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Class actions in Australia

UPDATED – MAY 2022

Class actions are an established and important part of the Australian legal landscape. Over the course of the past 20 years, Australia has become the most likely jurisdiction outside of the United States in which a corporation will face significant class action litigation.

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 historical support for class actions (and third party funding of class actions) as an 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 'explosion' of class action activity.

We outline below 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;

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, New South Wales and Queensland. A new regime is also proposed for the Supreme Court of Western Australia.

- **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;
- **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.	No certification process. 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 fees are prohibited for lawyers, except in the Supreme Court of Victoria (and only by order of the Court).

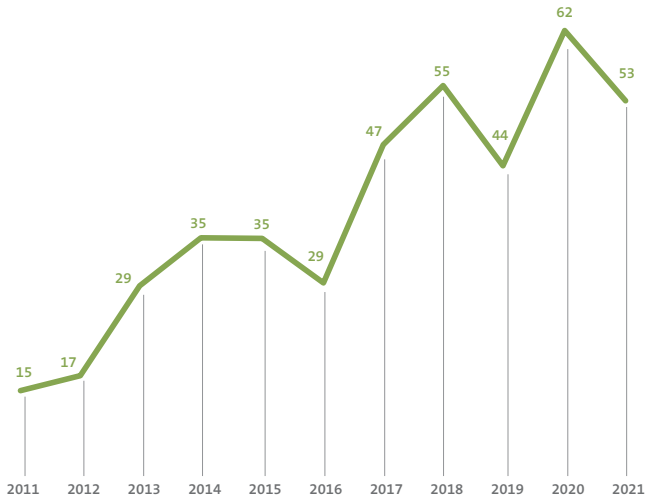
The absence of a class certification process and the low common issues threshold make it easier to commence and maintain a class action in Australia than in the United States. As a result, the Australian class action regime has been described as 'one of the most liberal class action rules in the entire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

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.

Class action activity in Australia

Claims filed

Figure 1: Class action filings from 2011 to 2021



There has been a steady increase in class action filings over the course of the last decade. While 2021 filings were down on the peak of 2020, there is still a broad trend of increased class action activity over the short to medium term.

The actual number of claims (peaking at 62 in 2020) is not indicative of the 'explosion' that was predicted following the acceptance of the legality of third party litigation funding in the mid 2000s. It is, however, sufficient to generate ongoing debate about the impact of class action risk on businesses operating in Australia; and, in recent times, has led to legislative reform intended to impose additional checks and balances on the entrepreneurial pursuit of class actions.

Types of claims

The types of class actions filed in Australia have changed over time. Initially, there was a focus on product liability cases – particularly in respect of products affecting human health. However, as the class action and litigation funding industries matured, there was a focus on securities and financial services class actions (the latter often arising from the alleged mis-selling of financial products that failed during the 2007/8 credit crisis).

More recently, however, we have seen a broader base of claims – with an increasing concentration of claims brought on behalf of consumers of goods or services. Other common types of claims include those in respect of the underpayment of employees, franchisees, treatment of Indigenous persons, environmental contamination, bushfires and (in recent years) outbreaks of COVID-19.

Lately, there has been a noticeable uptick of claims against automotive companies and medical device companies, often following a product recall. Those claims are usually underpinned by statutory guarantees that impose strict liability in respect of any consumer product that does not meet minimum acceptable quality standards (as discussed further below).

Sectors most at risk

The banking and financial services sector has long been the biggest target for class action filings. This is a reflection of a range of factors, including the size and consumer-facing nature of the sector; losses sustained from financial products in the credit crisis; and issues exposed in the 2018 Royal Commission into misconduct in the banking, superannuation and financial services industry.

There is, however, an increasing stream of claims affecting other sectors, including government, healthcare, manufacturing, infrastructure and technology.

For a more detailed analysis of trends see our Class Action Risk 2022 publication available here.

Funding of class actions

Most class actions are funded by one of the following methods:

- **Third party funding:** A third funding party arrangement that involves payment of legal fees and an indemnity for any adverse costs orders (given the 'loser pays' system) in return for a percentage of any proceeds (generally 20-40%). While funding has traditionally been a matter of contract between the funder and class members, there are circumstances in which the courts have made orders granting funders a percentage of the total recovery – although the law around the power to do so is not yet settled.
- **Lawyer funding:** Lawyers acting on a 'no win, no fee' basis, often with after the event insurance to cover the possibility of an adverse costs order. Contingency fees are generally not permitted; however, in 2020, legislation was enacted to permit contingency fees to be charged by lawyers in class actions in the Supreme Court of Victoria but only when approved by the court.

Third party funding has been the most significant factor in the development of the Australian class actions landscape. Since the High Court confirmed that funding was legal in 2006 through to around 2020, the funding industry grew with few obstacles, and no specific regulation or licensing requirements. Indeed, legislation was enacted to exempt funders from regulatory requirements that otherwise applied to the providers of financial services on policy grounds related to the desirability of third party funding in facilitating access to justice through class actions.

However, the pendulum started to turn in 2020, when legislation was introduced requiring funders to hold an Australian Financial Services Licence and for their funding schemes to comply with the requirements for managed investment schemes.

Further legislative reform has also been proposed, including a rebuttable presumption that class action outcomes that do not return 70% of any recovery to class members are not 'fair and reasonable' and therefore should not be approved by the court. These changes (and the associated uncertainties) have seen a reduction in third party funding of class actions in recent times.

Other drivers of class action activity

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:

- an increasing number of firms (other than the traditional plaintiff firms) have sought to capitalise on class action opportunities by developing plaintiff-focused class action practices and relationships with third party funders;
- increased regulatory focus across a range of areas (including financial services and product safety) has resulted in issues being exposed and class actions filed to 'piggyback' on the groundwork undertaken by the regulators;
- there has been (and continues to be) a 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 exposure of the Australian public to class actions has resulted in a (slowly) growing cultural acceptance.

Strict liability claims

Another important factor in the development of the Australian class action industry is the availability of a number of causes of action that do not require proof of intent or negligence by the defendant – in particular, the prohibition against misleading or deceptive conduct and the acceptable quality guarantee.

Misleading or deceptive conduct

In very general terms, in a commercial context, a person will have a statutory cause of action for 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.

By way of example, an Australian court was the first in the world to impose liability on a credit rating agency for its AAA rating of a financial product that defaulted during the credit crisis, on the basis that the rating misrepresented the risk of default of the product. Incidentally, the court also found that the arranging bank had engaged in misleading and deceptive conduct by marketing the product by reference to the rating.

Acceptable quality guarantee

The Australian Consumer Law creates a basic set of guarantees (or rights) for consumers who acquire goods. This includes a guarantee that the goods will be of 'acceptable quality' – that is, goods will be of a standard that a reasonable consumer would regard as acceptable, and perform their intended function(s), for a reasonable amount of time. This is an

objective test, based on community knowledge and expectations.

Consumers may bring a claim for damages in respect of personal injury or property damage suffered due to a product not meeting the requirements of the guarantee. Claims can be made against the supplier, the manufacturer and/or the importer. Liability is strict (subject to the availability of some limited, technical defences).

The acceptable quality guarantee is the foundation for most product liability class actions. The strict liability for failure to comply makes any product recall potential grounds for a class action – this is despite the fact that many recalls are undertaken out of an abundance of caution and are not necessarily indicative of a product not meeting the standard required by the guarantee.

Responding to class action risk in Australia

If a class action is commenced against your organisation, you are likely to face a period of litigation that is difficult and sustained (irrespective of the merits of the claim).

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.

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