



Class actions in Australia

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Class actions are an established and important part of the Australian legal landscape. In recent years, Australia has become the most likely jurisdiction outside of the United States in which a corporation will face significant class action litigation.

Recent developments in the Australian legal landscape – including increasingly plaintiff-friendly class action laws, the acceptance of third party litigation funding and a growing number of plaintiff class action legal practices – have facilitated that evolution. At least in part, these developments are the direct result of support for class actions (and third party funding of class actions) as important means of facilitating access to the civil justice system. The checks and balances in the Australian system have, however, helped to prevent what was predicted in the mid-2000s to be an ‘avalanche’ of class action activity.

This paper outlines some of the key issues and trends in Australian class actions.

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The Australian class action regime

Most class actions in Australia are commenced under the Federal Court of Australia’s representative proceeding regime.¹

The key features of that regime include:

- **threshold requirements:** the following requirements must be met to commence a class action:
 - there must be seven or more persons with claims against the same defendant;
 - the claims must be in respect of, or arise out of, the same, similar or related circumstances; and
 - the claims must give rise to at least one substantial common issue of law or fact;
- **representative plaintiff(s):** the claim is brought on behalf of all class members by one (or a small number of) representative plaintiff(s) – the representatives are the only class members to be parties to the proceedings;
- **class definition:** the class can be defined by a list of names or by a set of criteria (such as all persons who acquired shares in Company XYZ during a certain period) – it is not necessary to name members of the class nor to specify the number of people in the class or the total value of their claims;

¹ Part IVA of the *Federal Court of Australia Act 1976* (Cth). There are also equivalent regimes for class actions in the Supreme Courts of Victoria and New South Wales. A new regime is also proposed for the Supreme Court of Queensland.

- **opt-out regime:** every potential claimant who falls within the class definition is a member of the class unless they opt-out of the proceedings. A class may, however, be defined in a way that effectively requires members to opt-in to the class (including by entering into a retainer with a particular law firm or an arrangement with a particular third party funder);
- **settlement approval:** once proceedings are commenced, any settlement must be approved by the court – this requires the court to be satisfied that the settlement is fair and reasonable and in the interest of class members.

How are the class actions regimes in Australia and the United States different?

Class actions in Australia are different to class actions in the United States in (at least) the significant ways outlined in the table below:

	United States	Australia
Class certification	The lead plaintiff bears the onus of satisfying the court that the case satisfies the threshold requirements for proceeding as a class action.	The onus is on the defendant to establish that the threshold requirements referred to above have not been met.
Common issues	Common issues must predominate over individual issues.	There need only be one substantial common issue of law or fact.
Costs	Each party bears their own costs irrespective of the outcome.	The unsuccessful party will generally be ordered to pay the successful party's costs on a party/party basis.
Contingency Fees	Lawyers are permitted to charge based on a percentage of any amount recovered.	Contingency fee structures are generally prohibited for lawyers (but not for third party funders).

The absence of a class certification process and the low common issues threshold make it easier to commence and maintain a class action in Australia than in the United States. As a result, the Australian class action regime has been described as 'one of the most liberal class action rules in the entire world'.² The Australian position in respect of costs is, however, generally acknowledged as being a significant deterrent to speculative litigation.

The entrenchment of third party funding

Commercial third party litigation funders have been operating in Australia in an insolvency context since the 1990s. In 2001, Australia's largest and most active litigation funder listed on the Australian Securities Exchange and expanded its business to include significant non-insolvency claims and class actions. That move was controversial and led to many challenges, most of which (following the abolition of the torts of maintenance and champerty in most Australian states) were based on public policy and abuse of process arguments related to third party entrepreneurialism in the litigation process.

In 2006, the High Court of Australia gave its approval to the concept of third party funding when it found that it was not contrary to public policy or an abuse of process (although individual funding arrangements may still fall foul of those imperatives).³ The ruling removed the questions surrounding the validity of third party funding and has encouraged new funders to enter the Australian market. Third party funding has been the most significant factor in the development of the Australian class actions landscape in recent years, with more than triple the number of class actions commenced in the three years following the decision than in the three years prior.⁴

Since the High Court's decision, various appellate court decisions have held that certain regulatory regimes (such as the regime for managed investment schemes) applied to third party funders. The previous Federal Government was, however, quick to legislate to remove that regulatory burden. That action was taken on policy grounds related to the desirability of third party funding in facilitating access to justice through class actions. As a result, third party funders are not subject to any regulation beyond the general law (to the extent the funder is subject to Australian law) and a requirement to have adequate processes in place for managing conflicts of interest. This means that anyone can fund litigation except for the lawyers involved in the case (who are prohibited from entering into an arrangement that involves taking a share of the proceeds of the litigation).

In December 2014, the Productivity Commission recommended in the context of its inquiry into 'Access to Justice Arrangements' that third party funders should be subject to a licensing regime which focusses on capital adequacy and disclosure requirements. While there have been no developments since that time, it remains on the government's agenda. 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

2 Professor G Miller, 'Some Thoughts on Australian Class Actions in light of the American Experience' in the Hon Justice K E Lindgren (ed), *Investor Class Actions*, Ross Parsons Centre of Commercial, Corporate and Taxation Law (2009) 2 at 4. 3. *Campbell's Cash and Carry Pty Ltd v Postif Pty Ltd* [2006] HCA 41.

3 See Allens *Focus: 'High Court gives green light to litigation funding'* (August 2006) (www.aar.com.au/pubs/ldr/fldr30aug06.htm) See also Allens *Focus: 'Yet another tick for litigation funding'* (21 October 2009) (www.aar.com.au/pubs/ldr/fldr21oct09.htm)
4 Morabito V., 'An Empirical Study of Australia's Class Action Regimes: Class Actions Facts and Figures' (December 2009).

(if enacted) may impact the availability of class action funding is likely to depend on how the offshore funders (which currently comprise just over one-third of the funding market) respond.

In parallel with the debate around regulation, third party funders have become an increasingly entrenched, and accepted, participant in the Australian class actions sector. The level of that acceptance is highlighted by the following:

- the Federal Court held that it was in the interests of justice, and in keeping with its supervisory role in class action proceedings, to require that class members in an investor class action be informed that there was a risk that funding for the proceedings would be withdrawn if sufficient class members did not enter into an agreement with the third party funder;⁵ and
- the Full Federal Court held that a failure to provide evidence as to why a separate investor class action was not being commercially funded was a factor in favour of requiring the representative plaintiff to provide security for the respondents' costs.⁶

Moreover, the commercial imperatives of third-party funders have pushed the boundaries of what is permissible under Australia's class action regimes. The most obvious example of this is the way in which they have changed the essential nature of many class actions from 'opt-out' to 'opt-in' cases by only funding claims on behalf of persons who have entered into funding agreements.

In recent times, funders have sought to further cement their entrenchment in class action proceedings by asking the courts to make orders that would entitle them to receive a funding commission from all class members who participate in a settlement or judgment in an 'opt out' claim, rather than only those class members who have signed a funding agreement. Although early attempts were rejected on the basis that they were not in the interests of class members, in November 2016 the Full Federal Court made an order on qualified terms which would see all participating class members pay a funding commission at a level determined by the Court at the end of the proceedings. The fact that the commission will not be determined until the end of the proceedings introduces significant and unwanted uncertainty for funders. As a result, it remains to be seen what effect this development will have on future funding arrangements. However, the ability to avoid signing-up individual class members is likely to be welcome by funders and is also likely to encourage a race to file.

Other drivers

Aside from the entrenchment of third party funding, there have been a number of other sustained and long-term drivers for the growing significance of class actions in Australia, including the following:

- following the contraction of their personal injury law practices as a result of reform to Australian tort law, traditional plaintiff firms have focussed on class actions as significant business opportunities;
- firms other than the traditional plaintiff firms have seen the significant business opportunities this confluence of circumstances (sometimes described as a 'perfect storm') has created and have developed plaintiff-focussed class action practices and relationships with third party funders;
- there has been (and continues to be) a growing focus on corporate governance and the role of private litigation in enforcement – indeed, the heads of some of Australia's peak regulators have openly endorsed the role that class actions play in enforcement and deterrence;
- the introduction of, and amendment to, court procedures, rules and regimes directed at facilitating the bringing of class actions; and
- the increasing number of plaintiff class action practices and the 'light touch' approach to regulation of third party funders has led to additional third party funders entering the Australian market.

The prohibition against misleading and deceptive conduct

Another important factor is Australia's statutory prohibition against misleading or deceptive conduct. In very general terms, in a commercial context, a person will have a statutory cause of action in respect of loss caused by the misleading or deceptive conduct of another. In establishing that cause of action, it is not necessary to prove that the conduct was fraudulent, intentional or negligent – simply that it was misleading or deceptive or likely to mislead or deceive. This enables many causes of action to be brought in Australia that could not be brought in other jurisdictions.

Misleading and deceptive conduct claims are usually the primary basis for shareholder/securities class actions in Australia. In proving those claims it is only necessary to prove that the company misled the market; whether or not the company intended to do so, or was negligent in doing so, is irrelevant. By way of contrast, most similar actions in the United States (including under SEC Rule 10b-5) require proof of scienter (intentional fraud or deceit).

Another telling example is that, in November 2012, in a class action focused on the rating of a structured financial product, the Federal Court of Australia held that Standard & Poor's had engaged in misleading and deceptive conduct in assigning a AAA rating to the product because it misrepresented the risk of default of the product. The Court also found that the arranging bank had engaged in misleading and deceptive conduct by marketing the product by reference to the rating. This was the first case in the world to find that a rating was misleading.

⁵ *Muswellbrook Shire Council v Royal Bank of Scotland NV* [2013] FCA 616.

⁶ *Madgwick v Kelly* [2013] FCAFC 61. See our [Client Update](http://www.allens.com.au/pubs/ldr/culdr21aug13.htm) (www.allens.com.au/pubs/ldr/culdr21aug13.htm) for more information.

Trends in Australian class actions

Steady increase in major claims, but no ‘avalanche’:

Despite the so-called ‘perfect storm’ conditions for class action growth, there has not been an ‘avalanche’ in the *number* of class actions filed in recent years. Class actions have, however, become an increasingly significant and evolved part of the Australian legal landscape. For more details on the current state of the class action landscape, see our [Class Action Risk 2016](#) report.

A potential policy shift: In recent years, the Federal Government has played a significant role in the development of the policy and regulatory framework applicable to Australian class actions, particularly through its facilitative approach to third party funding. This has largely been driven by an acceptance, at a policy level, that third party funding of class actions promotes access to justice. It remains to be seen whether the possibility of increased regulation of the litigation funding industry (as discussed above) will mark a shift in that policy.

Broader range of claims: There has also been an expansion in the contexts in which class actions are being commenced.

Australian class actions were traditionally the domain of the product liability claim. The first securities class action was filed in 1999.

By 2009, shareholder class actions had overtaken product liability claims as the most common type of class action. Since about 2008, there has been an increase in the number of financial services class actions – many, but by no means all, of these claims relate to losses associated with the global credit crisis. In recent years there has also been a number of mass consumer claims, the most high profile of which relates to the ‘exception fees’ charged by major retail banks. There has also been a slight resurgence in product liability claims and a number of claims alleging anti-competitive conduct and environmental damage.

Broader range of defendants: Traditionally, the defendant in Australian class actions has been the company most directly connected with the alleged damage. In recent years there has, however, been an increasing trend towards claims being brought against others alleged to have been involved in the loss including, for example, advisors, auditors, brokers and ratings agencies.

Most class actions are settled: This is a clear trend. It is simply a reflection of the fact that the risks associated with a class action judgment (and inevitable appeals) are too high for the class and defendants alike. It is also not unusual for proposed class actions to be settled before they are filed.

Some key examples

Shareholder/ securities	Shareholders of Aristocrat Leisure Limited alleged that the company’s financial accounts were misleading and deceptive due to the inclusion of certain revenue in circumstances not permitted by accounting standards and that the company did not have reasonable grounds for statements made about its expected profitability. The case settled in August 2008 after trial (but before judgment) for \$136 million plus \$8.5 million in costs.
Investor	Investors in a complex structured financial product that had been assigned a ‘AAA’ rating by Standard & Poor’s alleged that the rating misrepresented the risk of default of the product. Allegations were also made about the role of the arranging bank in procuring the rating. This was the first case in the world to put a credit rating on final trial. It also raised the question of whether an arranging bank endorses a credit rating in passing it onto potential investors. Judgment was delivered against S&P and the arranging bank in November 2012. In short, the court found that S&P’s rating was ‘unjustifiable, unreasonable and unreliable’. It also found that the arranging bank was ‘knowingly involved’ in procuring the erroneous rating. The appeals from aspects of the decision were dismissed in June 2014. A follow-up class action has been commenced against on behalf of other investors in the product in Australia. Actions have also been commenced in Europe.
Anti-competitive conduct	Purchasers of corrugated packaging alleged that Amcor and Visy were involved in cartel conduct in relation to pricing. The case settled in March 2011 in the days prior to trial for \$95 million plus costs.
Mass consumer claim	In a series of coordinated class actions, bank customers allege that the exception fees charged by many of Australia’s major retail banks are unlawful penalties. In September 2012, the High Court reversed the law of penalties in Australia by finding that the doctrine of penalties may apply outside the context of a breach of contract. In February 2014, the Federal Court decided (in the first of those class actions to go to trial) that only one of the challenged exception fees (late payment fees on credit cards) was a penalty. However, in July 2016, the High Court of Australia held that none of the fees in question were penalties and, as a result, the class actions have been abandoned.

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