



Untju Alkata 2 by Tommy Watson

THE REVIEW

CLASS ACTIONS IN AUSTRALIA
2024/2025

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KWM has Australia’s leading dispute resolution practice. We have a strong track record in obtaining favourable results for our clients in some of Australia’s most high-profile class actions. Our strength lies in our ability to meld class action expertise with deep subject-matter understanding. Our partners with class action experience are known as subject matter experts in a diverse range of industries: from financial services to technology, health, gaming, and manufacturing.



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OUR CLASS ACTIONS & REGULATORY INVESTIGATIONS PRACTICE

Our track record includes some of the most high-profile, commercially significant and challenging proceedings in the market, including:



SECURITIES AND FINANCIAL PRODUCTS

Westpac: acting for both Westpac Banking Corporation and St. George Finance Limited in defence and settlement of a consumer class action in the Supreme Court of Victoria concerning the sale of vehicle loans through motor vehicle dealers on a 'flex commission' model.

AMP: successfully settled a class action regarding the changes that AMPFP made to the Buyer of Last Resort (BOLR) policy, and defending 2 class actions in the Federal Court in relation to superannuation fees and insurance.

OnePath Custodians Limited: acted for OPC, a subsidiary of Insignia Financial Limited, in a class action brought by 2 members of OPC's superannuation fund on behalf of members, where the matter successfully settled.

IG Markets Limited: acting for the IG entities in defending significant class actions relating to IG's marketing and offering of derivative financial products known as 'contracts for difference'.

QSuper Board: successfully settled a significant class action in the Federal Court of Australia in relation to changes to insurance policy premiums.

Allianz: successfully settled a class action proceeding in relation to add on insurance for \$170 million.

Suncorp: successfully settled a class action proceeding in relation to add on insurance.

Credit Suisse: acting in a highly unusual class action alleging insider trading against brokers who executed short sales of an Australian listed company on behalf of a research firm who later published a negative research report on that company.

NULIS: successful defence of a class action against the trustee of the MLC superannuation fund alleging that fees charged to members "for the purpose of" paying commissions to financial services licensees should not have been charged.

Tyro: successfully settled a class action brought on behalf of Tyro customers and merchants relating to payment processing terminals.

Insignia Financial: in the successful defence of a shareholder class action, the first to concern the materiality of non-financial information.

NAB: settling the first post-Banking Royal Commission consumer credit insurance class action.



GAMING

Entain Group: acting in defence of a class action in the Supreme Court of Victoria alleging contraventions of the Australian Consumer Law and breaches of contract in relation to live betting services.

Aristocrat: acting in defence of a class action involving the distribution of apps that offer online social casino games.

The Star: acting in defence of a shareholder class action, alleging breach of its disclosure obligations and engagement in misleading or deceptive contact in relation to regulatory compliance (including risk management and anti-money laundering controls).



COMPETITION AND CONSUMER LAW

Woolworths: defending consumer class action proceedings commenced in the Federal Court of Australia arising out of Woolworths' 'Prices Dropped' Program and matter raised in associated ACCC proceedings.

NatWest Markets: successfully settled a class action alleging cartel conduct arising from foreign exchange trading, following on from regulatory settlements and class actions in the United States, United Kingdom and European Union.

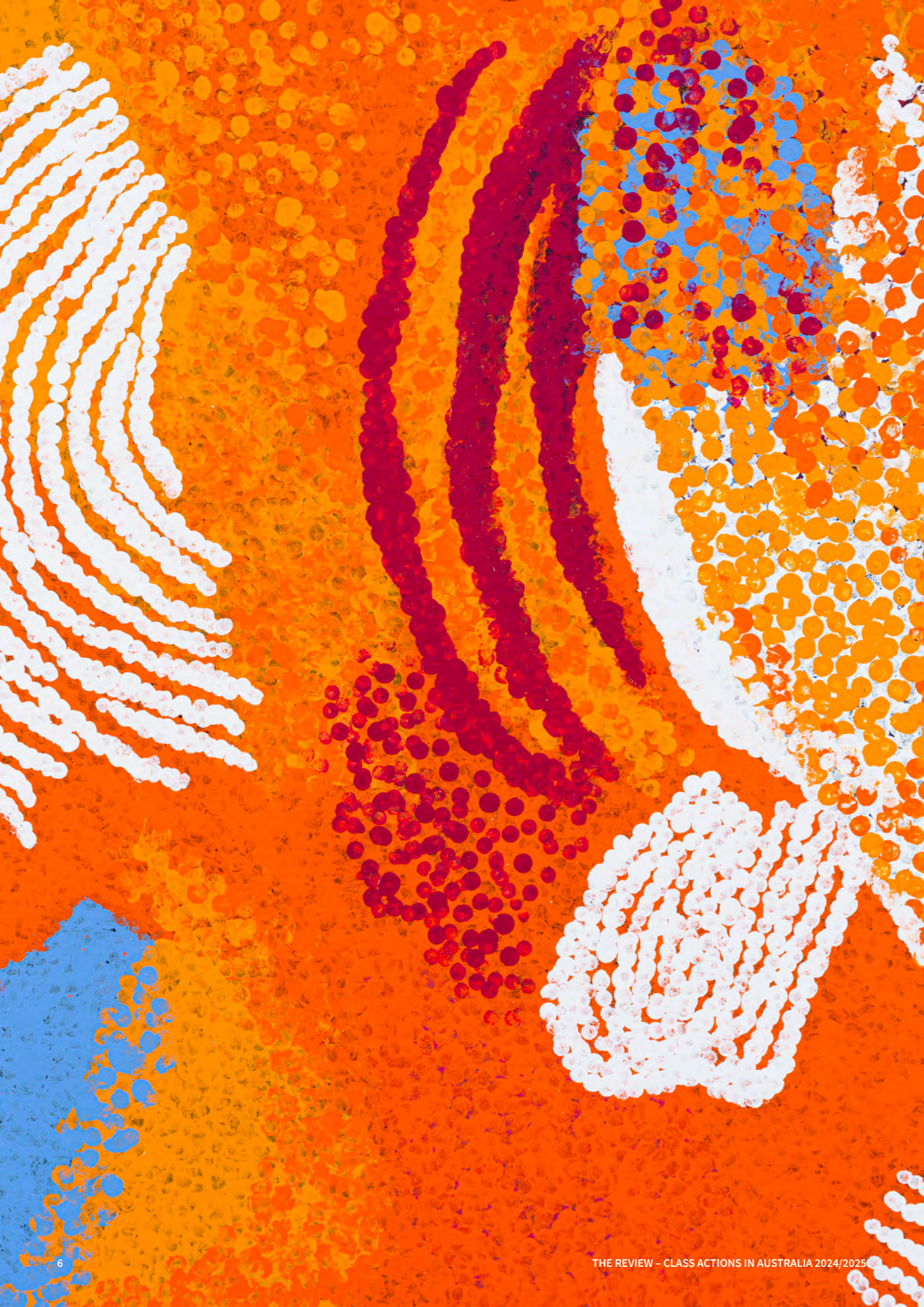
United Petroleum: defending class action proceedings alleging breaches of contract and consumer laws arising from franchise and commission agent arrangements.



PRIVACY

Medibank: defending 2 class actions in relation to all aspects of its response to a cybercrime incident in which a malicious threat actor stole and released information on the dark web concerning current and former Medibank customers.

Latitude Financial Services: on a first-of-its-kind joint investigation commenced by the OAIC and the New Zealand Privacy Commissioner (OPC) arising from a cyber-attack (with a representative complaint lodged and accepted by the OAIC). The resultant data breach is one of the biggest to ever impact an Australian company.



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July 2024 – June 2025

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INTRODUCTION

Welcome to The Review – Class Actions in Australia 2024/2025, in which we consider significant judgments, events and developments between 1 July 2024 and 30 June 2025.

We've been looking back at our dog-eared copy of last year's [The Review](#). At that time, there were several key matters that were the subject of an appeal or in which judgment had been reserved. Good things come to those who wait, and in the past year we've been rewarded with several seminal class action judgments. These include 5 judgments of the High Court and a decision from the Full Federal Court in a long-running shareholder class action.

Setting the scene at a very high level, the High Court weighed in on both procedural and substantive issues:

- In *Lendlease*, the High Court unanimously held that the NSW Supreme Court *does have* the power to order that a notice be issued to class action group members regarding a party's intention to seek a form of 'class closure' order upon any settlement approval hearing. The decision aligns the position in NSW with that of the Federal Court, which had previously held that it has power to make such orders. See our earlier Insight [here](#).¹
- In *Toyota and Ford*, the High Court considered how to quantify so-called 'reduction in value' damages under the Australian Consumer Law in circumstances where attempts are made by a manufacturer to repair defective goods. The Court found that the assessment of damages is to be undertaken having regard to all that is known at the time of trial about the 'state and condition of the goods' at the time of their supply, which includes the effectiveness, cost, inconvenience and timing of any repair of a defect in the goods. [See Loss in mass tort cases](#) section of The Review.
- In *Arrium*, the majority held that a group costs order (GCO) made by the Victorian Supreme Court would have no force if the proceeding were transferred to the NSW Supreme Court. The fact of the GCO, and the considerable risk that the proceeding would not continue in NSW without the benefit of it, were factors weighing decisively in favour of the Court's decision that the proceeding not be transferred. See our earlier Insight [here](#).²
- In *Shattercane*, the class action brought on behalf of sorghum farmers whose crops were contaminated with shattercane, the High Court held that the producer of the sorghum seed did not owe the farmers a duty to take reasonable care in its sorghum seed production process to avoid the risk that the farmers would sustain pure economic loss by reason of a hidden defect in the seed (ie shattercane contamination). See our earlier Insight [here](#).³
- In *R&B Investments* (in which judgment was delivered just after the review period), the High Court unanimously overturned the Full Federal Court as to whether the Federal Court has the power to approve the distribution of a sum, calculated as a percentage of the sum recovered at settlement or judgment, in favour of a law practice conducting the class action (commonly known as a 'solicitors' common fund order'). The High Court held that the Federal Court has no power to make a solicitors' common fund order as to do so would give effect to an agreement entered into contrary to the prohibition on contingency fees. See our earlier Insight [here](#).⁴

Turning to shareholder class actions, the Full Federal Court handed down its decision in *Zonia*, a shareholder class action alleging that the Commonwealth Bank of Australia (CBA) had breached its continuous disclosure obligations concerning its compliance with anti-money laundering and counter-terrorism laws. While the Full Court found that CBA contravened the continuous disclosure regime by failing to disclose certain matters, it also found that the appellants had failed to prove any loss. The appellants have sought special leave to appeal to the High Court. See [Securities](#) section of The Review, on the current state of play of 'constructive awareness' in the age of technology.

Outside of the key decisions above, class action practice continues apace. A record \$1.9b in settlement funds were approved and a further \$1.5b is either awaiting approval or was approved following the review period. Seven settlements in the review period were for more than \$100m.

The editors hope that you find this report informative,

ELEANOR ATKINS

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The increased sophistication of relevant protagonists is evident in the choices being made as between funding models and forums. For the first time, actions were filed in all 6 jurisdictions with a class actions regime, however:

- the Federal Court of Australia continues to be the forum of choice, and
- the Victorian Supreme Court was the jurisdiction with the second highest number of actions filed. The GCO regime that is unique to that Court is maturing and remains the only jurisdiction in which an arrangement akin to a contingency fee arrangement is available.

Within the review period, the first GCOs were approved at settlement with the GCO percentages undisturbed. Just outside of the review period, the Victorian Supreme Court — for the first time — reduced a GCO percentage at settlement based on matters including the return on investment to the legal practice.

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¹ KWM Insight [It's a question of power: High Court registers approval of notices of potential class closure](#) 8 May 2025.

² KWM Insight [Have GCO, won't travel: Group costs orders in class actions](#) 17 March 2025.

³ KWM Insight [You reap what you sow: High Court decides *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* \[2024\] HCA 25](#) 14 August 2024.

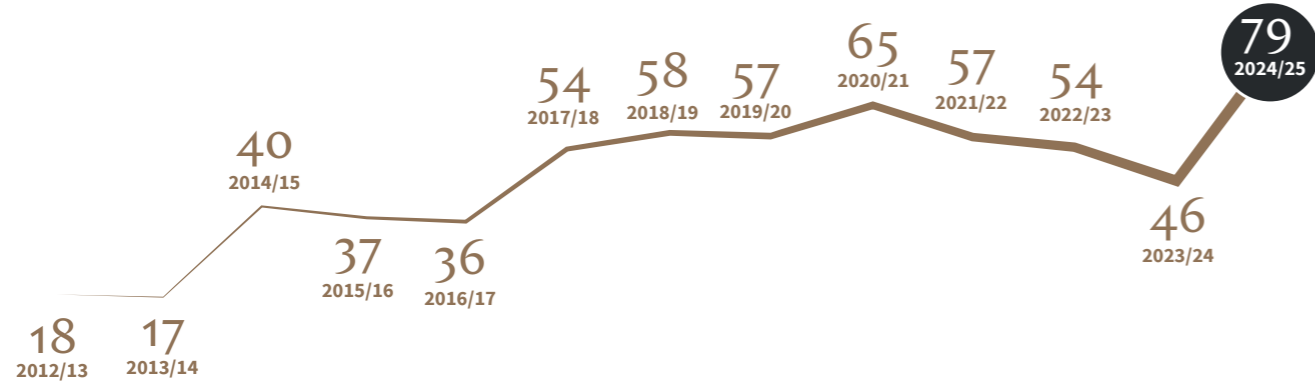
⁴ KWM Insight [Contingency fees for Victoria only: High Court confirms Federal Court has no power to allow solicitors to take a cut of a class action settlement or judgment](#) 7 August 2025.

HEADLINES

WHAT'S NEW?

The year to 30 June 2025 has been a record year with **at least 79 new class actions filed**; however, this apparent spike was due to 19 related employment class actions filed in March against various Health Services (see [Employment](#) section of The Review). The **total (excluding the employment matters) was otherwise consistent with totals we have seen since 2017/2018**, after a fall last review period.

Class actions filed



TYPES OF CLAIMS

The review period saw an uptick in most categories of class actions, with the only decline in financial products class actions (1, down from 10 in 2023/2024).

Class actions filed in the review period included the following claim types:

- **Consumer:** aged care; extended warranties; motor vehicle performance; cold and flu medication; talcum powder; breast implants; joint replacement devices; polybutylene pipe products; residential property development; travel credits; supermarket pricing; insurance pricing and products; live sports betting.
- **Competition:** adtech supply chain.
- **Against the State:** racial discrimination; suitability of land for residential development; foreign stamp duty; COVID quarantine and vaccines.
- **Employment:** doctors' working hours; wage underpayments; sexual discrimination.
- **Environmental:** PFAS contamination.
- **Securities:** iSignthis; Paladin Energy; Mineral Resources; Evolution Mining; WiseTech; Phoslock; Domino's.

Types of claims



28

Consumer



13

Government liability



25

Employment



8

Securities



2

Competition



1

Environmental

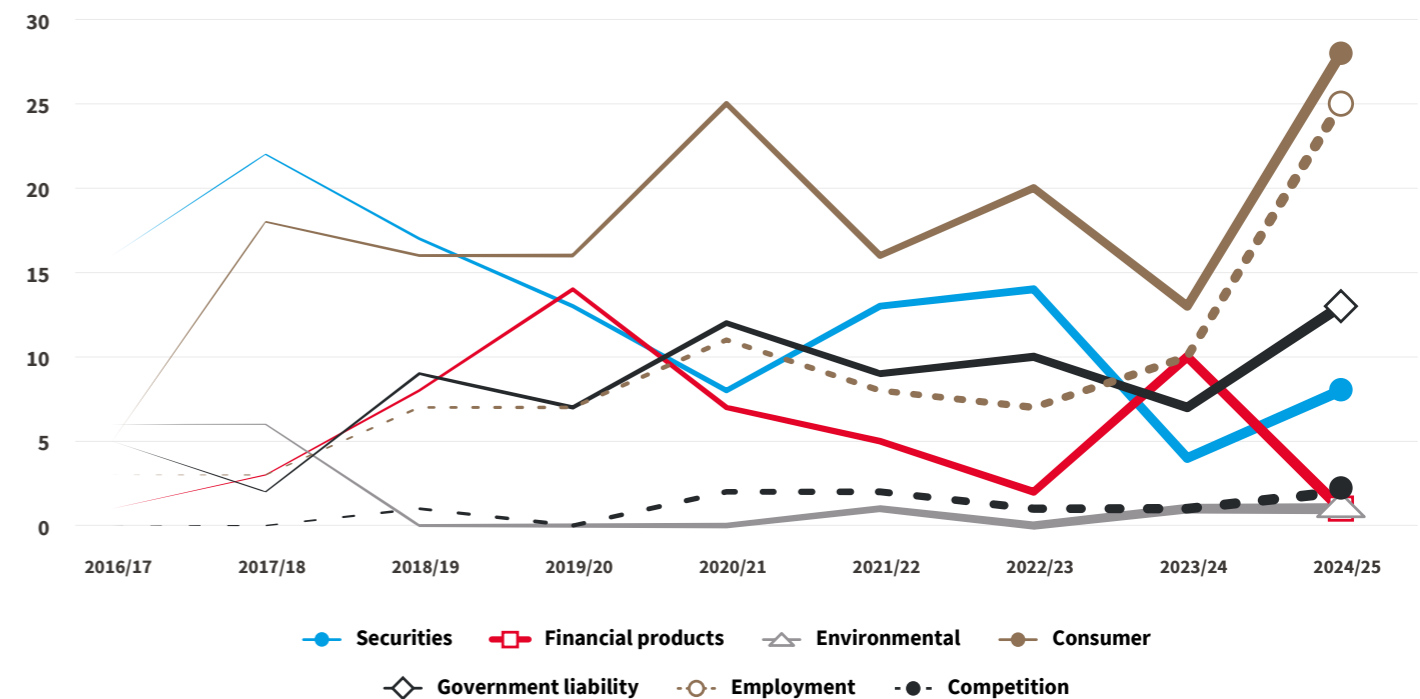


1

Financial products

Consumer claims continue to be the leading category of class actions with 28 new actions filed, a new record (up from the 25 filed in 2020/2021).

Types of claims - trend

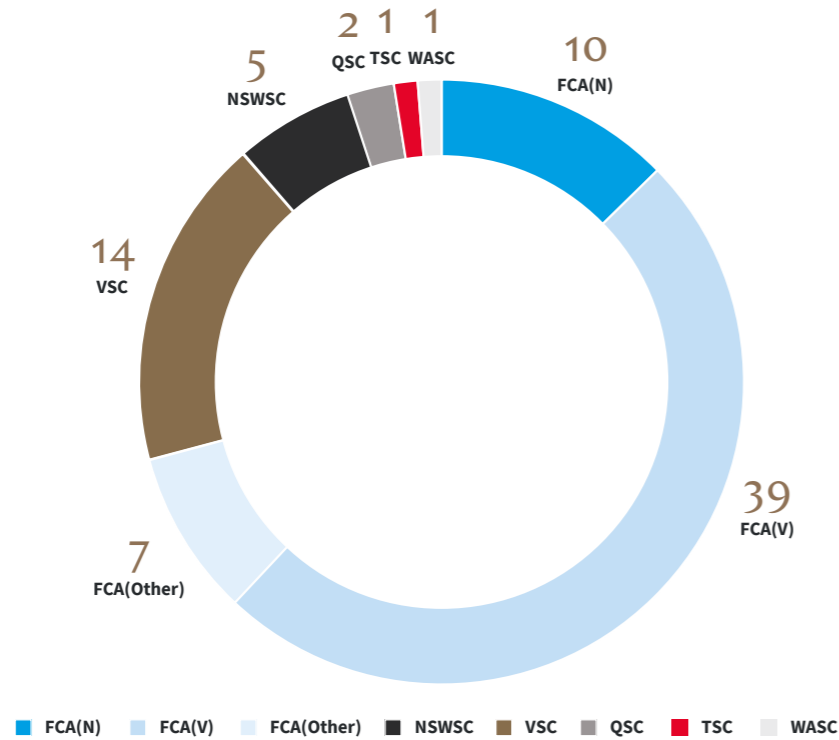


JURISDICTIONAL PREFERENCES

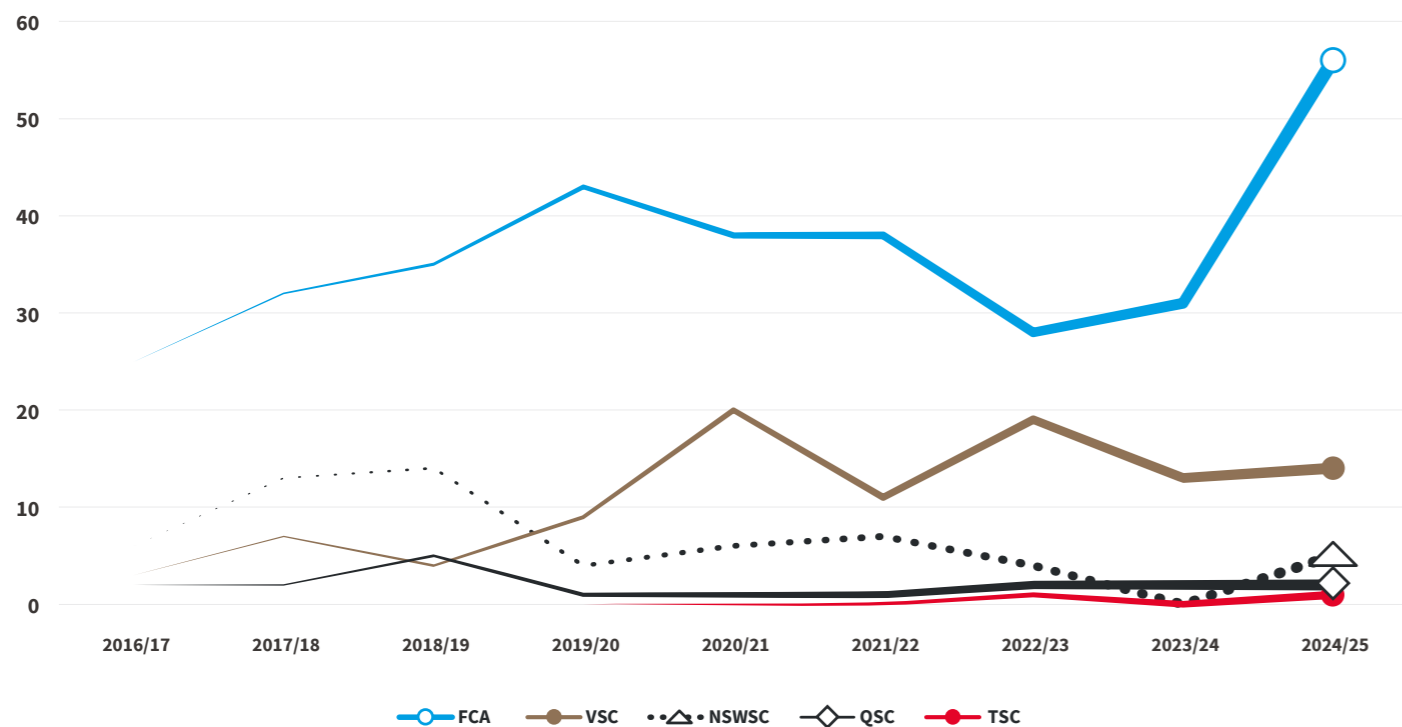
For the first time, we saw a class action filed in each of the 6 jurisdictions with a class actions regime. The Federal Court and the Victorian Supreme Court were the leading jurisdictions with new actions filed:

- 56 in the Federal Court (up from 31 in 2023/2024)
- 14 in the Victorian Supreme Court (up from 13 in 2023/2024).

Actions filed by court



Actions filed by jurisdiction - trend



THE PLAYERS

At least 24 firms filed a new action, including 2 firms that had not previously filed a class action:

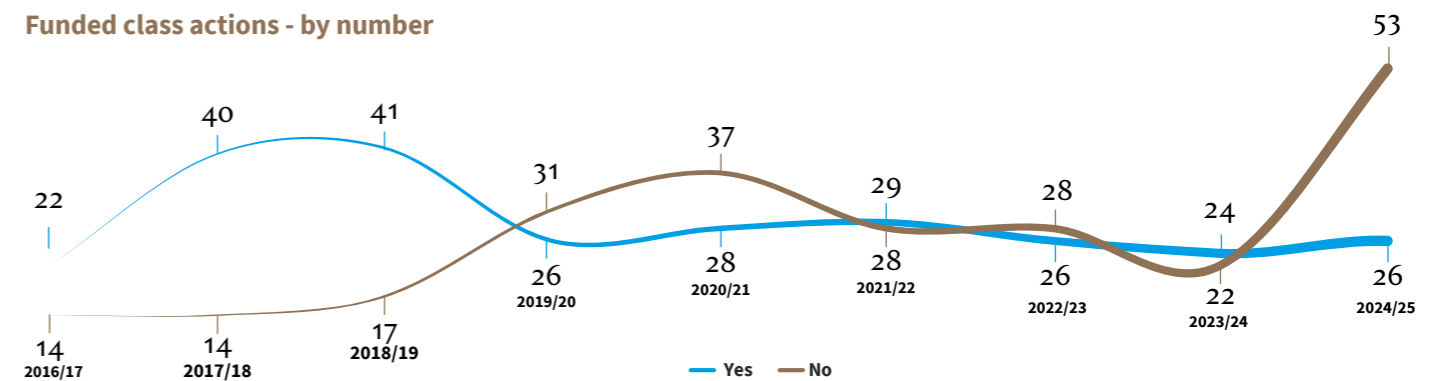
- 7 firms filed actions in the Victorian Supreme Court (down from 11 in 2023/2024)
- 17 firms filed actions in the Federal Court (down from 21 in 2023/2024)
- 5 firms filed actions in both jurisdictions (equal with 2023/2024)

- 5 firms filed 4 or more actions, and 4 firms filed 3 actions each (up from 1 and 3 in 2023/2024).

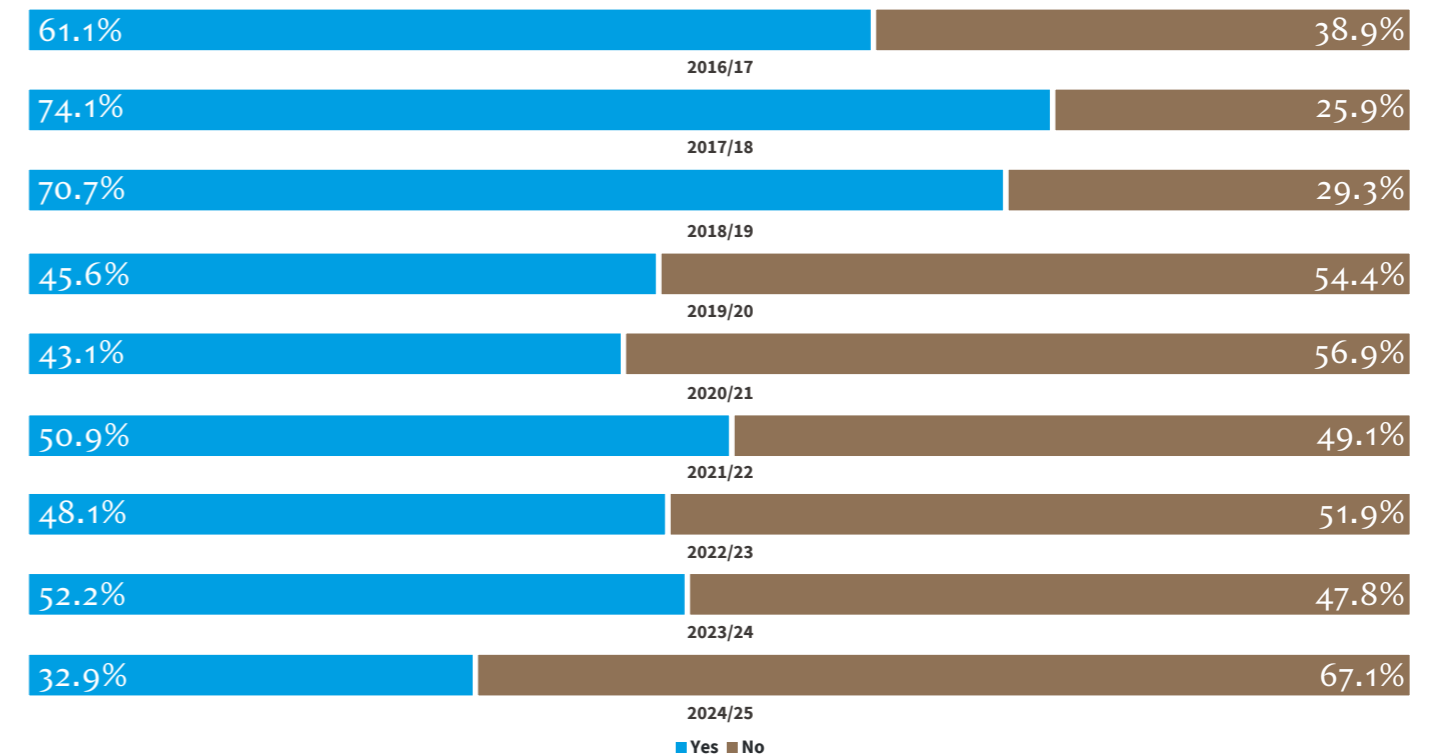
Funders included Omni Bridgeway (6), Woodsford Litigation Funding (4) and CASL (3).

The proportion of new actions involving a litigation funder decreased to 33% (partly due to multiple related unfunded class actions – see [Employment](#) section of The Review), although the number of funded actions remained consistent with the previous 5 years.⁵

Funded class actions - by number



Funded class actions - by %



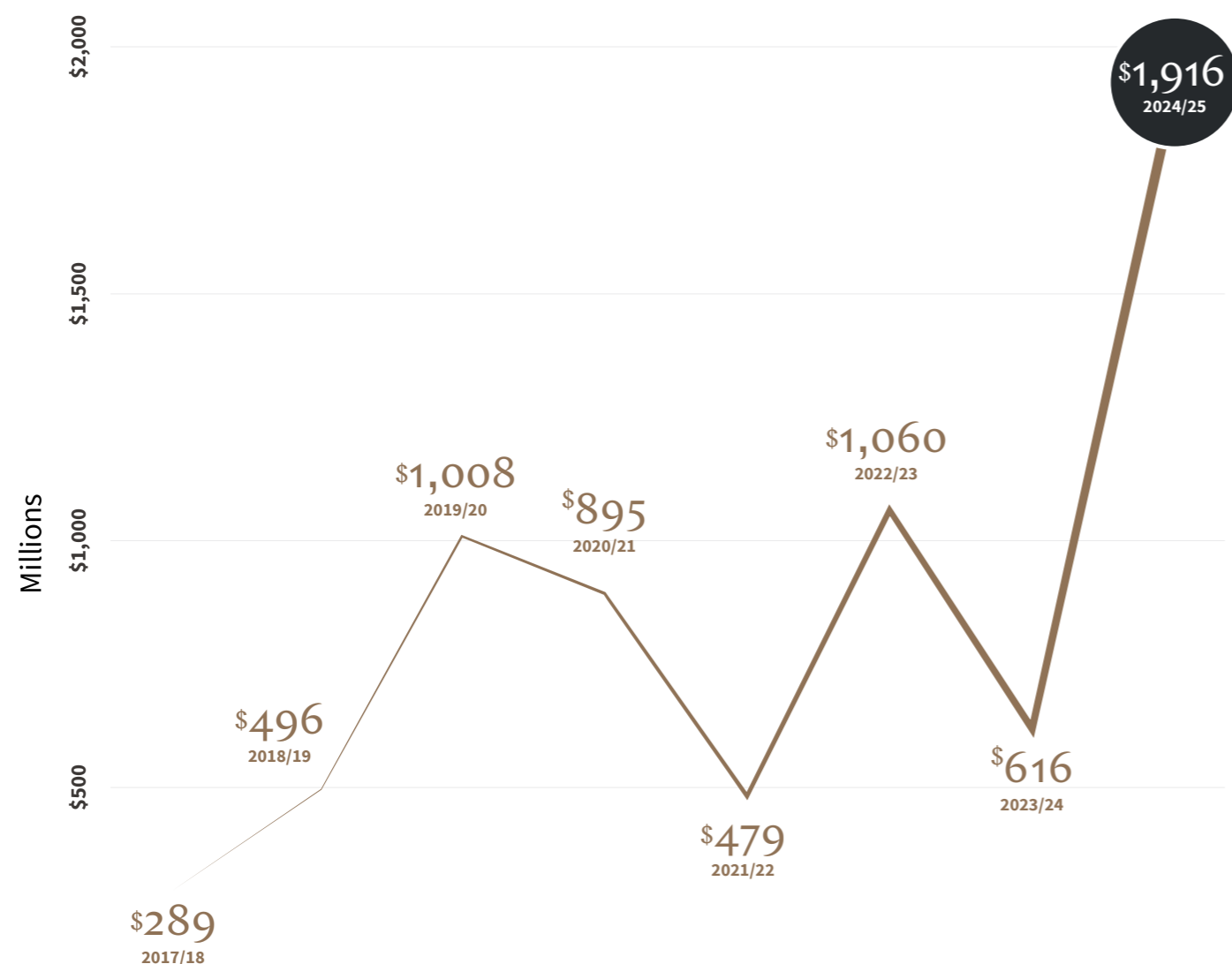
⁵ For the funding statistics in The Review:

- YES refers to publicly available records indicating third-party funding of group member(s)
- NO includes actions conducted on a no win no fee basis, and actions where a GCO is sought (or has been obtained) where there is no funding agreement between group member(s) and a third-party funder.

SETTLEMENTS

At least 30 class action settlements were approved in 2024/2025, representing over \$1.9b in settlement funds – a record, and more than the previous 2 years combined. The review period saw 7 settlements of \$100m or more (out of a total of 20 since 2017/2018).

Approved settlements - trend

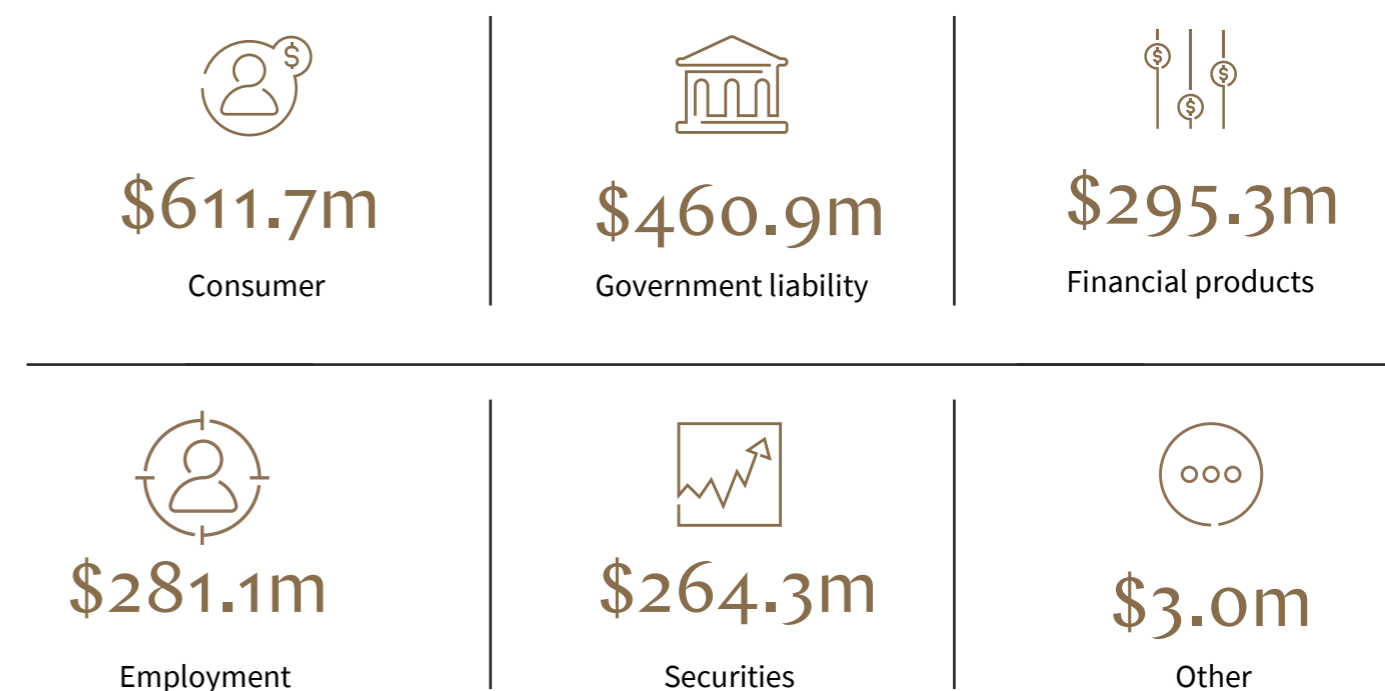


A further \$1.5b in class action settlements await Court approval (or were approved just outside of the review period, which are detailed in the [Outlook section](#) of The Review).

A full list of settlements appears on the following pages.

The review period has also seen a number of class actions filed that reached in principle settlement within a year of commencement. We will be watching to see whether this trend continues next review period.

Approved settlements - types of claims



JUDGMENTS ON LIABILITY AND DAMAGES

More class actions are proceeding to judgment (and appeal) than in past years, including:

- **Securities:** *Zonia* and *Quintis* (see [Securities](#) section of The Review).
- **Financial products:** *Superannuation fees – MLC*; *Linchpin Capital*.
- **Consumer:** *Count Financial*; *Holden dealership*; *Essure contraceptive*; *Ford and Toyota* (see [Loss in mass tort cases](#) section of The Review); *Shattercane contamination*; *Roundup* (see [Health](#) section of The Review).
- **Competition:** *Queensland electricity generators* (see [Consumer](#) section of The Review).
- **Against the State:** *Victorian public housing*; *Sydney Light Rail*.
- **Employment:** *Doctors' working hours*.

CLASS ACTION SETTLEMENTS

JULY 2024 – JUNE 2025

	CLASS ACTION	TYPE	SETTLEMENT SUM (DAMAGES) ⁶	PLAINTIFFS' COSTS	LITIGATION FUNDER % OR \$
1	Aksesstoday Limited	Financial products	\$9,250,000	\$1,840,468.71 + ATE premium	\$2,009,529.39 + \$330,000 bookbuild
2	Super fees – Colonial	Financial products	\$100,000,000	\$7,467,424.41	\$23,111,979.90
3	Doctors' working hours – NSW	Employment	\$229,800,000	\$9,046,028.25	N/A
4	G8 Education	Securities	\$46,500,000	GCO: 27.5% (\$12,787,500)	N/A
5	AMP financial advisers	Consumer	\$100,000,000	\$12,288,738.33 + \$155,000 for contradictor/costs assessor	\$26,578,805.83 commission + \$418,759.96 other reimbursements
6	Retail Food Group	Consumer	\$0 (some existing debts of group members waived)	Parties to bear own costs	\$0 (funder withdrew)
7	Stolen wages (NT)	Government liability	\$202,000,000 (up to \$180,000,000 + \$22,000,000 agreed costs)	(up to \$15,000,000 agreed) \$14,154,489.20 approved (+ up to \$1,000,000 costs assessor agreed) \$250,941.85 approved + ATE premium	20% (of net settlement, being up to \$31,500,000)
8	Ashley Youth Detention Centre	Government liability	\$75,000,000	\$7,950,000 + \$40,480 for costs referee + \$505,000 reserved for the costs of financial counselling and trauma assistance for group members	N/A
9	Stolen wages (WA)	Government liability	\$180,400,000 (up to \$165,000,000 + \$15,400,000 agreed costs)	\$27,501,618, + \$250,000 for costs assessor + ATE premium	16% (\$25,564,000)
10	Labour hire: Merivale	Employment	\$19,250,000	\$3,080,733	22.3% of Net Claim Proceeds (Settlement Sum - Project Costs) (\$3,721,115.37) + \$314,711.68 costs of MIS and other expenses
11	Uber – Taxi Industry Compensation x 4	Consumer	\$271,800,000	\$38,698,628.81	30% (\$81,540,000)
12	Mesoblast	Securities	\$26,500,000	\$8,051,050.57 + \$11,000 for costs referee	29% (of net settlement, \$5,930,290.25)
13	Doctors' working hours – ACT (Calvary Health Care)	Employment	\$31,500,000	\$2,860,000	N/A

⁶ Gross settlement including plaintiffs' legal costs, group member reimbursements, funder amounts and administration costs unless noted otherwise.

	CLASS ACTION	TYPE	SETTLEMENT SUM (DAMAGES) ⁶	PLAINTIFFS' COSTS	LITIGATION FUNDER % OR \$
14	Credit card interest – ANZ	Consumer	\$57,500,000	\$7,105,728.34 + ATE premium	27.50% (of net settlement, \$14,375,726.12) + \$250,839 costs of MIS
15	Mayne Pharma	Securities	\$38,000,000	\$6,032,291.13	25.70% (\$9,769,554.61)
16	Monash IVF	Consumer	\$56,000,000	\$10,608,800.04	N/A
17	Palm Island reports	Human rights	\$3,000,000	\$670,000	28% of funded group members
18	P&O Pacific Aria	Consumer	\$2,416,000	\$1,000,000	N/A
19	Walton Construction collapse	Consumer	\$20,000,000	\$9,675,000 (total costs and funder commission)	\$9,675,000 (total costs and funder commission)
20	Labour hire: Stellar Personnel	Employment	\$545,000	\$150,000	\$50,000
21	Audits re Melissa Caddick	Financial products	\$3,545,000	\$999,847.18 + ATE premium	\$492,952.82
22	Add-On Car Insurance (Allianz)	Consumer	\$170,000,000	GCO: 25% (\$42,500,000)	Covered by GCO
23	CIMIC	Securities	\$45,250,000	\$19,656,062.34 + \$30,000 for costs referee	Approximately \$6,663,189.82 (reduced to ensure group members receive 50%)
24	Linchpin Capital	Financial products	\$16,917,778	At least \$2,345,632.79 + \$230,077.73 agent fees + ATE premiums	\$4,445,535.21
25	Super fees – MLC	Financial products	\$64,250,000	\$19,459,028	N/A
26	Cryptocurrency – Qoin	Financial products	4.3M Qoin Tokens	No orders as to costs	40%
27	Clydesdale development	Consumer	Not disclosed	\$1,600,000	N/A
28	Future Estate Development Opportunity Fund	Financial products	\$1,300,000	\$784,970	\$161,250 (group members that contributed to costs)
29	Treasury Wine Estates	Securities	\$65,000,000	\$27,083,230.80	N/A
30	Noumi (formerly Freedom Foods)	Securities	\$43,000,000	GCO: 22% (\$9,460,000)	Covered by GCO
31	Add-On Car Insurance (AAI)	Consumer	\$34,000,000	GCO: 25% (\$8,500,000)	Covered by GCO

⁶ Gross settlement including plaintiffs' legal costs, group member reimbursements, funder amounts and administration costs unless noted otherwise.

COMPETING SYSTEMS OF REDRESS

In recent years, a number of proceedings have highlighted the options for redress which exist for group members beyond the traditional class action. Alternative mechanisms include internal and external dispute resolution mechanisms, such as remediation schemes and AFCA complaints, along with bespoke statutory actions, including through the Fair Work Commission and Office of the Australian Information Commissioner (OAIC). These competing systems of redress offer multiple pathways for the efficient and fair determination of claims. However, they also bring a risk of multiplicity and an oversaturation of compensatory choice where they exist alongside a concurrent class action. This raises the question of how the class action regime may need to adapt to these alternatives to ensure it continues to uphold the objectives of access to justice, efficiency and fairness.

THE LOW BAR FOR COMMENCING CLASS ACTIONS

As noted in the [Loss in mass tort cases](#) section of The Review, class actions in Australia have a low barrier to entry, with threshold requirements that are ‘deliberately undemanding’ and interpreted broadly to operate in favour of the commencement of a class action. The common issue uniting class members need only be more than trivial and ‘of weight and significance’ – it does not need to be a ‘major’ issue.

In contrast with regimes in the United States, Canada and the United Kingdom, where a plaintiff must obtain certification to commence a class action, such a hurdle was rejected by the Australian Law Reform Commission in its seminal 1988 report on Grouped Proceedings in the Federal Court on the basis that:

‘[certification] expenses are wasteful and would discourage use of the [class action] procedure. There is no need to go to the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure at any time.’⁷

DECLASSING APPLICATIONS

From a respondent’s perspective, the significant benefit of the class action regime can be promoting ‘efficiency in dealing with multiple claims so as to avoid multiple proceedings, inconsistent findings and respondents being unnecessarily vexed’.⁸

However, when faced with a class action when alternative forms of redress may be more appropriate or already underway, a respondent might wish to consider a declassing application, available through s33N of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) (and cognate provisions). Under that section, the Court has discretion to order that a proceeding no longer continue as a class action ‘if it is satisfied that it is in the interests of justice to do so’, due to matters of cost, efficiency or inappropriateness, or because ‘all the relief sought can be obtained by means of a proceeding other than a representative proceeding’.

The making of a declassing order is a discretionary decision involving a degree of subjectivity, having regard to the interests of justice, including considerations of the ‘principal objects of the class action procedure’: (a) to promote the efficient use of court time and the parties’ resources, (b) to provide a remedy for persons who may not have the funds to bring a separate action and (c) to protect respondents from multiple suits and the risk of inconsistent findings.⁹ The exercise ‘invites a comparison between the pursuit of the group members’ claims’ and their pursuit in hypothetical, non-representative proceedings.¹⁰

To succeed, a respondent must satisfy the Court that it is in the interests of justice that the proceeding no longer continue as a class action because of the presence of one or more of the conditions in s33N. The general principles applicable to declassing applications were recently reaffirmed in *Waller Legal*, in which Gorton J accepted that declassing was in the interests of justice as the class action ‘would not provide an efficient and effective means of dealing with’ the group members’ claims.¹¹ In that case, the respondent successfully argued that each group member’s case was ‘factually discrete’ such that a class action would ‘not ... appreciably shorten the process of evaluating each group member’s claim or lead to savings of any real significance’. His Honour supported the view that ‘imbalance between common and individual issues’ justified a declassing order.

While the reference in s33N to the ability to obtain relief ‘by means of a proceeding other than a group proceeding’ directs attention to another ‘proceeding’ (defined federally to be a proceeding ‘in a court’, and similarly in the States), considerations of efficiency may equally be capable of taking non-curial processes into account. This may particularly be the case following an initial trial of common issues, where remaining issues are predominantly individual and the efficiency inherent to the determination of common issues is spent.

Such was the case in *Cody Gemtec*,¹² in which actions against insurers arising from COVID-19 era business disruption were declassified, with Lee J concluding: ‘Although in each case I think a class action with a speedy initial trial leading promptly to a Court supervised assessment process would have been more efficient (and fairer) if adopted at the outset, the well-advanced private assessment processes have now become a more efficient mechanism of dealing with the residuum of issues left following the test cases’.

The private assessment processes in question were the internal dispute resolution procedures implemented by the respondent insurers. His Honour found that while those processes would not involve the same degree of judicial supervision as a Court-appointed referee process, ‘there is nothing on the evidence for me to conclude that the process will not be conducted bona fide and there are some measures of review protection for the insureds if they are dissatisfied with an initial determination’.

Justice Lee briefly considered the consequences for those standing behind the action, stating ‘although those promoting the class actions will no doubt experience some loss by reason of the declassing, that is an inevitable consequence of the vicissitudes of class action litigation’, and observing that ‘there is a potential cost benefit in participating in the private claim process for group members (in that outgoings will not be required to be deducted from any amount recovered to reflect the costs associated with maintaining the claim through the class action)’. That is, the fact that lawyers (and funders) will not “clip the ticket” of the private claim process results in a potential cost benefit to group members.

While the legal fees and funding commissions associated with class actions may suggest that respondent-driven private determination processes may ultimately leave claimants better off, consideration also must be given to the likely quantum recoverable and the nature of the process involved.

⁷ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, December 1988) at 63 [146].

⁸ *Stack v AMP Financial Planning Pty Limited (No 2)* (2021) 401 ALR 113; [2021] FCA 1479 at [16].

⁹ *Bright v Femcare Ltd* (2002) 195 ALR 574; [2002] FCAFC 243 at [152]-[155].

¹⁰ *Beecham Motors Pty Ltd v General Motors Holden Australia NSC Pty Ltd* [2021] VSC 855 at [14]-[15].

¹¹ *Jones (A Pseudonym) v Waller Legal Pty Ltd* [2025] VSC 42 at [48].

¹² *Cody Gemtec Retail Pty Ltd v Underwriting Members of Syndicate 2003 at Lloyd’s (Declassing Application)* [2024] FCA 1098.

MULTIPLICITY OF ALTERNATIVES

While *Cody Gemtec* involved an internal dispute resolution process to resolve individual claims, alternative redress can come in many shapes and forms, including:

- dispute resolution through AFCA in respect of claims the subject of financial services class actions, which is sometimes pursued by claimants with the assistance of claims aggregators operating parallel quasi-representative actions
- parallel actions under the *Fair Work Act 2009* (Cth) in respect of claims the subject of employment class actions (see [Employment](#) section of The Review)
- individual consumer actions before State tribunals. In *Scenic Tours*,¹³ the NSW Court of Appeal referred to the 2014 resolution by the NSW Civil and Administrative Tribunal of the claims of 2 cruise passengers, observing that '[b]y contrast, these proceedings have still not been finalised more than five years after the various cruises concluded their ill-starred journeys'. A final settlement was not approved by the Court until 2023,¹⁴ following orders for the determination of individual claims by Court-appointed referees¹⁵
- the representative complaint procedure under the *Privacy Act 1988* (Cth) (**Privacy Act**), under which a person may bring a privacy complaint to the OAIC on behalf of class members. Such a complaint is currently on foot against *Medibank* in parallel with a class action in the Federal Court (see [Privacy](#) section of The Review)

- regulatory enforcement actions, including:
 - compensation orders sought by regulators. In 1998, 2 ACCC-led class actions were the subject of successful declassing applications on the basis that the ACCC could instead seek compensation orders¹⁶
 - enforceable undertakings provided to ASIC. In 2006, Multiplex provided an enforceable undertaking to ASIC to compensate shareholders in the amount of \$32m, shutting out those who took up the compensation from participating in the subsequent class action
- other internal remediation processes. For instance, in the course of considering the proposed \$5m settlement of the *Tyro Payments* class action, the Court referred to the remediation which Tyro had '*sensibly and appropriately offered from early on*'.¹⁷

These alternatives may offer advantages to claimants over class actions, including that:

- they may be more tailored to the particular legal framework or factual matrix applicable to the claim
- they may lead to quicker resolution of claims
- they may be able to avoid both the myriad interlocutory disputes arising in class actions, and the legal complexity arising in fully litigated claims, and
- they may not require substantial commissions to be paid to funders or plaintiff law firms.

While the evidence necessary in a declassing application will ultimately '*vary greatly, depending on the facts and the form*' of the action,¹⁸ a respondent pointing to an alternative redress scheme might consider these advantages, and, in keeping with the matters considered in *Cody Gemtec*, provide evidence that any alternative process will be conducted bona fide and provide claimants with adequate protections and rights of review. In particular, any respondent relying on an internal dispute resolution or remediation process may benefit from establishing the process with these factors in mind.

While an economic incentive may continue to exist for an enterprising law firm or funder to pursue a class action, in circumstances where alternatives holding discernible advantages exist, the question arises as to whether the interests of justice favour the continuation of the parallel court action?

Section 33N is one avenue through which that question may be answered.

The preferencing of non-curial alternatives in *Cody Gemtec* represents a positive development in taking account of the range of redress options available to claimants. It should not be assumed that class action regimes possess a statutory monopoly to which claimants and respondents must invariably be subject.

BRIEF UPDATE ON MULTIPLICITY

While the decision in *Cody Gemtec* drew attention to alternative means for claimants to obtain redress, the Courts continue to deal with a host of multiplicity and carriage disputes between competing class actions. There were 4 sets of proceedings which were consolidated in the review period, with key takeaways being:

- where plaintiff firms run consolidated actions together, there is a real prospect that the Court will appoint an independent costs referee to monitor cost effectiveness and avoid duplication of work¹⁹
- in determining how an action should proceed, the Court will take into account the track record of cooperation between plaintiff firms. Cooperation and competition between firms should not be seen as a binary and can exist simultaneously²⁰
- cheaper funding models (eg such as one firm's lower percentage under a GCO) are a relevant but not determinative factor in carriage contests between plaintiff firms, with factors such as relevant experience and funding security holding weight²¹

- a common defendant is sufficient for consolidation, even where not all defendants in the competing actions are the same²²

- the Court will place significant weight on the originality and quality of the legal work undertaken by competing firms, and will take a dim view of a copy-paste approach without intellectual input, and²³

- the Court's decision in a multiplicity dispute is discretionary. An appellate Court will not simply apply the 'correctness standard' but will consider whether *House v The King* error has been demonstrated.²⁴

¹³ *Scenic Tours Pty Ltd v Moore* (2018) 361 ALR 456; [2018] NSWCA 238.

¹⁴ *Moore v Scenic Tours Pty Ltd* (No. 6) [2023] NSWSC 948.

¹⁵ *Moore v Scenic Tours Pty Ltd* (No. 5) [2023] NSWSC 392.

¹⁶ *Australian Competition & Consumer Commission v Giraffe World Australia Pty Ltd* (1998) 84 FCR 512; [1998] FCA 819; *Australian Competition and Consumer Commission (ACCC) v Internic Technology Pty Ltd* (1998) 42 IPR 225; [1998] FCA 818.

¹⁷ *Spozac Pty Ltd as trustee for the LDB Family Trust t/as Not Just Cakes v Tyro Payments Ltd* [2023] FCA 590 at [19].

¹⁸ *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200 at [130].

¹⁹ *Bain v International Capital Markets Pty Ltd (No 2)* [2024] FCA 847; *Singh v Harvey Norman Holdings Ltd; Douglas v Harvey Norman Holdings Ltd* [2025] VSC 290.

²⁰ *Kajula Pty Ltd v Downer EDI Ltd* [2024] VSCA 236 (**Downer**).

²¹ *Vingrys v International Capital Markets Pty Ltd & Ors* [2024] VSC 455; *Bain v International Capital Markets Pty Ltd (No 2)* [2024] FCA 847 (**IC Markets**).

²² *Inglis v Insurance Australia Limited* [2025] VSC 91; *Dawson v Insurance Australia Limited* [2025] VSC 92.

²³ *IC Markets*.

²⁴ *Downer*.

NEW AVENUES, NEW EXPOSURES: THE EVOLUTION OF PRIVACY CLASS ACTIONS

Representative proceedings for alleged interferences with privacy (**Privacy Class Actions**) have recently emerged as an opportunity for class action proponents, particularly following high-profile cyber incidents (eg *Optus* and *Medibank*). They are attractive to plaintiff law firms and litigation funders given: large class sizes (often in the millions), easily identified group members (identified through the respondents' mandatory notification obligations), and elevated public awareness making it easier to register large numbers of individuals.

Until legislative amendments introduced in the review period, there was no clear direct cause of action for breaches of privacy. To date, groups of impacted individuals have typically sought relief using the 'representative complaint' mechanism under the Privacy Act which allows for group compensation claims to be made directly to (and determined by) the OAIC for breaches of the Australian Privacy Principles (**APPs**). In some cases, different firms have filed a class action proceeding with the Court and a representative complaint with the OAIC on behalf of the same class in respect of the same data breach.

The appetite and urgency for a remedy accessible by consumers is underscored by the OAIC's latest statistics. In 2024, a record 1,113 data breaches were reported, representing a 25% increase from 893 notifications in 2023. Malicious and criminal attacks remain the main source of breaches, accounting for 69% of notifications in the second half of the year, with 61% of those being cyber security incidents. Health service providers and the Australian Government were the most affected sectors, together accounting for 37% of all breaches. The OAIC's report highlights the increasing risks to Australians' privacy and the need for organisations and agencies to step up privacy and security measures, as well as to ensure timely breach notifications.

Recent reforms to the Privacy Act have potentially shifted the landscape by introducing both:

- a **direct cause of action** for breach of privacy (the new statutory tort for serious invasions of privacy), and
- an avenue for **individuals to claim compensation from the Court** where the Australian Information Commissioner (**AIC**) is seeking a civil penalty against the entity for breach of the APPs (the new s80UA).

While the impact of these reforms is uncertain, we take a look at the possible future implications for Privacy Class Actions – and in particular, the following key questions facing applicants:

- **Federal Court v the OAIC:** which will emerge as the forum of choice?
- **Statutory tort v s80UA:** which avenue to compensation will prove more fruitful?

EXISTING LANDSCAPE

Historically, claimants faced a choice between 2 forums.

01

CLASS ACTION PROCEEDINGS IN COURT

- No right to sue for breach of APPs, or any other direct cause of action
- 'Roundabout' causes of action instead: breach of contract, misleading and deceptive conduct, breach of confidence, negligence
- Uncertain entitlement to damages for non-economic loss

02

REPRESENTATIVE COMPLAINT TO THE OAIC

- Only question on liability is breach of the APPs
- Statutory ability to award compensation for non-economic loss, including for injury to feelings and humiliation
- OAIC determination is not binding and requires a fresh hearing (*de novo*) in the Federal Court to enforce
- Uncertain entitlement to legal costs for law firms/funders

In both the *Medibank* and *Optus* examples, the respondents are presently facing class actions in the Federal Court *and* a representative complaint before the OAIC, in addition to civil penalty proceedings brought by the OAIC (and, in the case of *Optus*, the Australian Communications and Media Authority (**ACMA**)).



THE PRIVACY ACT REFORMS

Passed on 29 November 2024 (and effective from 10 June 2025), the *Privacy and Other Legislation Amendment Act 2024* (Cth) introduced 2 important reforms:

STATUTORY TORT (SCH 2)	SECTION 80UA
<p>Under the direct right of action, plaintiffs must prove:</p> <ul style="list-style-type: none"> a serious invasion of privacy by intrusion upon seclusion or misuse of personal information a reasonable expectation of privacy in the circumstances the invasion was intentional or reckless the invasion was serious, and the public interest in protecting privacy outweighs any countervailing interest (eg freedom of expression). <p>Proof of actual damage is not required, but harm may be relevant to ‘seriousness’ and remedies.</p> <p>Remedies include damages (including emotional distress), injunctions, apologies, and others.</p> <p>Exemptions apply to journalists and others (including intelligence and law enforcement).</p>	<p>In a civil penalty proceeding commenced by the AIC, the Court can now make orders:</p> <ul style="list-style-type: none"> that the respondent pay compensation to individuals for loss or damage suffered, or likely to be suffered, because of the contravention, and requiring remedial action or changes to practices. <p>An application for compensation under s80UA can be made by the Commissioner, or an affected individual.</p> <p>An order can be made if the Court <i>has, or will,</i> determine that an entity has contravened a civil penalty provision.</p>

STRATEGIC IMPLICATIONS FOR CLASS ACTION RISK

The reforms made no change to the representative complaint mechanism, which remains available as a pathway for groups of individuals to seek compensation for breaches of the APPs.

The limitations of the pre-existing representative complaint mechanism (opaque processes, non-binding determinations, and lack of clear mechanism to achieve returns on investment) mean that the statutory tort may be preferred where the defendant’s conduct meets the test – but the requirements that the interference be ‘serious’ and result from intentional or reckless conduct by the defendant may limit its viability, particularly in cyber breach cases. It is likely that applicants will continue to plead other causes of action (breaches of contract and confidence, misleading or deceptive conduct, negligence) at least until there is clear authority on the scope of the tort.

The availability of relief under s80UA depends entirely on the AIC seeking a civil penalty (and whether the AIC also applies for compensation orders under s80UA itself, as in *Optus*). For defendants, the new provision may make settling civil penalty proceedings with the AIC more complex, as any admissions leading to the imposition of a civil penalty can be relied upon directly by claimants to enliven compensation claims (including for non-economic loss).

When multiple pathways run in parallel – individual OAIC complaints, representative complaints, class actions under the statutory tort, and OAIC civil penalty proceedings – the interaction between them can create procedural complexity that may affect available remedies, timing, exposure for defendants and *res judicata* considerations. Different limitation periods, evidentiary rules, and liability thresholds apply across the different forums. In this regard, see the [Competing systems of redress](#) section of The Review.

A stark example of this complexity is *Optus*. As a result of the 2022 data breach, Optus is now subject to:

- 3 consumer claims, comprising 2 representative complaints before the OAIC lodged by Johnson Winter Slattery (October 2022) and Maurice Blackburn (April 2023) for breach of the APPs, and a class action in the Federal Court filed by Slater and Gordon (April 2023) claiming, among other things, negligence and breach of contract, and
- 2 civil penalty proceedings filed by the ACMA (in May 2024) and the AIC (in August 2025) for interferences with privacy. The AIC’s claim also includes a claim for consumer compensation under the new s80UA (an avenue not available to the class action claimants at the time of filing).

The Court is now considering the most appropriate way to manage the overlapping allegations, claims and group members across all proceedings involving multiple forums, regulators and causes of action.

CASE STUDY & UPDATE

Background: In March 2020, the OAIC commenced civil penalty proceedings in the Federal Court (NSD 246/2020) over the Cambridge Analytica matter (where Facebook users’ information was disclosed to third parties and risked being used for political profiling purposes), alleging serious or repeated interferences with privacy (s13G) affecting an estimated 311,127 Australian users.

Outcome: On 17 December 2024, the OAIC accepted an enforceable undertaking from Meta under s114 of the *Regulatory Powers (Standard Provisions) Act 2014*, establishing a \$50m payment program for eligible users. The OAIC discontinued the civil penalty proceedings – and the undertaking was accepted on a no-admissions basis and includes independent administration of the scheme.

Why it’s interesting: Resolving the Federal Court proceeding via an enforceable undertaking delivered a compensation pathway without declarations of contravening conduct or the imposition of a civil penalty.

Practice point: For organisations facing overlapping enforcement and litigation risk, early, coordinated engagement with the OAIC can streamline resolution and minimise duplicative proceedings – especially where forward-looking remediation and a pragmatic compensation mechanism can be agreed with the OAIC. A resolution of this kind is likely to be attractive for defendants, particularly now given the risk of a compensation order under s80UA in a civil penalty proceeding – but may be very difficult to achieve now that the regulator has a statutory pathway to achieve both a penalty and compensation.

King & Wood Mallesons acted for Meta Platforms, Inc.

CONTINUOUS DISCLOSURE AND HOW TO NAVIGATE CONSTRUCTIVE AWARENESS IN THE AGE OF TECHNOLOGY

Companies today are grappling with rapidly changing data systems and how these systems intersect with their continuous disclosure obligations. For instance:

- To what extent do the principles of constructive awareness of ‘information’ require data stored in company systems to be considered for the purpose of the continuous disclosure rules?
- What does good corporate governance look like from the perspective of ensuring information stored in data systems is escalated where that is necessary?

This section explores some of the challenges faced by companies against the backdrop of recent continuous disclosure judgments, and sets out some issues that should be considered by all officers of publicly listed companies.

CONTINUOUS DISCLOSURE OBLIGATIONS

Chapter 6CA of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the ASX Listing Rules require publicly listed companies to disclose to the market information the company ‘has’ that is not generally available and which:

- (a) a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the company’s shares,²⁵ or
- (b) the company knows would have a material effect on the price or value of the company’s shares (or is reckless or negligent with respect to whether this is the case).²⁶

Securities class actions in Australia typically seek to recover losses said to be occasioned to group members by reason of a company’s contravention of the continuous disclosure obligations and concomitant misleading or deceptive

conduct. All published judgments have considered the form of the continuous disclosure provisions as they existed before amendments to the Corporations Act in 2021, being only the ‘reasonable person’ expectation in (a) above. For conduct occurring since those amendments, private litigants are now required to establish the higher threshold fault element in (b) above.

Two Full Federal Court decisions considering the continuous disclosure obligations in s674 were handed down during the review period (one of which was in the class action context).²⁷ This section of The Review analyses the current state of play on the question of when a company may be found to ‘have’ information through the principles of constructive awareness, and what this means for companies and company officers.

CONSTRUCTIVE AWARENESS OF INFORMATION

The question of when a company is taken to ‘have’ information turns on whether the company was ‘aware’ of the information.²⁸ A company may become ‘aware’ of information through the *actual* knowledge of an officer or the *constructive* knowledge of an officer who ‘ought reasonably to have come into possession of the information in the course of the performance of their duties as an officer’.²⁹

The extension of the continuous disclosure obligations to information of which an officer is constructively aware is important because, without it, a company could avoid or delay its continuous disclosure obligations by simply failing to report or escalate market sensitive information to its Board or executive management.³⁰

HOW DOES THE CONSTRUCTIVE AWARENESS TEST APPLY IN PRACTICE?

In 2022, the Full Federal Court in *Worley* shed some light on how the constructive awareness test applies in practice. The Full Court held that the continuous disclosure provisions deem a company to have information where:

‘(a) the information in fact existed, (b) reasonable information systems or management procedures ought to have brought the information to the attention of a relevant company officer, and (c) acting reasonably the company officer ought to have discerned the significance of the information’.³¹

The Full Court also held that a company may be aware of, and required to disclose, information in the nature of an *opinion* which a company officer ought reasonably to have formed on the facts known to them, regardless of whether they had in fact formed that opinion.³² In doing so, the Court rejected the argument by *Worley* that where the information requiring disclosure is an opinion, continuous disclosure rules require only the disclosure of opinions actually held by company officers.

The judgment of the Full Court on this point is particularly notable because the Federal Court has not taken a straight path to arrive at this view. In 2015, Perram J expressed the *obiter* view in *Babcock & Brown* that such a scenario was *not* captured by the continuous disclosure obligations and noted that this conclusion was consistent with the ‘*structure of the reasoning*’ employed in the 2009 Western Australian case, *Jubilee Mines NL v Riley*.³³ The reasoning of Perram J was then adopted by Beach J in 2019 in *Myer*, who added that ‘*officers are not required to form an opinion based upon information they know or ought to know of and then disclose that information to the market*’.³⁴ However, Lee J did not agree with the reasoning of Perram J and Beach J respectively in *GetSwift*³⁵ in 2021, and Perram J, sitting on the Full Federal Court in *Worley* the following year, considered that his *obiter* comments years earlier were incorrect.³⁶

Post *Worley*, it is clear that a company may be constructively aware of an opinion which an officer ought reasonably to have formed from known facts. During the review period, the Full Court reiterated this principle in *ANZ*, stating that the information of which an officer ought reasonably to have come into possession ‘*includes opinions the officer ought to have held by reason of facts known to the officer*’.³⁷

One question which remained, however, was how this principle applies in the context of large and complex company information systems today. For instance, where factual data is stored in a company database, in what circumstances will the company be aware of the implications of this data because an officer ought reasonably have formed the opinion as to its significance?

Fortunately, *Zonia* has gone some way to answering this question (noting, however, in September 2025 the appellants sought special leave to appeal to the High Court on questions of causation and loss).

CONSTRUCTIVE AWARENESS OF THE SIGNIFICANCE OF DATA STORED IN COMPANY SYSTEMS

In *Zonia*, the Full Federal Court considered an appeal against the judgment of Yates J dismissing a class action brought by shareholders of CBA on the basis that CBA had breached its continuous disclosure obligations concerning its compliance with anti-money laundering and counter-terrorism laws.

Among other things, the appellants argued that CBA should have been aware that it had failed to submit on time approximately 80% - 95% of threshold transaction reports for transactions of \$10,000 or more that were processed through intelligent deposit machines, because these percentage figures *could* have been calculated from information held in CBA’s data warehouse.

One of the issues raised on appeal was whether the primary judge erred in his finding that CBA was not aware of the percentage figures, for the purposes of its continuous disclosure obligations.

25 Corporations Act s674 and Listing Rule 3.1.

26 Corporations Act s674A.

27 *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited* [2025] FCAFC 63 (Zonia); *Australia and New Zealand Banking Group Limited v Australian Securities and Investments Commission* (2024) 305 FCR 383 (ANZ).

28 *ANZ* at [34] (Lee J, with whom Markovic and Button JJ agreed on ground 1); see also Listing Rules 3.1 and 19.12.

29 *Zonia* at [224] (Murphy, Moshinsky and Button JJ); *ANZ* at [34] (Lee J, with whom Markovic and Button JJ agreed on ground 1); see also Listing Rules 3.1 and 19.12.

30 Part 4.4 of ASX Guidance Note 8.

31 *Crowley v Worley Ltd* (2022) 293 FCR 438 (Worley) at [178] (Jagot and Murphy JJ, with whom Perram J agreed at [1]).

32 *Ibid* at [166]–[182].

33 *Grant-Taylor and Others v Babcock & Brown Ltd (in liq) and Another* (2015) 322 ALR 723 at [156]–[160]. In *Jubilee Mines NL v Riley* (2009) 40 WAR 299, Martin CJ considered the similar issue of whether information that a company ought to have had can extend to ‘*information arising from business decisions*’ that the company has not yet made.

34 *TPT Patrol Pty Ltd (atf Amies Superannuation Fund) v Myer Holdings Ltd* (2019) 293 FCR 29; [2019] FCA 1747 at [1174].

35 *ASIC v GetSwift Ltd (Liability Hearing)* [2021] FCA 1384 at [1082]–[1083].

36 *Worley* at [3]–[4] (Perram J).

37 *ANZ* at [38] (Lee J; Button J at [117] and Markovic J at [2(1)] agreed with Lee J on ground 1).

The Full Court held that CBA was not aware of the percentage figures because, whilst they could be calculated from information stored in CBA's data warehouse, 'those percentage figures are the result of a calculation based on information that no person within the Bank knew'.

In coming to this decision, the Full Court drew out the following relevant principles:³⁸

1. The continuous disclosure regime applies to opinions or inferences that ought to have been formed by a company officer from *known facts*. These facts are confined to those that the officer ought to have come into possession of in the course of their duties as an officer.
2. The Full Court stated in *Worley* that a company is aware of information where 'reasonable information systems or management procedures ought to have brought the information to the attention of a relevant company officer'. It is not a principle of general application that a fact capable of discovery by interrogating a database and then performing calculations constitutes information of which an entity is aware just because it would be 'reasonable' for those enquiries to be made.
3. The continuous disclosure regime does not impose a wide-ranging obligation on listed entities to scrutinise their data just because someone *could* then derive a market-sensitive piece of information from that data. Neither the terms of, nor the policy objectives pursued by, the continuous disclosure regime require disclosure of information constituted by a calculation based on data simply because that data *could be* extracted from a database.
4. Constructive awareness does not extend to unknown facts that are merely capable of discovery through a process of further investigation into their existence, still less to facts that are capable of discovery with the benefit of hindsight.

LEARNINGS FOR COMPANIES AND COMPANY OFFICERS

The Full Court in *Zonia* expressly stated that the dismissal of this ground of appeal should not be misunderstood as suggesting that an entity can never breach its continuous disclosure obligations where the material information is constituted by, or may be drawn from, information on a company's databases. The question of whether there has been such a breach is one which is to be determined in each case against the specific factual circumstances.

So what then are the learnings for companies and company officers? We set out below some matters for companies to consider when approaching the establishment and oversight of data systems.

³⁸ *Zonia* at [269]-[285].

ISSUE	CORPORATE GOVERNANCE CONSIDERATIONS	QUESTIONS TO CONSIDER
Policies and procedures	<p>Officers should assume that their duty of care and diligence extends to ensuring that appropriate systems and processes are put in place to escalate facts that are known within the company from information stored in company databases.</p> <p>This means implementing policies and procedures which are effective to ensure that information known by staff 'that <i>should be</i> escalated to officers <i>is so escalated</i>'.³⁹</p> <p>The company's corporate culture, for which the Board is responsible, should be conducive to personnel following the company's policies and procedures.</p>	<ul style="list-style-type: none"> • Are there effective policies and procedures in place to ensure that information known by staff responsible for particular data systems is escalated to company officers when it should be? • Are staff provided with general training or internal policies regarding the company's disclosure obligations? • Do staff feel comfortable raising matters with supervisors and that policies are not just given lip service?
Reporting and escalation systems	<p>Listed companies should ensure they have robust reporting systems to ensure relevant information is brought to the attention of continuous disclosure committees and ultimately the Board.</p> <p>Given the oversight of data systems will frequently rest with specialist staff, there should be clear reporting lines from these staff to ensure that any facts known to them arising from company data are escalated where necessary to do so.</p>	<ul style="list-style-type: none"> • Are staff provided with opportunities to raise concerns regarding data systems with their superiors, or to present at subject-specific committees where such concerns may be formally raised? • What are the reporting lines between technical staff, or subject-specific committees, and the Board?
Officers' consideration of escalated facts	<ul style="list-style-type: none"> • Officers should turn their minds to the <i>importance</i> of the facts that have been escalated. • This is particularly important given the Full Court's confirmation that a company may be constructively aware of an opinion which an officer ought reasonably to have formed from known facts. 	<ul style="list-style-type: none"> • Do directors and officers understand the company's continuous disclosure obligations and what amounts to 'constructive awareness'? • Does the Board have a culture of asking probing questions – both of themselves and of management? Are potential consequences of known facts being routinely considered?
Auditing	<ul style="list-style-type: none"> • Companies should adopt regular and thorough auditing processes of key data systems to ensure that facts that ought reasonably to have come into the possession of an officer are identified. 	<ul style="list-style-type: none"> • Does the company undertake regular internal and external auditing of its data systems? • How are these audits recorded and reported? • How are the findings of these audits considered for the purposes of identifying facts that may give rise to material information?

³⁹ *Ibid* at [290].

EMPLOYMENT CLASS ACTIONS WORKING OVERTIME

KEY TAKEAWAYS

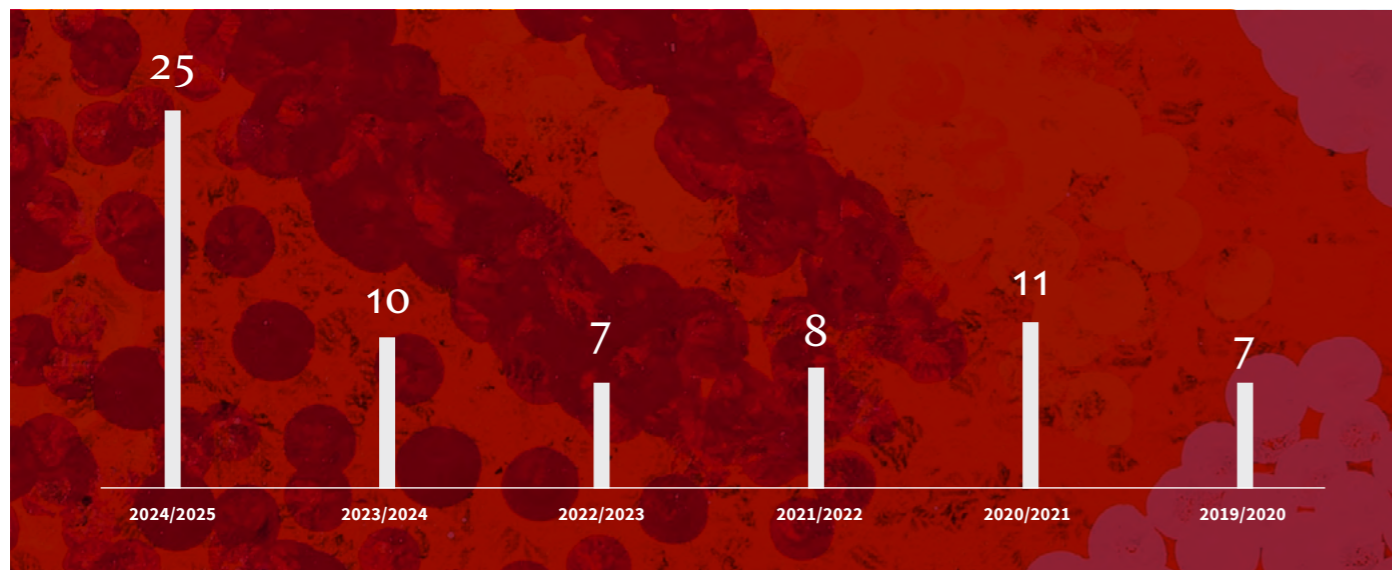
While at first blush there appears to have been a significant rise in the number of employee-related class actions in 2025, 84% of those class actions filed in the review period relate to the working hours of junior doctors in Victoria, and most were filed by the same law firm on the same day. Further, while a number of employee-related class actions settled during the review period with large headline figures, there has not been a relative increase in the entitlements being awarded to individual group members.

Having said that, a recent decision handed down by the Federal Court on 5 September 2025 against Woolworths and Coles may dramatically alter the trajectory of employment-related class actions.

FALSE POSITIVE HIDDEN BEHIND SURGE IN FILINGS

At first glance, there appears to have been a surge in employment class action filings in the review period:

Employment class actions filed



However, 21 of those class actions are related claims filed by the Australian Salaried Medical Officers Federation against various public health service providers in Victoria. These claims are separate but connected, and relate to alleged unpaid, un-rostered overtime worked by junior doctors. Similar claims were also commenced on behalf of junior doctors employed in NSW and the ACT, which have both been settled.

Outside of those claims there are 4 other employee-related class actions during the review period, relating to unpaid overtime in the health and retail sectors, underpayments in the public sector, and 2 claims concerning sexual discrimination in the mining sector.

MANY GROUP MEMBERS GIVE RISE TO HIGH SETTLEMENTS

In the review period, 4 settlements have been reached, ranging in total amounts between \$545,000 and \$229.8m. The parties in the Victorian junior doctors class actions referred to above have also reached an in-principle settlement of \$175m.

Most of these total settlement sums are significantly greater than settlements reached in previous employment class actions. However, the substantial sums appear to be more attributable to the large numbers of group members, rather than increasing levels of individual entitlements.

EMPLOYMENT SETTLEMENTS FROM THE REVIEW PERIOD

CLASS ACTION	SETTLEMENT SUM	GROUP MEMBERS (APPROX)	AVERAGE ENTITLEMENT PER PERSON (APPROX)
Junior doctors - NSW⁴⁰	\$229.8m, inclusive of legal and administrative costs	16,000	\$13,600 The Court noted that approximately 95% of the sum would go to group members, a proportion which is much higher than usual in class actions.
Merivale⁴¹ - a claim for wage underpayments under the <i>Hospitality Industry (General) Award 2010</i>	\$19.25m, inclusive of legal and administrative costs	2,900	\$3,931
Junior doctors - ACT⁴²	\$25.34m, plus \$6.16m in legal and administrative costs (totalling \$31.5m)	1,600	\$15,800
Stellar Personnel⁴³ - a claim by black coal miners engaged as casuals for annual leave entitlements	\$545,000, inclusive of legal and administrative costs	50	\$6,200

40 *Fakhouri v The Secretary for the NSW Ministry of Health (No.2)* [2024] NSWSC 1171.

41 *Boulos v M.R.V.L. Investments Pty Ltd (Settlement Approval)* [2024] FCA 1377.

42 *Tham v Australian Capital Territory* [2024] FCA 1508.

43 *Kelehear v Stellar Personnel Brisbane Pty Ltd* [2025] FCA 295.

EXPECTATIONS FOR THE YEAR AHEAD

On 5 September 2025 a major decision was handed down in the Federal Court involving 2 regulatory proceedings brought by the Fair Work Ombudsman (FWO), and 2 class actions commenced by nearly 30,000 employees, against Woolworths and Coles.⁴⁴ All of those claims arose from alleged underpayments to store-based management employees by reference to the *General Retail Industry Award 2010*.

In 2021, the FWO commenced legal action in the Federal Court against Coles and Woolworths in relation to the alleged underpayment of their salaried employees. Class actions were also commenced on behalf of salaried employees – the *Baker* proceeding against Woolworths and the *Pabalan* proceeding against Coles.

All 4 proceedings required determination of a common issue, being the proper characterisation of annualised salary arrangements and related set-off clauses in the relevant employment contracts. The salary arrangements sought to set-off against the annual salary any payments which those employees would otherwise be entitled to receive under the award (such as for overtime, weekend and public holiday rates and allowances) across different pay periods. These types of annual salary arrangements are very common and have been routinely adopted by employers in many industries.

The Court found that those salary arrangements did not operate as Woolworths and Coles had intended. As a result, and despite paying those employees above award rates, Woolworths and Coles nonetheless had to make award related payments to those employees calculated within the single pay period. Critically, set-off could not be effected *between* pay periods.

This decision will have far-reaching implications for retail based and other employers who rely on annualised salary arrangements which, up until now, had been standard practice. While the decision may yet be appealed, we expect to see a rise in the number of class actions seeking to recover alleged underpayments for employees and for those class actions to seek recovery for a broader range of employees, including management based and professional level employees who traditionally receive an overall salary in lieu of award specified amounts.

‘NOT SEEING THE TREES FOR THE FOREST’ – THE ECONOMICS OF PROVING INDIVIDUAL LOSS IN MASS TORT CASES

The moniker of ‘mass torts’ litigation in Australia extends to a wide variety of class actions where the claim (both tortious and related claims) arises out of a single identifiable event or product affecting a large number of individuals by causing economic loss, property damage, and/or personal injury.

Mass tort claims have been prevalent since the class action regime was introduced by Part IVA of the FCA Act and are often among the highest profile, complicated and fiercely contested.

The threshold for commencing a class action in Australia is low, needing only 7 group members and 1 (non-trivial) common issue of fact or law. As a result, while a class action can be commenced on behalf of a large and disparate set of group members with relative ease, resolving individual claims (outside of settlement) is far more challenging. This is because the so-called ‘initial trial’ can only determine the individual claims of the representative applicant (and any sample or representative group members) and any issues common to all group members. If there are issues that are specific to the other group members’ individual circumstances (that is, issues that are not common to the class), these would need to be resolved at a subsequent stage.

This problem is arguably most pronounced in mass tort litigation, which often gives rise to a broad range of individual issues, particularly around causation and loss. Contributing further to the problem is that, unlike in shareholder class actions, there is no market-based or indirect theory of causation available in mass tort cases.

To illustrate this, we examine the long-running *Toyota* and *Ford* class actions regarding alleged vehicle defects. In each proceeding, the applicant claimed damages for breach of the ‘acceptable quality’ consumer guarantee required by s54 of the Australian Consumer Law (ACL) and sought a form of aggregated damages on behalf of group members.⁴⁵ Despite each applicant succeeding at the initial trial, the individual claims of group members still remain unresolved years later, demonstrating the complexities around determining individual claims and the limits of the Court’s powers to address such complexities (including the limits of aggregated damages).

LIMITS OF CASE MANAGEMENT AND CLASS ACTION REGIME

Typically, it is following an initial trial regarding common issues and the individual claims of the lead applicants that the Court will decide whether and how the claims of individual group members should be determined.

The Courts can establish a sub-group, appoint sample group members, permit an individual group member to appear, or essentially give any further ‘directions’ as to the conduct of the current or a new proceeding. Exactly what this might look like is case specific, and there are comparatively few examples of class actions that progress to this stage.

⁴⁴ *Fair Work Ombudsman v Woolworths Group Limited; Fair Work Ombudsman v Coles Supermarkets Australia Pty Ltd; Baker v Woolworths Group Limited; Pabalan v Coles Supermarkets Australia Pty Ltd* [2025] FCA 1092. See KWM Insight [Federal Court rules out contractual set-off of award entitlements between pay periods](#) 5 September 2025.

⁴⁵ ACL contained in *Competition and Consumer Act 2010* (Cth) Sch 2; *Capic v Ford Motor Company of Australia Pty Ltd* [2021] FCA 715 (**Ford Initial Trial**); *Williams v Toyota Motor Corporation Australia Limited (Initial Trial)* [2022] FCA 344 (**Toyota Initial Trial**).

In addition, the Court has the power to award 2 forms of aggregated damages to group members:

- **formula based aggregated damages** - formula based, specifying how damages for an individual group member should be calculated,⁴⁶ and
- **lump sum aggregated damages** - a lump sum awarded across the group; the Court does not have to specify how the amount is to be divided among individual group members, which may be addressed later.⁴⁷

Such orders, however, are rare – not just because few class actions go to trial, but also because the Courts have not interpreted them as a way to circumvent the usual rules for proving individual causation and loss (as the *Ford* and *Toyota* litigation demonstrate).⁴⁸

VEHICLE TROUBLE – ONGOING SAGA OF TOYOTA AND FORD LITIGATION

The *Ford* litigation began in 2016 alleging defects in the transmissions of particular Ford vehicle models, while the *Toyota* litigation commenced in 2019 alleging defects in the diesel particulate filter in certain Toyota models.

In both class actions the lead applicant claimed, on their own behalf and on behalf of group members, damages under s272(1)(a) and s272(1)(b) of the ACL for breach of the ‘acceptable quality’ consumer guarantee. Section 272(1)(a) allows an affected person to recover damages for overpayment for the price paid of the goods (**reduction in value damages**), while s272(1)(b) allows an affected person to recover for reasonably foreseeable loss arising from the breach (**consequential loss**).

(a) Initial trials

Both lead applicants were successful at initial trial (held in 2021 and 2022), recovering damages for their own claims for breach of the ‘acceptable quality’ consumer guarantee.

Notably, both Lee J (*Toyota*) and Perram J (*Ford*) found that later events including the availability of future repairs or fixes were irrelevant to assessing reduction in value damages.

Further, as we will return to below, the Court was either unwilling to make an order for aggregated damages (in the case of *Ford*) or only willing to make such an order on a narrow basis (in the case of *Toyota*) leaving individual claims still largely unresolved.

(b) The appeals

Both matters were appealed to the Full Federal Court and then the High Court, including with respect to the proper means of assessing reduction in value damages and whether later events, including repairs, could be taken into account to lower the assessment.

While both the Full Federal Court (delivering judgment in 2021 and 2022)⁴⁹ and the High Court (delivering simultaneous judgments in 2024)⁵⁰ agreed that later events could be considered, the reasoning of each Court was quite different.

The Full Federal Court considered that the time for assessment of the damages was not fixed to the time of supply, but emphasised the ‘utilisation value’ of goods, meaning the damages could vary depending on how much the defect affected the consumer’s ability to use and enjoy the product during the period before the repair.

In contrast, the High Court concluded that reduction in value damages must be assessed at the time of supply and found this should be done by attributing to a reasonable consumer at the time of supply all knowledge available at trial about the defect, including the timing, cost, and inconvenience of any repair. As such, the actual history of repairs for a consumer is not relevant, but ‘what is relevant is the likely future repair trajectory as it appears to the hypothetical reasonable consumer’ at the time of supply.⁵¹

The High Court’s decision made clear that reduction in value damages are performance based and are not measured by reference to the actual consequences suffered by the affected person, but rather calculated by the difference in value between the performance that was received (ie the actual vehicle) and the one promised (ie a car of acceptable quality). On the other hand, s272(1)(b) encompasses individualised forms of loss, like loss of income or expenditure on repairs.

Obstacle to resolving individual claims

Despite the lead applicants’ success at the initial trials and appeals to the Full Federal Court and then the High Court, the claims of group members still remain substantially unresolved. The fact that the lead applicant in each proceeding claimed one or both forms of aggregated damages on behalf of group members has done seemingly little to expedite that process.

To understand why, one must consider both the individual nature of some the damages claimed and certain defences:

- *First*, s271(6) of the ACL bars a person who had the benefit of an express guarantee from recovering reduction in value damages unless the manufacturer had refused a repair or not done so in a reasonable time.
- *Second*, unlike many other causes of action, the limitation period for a breach of the acceptable value guarantee is determined by reference to the group member’s individual or constructive knowledge of when the guarantee was breached.⁵²
- *Third*, consequential loss may encompass much more individualised forms of loss.
 - (i) Hesitancy to award aggregated damages

In *Ford*, at the initial trial Perram J refused to make an order for lump sum aggregated damages. In particular, his Honour observed that it was unknown which group members’ claims for reduction in value damages might be barred under s271(6) of the ACL.⁵³

In *Toyota*, at the initial trial Lee J refused to order lump sum aggregated damages (including because a reasonably accurate assessment was not possible). His Honour did, however, award formula based aggregated damages (dependent on the vehicles having a true value of 82.5% of the average retail price), but only with respect to a subset of group members (being those who had owned their vehicle the entire period, and had not received a fix) and only for reduction in value damages (and not consequential loss). As such, the order far from resolved the claims of all group members.

(ii) Where things are at – back to first instance

Following the High Court’s decision in both matters, each was remitted to the trial judge (ie Lee J and Perram J) to determine the damages in light of the High Court’s ruling.

Justice Perram delivered further judgment in *Ford* on 20 June 2025. His Honour’s assessment of the reduction in value damages was unchanged despite applying the High Court’s reasoning (because his Honour considered that the prospect of repairs was balanced out by the potential inconvenience, including of obtaining those repairs). The matter is relisted in late October to address further issues. The remittal hearing in *Toyota* is set down to be heard in 2026.

Importantly, multiple aspects of individual group member claims remain unresolved across one or both proceedings, including: the application of limitation periods (Perram J appointed sample group members to assist with this issue); whether any previously received fix has barred a group member’s right to recover under s271(6) (Lee J has ordered the appointment of sample group members to assist with this issue); how group members who purchased their vehicle second hand should be treated (there being some indication that there will be further appeal on this matter); and the quantification of any consequential loss for group members.

TAKEAWAYS

Defendants (especially in mass tort claims) should identify the individual nature of group members’ claims from the outset - most importantly to ensure that any individual issues are preserved and not artificially subsumed by the plaintiff into the list of common issues. As *Toyota* and *Ford* demonstrate, in most cases even some success by the lead applicant at an initial trial should not (as a matter of principle and fairness) translate to liability to an entire class of group members, as their individual claims might differ in important respects.

46 FCA Act s33Z(1)(e) and state cognates

47 FCA Act s33Z(1)(f) and state cognates.

48 Indeed, the power to award lump sum aggregated damages under s33Z(1)(f) is expressly conditional on the Court’s ability to make a ‘reasonably accurate assessment ... of the total amount to which group members will be entitled under the judgment’. And while the power under s33Z(1)(e) is not expressly subject to the same condition, Courts have held that general damages principles are still applicable such that while reasonable approximations or estimates might be allowed, merely speculative exercises are not: see eg *Toyota* Initial Trial at [445].

49 *Ford Motor Company of Australia Pty Ltd v Capic* [2023] FCAFC 179; *Toyota Motor Corporation Australia Limited v Williams* (2023) 296 FCR 514; [2023] FCAFC 50.

50 *Williams v Toyota Motor Corporation Australia Limited* [2024] HCA 38; *Capic v Ford Motor Company of Australia Pty Ltd* [2024] HCA 39.

51 *Capic v Ford Motor Company of Australia Pty Ltd (Remitter)* [2025] FCA 670 at [33] (the judgment delivered following remittal).

52 Under ACL s273. A similar issue arises in relation to determining the limitation period for safety defects under ACL s143, as seen in *Turner v Bayer* [2024] VSC 760 at [2090].

53 Although his Honour ultimately left open whether such an award of aggregated damages could be made including once known which vehicles had been repaired: *Capic v Ford Motor Company of Australia Pty Ltd (Revised Common Questions)* [2021] FCA 1320 at [6].

CONSUMER STAPLES: THE BREAD-AND-BUTTER APPROACH TO CLASS ACTIONS

Consumer actions surged to record numbers in this review period, with 28 filings (2023/2024: 25).

The majority of filings were under the ACL and consumer protection provisions of the ASIC Act; however, consumers also brought actions under the competition provisions of the *Competition and Consumer Act 2010* (Cth) (CCA).

OBSERVATIONS ON CURRENT CONSUMER ACTIONS

(a) Plaintiffs go with the (regulator) flow

Consumer guarantees were both an ACCC enforcement priority and an increasing focus for class actions in the review period, accounting for 11 filings (about 39% of consumer actions) (2023/2024: 2, or 8%). Actions were filed against *Bupa*, *Iplex Pipelines*, *Harvey Norman*, *3M* and more alleging either direct breaches of ACL consumer guarantees, or misleading representations in relation to the availability of consumer guarantees under the ACL.

In parallel, the Federal Government is considering whether to introduce new prohibitions in relation to consumer guarantees, including for businesses that do not provide a consumer guarantee remedy when required, as well as new powers for the ACCC (and potentially state and territory regulators) to issue infringement notices and seek civil penalties for contraventions. If these reforms proceed, increased activity by the ACCC in relation to consumer guarantees may form a basis for more potential class action claims.

Plaintiff firms are also keeping an eye on regulators like the OAIC (see [Privacy](#) section of The Review) and ACMA, which had previously investigated (but not pursued) gambling services offering in-play or 'live' bets made on sporting events. Consumer class actions commenced against 2 corporate groups alleging breaches of the *Interactive Gambling Act 2001* (Cth) and misleading or deceptive conduct under the ACL cited ACMA's findings as to whether the services were prohibited interactive gambling services.

(b) 'Checking out' trends in supermarkets and online markets

In a similar vein, cost of living pressures and the role of digital platforms have dominated Australian political cycles, with both regulatory enforcement and consumer class actions in these areas following similar trends:

- Class actions were filed in relation to the pricing of consumer grocery staples, following on from similar ACCC litigation and the ACCC's year-long Supermarkets Inquiry, with a number of proposals for further regulation of supermarket pricing practices under consideration by the Federal Government.⁵⁴
- Competing adtech class actions were filed by digital publishers, alleging that Google engaged in anti-competitive conduct in the provision of services to Australian publishers in the digital display advertising market. These actions were preceded by overseas investigations and litigation, and cite findings from an ACCC inquiry.

(c) Why do these trends emerge?

So why do class actions follow regulatory investigations or overseas actions? Contributing factors include:

- **Use of prior admissions and findings as evidence:** Admissions or findings of contravention in a regulatory action can make a class action attractive. Although admissions or findings in one proceeding will not generally bind the party in separate proceedings, they nevertheless provide a factual substratum upon which to advance a class action claim. Further, some statutory provisions make it easier for claimants by providing that findings of fact made against a respondent in a regulatory proceeding will be prima facie evidence in certain types of subsequent proceedings on the same facts.⁵⁵ Businesses should also be mindful that admissions or facts established overseas may also attract attention in Australia.
- **Use of regulatory material as evidence:** Plaintiff firms often seek access to investigation material or evidence obtained in regulatory proceedings. Courts have generally allowed such material to be used in subsequent class actions, recognising the efficiency in large scale litigation.
- **Publicity and consumer awareness:** Regulatory action often generates significant media coverage and thereby deters similar conduct, which plaintiff firms are quick to capitalise on, launching registration drives and commencing proceedings soon after regulatory action or outcomes are announced. This trend is not restricted to ACCC and ASIC actions, — we often see class actions threatened against manufacturers and suppliers of therapeutic goods on the heels of regulatory action by the Therapeutic Goods Administration. Similarly, high-profile overseas actions often generate significant media coverage in Australia, with the *Tesla* and adtech class actions being filed on the back of actions in the United States and other jurisdictions.

ELECTRICITY LITIGATION FIZZLES OUT, BUT COMPETITION ACTIONS MAINTAIN SPARK

In the review period, we have also seen a first instance decision in a consumer class action relying on the misuse of market power provisions in s46 of the CCA.⁵⁶

This class action was brought by electricity consumers against state-owned corporations Stanwell and CS Energy, the largest electricity generators in the Queensland Region of the National Electricity Market (QRNEM). Stanwell and CS Energy sell electricity to customers through the centrally-coordinated National Energy Market (NEM) dispatch process.

While the Court upheld the plaintiff's definition of the relevant market (the market for the wholesale supply of electricity to the QRNEM), SC Derrington J concluded that it did not establish the other critical elements of the cause of action.⁵⁷

- **Market power:** Stanwell and CS Energy did not have substantial market power (despite having market share), and each of the alleged instances of re-bidding conduct (described below) were 'transient in nature' and incapable of supporting an inference of substantial market power.
- **Conduct taking advantage:** Stanwell and CS Energy were alleged to have taken advantage of their market power by adopting a strategy to significantly increase electricity spot prices during the Queensland summer months (when demand is high) to maximise their profits by bidding, cancelling and then re-bidding for capacity. While Stanwell and CS Energy did adopt a trading strategy to maximise profits and cover costs in the summer months, which may have involved making delayed bids, the Court held that this was not a strategy to ensure competing generators would have insufficient time to respond, and therefore there was no conduct of the nature alleged.

⁵⁴ See KWM Insight [Second term's a charm: Labor's ambitions for competition and consumer law reform](#) 21 July 2025.

⁵⁵ CCA s83.

⁵⁶ *Stillwater Pastoral Company Pty Ltd v Stanwell Corporation Ltd* [2024] FCA 1382 (Stanwell).

⁵⁷ *Ibid* at [198].

- **Anti-competitive purpose:** Even if Stanwell and CS Energy did have market power and had engaged in the alleged rebidding strategy, the purpose was not to deter other competitors from engaging in competitive conduct as alleged. Even though they ‘hoped’ that their trading strategies would result in a price spike, that did not translate to a proscribed purpose, and her Honour observed that price spikes are an ‘intended and ubiquitous feature’ of the NEM.⁵⁸ Her Honour commented on the lack of direct evidence, documentary or otherwise, about the alleged trading strategy, demonstrating the importance of documentary or testimonial evidence to support an inference about anti-competitive purpose.

Despite finding for Stanwell and CS Energy on liability, SC Derrington J refused an application to order costs on an indemnity basis. Given the highly technical nature of electricity generation and the energy market, the Court found that it was not a ‘hopeless case’ and the plaintiff did not act unreasonably in rejecting offers that would have been unlikely to receive Court approval – see [Settlement scrutiny](#) section of The Review for further discussion on indemnity costs.

The liability decision in *Stanwell*, now on appeal, demonstrates the difficulties of proving a case under s46 of the CCA. However, recent events suggest that s46 is not an insurmountable hurdle for plaintiffs. Since the end of the review period, the Federal Court has handed down class action decisions against Apple and Google, finding that they contravened the misuse of market power provisions in relation to their app stores. These are significant decisions because they represent the first contested cases reliant on the amended misuse of market power provisions introduced in 2017. With other class actions brought under CCA s46 in recent years, including the adtech class action against Google discussed above and a class action against Sony,⁵⁹ these decisions may signal a resurgence in consumer class actions brought under competition laws.

LOOKING AHEAD

The interplay between regulatory enforcement and class actions is expected to intensify, particularly as new legislative regimes come into effect, such as the Scams Prevention Framework and the proposed unfair trading prohibition, which are expected to be vigorously enforced. Plaintiff firms remain quick to act on regulatory findings, whether domestically or overseas. Businesses should anticipate continued ‘piggybacking’ on regulatory action and heightened class action risk, especially in sectors under active regulatory scrutiny, and keep an eye on regulators’ compliance and enforcement priorities.

PULSE CHECK: CLASS ACTIONS IN HEALTH SECTOR ALIVE AND WELL

Over the past 18 months, Australia’s health sector has been a focal point for some of the most high-profile and complex class actions. This has included multi-million-dollar settlements of claims relating to genetic testing, claims of defective joint implants, and landmark trials. In the *Essure contraceptive* class action, the Victorian Supreme Court found that the plaintiff had failed to prove that the Essure contraceptive device had caused the injuries pleaded. Similarly, in the Roundup class action, the plaintiffs failed to prove the causal link between the product (herbicide) and the alleged health issues.

Health sector class actions are complex because they sit at the intersection of law, science, medicine, and public policy. They require courts to resolve difficult questions of causation, manage diverse and often vulnerable group members, understand evolving scientific evidence, and weigh up competing expert opinions.

ROUNDUP AND THE ISSUE OF CAUSATION

It is often difficult to establish causation in health-related class actions. Justice Lee’s judgment following the initial trial in *Roundup*⁶⁰ provides a useful illustration. This action had been filed against Monsanto and Australian company Huntsman Chemical Company (that had been a subsidiary of Monsanto at the relevant time) on behalf of over 800 individuals in Australia who had been diagnosed with non-Hodgkin lymphoma (NHL). The plaintiffs claimed that Monsanto’s herbicide product ‘Roundup’ had caused their NHL.

Despite the ‘dense, complex, and voluminous’ expert evidence relied on by the plaintiffs, Lee J found that the plaintiffs had not proven, on the balance of probabilities, that the use of and/or exposure to Roundup products increased the risk of developing NHL, or caused an individual to develop NHL.

Here, Lee J’s judgment underscored the high evidentiary burden of proving causation in Australia.

CASE STUDY ROUNDUP

Allegation: Glyphosate-based herbicides caused plaintiffs’ NHL.

Evidence: Expert testimony in 3 streams — epidemiology, animal studies, mechanistic biology.

Outcome: Federal Court found causal link not established; action settled without any payment being made to group members.

Key takeaway: The plaintiffs’ expert evidence was not sufficient to establish causation on the balance of probabilities.

Australian Courts have developed procedures designed specifically to enable the proper weighing up of complex scientific evidence. Expert conclaves and joint reports narrow the issues in dispute. ‘Hot-tubbing’ enables the Court to hear expert evidence concurrently and provides experts with an opportunity to respond to each other in real time. This can clarify the key points of agreement and contention for the judge. In rare cases, Court appointed experts or referees assist the Court to interrogate highly technical expert evidence.

⁵⁸ Ibid at [761].

⁵⁹ Discussed in [The Review 2023/2024](#) (Consumer class actions).

⁶⁰ *McNickle v Huntsman Chemical Company Australia Pty Ltd (Initial Trial)* [2024] FCA 807.

GLOBALISATION OF PRODUCT RISK: THE US V AUSTRALIAN CLASS ACTION EXPERIENCE

Class actions in the health sector in the United States often precipitate similar actions in Australia. However, fundamental differences in the way class actions are run in Australia have a significant impact on the likelihood of Australian actions following US proceedings.

For example, US class actions often involve juries and the prospect of punitive damages, neither of which are available in Australia. Importantly, in the US each party typically bears its own costs, while in Australia the ‘loser pays’ rule provides a significant disincentive for the filing of speculative class actions. The litigation process, risk and reward profile differ markedly and fundamentally affect strategy.

MONASH IVF

Settlement of the class action against Monash IVF involved the company agreeing to pay \$56m to more than 700 patients.⁶¹ The case centred on the use of a non-invasive genetic test that allegedly produced a high rate of false positives, leading to the wrongful destruction of potentially viable embryos.

While Monash settled without admitting liability, the outcome provided partial closure for affected families and set a strong financial precedent that highlights both the emotional stakes of reproductive medicine and the potential exposure of healthcare providers.

CASE STUDY

MONASH IVF

Allegation: Genetic testing service alleged to have identified healthy embryos as non-viable, leading to their wrongful destruction.

Claims: Negligence, breach of contract, misleading conduct, breach of ACL.

Outcome: \$56m settlement approved in 2024; \$40m to group members, \$16m in legal costs. State and federal health departments are conducting reviews of the sector’s regulation and accreditation requirements.

Key takeaway: Disputes in health care, even when settled, can result in ongoing reputational and regulatory risk.

In 2025, additional procedural errors were said to have been identified, including an embryo mix-up in Brisbane that is alleged to have resulted in a woman giving birth to a child that was the biological child of another patient. Monash IVF’s share price fell sharply, patients transferred embryos to competitors, and renewed calls were made for an independent national regulator to replace the patchwork of self-regulation currently in place. The contemporaneous share price decline highlights that the risk is not only for class actions brought on behalf of patients – it also exposes reproductive healthcare providers to the risk of shareholder class actions.

EXPECTATIONS FOR THE YEAR AHEAD

Looking forward, the health sector is expected to remain a focal point for class action activity in Australia. Key trends to watch include the impact of regulatory reforms, the increasing complexity of scientific and medical evidence, and the emergence of new risk areas such as digital health and data privacy.

IT’S NOT THE DESTINATION, IT’S THE JOURNEY: INTERLOCUTORY ISSUES IN CLASS ACTIONS

This review period has continued to highlight the significant issues facing both plaintiffs and defendants in their journey to a hearing. This section looks at some key decisions from the past 12 months regarding:

- trends and key judgments for security for costs
- attempts to circumvent limitation periods by taking advantage of statutory suspensions of limitation to amend group member class definitions
- the differing approaches of the Courts in reliance on expert evidence and early determination of objections to evidence, and
- soft class closure.

SECURITY FOR COSTS

Australian Courts remained receptive to security for costs applications in class actions during the review period, with security granted in most proceedings in which it was sought. This reflects the continued balancing of parties’ legitimate interests - ensuring that adequate and fair protection is provided to a defendant where there is a legitimate concern that an impecunious plaintiff might be unable to pay its costs, while not denying that plaintiff access to the Courts.

(a) Headline trends

TRENDS	WHAT WE SAW
Form of security	<ul style="list-style-type: none"> • Deeds favoured: the majority of orders were for deeds of indemnity/deed polls, which remain preferred by litigation funders looking to preserve capital. • Cash is not king: cash paid into Court was ordered in only 3 proceedings (but was available as an alternative in other proceedings).
Timing and cooperation	<ul style="list-style-type: none"> • Some orders were made by consent, and in some circumstances without the prior filing of an application.
Scope of cover	<ul style="list-style-type: none"> • Procedural steps: security may be fixed to specific procedural steps such as filing of pleadings and evidence, or taking part in mediation. • Tranches: in some matters, security was granted in tranches, occasionally up to the commencement or end of trial. • Top-up triggers: security for ‘costs in the proceeding’ was ordered in at least 3 proceedings, but respondents were permitted to notify applicants when their costs and disbursements reached or exceeded certain limits.

⁶¹ *Bopping & Anor v Monash IVF Pty Ltd & Ors* [2024] VSC 785.

(b) Notable judgments

Of particular interest from the review period is the Victorian Supreme Court’s consideration of security for costs in the context of a GCO.

In circumstances where the plaintiffs’ law firm had the benefit of a GCO, Gobbo AsJ held that the relevant inquiry was whether the firm - rather than the plaintiffs - had the ability to satisfy an adverse costs order.⁶² A review of the firm’s audited accounts revealed material WIP and cashflow concerns, and the evidence established there was a risk it may not be able to meet an adverse costs order.

Her Honour also rejected the firm’s proposal to provide an undertaking to pay any adverse costs rather than security – an undertaking would not secure a fund that could be drawn upon, and would merely re-affirm the firm’s existing obligations under the GCO, as provided for by the legislative regime. Rather, a fund or asset was required, and the fact that the firm may incur direct borrowing costs to provide security should simply be regarded as part of the expense of mounting (and potentially benefitting from) litigation.

Other decisions of note include:

JUDGMENT	WHY IT MATTERS
<p>Pie Face class action – FNH United Pty Ltd v United Petroleum Franchise Pty Ltd [2025] VSC 190</p>	<ul style="list-style-type: none"> • ‘Tardy and unsatisfactory’ conduct of a proceeding by plaintiffs may weigh in favour of security: at the time of hearing, the plaintiffs’ claims were still not properly formulated and their conduct had resulted in delays and further costs. • Other matters considered by the Court included that the plaintiffs were clearly impecunious; the proceeding was large and complex; previous costs orders had been made in favour of the defendants; and there was no evidence of stultification as 4 funders were still actively considering involvement.
<p>COVID vaccine injuries class action – Rose v Secretary of the Department of Health and Aged Care [2025] FCA 339</p>	<ul style="list-style-type: none"> • A less frequent example of refusal to grant security for costs. • Proceeding was both crowdfunded and funded by a non-commercial funder who did not stand to benefit from the litigation; offer from Mineralogy Pty Ltd to pay the respondents’ costs sought by way of security. • The applicants were impecunious, and the applicants’ problematic pleadings had unnecessarily augmented the costs the respondents should reasonably be expected to bear. • However, public interest considerations raised by the proceeding, as well as the funder having a binding obligation to pay adverse costs orders and ‘substantial assets’ to satisfy those orders, appear to have ultimately tipped the balance against ordering security.

62. *Nathan v Macquarie Leasing Pty Ltd (Security for Costs)* [2024] VSC 606.

(c) Key takeaways

- In good news for defendants, Courts continue to be inclined to make orders for security for costs, to ensure that defendants are protected in class actions.
- For proceedings involving litigation funders or law firms with the benefit of a GCO (only in Victoria), orders for security will be the default position, with debate limited to form and quantum.
- Parties engaging with each other on the issue of security from the commencement of proceedings and reaching a consent position can lead to significant cost, time and resource savings for all.

LIMITATION PERIODS

At least 4 judgments in the past year have considered the application of limitation periods in class actions where the definition of ‘group members’ has been amended to add new group members. These decisions reflect a trend, by which amendments expanding the class are heavily scrutinised to ensure limitation periods are not unfairly circumvented, with the default position being that such amendments should take effect prospectively (ie from the date of amendment) unless exceptional circumstances justify a different approach.

This issue of ‘circumventing limitation periods’ is particularly relevant in the context of class actions, given the legislation establishing the representative proceeding regimes includes a section which provides that upon the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended (**Suspension of Limitation Periods Section**). Recent decisions have clarified that this section should not be interpreted to allow subsequent amendments which do not relate to the same claim being brought out of time.

63. *Hepi v Toyota Finance Australia Ltd* [2025] VSC 121.
 64. *Impiombato v BHP Group Limited* [2025] FCAFC 9.
 65. *Ethicon Sârl v Gill* (2018) 264 FCR 394; [2018] FCAFC 137.

(a) Notable judgments

In *Toyota Finance*,⁶³ the Court maintained the position that the Suspension of Limitation Periods Section only protects claims that were within the scope of the proceeding as originally commenced. New claims or new group members added by amendment are generally subject to limitation periods calculated from the date of amendment, not the original commencement date. His Honour described limitation defences as a ‘substantive right’ and stated that limitation periods:

‘[142] ... reflect a fundamental and all but universal policy that the litigation of stale claims constitutes potentially significant injustice.’

This was also reflected in *BHP Group*,⁶⁴ where the Court held that the default position is that amendments to the group definition take effect from the date of amendment, not retrospectively from the commencement of the proceeding. In so holding, Beach and O’Byrne JJ applied the Full Federal Court’s decision of *Ethicon Sârl*,⁶⁵ in which the Court stated that this approach:

‘[51] ... prevents the topsy turvy notion that someone retrospectively becomes a group member on commencement, when the Court has thus far proceeded on the basis that they are not group members [... and avoids] the vice of potentially resuscitating causes of action by persons who have never sought to agitate them. It would be odd that by becoming a group member through the augmentation of a class, substantive rights were conferred on a claimant that had been either extinguished or barred by operation of statute and could not otherwise be advanced by that claimant.’



In considering the importance of the suspension of limitation periods, in *Blue Dog*⁶⁶ the Queensland Supreme Court reasoned that discontinuance does not constitute a judicial ‘decision’ or ‘determination’ of group members’ claims, and therefore the limitation periods would remain suspended unless the Court made an order to the contrary. To avoid the injustice of group members’ claims being indefinitely suspended (and defendants being exposed to claims in perpetuity), the Court exercised its ‘gap-filling’ power under s103ZA of the *Civil Proceedings Act 2011* (Qld) (which allows the Court to make any order necessary to ensure justice is done in the proceeding) and ordered that the limitation periods for group members’ claims against the discontinued defendants would recommence 30 days after the date of the discontinuance order.

(b) Key takeaways

- It is crucial that plaintiff lawyers are meticulous when drafting the definitions of ‘group members’ in originating claims. While it is almost inevitable that ‘minor’ amendments will be required as the intricacies of the case reveal themselves over time, plaintiffs will struggle to introduce substantive amendments which will benefit from the suspension afforded by the Suspension of Limitation Periods Section.
- Defendants of class actions should always be aware of limitation defences, particularly when plaintiffs seek to amend the definitions of group members or rely on the Suspension of Limitation Periods Section.

EXPERT EVIDENCE

(a) Pre-trial ruling regarding admissibility of evidence

Admissibility of evidence is usually ruled on during a trial, but in *Boral*⁶⁷ the respondent successfully obtained a pre-trial ruling as to admissibility of evidence. As Lee J acknowledged, an admissibility dispute ‘brings into focus the recurring problem of spiralling costs of expert evidence in class actions’, and pre-trial rulings can narrow issues in dispute and thereby reduce the costs for both parties in preparing for a trial.

While Lee J ultimately decided not to reject or exclude the evidence that was objected to by the respondent in this instance, this judgment is significant because it demonstrates willingness by the Court to hear and make rulings on admissibility of expert evidence prior to the trial of a class action.

Similarly, in *S&P Global*,⁶⁸ the Federal Court declined to exercise the discretion to make rulings on the admissibility of evidence pre-trial. The respondent sought to exclude the entirety of the applicants’ expert evidence. Justice Shariff dismissed the respondent’s application, on the basis that it was not the appropriate time to rule on the merits of the admissibility arguments in circumstances where the Court did not have the benefit of the parties’ opening statements. His Honour also held that particular arguments reflected a pleading dispute which would be better addressed by the parties’ submissions.

(b) Court rejects expert evidence in group car loan proceedings

Two *Flex Commissions* class actions were listed for joint trial before Dixon J in late 2024. The plaintiffs in each proceeding sought to rely on expert evidence from a behavioural economist regarding cognitive biases and decision-making vulnerabilities in the loan process, and a linguistics expert’s analysis of the complexity and comprehensibility of loan documentation. The defendants objected to the admissibility of this evidence, arguing it was irrelevant, constituted inadmissible opinion evidence, and should be excluded even if technically admissible.

The Court found that this expert evidence was irrelevant and inadmissible, reinforcing the principle that judicial fact-finding should be grounded in direct evidence from the parties and analysis of actual loan documents.⁶⁹ The Court emphasised that, under the *Evidence Act 2008* (Vic), evidence is only relevant if it could rationally affect the probability of a fact in issue.

Opinion evidence is generally inadmissible unless it is based on specialised knowledge that is beyond the ordinary experience of the Court. The Court distinguished this case from *Trivago*⁷⁰ and *Google*⁷¹ where it was necessary for the Court to form a view about whether consumers had been or were likely to have been misled by marketing or by systems processes.

This decision highlights:

- the importance of direct, transaction-specific evidence rather than relying on expert predictions or academic frameworks, and
- the fact that expert evidence is of little utility where it is not based on specialised knowledge beyond the Court’s own capabilities or where it is not directly relevant to the facts in issue.

SOFT CLASS CLOSURE / REGISTRATION

(a) Clarity on the power to order soft class closure

In *Lendlease*,⁷² the High Court held that the NSW Supreme Court is empowered under s175(5) of the *Civil Procedure Act 2005* (NSW) to order that notice be given to group members of a defendant’s intention to seek ‘class closure’ orders. By doing so, the High Court has aligned the position in NSW with that of the Federal Court.⁷³

The central theme emerging from the unanimous decision, delivered through 5 separate judgments, is that the Court’s power under s175(5) to approve settlements encompasses the authority to order the giving of notices where necessary to do justice between the parties, and to facilitate any settlement and finality as a matter of practical necessity. Such power is not defeated by the notion of ‘fundamental precept’ of the opt-out regime that a group member need not do anything to obtain the benefit of a settlement or favourable judgment.

(b) Granting class closure orders

Courts assess class closure orders on a case-by-case basis, focusing on whether they are appropriate and necessary to achieve justice. Key factors include:

- **Facilitation of settlement:** Orders may be justified in complex, costly proceedings.⁷⁴
- **Adequacy and length of notice:** Where sub-group members cannot be readily identified, the Court requires robust notice measures. In *Beach Energy*, limiting notice to the *Australian Financial Review* was deemed inadequate, and additional publication in US media was ordered. The notice period must also be long enough for group members to respond.⁷⁵
- **Stage and timing:** The timing of closure relative to the proceedings and mediation is important to avoid prejudice.⁷⁶
- **Mediation/settlement arrangements:** Orders are less likely without mediation or settlement discussions in place.⁷⁷

Less persuasive factors are:

- **Multiple orders and notices:** The Court does not find the potential risk of confusion from further orders or notices persuasive.⁷⁸
- **Costs of notice:** Notice costs are considered but not given undue weight if necessary for adequate notice,⁷⁹ though proportionality remains relevant.⁸⁰

(c) Group members who fail to register before a registration deadline

Soft class closure orders typically bar unregistered group members from settlement (or, in principle, judgment) benefits unless the Court grants leave. Leave is only given if excluding the member would cause unfair prejudice - mere prejudice is not enough. See [Settlement scrutiny](#) section of The Review.

66 *Blue Dog Group Pty Ltd v Credit Suisse Equities (Australia) Limited & Ors* [2025] QSC 101.

67 *Parkin v Boral Ltd (Materiality Evidence Ruling)* [2025] FCA 70.

68 *ACN 117 641 004 Pty Ltd (in liq) v S&P Global, Inc (No 4)* [2025] FCA 72.

69 *Nathan v Macquarie Leasing; Fox v Westpac (No 2)* [2024] VSC 643.

70 *Australian Competition and Consumer Commission v Trivago NV* (2020) 142 ACSR 338; [2020] FCA 16.71

71 *Australian Competition and Consumer Commission v Google LLC and Another (No 2)* (2021) 391 ALR 346; [2021] FCA 367.

72 *Lendlease Corporation Limited v Pallas* [2025] HCA 19. For a detailed analysis, see KWM Insight [It’s a question of power: High Court registers approval of notices of potential class closure](#) 8 May 2025.

73 *Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47.

74 *Nelson v Beach Energy Ltd* [2025] VSC 339 (**Beach Energy**) at [18].

75 *Ibid* at [30].

76 *Kilah v Medibank Private Ltd (No 2)* [2024] VSC 519 (**Medibank**) at [22]-[24].

77 *Ibid* at [32].

78 *Ibid* at [27].

79 *Beach Energy* at [29].

80 *Medibank* at [27].

SETTLEMENT SCRUTINY

As class action settlements require Court approval, the Court plays a crucial role in protecting group members' interests. Rather than simply approving settlements, the Court rigorously assesses their terms for fairness and reasonableness.

In the review period, Courts have focused on several key aspects before granting approval, including:

- recoverability of solicitors' fees and group costs orders (**GCOs**)
- impact of late registration applications by unregistered group members (**UGMs**), and
- the treatment of Calderbank offers in the class action context.

RECOVERABILITY OF SOLICITORS' FEES

Courts closely scrutinise deductions from the settlement sum, such as legal costs and funders' commissions, to ensure they are reasonable and do not unduly erode the benefits to group members. The Court often relies on independent cost assessments and considers the proportionality of costs to the risks and effort involved in the litigation.⁸¹

(a) Proportionality

Courts continue to show a willingness to reduce legal fees and funders' commissions where the combined deductions would leave group members with an unacceptably low share of the settlement. For example, in *CIMIC Group*,⁸² a compromise was reached between the applicants' lawyers and funder whereby the lawyer's fees and the funder's commission were reduced to ensure that group members received no less than 50% of the Settlement Sum. This involved both the applicants' lawyers and the funder agreeing to a reduction of approximately \$1,137,500 in legal fees and approximately \$4,727,766 in funding commission respectively.⁸³

The Court has also been critical of deductions for legal fees where methods adopted in administering the class actions are unnecessarily expensive, resource-intensive or otherwise inappropriate:

- In the *NT Stolen Wages class action*,⁸⁴ when assessing the solicitors' fees payable to the applicant's lawyers and declining to make the proposed cost deduction order sought, Mortimer CJ considered that the firm had applied an 'excessive level of human resources' to the proceeding (with 131 fee earners working on the proceeding), and applied it in a way which was 'not conducive to the most effective and efficient conduct of the proceeding'.⁸⁵

- In the *WA Stolen Wages class action*,⁸⁶ the Court was concerned by the excessive costs that had been incurred by the applicant's law firm post-settlement. Justice Murphy considered that before the firm 'ran up such enormous costs post-settlement' it should have come before the Court and given notice of that proposed expense.⁸⁷ The Court indicated that the applicant's law firm needed to give greater attention to whether there were 'cheaper or more efficient ways of achieving a similar outcome' and also suggested that engagement of local Indigenous representatives may have provided a more appropriate solution. Ultimately, the Court reduced the applicant's law firm's fees by \$4m from the amount approved by the cost referee which brought the total firm's costs and disbursements down to approximately \$27.5m.

(b) Approval of GCOs at time of settlement application

A GCO is a creature of Victorian legislation that allows law firms acting for a plaintiff to recover their legal costs as a percentage of any award or settlement in the proceeding.⁸⁸

Section 33ZDA(3) of the *Supreme Court Act 1986* (Vic) allows the Court to review the GCO rate once more information regarding the conduct and outcome of the proceeding becomes available. This ensures the rate represents an appropriate reward, considering the effort and investment of the legal practice, the duration of the proceedings and the risks undertaken under the GCO.

In the review period, the Court approved the following settlements:

- *G8 Education*: the settlement of \$46.5m included a GCO of 27.5% (being \$12,787,500)
- *Allianz*:⁸⁹ the settlement of \$170m included a GCO of 25% (being \$42.5m), and
- *Noumi*:⁹⁰ the settlement of \$43m included a GCO of 22% (being \$9.46m).

Neither the Court nor the parties in these proceedings sought to vary the GCO percentage. In *G8 Education*, Watson J noted that the absence of any party seeking an amendment of the GCO rate does not relieve the Court of its obligation to consider whether the rate should be amended.⁹¹

Indeed, just outside of the review period, Delany J determined that it was appropriate to vary the GCO percentage in the class action against *Hino Motors*.⁹² There, the Court reduced the GCO percentage from 24.66% to 17.39% on the basis that the lower percentage would represent 'an appropriate reward in the context of the effort and investment of the legal practice, the duration of the proceeding, and the risks which were undertaken under the GCO.'

⁸¹ See for example, *Minnie McDonald v Commonwealth of Australia* [2025] FCA 380 (**NT Stolen Wages class action**); *Street v State of Western Australia* [2024] FCA 1368 (**WA Stolen Wages class action**); *Allen & Anor v G8 Education* (No 4) [2024] VSC 487 (**G8 Education**).

⁸² *Miciulis v CIMIC Group Limited* [2025] FCA 307.

⁸³ *Ibid* at [63]-[65].

⁸⁴ Under the settlement, the Commonwealth will pay a sum of up to \$180m in compensation and up to \$22m for the applicant's agreed costs, costs assessor's costs and agreed administration costs:

NT Stolen Wages class action at [6]-[8].

⁸⁵ *Ibid* at [461].

⁸⁶ Under the settlement deed, the State agreed to pay up to \$180.4M, comprised of an amount of up to \$165m in compensation and an amount of up to \$15.4m in respect to the applicant's party/party costs of the proceeding up to the date of settlement approval: *WA Stolen Wages class action* at [4].

⁸⁷ *WA Stolen Wages class action* at [24].

⁸⁸ *Supreme Court Act 1986* (Vic) s33ZDA.

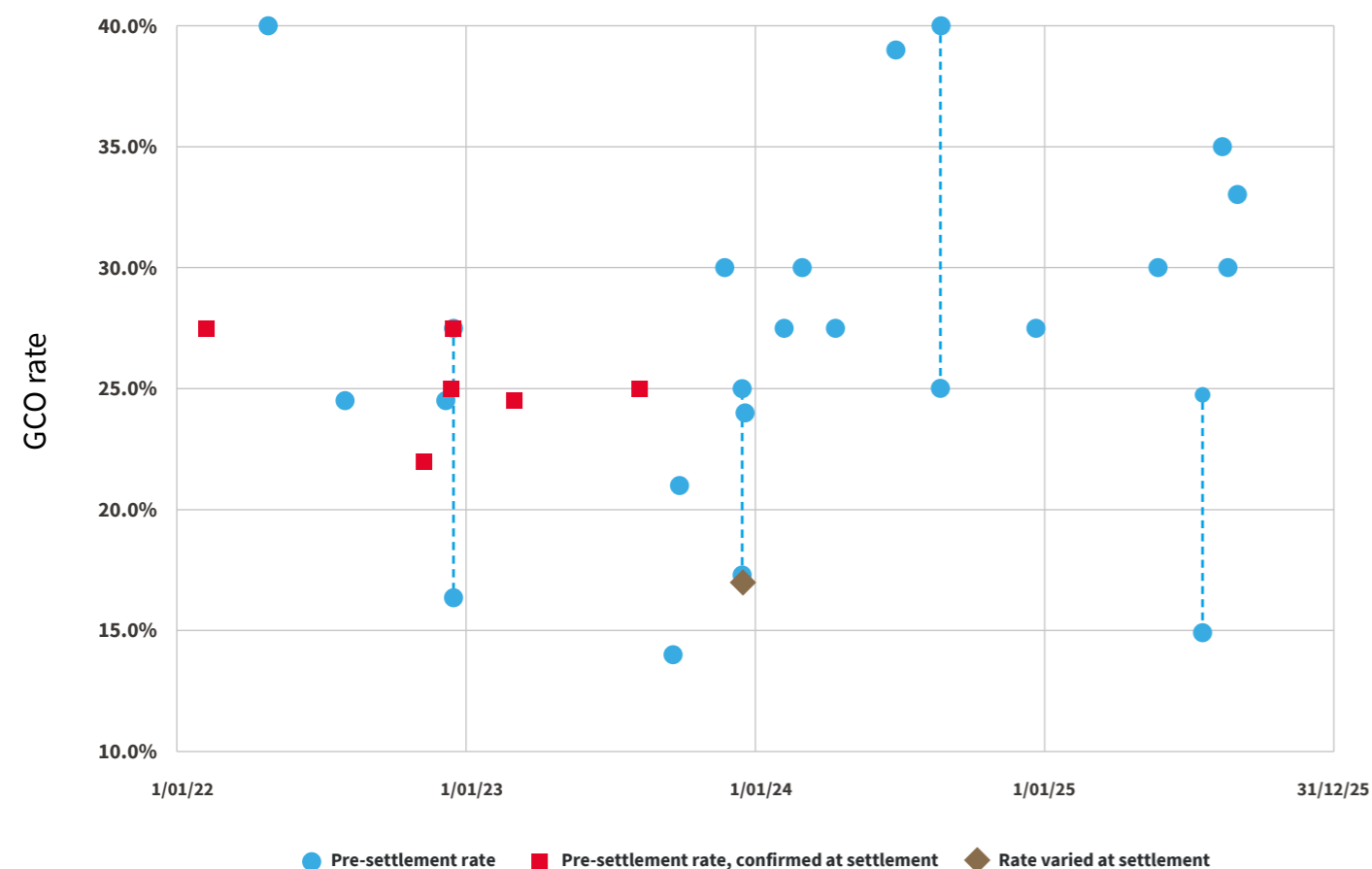
⁸⁹ *Fuller & Anor v Allianz Australia Insurance Ltd & Anor* [2025] VSC 160.

⁹⁰ *Gehrke & Anor v Noumi Ltd & Anor* [2025] VSC 373.

⁹¹ *G8 Education* at [62]; also cited in *Allianz* at [156] and [176].

⁹² *McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553.

GCO RATES OF GCOs GRANTED (date GCO first granted)



LATE REGISTRATIONS

This review period has seen large numbers of applications for late registrations by unregistered group members who did not register by the court-ordered deadline. When determining whether UGMs should be permitted to participate in the settlement, the Court undertakes a delicate balancing act between fairness, procedural certainty, and efficient administration of justice.

In *Uber*,⁹³ 5,722 late applications were received (of which only 140 were approved), while in *Monash IVF*⁹⁴ there were 174 late applications (of which only 61 were approved). The *Uber* and *Monash IVF* class actions highlight that UGMs must satisfy a high threshold to be approved as late registrants and must sufficiently demonstrate unfair prejudice to them in the operation of the class closure order.⁹⁵

Factors which may impact whether the Court will accept a group member's late registration application include the:

- nature and extent of notice given to group members of the requirement to register before the deadline⁹⁶
- extent to which the settlement sum available to group members who registered on time will be diluted⁹⁷
- impact of the late applications; for example, if it would cause a substantial delay to the settlement approval,⁹⁸ and
- reasons (if any) given by an UGM as to why they did not register on time, and why a late registration should be approved.⁹⁹ For example, if there is persuasive evidence that the UGM did not receive the opt out or registration notice,¹⁰⁰ or if extraneous life circumstances provide a reasonable excuse for failure to register.¹⁰¹ Where a UGM has made a considered decision not to register, and there is no evidence to show that their decision-making capacity was compromised, the Court is unlikely to grant leave to register.¹⁰²

If a UGM misses the late registration application deadline and applies out of time, the Court will additionally consider the amount of notice given to UGMs to submit late registration applications, and whether the UGM applied to the Court for an extension.¹⁰³



The issue of late registrants was also raised in *Merivale*,¹⁰⁴ where 788 employees registered after a settlement had been agreed. The Applicant raised concerns that these late registrations significantly diluted the value of the proposed settlement for group members. As a result, the parties agreed to increase the settlement amount from \$9.4m to \$19.25m, which the Federal Court approved in November 2024.

These cases demonstrate the importance of giving appropriate notice of the registration date to group members to avoid applications by UGMs delaying settlement approval and potential dilution of the settlement sum. Furthermore, these cases illustrate how registrations made prior to mediation, as well as assumptions regarding participation rates, can significantly impact settlement negotiations and outcomes.

⁹³ *Andrianakis v Uber Technologies Inc; Salem v Uber Technologies Inc (No 2)* [2024] VSC 436 (**Uber**).
⁹⁴ *Bopping & Anor v Monash IVF Pty Ltd & Ors (No 2)* [2025] VSC 8.
⁹⁵ *Andrianakis v Uber Technologies Inc (Settlement Approval)* [2024] VSC 733 (**Uber Settlement Approval**) at [61]-[63].

⁹⁶ *Uber* at [42].
⁹⁷ *Uber Settlement Approval* at [67]; *Monash IVF* at [13]-[14].
⁹⁸ *Uber* at [49].
⁹⁹ *Uber Settlement Approval* at [99], cited in *Monash IVF* at [12].
¹⁰⁰ *Uber Settlement Approval* at [65]; *Monash IVF* at [16].
¹⁰¹ *Monash IVF* at [18]-[20].
¹⁰² *Ibid* at [17].
¹⁰³ *Uber* at [43]-[44].
¹⁰⁴ *Boulos v M.R.V.L. Investments Pty Ltd (Settlement Approval)* [2024] FCA 1377.

Summary of factors for late registration applications¹⁰⁵

FACTORS	RELEVANT 	INSUFFICIENT 
Notice	Failed to receive notice or the notice process was defective	Mere unawareness of or confusion about the notice
Settlement dilution	The number and value of late claims	Disproportionately affecting registered members
Characteristics	Literacy, physical or mental capacity if linked to non-registration Special vulnerabilities	General claims of being overwhelmed
Reasons	Mistaken belief in registration supported by persuasive and credible reasons Failure due to errors or omissions of others	Changing of mind in absence of vitiating reasons
Delay	Insignificant delay Intention to participate known to the parties	Extensive delay in approaching the Court

CALDERBANK OFFERS NOT A GUARANTEE FOR INDEMNITY COSTS

Generally in commercial litigation, where a Calderbank offer is rejected by an unsuccessful party, and the offer proves to be more generous than the subsequent judgment, the Court may award costs on an indemnity basis where the offer was unreasonably rejected.

Last year, the Federal Court held that Calderbank offers can operate in class action proceedings.¹⁰⁶ This means that, if (for example) the applicant in a group proceeding does not accept an offer made by the respondent, and the respondent is successful at the subsequent trial, it is open to the Court to order the applicant pay the respondent's costs on an indemnity basis from the date the offer was made. However, subsequent decisions demonstrate that there is a high threshold to meet before a Court will make such an order in a class action, even if the respondent is successful at trial.¹⁰⁷

The Court may consider the following factors in the decision to award indemnity costs (or not):

- **Assessment of prospects.** Complex and/or novel issues which have not been the subject of judicial consideration, or unique factual contexts which make the application of otherwise-settled principles challenging, may give rise to uncertainty about the way in which the trial will resolve.¹⁰⁸
- **Extent of compromise.** In *NULIS*, the offer of \$11.7m was a steep compromise on the applicants' assessment of the claim (being \$181m),¹⁰⁹ and in *Stillwater*, accepting the offer 'would have resulted in there being no return to the class members at all'.¹¹⁰ It generally will not be unreasonable for a party to reject offers that are unlikely to receive Court approval.
- **Factors which are peculiar to class actions, including the requirement for Court approval of settlements.** As an example, in *Stillwater*, the applicant had been preparing for trial for close to 4 years, and the offer was made 10 days before the commencement of the trial. Practically, to obtain Court approval of the settlement, the court dates would have needed to be vacated. If the in-principle settlement then fell through, this could have led to considerable delay, inefficiencies and costs. The reasonableness of rejecting the offer was assessed in this context.¹¹¹

Parties making a Calderbank offer should therefore consider the length of time given to the other party to consider and accept the offer, the return to group members after payment for costs, and any prospects assessments. Notably, even a seemingly generous offer may not be deemed unreasonable to refuse if the claim is novel and the offer is subjectively perceived as significantly undervaluing the claim.

¹⁰⁵ See *Uber*; *Uber Settlement Approval*; *Monash IVF*; *Noumi*; *G8 Education*; *Horsky v Mesoblast Ltd* [2024] FCA 1509; *Allianz*.

¹⁰⁶ *Karpik v Carnival plc (The Ruby Princess) (Common Questions and Costs)* [2024] FCA 57 at [18]-[20].

¹⁰⁷ *Brady v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund (Costs)* [2025] FCA 128 (**NULIS**); *Stillwater Pastoral Company Pty Ltd v Stanwell Corporation Ltd (No 2)* [2025] FCA 316 (**Stillwater**).

¹⁰⁸ *NULIS* at [26]; *Stillwater* at [39].

¹⁰⁹ *NULIS* at [28]-[29].

¹¹⁰ *Stillwater* at [41].

¹¹¹ *Ibid* at [28], [34].

OUTLOOK – WHAT’S NEXT FOR CLASS ACTIONS IN AUSTRALIA?

ON THE RADAR

A large number of hearings are expected to be heard, including:

- **2026:** AMP – life insurance fees; KFC and McDonalds (rest breaks); Spring Farm; A2 Milk; CuDeco; COVID business losses (Vic); Colonial – super fees (actions by Slater and Gordon and Shine); Queensland electricity generators (appeal); Toyota (remitted); James Hardie; Nuix; Arrium; Coles and Woolworths (discount pricing); Aussie Home Loans – mortgage protection insurance; NT public housing in Aboriginal communities; Qantas COVID credits
- **2027:** Fitch Ratings; Westpac – AUSTRAC.

JUDGMENTS AND APPEALS

We await the results of:

- **initial trials:** securities class action against Brambles and wages class action against Domino's
- **appeals:** securities class action against Worley
- **High Court special leave applications:** *Zonia* (see [Securities](#) section of The Review)
- **High Court reserved judgments:** *Sydney Light Rail*.

STOP PRESS

Just outside the review period we have seen:

- **Class actions commenced:** at least 9 class actions have been filed, including claims relating to junior doctors' working hours in Tasmania and alleged paint defects in motor vehicles.
- **Settlements:** at least 5 settlements have been approved since 1 July 2025, and at least a further 9 settlements are awaiting Court approval. Together, these represent over \$1.5b in potential settlement funds. In *Hino Motors* we saw the first settlement approval varying a GCO order (see [Settlement scrutiny](#) section of The Review).
- **Judgments:** liability judgments in the climate change class action on behalf of Torres Strait Islanders,¹¹² the competition class actions on behalf of app developers against Apple and Google,¹¹³ and the employment class actions against Coles and Woolworths in relation to alleged staff underpayments (see [Employment](#) section of The Review); a High Court appeal that held the Federal Court does not have the power to make a solicitors' CFO in NSW;¹¹⁴ an appeal dismissed in the *Ruby Princess* class action.¹¹⁵

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¹¹² See KWM Insight [Climate obligations in Australia and abroad are oceans apart – what does it mean?](#) 29 July 2025.

¹¹³ *Anthony v Apple Inc* [2025] FCA 902.

¹¹⁴ See KWM Insight [Contingency fees for Victoria only: High Court confirms Federal Court has no power to allow solicitors to take a cut of a class action settlement or judgment](#) 7 August 2025.

¹¹⁵ *Karpik v Carnival plc (The Ruby Princess)* [2025] FCAFC 96.



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