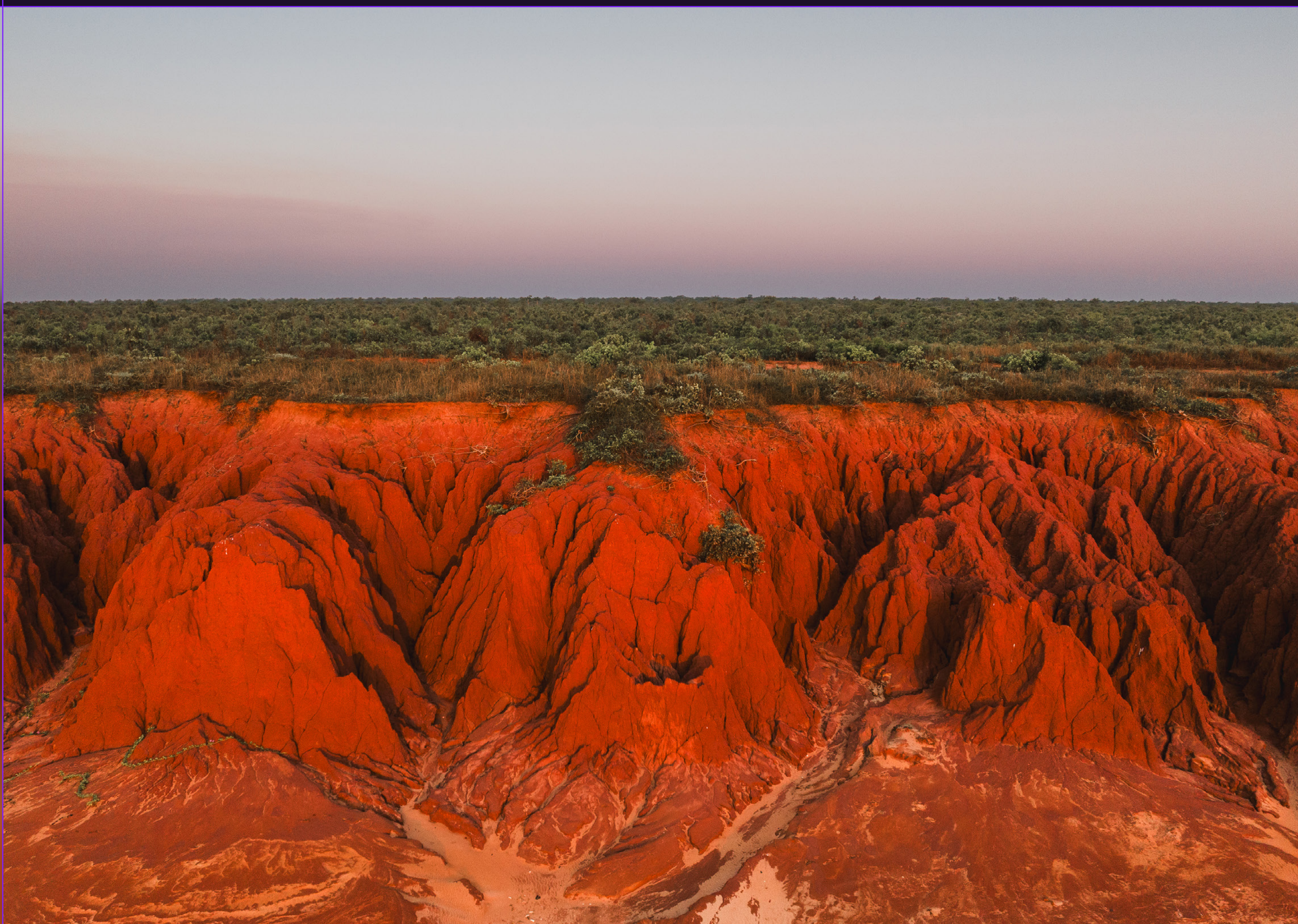
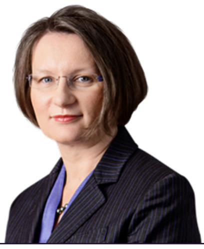
MALLESONS

The Review

Class Actions in Australia 2025/2026



Living in a material world: Non-financial risks and the new frontier of securities class actions



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The review period proved to be a defining year for securities class actions in Australia.

After repeated failures by applicants to prove loss or damage, the review period saw success at first instance in the *Brambles*[3] class action and on appeal in the long-running *Worley*[4] litigation.

The High Court also granted special leave in the *Zonia* securities class action and heard the substantive appeal in June 2026.[5] While much attention during the review period has been directed at the issues of materiality, causation and loss, being key issues raised in the *Zonia* appeal, it is notable that the High Court's first foray into securities class actions concerns a claim arising from the contravention of the continuous disclosure provisions in respect of **non-financial risks**.

This rightly raises questions for listed entities as to whether this reflects a trend in the broadening of the orthodox subject matter of continuous disclosure claims into other areas of operational risk.

This chapter traces how Australia's continuous disclosure regime has been used as a vehicle to prosecute alleged shareholder losses said to arise from listed entities' non-disclosure of non-financial risks. It also identifies emerging subject matters in the United States and elsewhere that may indicate the types of claims which could be litigated in Australian courts in the near term.

SECURITIES CLASS ACTIONS: THE ORTHODOX POSITION

Historically, Australian securities class actions have tended to settle rather than proceed to trial. The first judgment in a securities class action (in favour of Myer) was delivered in October 2019,[6] a decade after the first settlement of a securities class action against GIO.

Before this review period, post-*Myer* trials generally failed on liability or, even where liability was proven, on causation and loss or damage.

The majority of these claims concerned earnings guidance, revisions and disclosures. These 'classic' continuous disclosure claims alleged failures to correct the market when guidance was no longer maintainable, or impugned the basis on which the guidance was issued.

These claims follow a clear conceptual formula:

- awareness of the information is premised on officers' (board and executives) engagement with profits and earnings guidance
- the ASX's Guidance Note 8 specifically contemplates the thresholds at which earnings-related information should be treated as material, and
- reliance on market-based causation, seeking to avoid the need to overcome potentially difficult causative issues of individual reliance by applicants and group members on the contravening conduct.

3 *Southernwood v Brambles Limited (No 3)* [2026] FCA 418.
4 *Crowley v Worley Limited* [2026] FCAFC 78.
5 On appeal from *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited* (2025) 427 ALR 233; [2025] FCAFC 63 and *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited (No 2)* [2025] FCAFC 123.
6 *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* (2019) 293 FCR 29; [2019] FCA 1747.

THE EMERGENCE OF NON-FINANCIAL RISK

Over the last decade, shareholder class actions have been increasingly deployed to agitate alleged failures to disclose the existence and realisation of non-financial risks. These proceedings allege systemic failures in the systems and processes for managing and disclosing non-financial and operational risks.

In short compass, these claims have concerned:

- **Illegal and corrupt conduct:** the first proceeding in Australia premised on non-financial risk arose in 2007 from revelations in the Cole Inquiry that AWB had made payments associated with wheat export contracts to front companies for Saddam Hussein's Iraqi regime, in breach of United Nations sanctions and Australian law. Far from a watershed moment in Australian securities litigation (and perhaps reflective of difficulties in the 'counterfactual' analysis where illegality is alleged), almost a decade passed before the second non-financial risk claim was commenced against CIMIC Group (2016) alleging that officers were aware of the risks of the potential corrupt conduct of an offshore subsidiary to secure construction work in Iraq.
- **Jurisdictional risks:** the Crown Resorts class action (2017) alleged inadequate disclosures of known risks of marketing gambling in mainland China before the 2016 arrests of Crown employees.
- **Anti-money laundering and counter-terrorism financing compliance:** proceedings against the Commonwealth Bank (2017), Westpac (2019), Crown Resorts (2020) and Star Entertainment (2022) each followed AUSTRAC civil penalty proceedings or other public statements concerning the entity's AML/CTF compliance.
- **Environment, safety and operational disasters:** claims against BHP (2018) and Ardent Leisure Group (2020) alleged awareness of environmental, safety or operational risks before the 2015 Fundão dam failure and October 2016 Dreamworld tragedy, respectively.
- **Information and data security:** Medibank (2022) is alleged to have been aware of deficiencies in its information security controls before announcing a major data breach in October 2022.

While the subject matter underpinning these claims has varied, there are common denominators among the claims:

- an alleged **deficiency in systems and processes that is alleged to have been known**, or ought to have been known, by officers of the entity. As the impugned systems and processes generally concern allegedly significant risks that are the subject of market representations (including annual reporting), there is generally a direct link articulated between the subject matter and the alleged knowledge of the respondent's senior executives and board
- a **'corrective disclosure'** event revealing, either expressly or implicitly, the alleged true position of the respondent's systems and processes, and
- reliance on **market based causation** to avoid proving the direct reliance by group members on the alleged non-disclosure or representation.

The rationale for this reliance on non-financial risks to ground securities class actions rests on several interconnected factors:

- **The continuous disclosure regime is subject-matter agnostic:** Australia's statutory disclosure regime does not distinguish between financial and non-financial risk. Rather, s674(2) of the Corporations Act requires disclosure of any information that a reasonable person would expect to have a material effect on the price or value of a company's securities. ASX Listing Rule 3.1 similarly requires immediate disclosure once an entity becomes 'aware' of information that satisfies the materiality threshold. Whether the undisclosed information concerns deteriorating earnings forecasts or systemic AML/CTF non-compliance, the legal test is the same: would the information, if generally available, be likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of the securities?[7]
- **Potential gap between corporate accountability and shareholder recovery:** Regulatory enforcement addresses corporate compliance failures, but civil penalties flow to the Commonwealth rather than shareholders who acquired securities at allegedly inflated prices. Shareholder class actions arguably seek to fill that compensatory gap and vindicate the continuous disclosure regime's statutory purpose of ensuring an informed and efficient market.[8]

7 *Corporations Act 2001* (Cth) s677.

8 *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd (No 5)* [2024] FCA 477 at [357].

- **Securities class actions will frequently follow regulatory investigations:** Regulatory action can provide a foundation for follow-on claims where the alleged misconduct has been investigated, pleaded or admitted in another forum. AUSTRAC proceedings against CBA and Westpac, for example, supplied a public account of alleged AML/CTF control failures capable of being reframed as governance and disclosure issues for investors. Increasingly, the investigation is not merely a prelude to enforcement and in serious operational risk matters, it may itself be treated as disclosable. This link is explored further in the Parallel Pressure chapter of The Review.

While these features make shareholder class actions attractive, claims based on non-financial risk raise difficult questions of materiality, causation and loss. The complexity of issues raised before the High Court in the *Zonia* proceedings illustrates the live issues.

FUTURE CLAIMS: A LOOK OVER THE HORIZON

While plaintiffs and defendants alike await the High Court's judgment in *Zonia* with a view to clarifying many of these issues, class actions are likely to continue to be deployed as a means to prosecute perceived failures in non-financial risk management and governance.

Overseas developments, particularly in the United States, suggest where Australian shareholder claims may head next. Although the Australian regime is distinct, United States securities litigation has moved beyond traditional financial misstatement cases into alleged failures concerning artificial intelligence (**AI**), environmental, social and governance (**ESG**) commitments, workplace culture and corporate governance.

We identify below the subject matter of securities proceedings overseas that may prove to be a forecast of what lies ahead for listed Australian entities.

Artificial intelligence

The potential for AI to reallocate task-based work, improve processes and realise efficiencies is undeniable, but, like any novel and rapidly developing tool, carries risk. Although corporate Australia has embraced AI, and much judicial ink has been spilt on the use of AI by corporations (not least Lee J's consideration of the use of AI by directors in *ASIC v Bekier*[9]), Australia has not yet seen significant litigation, or shareholder class actions, directed to AI-related disclosures.

That is not so in the United States, where multiple securities class actions have been filed concerning representations about AI use and its benefits. To date, these proceedings have targeted AI developers, AI infrastructure suppliers and businesses deploying AI tools. A recurring allegation is 'AI washing': overstating AI capabilities, rebranding existing tools as AI-driven, or promoting AI-led growth before products are market-ready or scalable.

Given the prevalence of AI use in Australia, and the emerging trend of AI litigation in the United States, companies should be cognisant of the risks of the new technology and pay close attention to their disclosures in respect of AI capabilities and growth predictions.

ESG and greenwashing

A small but established category of securities class actions in the United States are those related to a company's ESG practices — that is, proceedings alleging that a company has made materially false or misleading statements about its environmental, social, or governance practices. Claims arising from misleading environmental statements are commonly referred to as 'greenwashing' litigation.

Recent additions to the ESG securities class actions environment in the United States include 'anti-ESG' proceedings, which allege that a company has implemented ESG initiatives without adequate risk disclosure. The *Enviva*[10] and *Danimer*[11] cases, for example, illustrate how ESG and sustainability claims may provide the basis for investors to allege that public-facing environmental statements overstated the entity's true performance, product attributes or operational sustainability. In both, the claims were sparked by external scrutiny and publication (short-seller reports or investigative journalism) which led to share price declines.

Similar proceedings have been commenced in other jurisdictions. In England, institutional and retail investors in garment producer Boohoo Group plc commenced group proceedings in 2024 alleging that public revelations of unethical supply chain practices caused a significant decline in share price value and revealed the 'bluewashing' of Boohoo's practices in its market disclosures. Bluewashing is akin to greenwashing but focuses on the human and social element of an entity's ESG practices.

Similarly, the content of mandatory sustainability reporting requirements for Group 1 ASX reporting entities may attract closer scrutiny by investors and plaintiff lawyers of entities' ESG activities. Mallesons' Mandatory Sustainability Reporting in Practice contains an in-depth analysis into the first wave of such reporting.

While there is yet to be tangible success for plaintiffs at the trial of such class actions overseas, these developments and domestic regulatory progress may encourage plaintiff firms and funders to consider local claims grounded in alleged ESG representations and disclosures, as noted in the Next Frontier chapter of The Review.

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9 *Australian Securities and Investments Commission v Bekier* [2026] FCA 196 at [390]–[394].

10 *Fanucchi v. Enviva Inc.*, 2023 WL 1415628 (D. Md.).

11 *Swanson v. Danimer Scientific, Inc.*, 2024 WL 4315109 (E.D.N.Y.); dismissal affirmed on appeal to the United States Court of Appeals for the Second Circuit.

Workplace misconduct

The review period has seen a number of employment class actions commenced alleging failures in employers' handling of systemic workplace misconduct and harassment. These are explored further in the Employment class actions chapter of The Review.

As a form of operational risk, workplace misconduct may support securities claims focused on the organisation's knowledge and statements regarding the extent and handling of alleged misconduct.

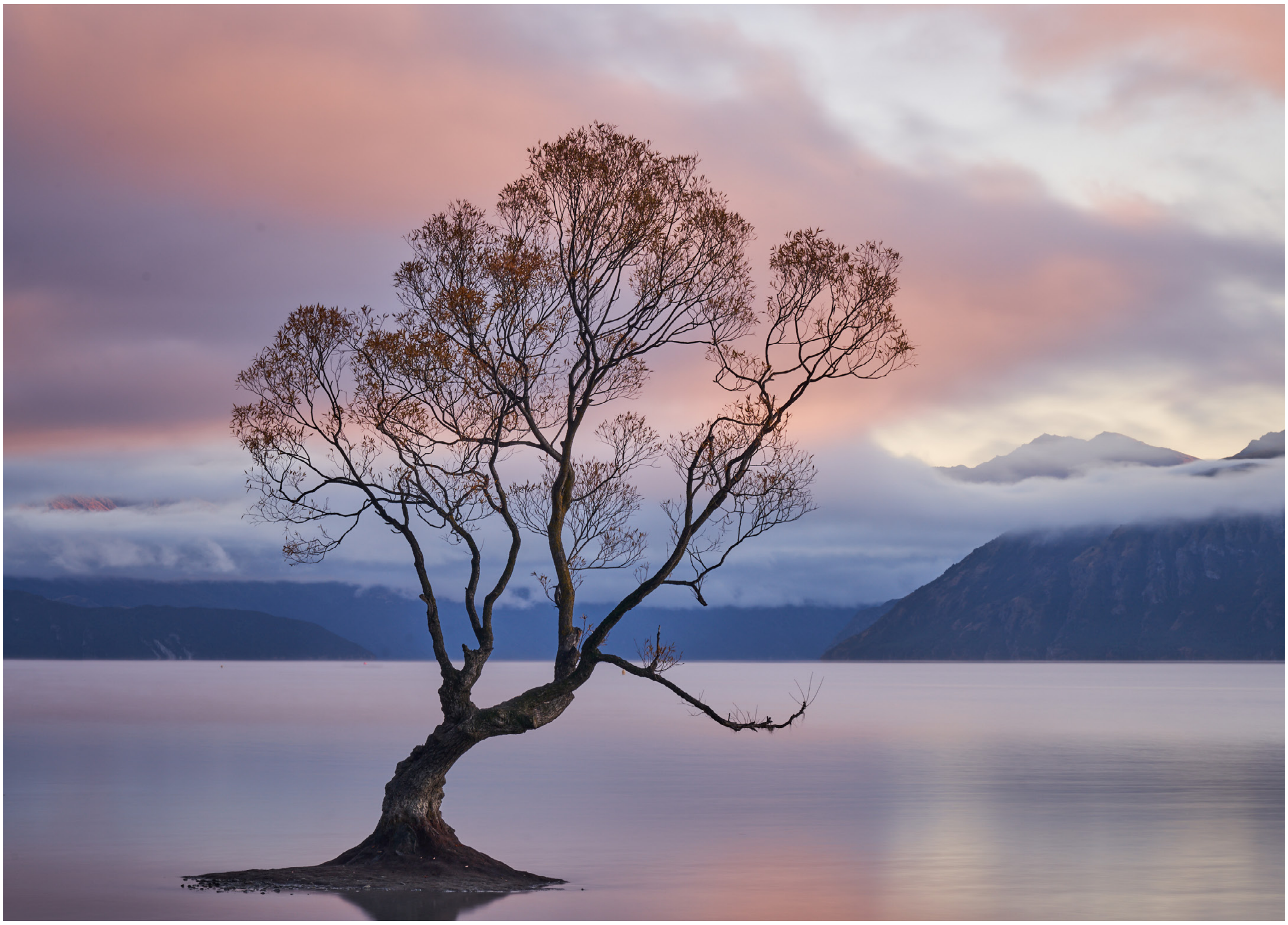
In the United States, investors in gaming and software manufacturer Activision Blizzard Inc. commenced proceedings in 2021 following Californian and federal investigations into alleged workplace misconduct, alleging that market statements regarding those investigations misstated and downplayed their severity and informed the price of its shares. The claim was dismissed prior to hearing.

The securities litigation risk is therefore not the occurrence of misconduct itself, but what is said or left unsaid about the systems, processes and governance for investigating, managing and resolving such conduct and the accuracy of disclosures about third-party investigations.

CONCLUSION

Trends overseas indicate that the legal architecture of shareholder class actions is familiar, but the alleged corporate failures to which it may be applied are broadening. Established securities class action mechanisms can be used to recast serious operational or governance failures as claims about what the market was told, what it was not told, and what senior decision-makers knew or ought to have known.

Where systemic deficiencies, serious risk and a corrective disclosure event intersect, recent examples indicate the potential foundation for class action claims and a longer-term trend for future review periods.



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