – together they accounted for more than 45 per cent of all class actions filed in the last five years (compared with 49 per cent in the prior five years) – a significant increase compared to the ten years prior; and
- tend to be among the more high-profile claims.

The biggest change to the types of class actions filed in recent years has been the emergence of natural disaster class actions. These claims were largely unheard of five years ago, but now play a significant role in the class actions landscape. In many ways, this is the result of class action promoters identifying the opportunity to claim against third parties (such as a power companies, local authorities and dam operators) for their alleged role in losses that were previously considered to be the result of 'acts of God'.

Also of note is the increasing use of class actions in the 'public interest' context, including racial discrimination, false imprisonment, abuse and immigration claims. These claims comprised five per cent of claims filed in the period from 2010 to 2014, and are usually run by plaintiff firms on a pro bono basis.

2 In considering percentage changes it is important to keep in mind that, having regard to the small sample size, the change in filings required to give rise to a change in the percentage of market composition is quite small. For example, the fall in investor claims shown in Figure 3 is the result of one less investor claim being filed in the later period than in the earlier period.

How are class actions resolved?

The vast majority of class actions are settled. Of the class actions filed between 2005 to 2014 that have been resolved:

- approximately 63 per cent were settled;
- approximately 34 per cent were dismissed/discontinued or the proceedings discontinued as a class action; and
- approximately 3 per cent were the subject of a final judgment.

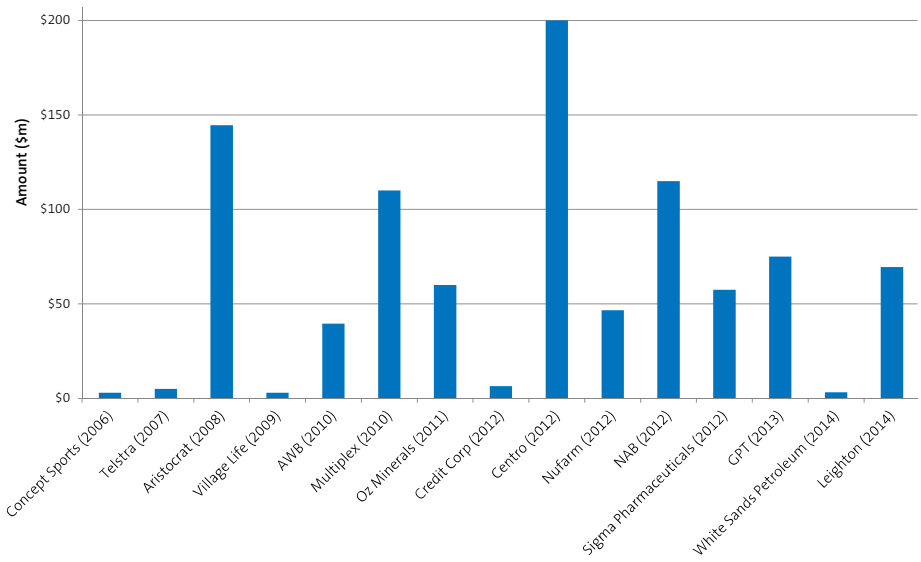
The vast majority (but not all) of the dismissed or discontinued claims were filed by firms not experienced in running class actions.

It is difficult to draw meaningful inferences about the class actions landscape from settlement amounts. So much depends on matters specific to each case – the size of the class, the apparent strength of the case, the motivation of the parties to settle, whether a third party funder is looking for a quick return, the precedential value (or risk) of the case, the point in the litigation in which the case settled – to name just a few.

To illustrate this point, we have set out in Figure 4 the amounts for which various shareholder class actions have settled over the last ten years.

In our opinion, there is no discernible trend that can be drawn from these figures other than the infrequency of nominal settlements ($5 million or less) in recent years.

Figure 4: Shareholder class action settlements



Launching class actions

It is quite common for class actions to be 'launched' before they are filed.

The 'launching' practice is often used as a way to gauge interest among potential group members and to enable funders to engage in a 'book building' process.

Unlike filing, 'launching' does not require the solicitors to have formed the view that the claim has reasonable prospects of success. It does, however, often result in extensive media comment about the prospective target's alleged conduct and, in many cases, has an adverse effect on the share price of a listed target.

Not all 'launched' class actions are filed. Of the 29 claims we identified as having been launched by Maurice Blackburn and Slater & Gordon in the period between 2011 and 2013,[3] less than half had been filed by the end of April 2015.

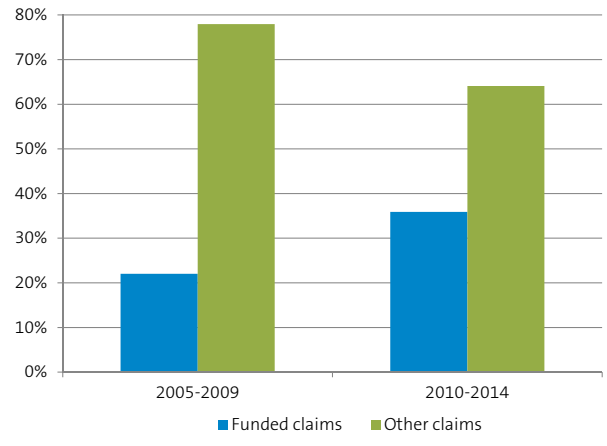
At least three 'launched' class actions have been settled before they were filed.

3 Maurice Blackburn and Slater & Gordon are the two firms that had an established practice of launching claims in the period from 2011 to 2013. ACA Lawyers developed such a practice in 2014. We have, however, excluded claims launched in 2014 from this analysis due to the higher likelihood that they are still in the investigatory / book building stage.

Third party funding of class actions

There has been a marked increase in the number of class actions that are funded by third party litigation funders.

Figure 5: Percentage of funded class actions



Approximately 20 per cent of the claims filed in the period between 2005 to 2009 were publicly identified as third party funded claims. That number had increased to approximately 35 per cent in respect of claims filed in the period between 2010 to 2014. Our research shows that the vast majority of funded claims are conducted by the firms referred to above as notable players in the market.

Of the funded class actions filed between 2010 to 2014:

- 54 per cent were funded by IMF Bentham Limited;
- 12 per cent were funded by other local funders (including LCM Litigation Fund, Litman Partners, Litigation Lending Services and Legal Justice); and
- 34 per cent were funded by offshore funders (including Comprehensive, International Litigation Funding Partners, International Litigation Partners, Harbour, Argentum and Omni Bridgeway).

While there has been a significant increase in the number of funded claims, approximately two-thirds of class actions are not externally funded. The majority of these claims are funded by the solicitors who bring the claim on a 'no win-no fee' basis.

Potential agents for change in 2015

Common fund orders – a potential game changer: Third party funders are seeking to fundamentally change the class actions landscape by seeking orders from the courts that would see them receive a commission from the total 'fund' recovered in a class action, and not just from the group members who have signed funding agreements. If permitted, this would avoid the need for funders to 'book build' before commencing a class action and significantly increase the amount required to settle class actions (as the funders would require a larger payment). The legality of this development is currently before the Federal Court in the shareholder class action against Allco Finance. If the practice is accepted by the courts, we would expect it to result in more class actions being filed over time.

The causation question: The question of whether causation in shareholder claims can be established through market-based causation has significant implications for the continuing viability of shareholder class actions. Justice Perram's recent obiter comments in favour of market-based causation in the Babcock & Brown case provide limited preliminary judicial support for the proposition.[4] However, particularly in circumstances in which a recent interlocutory judgment by Justice Farrell suggests that her Honour may well reach a different conclusion,[5] the position remains uncertain. The next potential forum for a decision may be a case brought by shareholders of HIH Insurance Limited, which was heard by the Supreme Court of NSW in early 2015.

Regulation of third party funding: This topic is likely to be back on the agenda following the Productivity Commission's recommendation that funders should be subject to a licensing regime which focuses on capital adequacy and disclosure requirements. A licensing regime would inevitably impose a barrier to entry (or to continued operation) for current and would-be funders. The extent to which such a barrier may impact the availability of class action funding is likely to depend on how the offshore funders (which currently comprise about one-third of the funding market) respond.

4 *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2015] FCA 149.
5 *Caason Investments Pty Limited v Cao* [2014] FCA 1410.

The viability of penalties class actions: One aspect of the test for whether a fee is penal requires a comparison between the amount of the fee and the loss that may be suffered as a result of the conduct that led to the fee being charged. The Full Federal Court has recently held (in one of the bank fees class actions) that indirect costs may be taken into account in that comparison. An application for special leave to appeal to the High Court has been filed. The outcome of that application, and any High Court appeal if special leave is granted, is likely to determine the viability of other penalties class actions that have either been commenced or foreshadowed.

Contingency fees: In December 2014, the Productivity Commission recommended the removal of the general prohibition on the charging of contingency fees in civil matters by the legal profession. It is, however, by no means certain that the prohibition will be lifted. It is difficult to predict what effect lifting the ban (if it were to happen) might have on the class action landscape. Despite the prevalence of third party funding, the majority of class actions are run by solicitors on a 'no win-no fee' basis. The one certainty is that providing greater incentives for lawyers to fund class actions will not reduce the number of class action filings.

Scope of our research

Our research is based on publicly available information in relation to class action filings between 2005 and 2014 in the Federal Court of Australia, and Supreme Courts of Victoria and New South Wales.[6]

It is the result of extensive searches of publicly available sources, including interlocutory and final judgments, the Federal Court's online search facility, class action publications, press reports and the websites of courts, law firms and litigation funders (and, of course, our own knowledge).[7]

6 Filings in the Supreme Court of NSW from the enactment of Part 10 of the *Civil Procedure Act 2005* (NSW) in 2010.
7 There are some class actions that are not readily identified by searching publicly available information, which may not have been captured in our research.

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