MALLESONS

The Review

Class Actions in Australia 2025/2026

Meet our national class action experts

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Introduction

Welcome to The Review – Class Actions in Australia 2025/2026, in which we consider significant judgments, events and developments between 1 July 2025 and 30 June 2026 and look ahead to what is coming in the class action arena in the next financial year.

This year's edition of The Review follows a downturn in the number of new class actions filed, with the lowest total filings since 2016/2017. As the adage goes, the numbers rarely tell the whole story — and that has proved to be the case as we have analysed the factors which contributed to the pace and types of claims filed during the review period. While we have seen a slow start to the calendar year, all signs point towards an uptick in FY27.

In terms of high-level trends during the review period:

- It was another strong year for employment class actions, which remained second for new filings behind consumer claims.
- The Federal Court was again the jurisdiction of choice, followed by the Victorian Supreme Court — which remains the only jurisdiction that permits contingency-like fees to be sought for plaintiff lawyers (group costs orders or GCOs): see the Funding Developments chapter of The Review.
- In the Victorian Supreme Court, the median rate of pre-settlement GCOs stayed at 30% (matching 2024/2025), although the highest GCO rate confirmed at settlement remains 27.5%. The review period also saw the lowest GCO rate ever ordered: 13.253% at settlement, revised from a range of 17.5%-25% pre-settlement.
- The review period saw the second largest ever quantum of approved settlements, with more than $1.65b in settlement funds approved (and 5 settlements being $100m or more).

There were also several significant judgments during the review period advancing both substantive and procedural class action jurisprudence. These included the first 2 judgments in favour of plaintiffs on issues of causation and loss in Australian shareholder class action history:

- In April 2026, the Federal Court in *Brambles* issued the first Australian class action judgment which found that a company's breach of its continuous disclosure obligations caused shareholders quantifiable loss.
- In May 2026, the Full Federal Court in *Worley* upheld the remitter judge's findings on liability and found in favour of the applicant on both causation and loss, becoming the first appellate court to confirm the availability of market-based causation. The Full Federal Court also rejected the argument that an applicant must prove what the market impact of a specific counterfactual disclosure would have been in order to establish that they had suffered 'some' loss.

There will be further developments in both of these cases in FY27 as the judgment in *Brambles* goes on appeal and the High Court determines an application for special leave in *Worley*.

The year ahead will also bring the first definitive guidance from the High Court on what is required to prove loss in a shareholder class action when judgment is published in the *Zonia* appeal, which was heard in June 2026. The High Court's judgment in *Zonia* could overtake the reasoning in *Brambles* and *Worley*, or may recalibrate how courts approach questions of causation, counterfactual analysis and the standard for proving loss in this context.

Regardless of the outcome, a decision in *Zonia* will have a significant impact on future shareholder class actions in Australia. Plaintiff firms and litigation funders have been awaiting the outcome, which may be a contributing factor in the slow pace of new securities class actions filed (4) in the calendar year to date. There is little doubt, however, that a successful outcome for the appellants in *Zonia* will re-energise these filings. We cover what might be next for shareholder class actions in more detail in the Securities chapter of The Review.

The review period also saw some interesting procedural developments concerning the interaction between regulatory proceedings and class actions. These include joint liability trials being held across parallel proceedings and class actions, and the Federal Court directing for the first time that a civil penalty obtained by ASIC be paid to a class action administrator for distribution to group members, rather than becoming government revenue. Almost a third of the class actions commenced in the review period intersected with a regulatory proceeding, investigation or inquiry on the same subject matter. We assess these developments, and how companies can manage overlapping regulatory and class action risk, in the Parallel Pressure chapter of The Review.

Looking ahead to FY27, we expect to see plaintiffs continuing to test the boundaries in emerging areas of societal concern. We examine the areas which might feature in the next wave of class actions, and what companies can do to prepare, in the Next Frontier chapter of The Review.

Our key message is that companies should remain vigilant in managing class action risk, in an environment where we do not expect any lasting reduction in class action activity.

The editors hope that you find this report informative.

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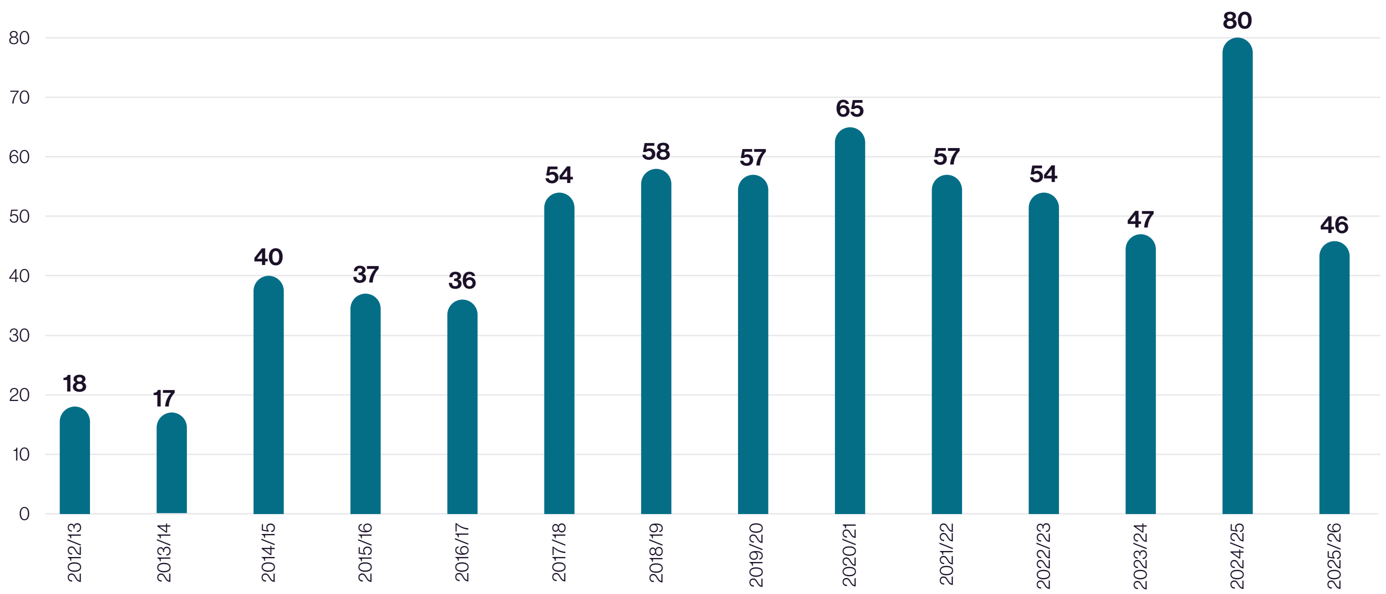
Headlines

WHAT'S NEW?

There were at least 46 new class actions filed in the financial year to 30 June 2026. This was the lowest total we have seen since 2016/2017, after a record high in the last review period that was in part inflated by a group of similar actions.

Class actions filed



TYPES OF CLAIMS

With lower overall numbers, most categories of class actions declined in the review period, although the top end of the leader table remained largely unchanged.

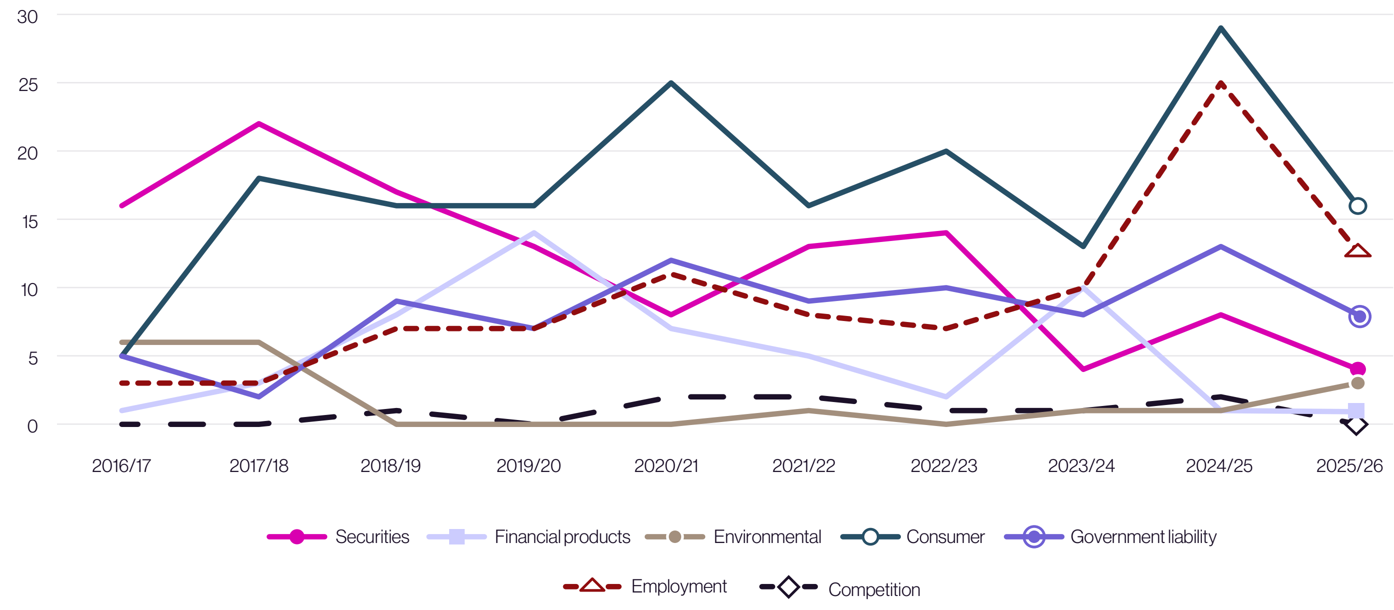
16	13	8
Consumer	Employment	Government liability

4	3	1	1
Securities	Environmental	Financial products	Other

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

- **Consumer:** motor vehicle performance; interest-free offers; property development; data breaches; rent reduction claims; gaming products; proton pump inhibitor drugs.
- **Against the State:** racial discrimination; sex discrimination; land remediation; IVF rebates; card payment surcharges.
- **Employment:** doctors' working hours; wage underpayments; rest breaks.
- **Environmental:** flood damage; land contamination; emissions.
- **Securities:** James Hardie; Light & Wonder; Woolworths; Paladin Energy.

Types of claims – trend

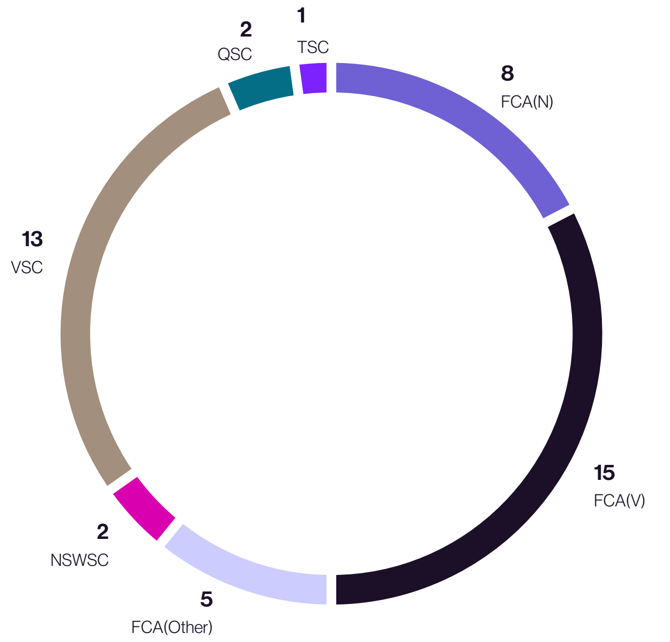


JURISDICTIONAL PREFERENCES

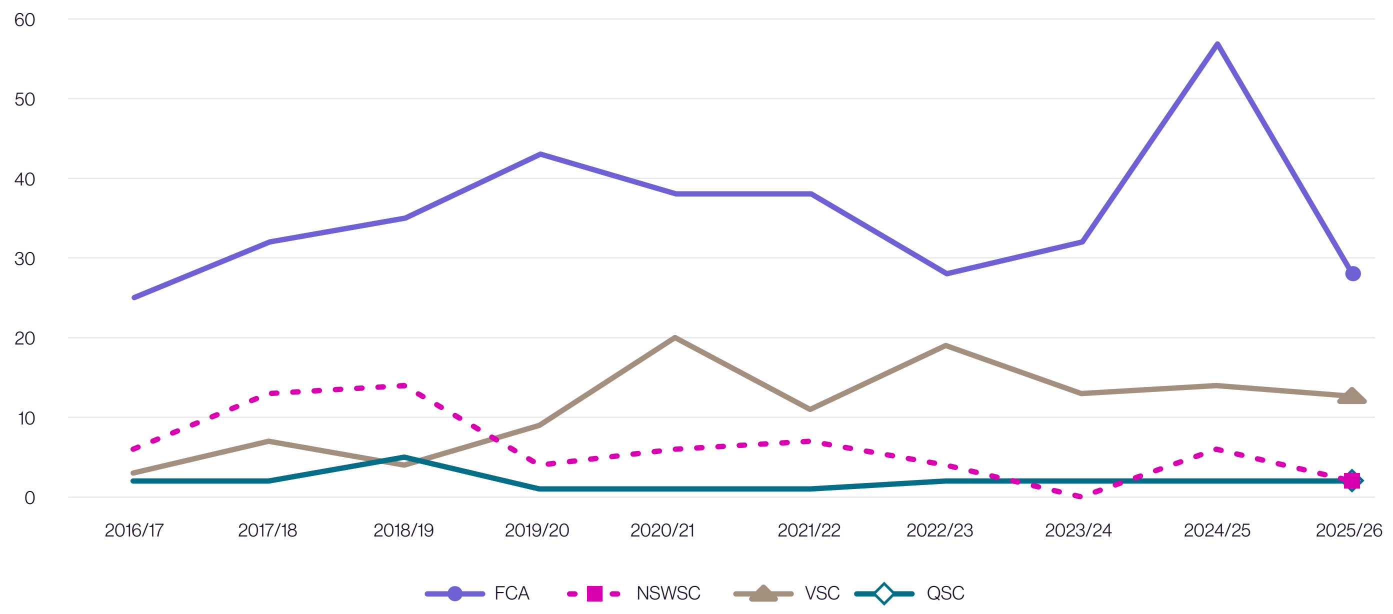
The Federal Court and the Victorian Supreme Court remain the leading jurisdictions for new actions filed:

- 28 in the Federal Court (down from 56 in 2024/2025), with the Victorian Registry being most popular
- 13 in the Victorian Supreme Court (slightly down from 14 in 2024/2025).

Actions filed by court



Actions filed by jurisdiction – trend



THE PLAYERS

At least 23 firms filed a new action. This is a similar number to last year, but is significant due to the lower total number of claims filed, and includes 7 firms which had not previously filed a class action:

- 9 firms filed actions in the Victorian Supreme Court (up from 7 in 2024/2025)
- 16 firms filed actions in the Federal Court (down from 17 in 2024/2025)
- only 3 firms filed actions in both of those jurisdictions (down from 5 in 2024/2025)
- 3 firms filed 4 or more actions, and 1 firm filed 3 actions (down from 5 and 4 in 2024/2025).

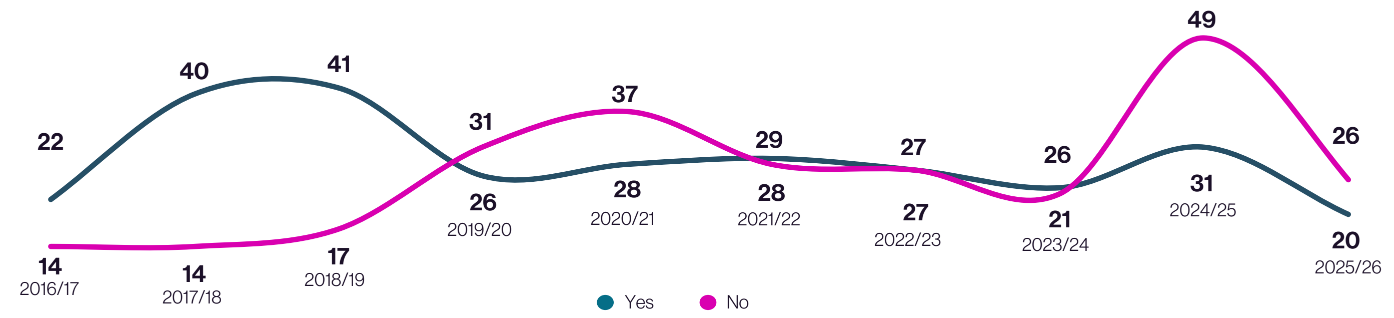
Funders included unions (5), Litigation Lending Services (4) and Omni Bridgeway (4).

The proportion of new actions involving a litigation funder increased to 43.5%, after a low last review period due to multiple related unfunded class actions.[1]

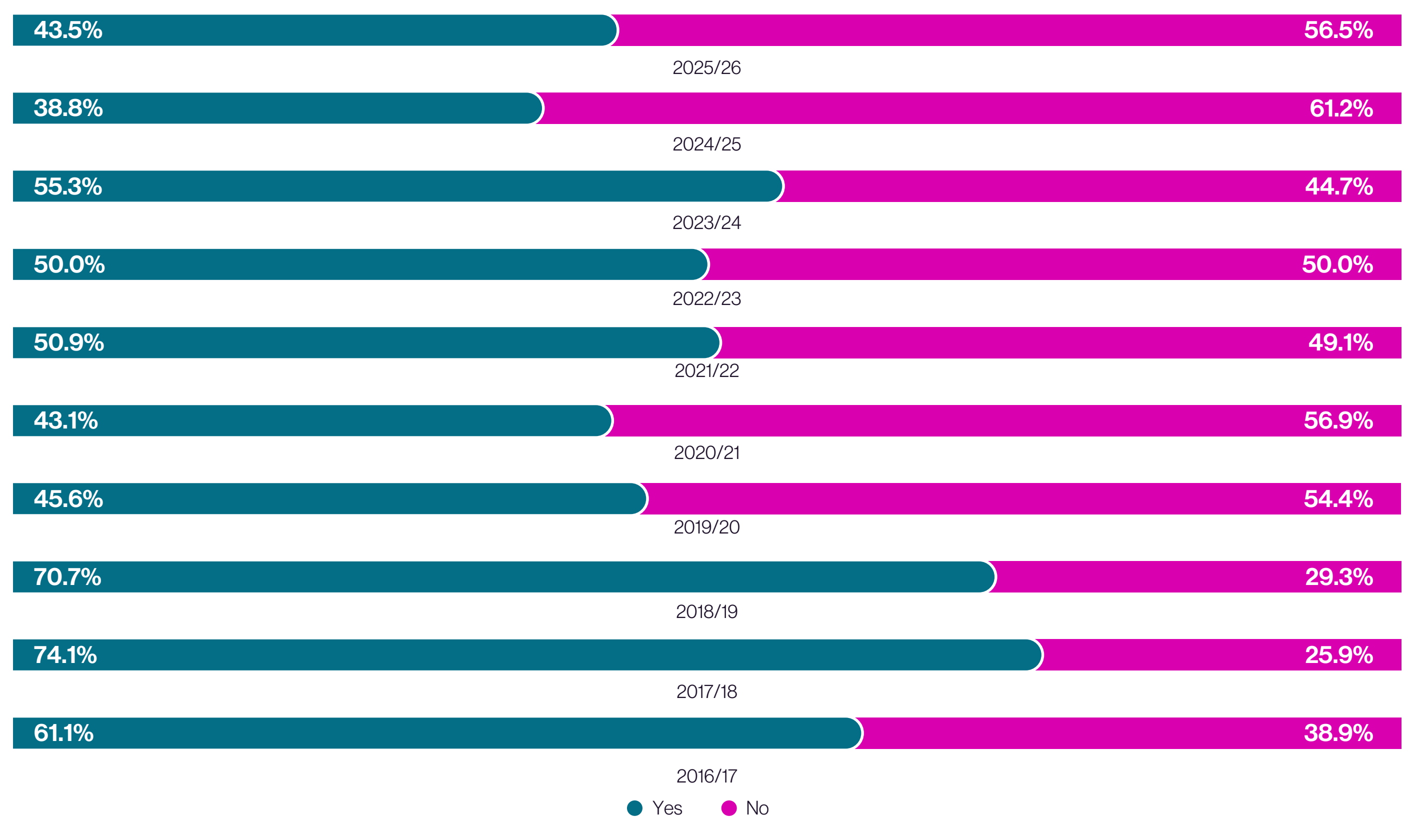
Five firms have now filed 30 or more class actions in the last 10 years, however only 2 funders have been involved in as many actions.

1 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.

Funded class actions - by number



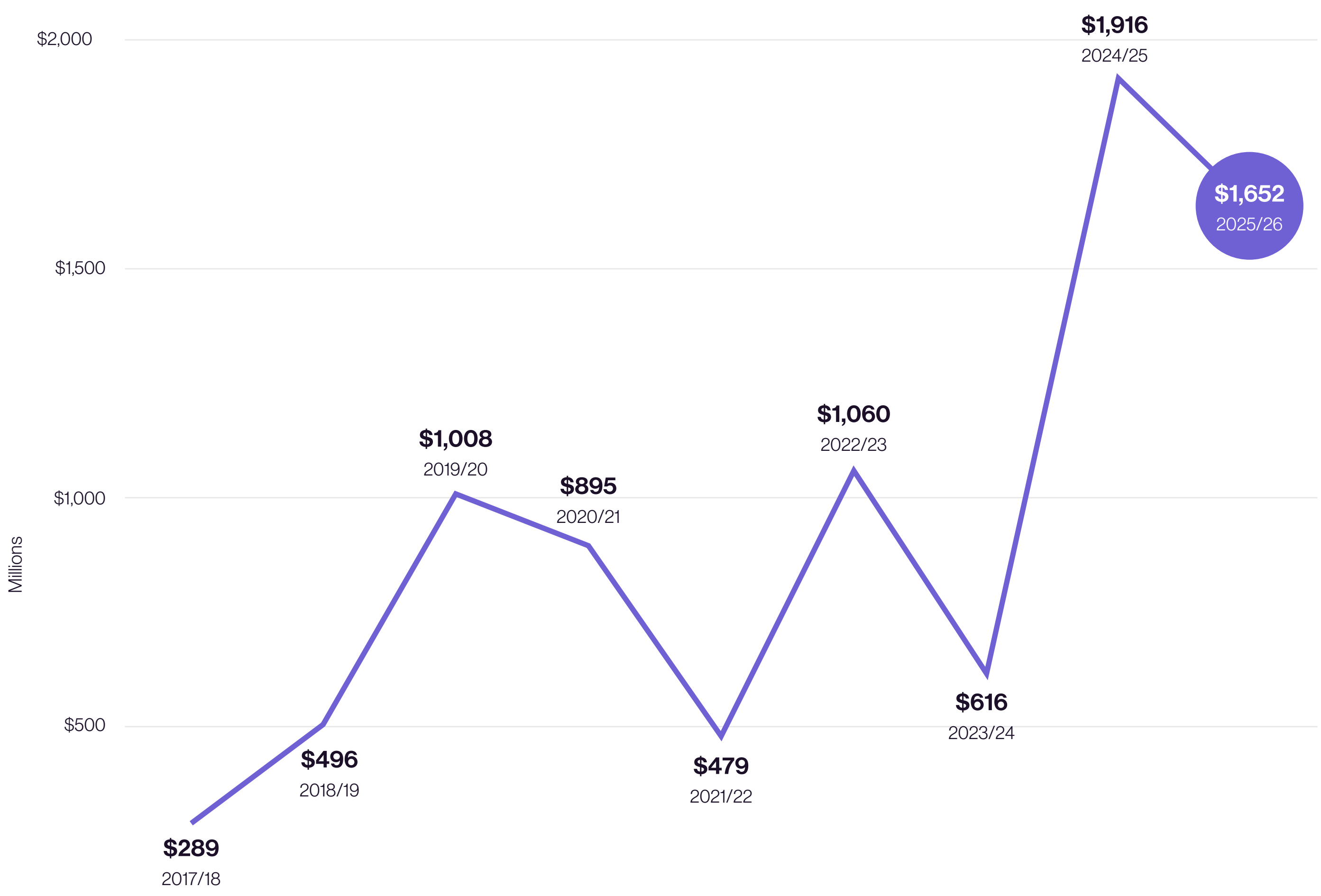
Funded class actions - by %



SETTLEMENTS

At least 20 class action settlements were approved in 2025/2026, representing over $1.65b in settlement funds. The review period saw 5 approved settlements of $100m or more. A further $650m in class action settlements await Court approval (or were approved just outside of the review period — these are detailed in the Outlook chapter of The Review).

Approved settlements in the review period – trend



Approved settlements in the review period - claim type

$548.5m Government liability	**$377.7m** Consumer	**$257.0m** Financial products
$233.3m Securities	**$176.3m** Employment	**$59.0m** Other

JUDGMENTS ON LIABILITY AND DAMAGES

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

- **Securities:** *Worley (appeal)*; *Whitehaven Coal*; *Brambles*.
- **Financial products:** *MLC – super fees (appeal)*.
- **Consumer:** *Cladding*; *Ruby Princess (appeal)*.
- **Competition:** *App purchases (Epic Games)*.
- **Against the State:** *Vic public housing (appeal)*; *Sydney Light Rail (appeal)*; *Capsicum spray*; *Strip searches – music festivals*; *Climate change risk – Torres Strait Islanders*.
- **Employment:** *Coles*; *Woolworths*; *Postgraduate research candidate hours*.

Class action settlements July 2025 – June 2026

	CLASS ACTION	TYPE	SETTLEMENT SUM (DAMAGES)[2]	PLAINTIFFS' COSTS	LITIGATION FUNDER % OR $
1	Car Loan Flex Commissions – ANZ and Macquarie	Consumer	$85,000,000	GCO: 24.5% ($20,825,000)	GCO
2	Toyota – diesel emissions (Hino)	Consumer	$87,000,000	GCO: 13.253% ($11,530,000)	GCO
3	Foreign Exchange Cartel	Competition	$59,000,000	$30,870,338.61 + $3,047,800 ATE premium	N/A
4	Car Loan Flex Commissions – Westpac	Consumer	$130,000,000	GCO: 24.5% ($31,850,000)	GCO
5	Car Loan Flex Commissions – Macquarie Leasing	Consumer	$56,500,000	GCO: 24.5% ($13,842,500)	GCO
6	Crown Resorts – 2020	Securities	$72,500,000	GCO: 27.5% ($19,937,500)	N/A
7	James Cook University	Consumer	Not disclosed		
8	Doctors' working hours – Vic x 30	Employment	$173,302,489.68	$20,802,489.68	N/A
9	Gladstone Ports	Environmental	$0	No – plaintiffs to contribute to defendant's costs	No
10	Exactech	Consumer	$8,700,000	$2,185,491.25	N/A
11	BHP Brazilian Mine disaster	Securities	$110,000,000	$48,163,291 + $4,098,500 ATE premium	$2,738,208
12	Bindarrah Level Crossing Collision	Consumer	$6,809,703.35	Parties to bear own costs	N/A
13	Quintis	Securities	$15,700,000 (includes previous partial settlement)	$7,000,000	25% of total settlements ($3,925,000)
14	Super fees – OnePath	Financial products	$50,000,000	$14,271,442.94	N/A
15	EML Payments	Securities	$37,356,125	GCO: 24.5% ($9,152,250.63)	N/A
16	Super fees – Colonial	Financial products	$140,000,000	$15,717,695.01	27.50%
17	Wilson Security	Employment	$3,050,000	$915,000	N/A
18	Summerlin Parklands development	Consumer	$3,755,000	$700,000	N/A
19	Super fees – QSuper	Financial products	$67,000,000	$8,240,540.62	25% ($16,750,000)
20	Robodebt	Government liability	$548,500,000	$13,500,000	$35,000,000

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

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.

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.

Under (parallel) pressure: Class actions and regulatory proceedings

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Corporations continue to face significant regulatory action across multiple sectors including consumer, employment and financial services. ASIC secured $830m in civil penalties in FY26 and commenced more than 250 investigations;[12] the Fair Work Ombudsman (**FWO**) announced in October 2025 that it had recovered more than $358m in underpayments for workers in the previous financial year;[13] and the ACCC has emphasised that it will continue to pursue robust enforcement action.[14]

Corporations navigating regulatory action may encounter increased class action risk in respect of the same or similar conduct, particularly where there are (public) civil penalty proceedings or enforceable undertakings. Regulatory proceedings may put a spotlight on a particular issue, and the allegations, evidence and/or findings in such proceedings can provide the factual foundations for class action pleadings.

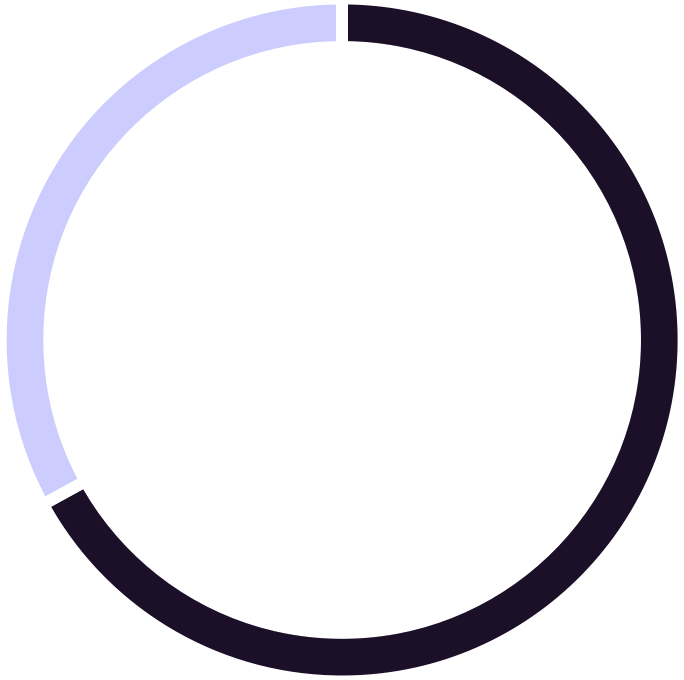
Almost a third of the class actions commenced in the review period intersected with a parallel regulatory proceeding, investigation or inquiry on the same subject matter. Significant decisions in the review period have sharpened the interplay between class actions and regulatory proceedings:

- In each of the *Coles*[15] and *Woolworths*[16] cases about pricing representations, the Federal Court conducted the liability trial of the ACCC proceeding and the consumer class action jointly in each case, illustrating an option for case management of overlapping proceedings.
- In *Noumi*,[17] for the first time, the Federal Court ordered that the civil penalty amount ordered in an ASIC proceeding be paid to the settlement administrator in a class action for distribution to group members, rather than being paid to the Commonwealth. *Noumi* highlights the intersection between the aim of civil penalties in achieving deterrence and orders seeking to compensate impacted persons, which can create tension where both remedies are sought against a respondent with limited assets.

For corporations facing simultaneous regulatory and class action proceedings (or potential proceedings), the message is clear: strategies to manage regulatory matters and mitigate class action risk must be developed in parallel. Legal teams should continue to consider carefully the impact of any admissions in regulatory proceedings on class action risk, along with the extent of any remediation.

Looking ahead, we expect the interplay between regulatory proceedings and class actions to continue, particularly in the employment space where both the FWO and class action applicants routinely seek compensation on behalf of employees, potentially raising questions about the utility and viability of the class action proceedings.

12 See ASIC secures record $830 million in civil penalties orders and $644 million back to Australians in 2025-26 20 July 2026.
13 See Fair Work Ombudsman $358 million back-paid to Australian workers 29 October 2025.
14 See ACCC's compliance and enforcement priorities update 2025-26 20 February 2025.
15 *ACCC v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598.
16 *ACCC v Woolworths Group Limited* (VID974/2024).
17 *ASIC v Noumi Limited (No 5)* [2025] FCA 1524.



JOINT LIABILITY TRIALS IN THE REVIEW PERIOD

Context

In September 2024, the ACCC commenced proceedings against both Coles and Woolworths. It alleged that the supermarkets temporarily increased the price of certain products before placing them on promotions at prices which, although lower than the temporarily increased prices, were higher than, or the same as, the pre-increase price. The ACCC alleged that this was misleading because the promotional price was not a genuine discount.

Parallel consumer class actions quickly followed, advancing materially the same allegations on behalf of persons who purchased relevant products. In each case, the Court ordered that:

- the initial hearing on liability in each class action be heard together with the relevant regulatory proceeding
- evidence in the ACCC proceedings be evidence in the class actions, and
- the lead applicant was not to take further steps in the class actions pending resolution of the regulatory proceedings, with the applicants undertaking to be bound by the findings of fact and law made in the ACCC's proceeding.

Significance of joint liability trials

While this approach is not unprecedented, it is relatively rare. Ordering joint trials across regulatory proceedings and class actions requires:

- a respondent willing to go to trial
- sufficient overlap in substantive issues, and
- cases that are practically (and fairly) able to be case managed together, which may not be the case, for example, if a class action is commenced years after a regulatory proceeding.

A natural 'brake' on the use of joint liability trials is often a practical one. In many instances, respondents are willing to agree facts and admissions with the relevant regulator and contest only issues of penalty, avoiding the need for a trial on liability in the civil penalty proceedings. In addition, where the regulatory proceedings include natural persons as respondents who can claim penalty privilege, the regulatory proceeding will ordinarily be sequenced first to avoid any prejudice to the individual's defence.[18]

18 See for example *ASIC v Helou* (2019) 139 ACSR 489; [2019] FCA 1634 at [289].

Joint liability trials can deliver significant resource efficiencies for both courts and parties. For respondents, exposing executives or employees to the rigours of a trial on only 1 occasion is attractive, as is the ability of the in-house legal team to manage its resources more effectively. Class action applicants can also benefit from the ability to adopt the regulator's evidence and have the regulator prosecute the common issues, thereby reducing costs and leaving a theoretically larger proportion of any amount for compensation available to group members.

A critical element in assessing the utility of a joint liability trial is of course the extent to which the factual issues overlap. The Medibank regulatory proceeding and related class action are an example of cases in which there is not a complete overlap of issues between the 2 sets of proceedings (including because different statutory provisions are in issue), but the consumer class actions and the privacy regulator's case will proceed by joint trial. It is also possible that applicants in a class action may propose a hybrid approach, with any additional causes of action, defences and possibly questions of loss raised in the class action to be the subject of a subsequent 'mini-trial'.

Respondents should carefully consider whether to agree to or oppose a joint liability trial, having regard to the nature of the allegations and evidence, whether a joint trial may enhance or detract from any settlement considerations, and any impact on insurance arrangements. In weighing the various factors, it is also relevant that an applicant in a subsequent class action would in any case take the benefit of the Court's factual findings in the regulatory proceeding and may be able to rely on evidentiary mechanisms to provide them with a leg up. These include:

- certain legislative provisions under which findings of fact and/or admissions from regulatory proceedings are 'prima facie' evidence of those facts in class actions, and
- the ability for an applicant to issue a notice to admit in relation to any statement of agreed facts entered into between the respondent and the regulator.

Further, the advantages for a respondent of having a second bite of the evidentiary cherry in a subsequent class action that follows on from regulatory proceedings may be more illusory than real. For instance, witnesses who have given evidence in 1 proceeding may understandably be reluctant to give evidence again and will be bound by the answers already given under oath.

Finally, even if a class action has not been commenced, legal teams acting for respondents in regulatory proceedings cannot afford to discount the potential for future class actions in making decisions about how to resolve those proceedings. Respondents should approach potential admissions with class action risk in mind, regardless of how they are treated from an evidentiary perspective. This is because, even though it is well known that admissions in regulatory proceedings are sometimes made to cooperate and reduce any civil penalties, it can be difficult forensically for a respondent to take a different position in later class action proceedings. A key question for corporations in considering potential admissions is whether class action risk can be mitigated, for example, by:

- seeking to agree proposed contraventions that do not necessarily (or perhaps easily) translate to a cause of action that gives rise to a claim for loss in a class action, and/or
- making known details of any remediation undertaken, to signal any class action may not be economically viable as the loss that group members could otherwise seek to recover is negligible.

Having an external legal team that can demonstrate experience in both regulatory and class action proceedings and who are alive to these issues will continue to be an important selection criterion for in-house legal teams.

NOUMI: THE CLASS COMES FIRST

Context

While overlapping regulatory proceedings and class actions may run in parallel and address common factual issues, their purposes are different. Regulatory proceedings are typically focused on obtaining civil penalties, which are intended to achieve both specific and general deterrence and are paid into the Government's consolidated revenue. Class actions, by contrast, are brought by private parties seeking compensation for affected persons (and a return for funders).

Regulators, however, may also have statutory powers to seek compensation or refunds from the Court on behalf of impacted persons, or to require a respondent to undertake a remediation program. Where liability is admitted or likely to be admitted in a regulatory proceeding, a respondent may also be incentivised to undertake a remediation program promptly, as this is a factor relevant to the assessment of civil penalties. For instance, ASIC estimates that $644m is being paid back to Australians 'in connection with' its work in FY26.[19]

19 See ASIC secures record $830 million in civil penalties orders and $644 million back to Australians in 2025-26 20 July 2026.

Where compensation or remediation is sought by a regulator or undertaken by a respondent, real questions can arise as to the utility and/or economic viability of any parallel class action. This is particularly so where the claims made and alleged loss in the regulatory proceeding and class action are substantially the same.[20] This is an area we expect to increasingly come into focus particularly in the employment space given the FWO routinely seeks compensation on behalf of employees (in addition to penalties).

That said, class action risk may remain, depending on the scope of any compensation or remediation — that is, applicants may contend that the compensation or remediation was insufficient to fully compensate for losses suffered by group members. For example, a class action has recently been commenced against Macquarie in relation to the Shield and First Guardian Master Fund collapses, despite Macquarie agreeing with ASIC to remediate investors' lost capital (although not lost investment returns).

So, what happens when a respondent with limited means to satisfy a judgment faces both civil penalties and potential compensation liabilities arising from a class action? This is the issue that arose in *Noumi*.[21]

What happened in *Noumi*?

ASIC commenced civil penalty proceedings in the Federal Court against Noumi Limited, its former CEO and its former CFO, alleging breaches of the continuous disclosure obligations by overstating its inventory. A parallel class action was commenced in the Victorian Supreme Court on behalf of shareholders who acquired an interest in Noumi shares during a broader period.[22]

Ahead of the hearing of the class action, the lead applicants applied for leave to intervene in the ASIC proceeding, seeking an order that any pecuniary penalty be paid into Court pending the resolution of the class action. In August 2024, the Federal Court ordered Noumi to pay a $5m penalty into Court on that basis. The Victorian Supreme Court approved the settlement of the class action for $43m in June 2025 and also made a compensation order under s1317HA of the Corporations Act, allowing the applicant to seek orders in the Federal Court under s1317QF(3) that preference be given to compensate the class members so that the penalty sum would be made available for distribution to group members. Those orders were subsequently made by Jackman J, with the civil penalty amount to be transferred to the administrator of the approved settlement distribution scheme.

While there are equivalent provisions to s1317QF under the Competition and Consumer Act and the Australian Consumer Law,[23] *Noumi* was the first occasion where the Court ordered the payment of a civil penalty in an ASIC proceeding to a class action administrator for the benefit of class action group members.

Justice Jackman identified 5 reasons for the order:[24]

- the admissions and contraventions underpinning the compensation order in the class action mirrored the admissions and declarations in the regulatory proceeding
- any entitlement to compensation from the ASIC proceeding (which applied to a sub-group of the class) would be separate from, and additional to, the right of all registered group members in the class action to obtain a share of the settlement sum
- at the time of settlement, Noumi was in a constrained financial position and had limited capacity to contribute to any settlement
- the relevant group members were estimated to have suffered losses from Noumi's conduct greater than the compensation they would receive from the settlement, and
- the ASIC penalty sum would be distributed to the relevant group members in a manner that is fair and reasonable.

Significance of *Noumi*

The use of s1317QF to preference the payment of class action settlements rather than a penalty to the Commonwealth makes sense where the respondent's cash flow is constrained or it otherwise lacks the means to meet both a class action settlement or judgment and a civil penalty (as was the case in *Noumi*).

For large companies, the impetus for class action representatives and funders to seek such orders may be less. To the extent, however, that it is perceived as a viable way to facilitate a class action settlement or to secure a larger settlement amount, or in cases involving superannuation trusts (where it may be seen as a means to obtain a direct payment to group members outside of the preservation rules rather than having settlement monies paid by the trustee to restore the fund), we could see these orders being sought by plaintiffs more broadly.

20 Cf *Baker v Woolworths Group Limited (No 2)* [2022] FCA 534, where Murphy J refused to approve the settlement and discontinuance of a class action on the basis of a parallel FWO proceeding including because the FWO proceeding did not cover the entire group or all the claims made in the class action (see for example at [81]).

21 *ASIC v Noumi Limited (No 5)* [2025] FCA 1524.

22 *Gehrke v Noumi Limited* [2025] VSC 373.

23 *Competition and Consumer Act 2010* (Cth) s79B; Australian Consumer Law s227.

24 *ASIC v Noumi Limited (No 5)* [2025] FCA 1524 at [22]-[31].

In the consumer space, the regulator isn't the only sheriff in town

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OBSERVATIONS ON CURRENT CONSUMER ACTIONS

Consumer class action filings fell sharply in this review period, from a peak of 29 in 2024/2025, to only 16 in 2025/2026. Consumer claims nonetheless remained the highest category as a proportion of the total number of class actions filed, at over a third of all filings.

Overall, the themes for new consumer actions in 2025/2026 were product liability/defects, gaming, privacy/data breach, and construction/property development. Compared with 2024/2025, the mix narrowed: in 2024/2025, consumer filings covered a broader spectrum including aged care, extended warranties, talcum powder, breast implants, pipes, travel credits, supermarket pricing and insurance products.

A NOVEL APPROACH: CLASS ACTIONS PIGGYBACKING ON PRIVATE LITIGATION

In the Parallel Pressure chapter of The Review, we examine the trend of class actions following on from *regulatory enforcement proceedings*. Another notable development in 2025/2026 was the liability decision in the consumer class actions commenced after Epic Games brought proceedings against Apple and Google, which is a rare example of a consumer class action following on from proceedings brought by *private litigants*. These proceedings illustrate how private litigation can establish the factual groundwork, and a roadmap for later representative claims.

Epic Games: A case study

The class actions arising from the Epic Games litigation are illustrative of this broader evolution. Two class actions were commenced: the first brought by David Anthony and Dark Ice Interactive Pty Limited (**Dark Ice**) against Apple entities, and the second brought by Brett McDonald and Dark Ice against Google entities. The class actions were brought on behalf of both app developers and app end users who purchased iOS apps or in-app digital content through the Australian App Store, or Android apps or in-app digital content through the Australian Play Store, between 6 November 2017 and 20 June 2022.

The class actions were derivative of the private actions brought by Epic Games against Apple and Google on questions of liability, and were heard concurrently in a joint trial with those proceedings. In the 2 private actions, Epic alleged that Apple and Google misused their market power in contravention of s46 of the Competition and Consumer Act by requiring developers to distribute apps exclusively through the App Store and Play Store respectively and to process in-app payments through Apple's and Google's own payment systems (charging commissions of up to 30%). The Court found that both Apple and Google held substantial market power in their respective app distribution and in-app payment solutions markets. These liability findings then underpinned the related class actions, which found developers were forced to pay materially higher commissions than in a competitive counterfactual. This form of case management, where the Court tries related but factually distinct conduct jointly, highlights a movement towards coordinated multi-forum proceedings based on the same underlying facts.

In this case, a comprehensive resolution of the anti-competitive app store conduct required both:

- the private action brought by Epic Games to establish contravention and secure forward-looking relief including declarations and injunctions, and
- the representative proceedings to allow developers and consumers to seek damages for their quantifiable loss arising from the overcharge.

The case demonstrates how class actions can be 1 component of broader litigation risk, rather than self-contained vehicles. Where the conduct complained of raises both ongoing systemic impacts and historic damage, private companies facing litigation risk may need to manage exposure across multiple forums, including regulatory enforcement, remediation processes and representative proceedings.

While the ACCC did not bring separate proceedings, it did intervene in the Epic proceedings at key points – when the platforms argued the cases should be stayed in favour of US litigation, and to make submissions on appropriate relief (in which it largely backed the broad remedies sought by developers). These targeted interventions demonstrate a model where regulators could seek to rely on liability established in private proceedings to achieve (or influence) efficient enforcement outcomes.

CAN CONSUMER CLASS ACTIONS PROMPT REGULATORY ACTION?

While we have seen the rise of 'follow-on' actions from regulatory proceedings and the rare instance of an action piggybacking on existing private proceedings, the question remains: could regulatory investigation and enforcement follow on from consumer class actions?

In the United States, we have seen instances of this inverse influencing, with consumer class actions prompting regulatory investigation or enforcement action. Two interesting recent examples are:

- **Swifties take on Live Nation:** In 2022, a group of aggrieved Taylor Swift fans who could not buy tickets to the Eras Tour commenced a class action against Ticketmaster and its parent company Live Nation alleging anticompetitive behaviour. After the class action, the Department of Justice (**DOJ**) (alongside 40 state attorneys general) commenced enforcement action, resulting in a jury finding for the States on 15 April 2026 that Live Nation had contravened US competition law.
- **Collusion by code:** In 2023, more than 30 consumer class actions representing frustrated renters were consolidated into a single proceeding against property management software company, RealPage. The class applicants alleged the unlawful coordination of rental prices between rival landlords through RealPage's algorithmic pricing software. Following these filings, the DOJ launched an investigation leading to enforcement action being commenced in 2024. On 19 May 2026, the Court approved RealPage's settlement with the DOJ which fundamentally changes how its proprietary rental software can function.

To date, we have not identified any instances where an Australian consumer class action has prompted public regulatory investigation or enforcement action. As illustrated by the Epic Games litigation, Australian regulators, in particular the ACCC, appear content for consumer class actions (and private proceedings more generally[25]) to continue without any related enforcement action unless it impacts regulatory priorities or is a matter of public importance.

Regulatory action, private proceedings and class actions (or a combination of all 3) remain a significant risk where there is non-compliance with laws that directly impact consumers.

25 For example, *Mayfield Development Corp Pty Ltd v NSW Port Operations Hold Co Pty Ltd* [2026] HCA 12.

Employment class actions: No signs of slowing down

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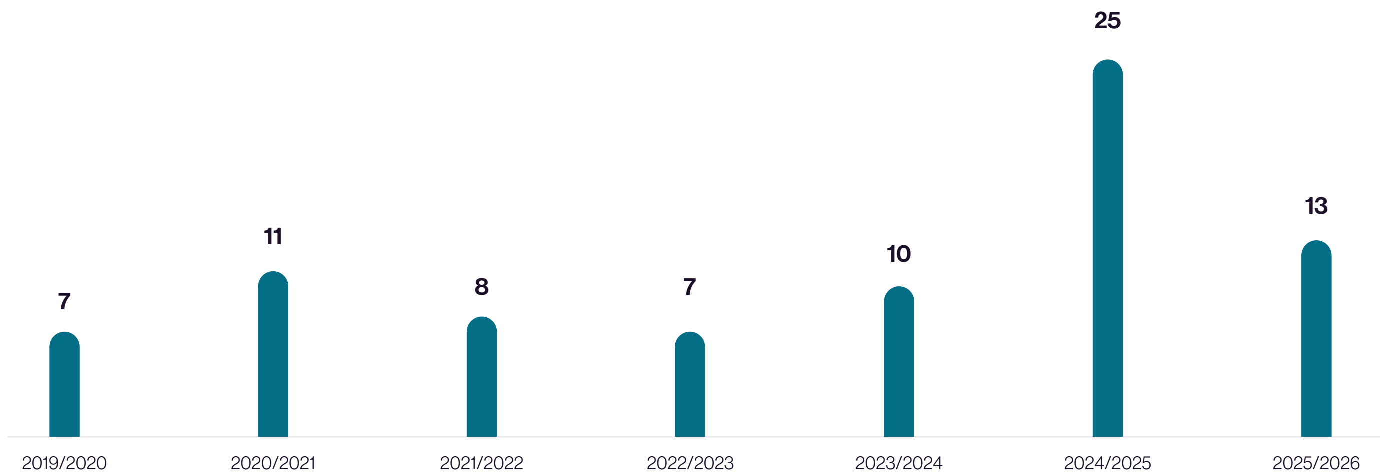
Employment class actions filed



Employment-related class actions remained strong in FY26, with 13 new proceedings filed, representing the second most prevalent category of new class actions in the review period (behind consumer claims). Several themes stood out this year:

- underpayment and entitlement claims continue to dominate in the wake of the *Coles* and *Woolworths* litigation, and are expected to spread beyond the retail sector
- junior doctors' underpayment claims remain the largest cohort, although these claims are mature and are proceeding to settlement, and
- workplace sexual harassment claims have emerged as a key growth area, with several proceedings on foot in the public and private sectors.

Last year's headline figure of 25 filings was inflated by 21 related junior doctors' underpayment claims filed by the same firm on the same day against various Victorian public health services providers.

By comparison, the number of new proceedings commenced in FY26 confirms that employment claims are increasingly prevalent and are extending beyond the health care sector into retail, resources and hospitality.

EXPANSION OF EMPLOYMENT CLASS ACTIONS

Underpayments and entitlements claims

Underpayment class actions increased again in FY26, continuing the upward trajectory observed over recent years. The landmark decision handed down last year in the Supermarkets decision[26] provided a springboard for wage underpayment litigation arising from the use of annualised salary arrangements, as well as a host of technicalities relating to workplace law compliance. In that case, which has attracted significant publicity, the Federal Court held that payments above award entitlements in a pay period cannot be set off against entitlements arising in other pay periods, affecting widespread remuneration practices in the retail sector and beyond. The decision is almost certain to be appealed, although final orders have not yet been made, so any appeal is unlikely to be heard until 2027 at the earliest.

Following the Supermarkets decision, a series of proceedings have been filed, with further proceedings foreshadowed, targeting annualised salary arrangements for retail managers. Proceedings against Rebel Sport, Alinta Apparel and Kmart were commenced in FY26 and further investigations by the same plaintiff law firm into other retailers have been publicised.

FY26 also saw a number of class actions commenced relating to work on public holidays. Proceedings have been commenced against McDonald's, Hungry Jack's, Woolworths and Coles, alleging failure to provide public holiday entitlements for Sunday shifts (under South Australian legislation Sundays were legislated as public holidays from 1910 to 31 December 2023).

Junior doctors' class actions remained the largest category of Australian employment underpayment litigation, with several follow-on proceedings commenced in FY26. First-wave claims are largely in settlement administration, with follow-on proceedings addressing employers or instruments not captured by earlier settlements.

Sexual harassment and discrimination claims

Sexual harassment claims have emerged as a potential growth area in employment class actions. Proceedings have been commenced against the Australian Defence Force (**ADF**) alleging vicarious liability for a systemic failure to protect female ADF members from sexual harassment. The Royal Commission into Defence and Veteran Suicide provides important background to this claim, with findings that close to 800 sexual assaults were reported in the ADF over 5 years, and estimated under-reporting at 60%.

Class action proceedings have also been brought against 3 separate private sector employers in the energy and resources industry, being BHP, Rio Tinto and Fortescue Metals. These claims follow a West Australian Parliamentary Inquiry into sexual harassment against women in the FIFO mining industry in 2022. These 3 proceedings, run by the same plaintiff law firm, allege that the relevant corporate groups, related subsidiaries and contractors are vicariously liable for failing to protect current and former female employees from sex discrimination, sexual assault and/or sexual harassment.

LOOKING AHEAD

We expect that conduct-related class actions — including in relation to sexual harassment — will continue to rise, particularly in industries where sexual harassment is a significant and known risk factor, including traditionally male-dominated and hierarchical organisations.

Discrimination claims may also be an area of increased activity in the employment class action space. In particular, the Royal Commission on Antisemitism and Social Cohesion may heighten focus on workplace discrimination risks. If findings implicate institutional conduct, plaintiff law firms may explore whether common policies or systemic failures can support race or religion-based group claims (which must initiate as a representative complaint to the Australian Human Rights Commission).

Payday superannuation legislation commenced on 1 July 2026, requiring employers to pay superannuation guarantee contributions each payday rather than quarterly. This change, coupled with amendments from 1 January 2024 to include superannuation contributions as a national employment standard (for the first time, giving employees and unions a legal right to pursue unpaid superannuation directly), may expose previously hidden shortfalls and we may see a new trend of group claims emerge in relation to failures to make minimum superannuation contributions.

26 *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) 343 IR 340; [2025] FCA 1092.

Drugs and devices on trial: A decade of health sector class actions in Australia

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Over the last 10 years, there have been a number of high-profile class actions in Australia against companies relating to consumer health and therapeutic goods, and health services. These proceedings often follow similar claims in the United States. This chapter outlines what we have observed over the decade, and the trends that may influence future class action filing activity.

SNAPSHOT OF CLASS ACTIONS IN THE HEALTH SECTOR

- 20 class actions were filed between February 2016 and June 2026.
- Almost half of these proceedings were commenced in the past 2 financial years: 2024/2025 was the most active year for filings (5 new proceedings), followed by 2025/2026 (4 new proceedings).
- 80% of these class actions followed on from US litigation, regulatory action or product recalls.

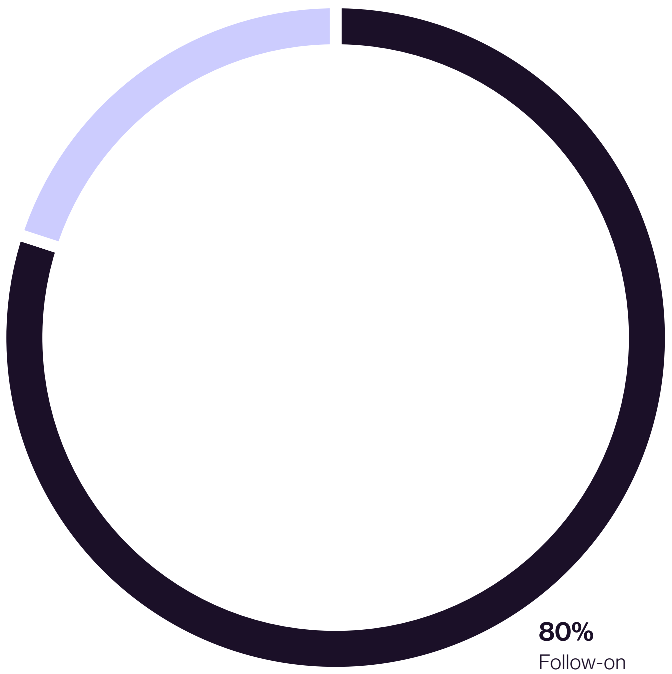
TRENDS OVER A DECADE OF FILINGS

The proceedings filed between February 2016 and June 2026 involved claims alleging negligence and contraventions of the Australian Consumer Law (**ACL**) relating to a diverse range of:

- **consumer health and therapeutic goods**, including sleep apnoea machines, contraceptive devices, joint implants, and over-the-counter medicines, and
- **health services**, including genetic testing for IVF and cosmetic surgery.

While these class actions make up only a small percentage of the class actions filed nationally each year, they have often garnered significant public interest due to:

- the nature of the subject matter (consumer health and therapeutic products), and
- their relationship to actions overseas — a particular feature of class actions in this sector.



The overwhelming majority (approximately 80%) of these class actions were 'follow-on' proceedings, being claims that were commenced in Australia following litigation or regulatory action (including product recalls) that had been taken in the United States.

Only 4 matters (20%) originated independently in Australia. These proceedings cluster into 3 categories:

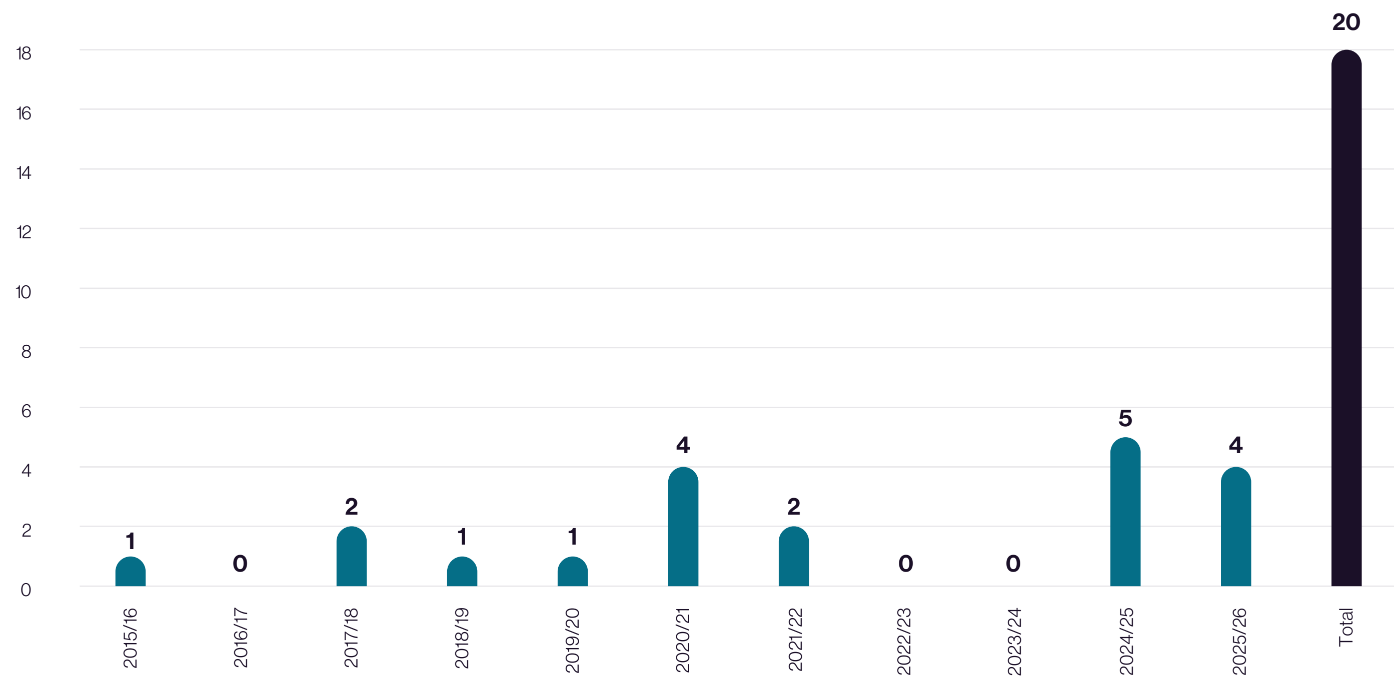
- professional negligence claims against individual practitioners or clinics (the Cosmetic Institute and Dr Lanzer proceedings)
- matters tied to distinctly Australian circumstances with no overseas analogue (the Monash IVF proceedings), and
- claims catalysed by prior domestic regulatory action (the Nurofen proceeding, which followed successful ACCC enforcement action relating to misleading marketing claims that the painkillers had been formulated to target specific types of pain).

Several factors are likely to have driven this pattern.

The United States has traditionally been a more fertile ground for health class actions, where the market — and consequently, the group size — is large, and offers the most significant awards to plaintiffs and returns for plaintiff law firms or funders who take on the risk of commencing proceedings without the risk of an adverse costs order.

By comparison, the Australian health market is small and the risk of bearing the costs of commencing and running test-case proceedings can often outweigh the potential benefits in terms of a monetary award to plaintiffs or their representatives. However, as a common law jurisdiction, similar causes of action to those that have succeeded in the United States are often available in Australia, and the risk of running a class action in Australia is materially reduced after succeeding elsewhere first (as well as there being higher prospects of obtaining a favourable settlement).

Filing trends by financial year



The health sector class actions filed across the decade were not evenly spread. Two distinct waves stand out: 2017/2018 to 2021/2022 and 2024/2025 to 2025/2026, separated by a gap in which no class actions were filed.

The pattern contrasts with the broader Australian class action market, in which proceedings have been commenced at a comparatively steady rate, perhaps suggesting a closer alignment within the health sector to developments overseas than domestically.

The pattern may also be reflective of Australian class action plaintiff firms and funders running one mass tort wave to conclusion before committing to invest in the next. The gap in filings between 2021/2022 and 2024/2025 is consistent with this approach: a first wave of matters resolved during this period, including a stay of proceedings in the American Medical Systems mesh proceedings in 2022, settlement of the TFS Manufacturing mesh proceedings in 2023, and resolution of the Essure, Ethicon and Boston Scientific proceedings in 2024.

The uptick in Court filings in 2024/2025, being the highest single year over the decade, involved matters relating to earplugs, joint replacement devices, breast implants, over-the-counter medication and talcum powder.

Nature of the products and claims

Class actions in relation to medical devices, including sleep apnoea machines and joint implants, account for 45% of filings over the decade, with the remainder split between health services (15%), over-the-counter medicines (35%) and prescription medication (5%).

Of the 17 proceedings where a Statement of Claim is publicly available, 13 plead both negligence and ACL claims, pairing a safety or quality defect allegation with a fault-based claim. The remaining 4 proceedings rely on the ACL alone. Notably, 3 of those were commenced in 2024/2025.

On one view, claims grounded exclusively in the ACL can be easier to make out where the harm is about a product's promised qualities. We expect to see a continued trend in health sector class actions towards labelling, marketing and efficacy-based claims, rather than product safety claims alone.

45%	15%	35%	5%
Medical devices	Healthcare services	Consumer or over-the-counter health products	Prescription medications

OUTCOMES

- 10 of the 20 health sector class actions filed have resolved.
- Of these, 7 settled (including the $56m Monash IVF settlement discussed in The Review 2024/2025) and 2 were stayed or procedurally closed, including the American Medical Systems mesh proceeding, following its US parent company's insolvency.
- The remaining proceeding, Essure, resulted in a win for the defendant. The applicants could not establish the necessary causal link on the balance of probabilities, illustrating the evidentiary hurdle that plaintiffs who run actions in the health sector may face even where a similar claim overseas was successful.

LOOKING AHEAD: OBSERVATIONS FOR 2026 AND BEYOND

We have seen a marked uptick in the commencement of class actions in the health sector, with 9 of the 20 proceedings filed in the past decade having been filed in the past 2 financial years.

Given the continued introduction of new high-profile medical devices and treatments in the United States, we expect this surge to continue in the coming years.

CASE STUDY - ESSURE CONTRACEPTIVE

Case: *Turner v Bayer Australia Ltd* [2024] VSC 760 (Supreme Court of Victoria, Keogh J)

Proceeding: A class action brought on behalf of more than 1,400 group members who received an Essure implant in Australia prior to 31 December 2018.

Allegation: The Essure permanent contraceptive device caused ongoing chronic inflammation resulting in pelvic pain and abnormal uterine bleeding. The device was therefore defective and not of acceptable quality in breach of the *Trade Practices Act 1974* (Cth) and/or the Australian Consumer Law, and the defendants were negligent in designing and manufacturing Essure and in failing to adequately warn of associated risks.

Context: Essure was voluntarily withdrawn from the Australian market in 2017. In the United States, the Food and Drug Administration restricted Essure sales in April 2018, and Bayer ceased distribution of the product by the end of 2018, following more than 26,000 adverse event reports between November 2002 and December 2017. Nearly 39,000 women filed claims in the United States. In August 2020, Bayer resolved the vast majority of those claims for approximately US$1.6b, without admission of liability.

Outcome in Australia: After weighing extensive biostatistical and epidemiological expert evidence, Justice Keogh found that causation was not established on the balance of probabilities. His Honour concluded that the plaintiff's symptoms were more likely explained by an unrelated condition rather than any inherent defect in the device. The claims were dismissed.

Key takeaway: Bayer's US$1.6b settlement in the United States did not translate to success for the group members in Australia. Australian courts will independently scrutinise causation through their own procedural and evidentiary frameworks, relying on case-specific expert evidence. Justice Keogh in this proceeding accepted the defendants' submission that the regulatory history of Essure was 'peripheral to the critical issues requiring determination', and the plaintiff had not established that any regulatory issue 'made any relevant difference' to her case. Practitioners advising on Australian product liability exposure should therefore focus on building a robust, Australia-specific evidentiary record on causation, including biostatistical, clinical and expert evidence, from the outset of any claim or defence, even where there has been overseas regulatory action or significant settlements.

The next frontier: New and novel claims on the horizon

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Historically, new categories of class action litigation in Australia have tended to emerge from domestic triggers such as the introduction of new statutory regimes, shifts in regulatory enforcement priorities, and the findings of royal commissions and public inquiries. These catalysts remain important, but they no longer fully explain the origin of claims litigated in representative proceedings or provide a definitive indication of when, or from where, the next wave of proceedings is likely to emerge.

The class action risks facing companies in Australia today extend beyond historically typical securities class actions against listed companies, and product liability and financial services claims. The class action arena is increasingly seeing the filings of new claims in other areas of social concern.

That is for 2 primary reasons:

- First, companies are operating in increasingly complex global markets in which social, geopolitical and economic forces are moving faster than Parliament or regulators can adapt. In that environment, plaintiff class action firms and litigation funders are increasingly prepared to test the boundaries of existing causes of action in emerging areas of societal concern (such as claims based in negligence asserting a novel duty of care in relation to climate change — see the discussion below).
- Second, Australian plaintiff firms and litigation funders are regularly looking offshore for inspiration, watching new and novel causes of action incubate overseas before they are applied in class action litigation in Australia.

The lesson for companies operating in Australia is clear: claims that once appeared speculative are increasingly being litigated in Australian courts. The question is not whether new and novel claims will be launched in areas of current social concern, but what steps companies should take to avoid becoming the 'test case' respondent when they do.

This chapter of The Review focuses on 3 types of claims which we expect to see tested in class actions in the coming years, and identifies other areas for further monitoring. The best way for companies to manage class action risk in these areas is to be aware of these emerging claim types; be proactive in complying with the incoming regulatory regimes; and conduct business operations with both customers and environmental, social and governance (**ESG**) considerations front of mind.

CONSUMER CLAIMS: UNFAIR TRADING PRACTICES

The passage of the *Competition and Consumer Amendment (Unfair Trading Practices) Act 2026* (Cth) during the review period marks one of the most significant expansions of Australia's consumer protection framework since the introduction of the unfair contract terms regime in 2011. The Act introduces into the Australian Consumer Law, from 1 July 2027, a broad prohibition on conduct that manipulates a consumer or unreasonably distorts the environment in which they make a decision, and which causes, or is likely to cause, detriment (whether financial or otherwise).[27]

27 See Mallesons Insight New ACL obligations: Unfair Trading Practices provisions in effect from 1 July 2027 6 July 2026.

The new prohibition is deliberately framed to capture conduct that has historically been difficult to establish as a breach of the existing misleading or deceptive conduct, unfair contract terms or unconscionable conduct provisions, potentially lowering the threshold for plaintiffs to establish liability. The changes are particularly intended to target so-called 'dark patterns' in websites and apps, such as pre-ticked boxes that favour the business, artificial urgency created by countdown timers or stock warnings, and 'confirm shaming' messaging, where a customer is unfairly made to feel bad about a choice. The prohibition captures *'wrongful interference with a consumer that results in a change in the consumer's behaviour, decision making or action that is against the consumer's interests' and 'is not intended to require dishonesty'*.[28]

There are also new prohibitions from 1 July 2027 on drip pricing (where mandatory fees are revealed only late in the purchase process — particularly on online carts and checkout pages) and subscription traps (where consumers face onerous barriers to cancelling a service or are not properly notified before being charged).

All of these new prohibitions will sit within the existing enforcement framework of the Australian Consumer Law: the ACCC and state and territory consumer protection regulators will have the power to pursue contraventions through civil penalty proceedings or the issuing of infringement notices.

The reforms are also likely to provide a new avenue for consumer class action claims. The Explanatory Memorandum expressly states that the regime is intended to extend to *'conduct in relation to an individual consumer, class of consumers, or consumers generally'*,[29] meaning a single dark pattern or other unfair trading practice deployed across a customer base may create a common issue on which to base a representative proceeding.

Businesses who deal with consumers or small businesses should begin assessing their compliance with these new provisions well in advance of 1 July 2027. This should include, in particular, reviewing customer platforms and interfaces, customer onboarding processes and selling and marketing practices more generally.

CLIMATE AND ENVIRONMENTAL CLAIMS: THE SEARCH FOR A NOVEL DUTY OF CARE

Globally, litigation continues to be used as a strategic tool for addressing climate-related harms. While the situation is no different in Australia, which had the third-highest number of climate cases filed globally in 2025,[30] there has been a divergence in the jurisprudence to date.

Some overseas courts have been willing to recognise duties of care or human rights obligations to prevent climate-related harms, with some cases turning on an express right to a healthy environment incorporated into those jurisdictions' human rights frameworks, following declaration of the right by the United Nations in 2022.[31] Australian courts, by contrast, have taken a more cautious approach, and only the ACT has adopted a standalone human right to a clean, healthy and sustainable environment.

Notably, Australian courts have so far refused to recognise the existence of a novel duty of care to prevent climate-related harm in 2 significant class action decisions,[32] being:

- *Sharma*, which alleged a duty owed to children,[33] and
- *Pabai*, which alleged a duty owed to people of the Torres Strait Islands.[34] An appeal in Pabai was heard on 28 to 31 July 2026 and judgment is reserved.

While no new claims of this nature have been made since the judgment in *Pabai*, we expect to see more climate-related claims commenced against Australian companies and the Government as climate-related regulation becomes more onerous and societal pressure for corporate accountability increases.

This is particularly because:

- **Class actions remain an accessible procedural mechanism for bringing climate-related claims:** There are limited prerequisites to bringing a class action in Australia, which can include both residents and non-residents as group members.[35]

28 Explanatory Memorandum, *Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026* (Cth) [1.25].

29 Ibid [1.20].

30 Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2026 Snapshot' (Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, 2026) at p. 7.

31 This includes, for example, International Court of Justice, *Advisory Opinion on the Obligations of States in Respect of Climate Change*, Inter-American Court of Human Rights Advisory Opinion on the Climate Emergency and Human Rights and European Court of Human Rights *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.

32 See Mallesons Insight *Climate obligations in Australia and abroad are oceans apart – what does it mean?* 30 July 2025.

33 *Minister for the Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35.

34 *Pabai v Commonwealth (No 2)* [2025] FCA 796 (**Pabai**).

35 *BHP Group Ltd v Impiombato* (2022) 276 CLR 611; [2022] HCA 33.

- **Australian courts have accepted (largely unchallenged) expert evidence on climate change:** In both *Pabai* and *Sharma*, the Court accepted scientific evidence of the impact of climate change. While the Federal Court in *Pabai* considered it was not possible to measure the precise extent to which an alleged breach contributed to the impacts of climate change on individual claimants, international jurisprudence has concluded that it is possible to determine and quantify each country's contribution to global emissions. The Australian position is likely to be tested further in future litigation.
- **Climate-related reporting schemes will increase scrutiny:** As regulatory obligations in this area continue to grow, applicants will increasingly look beyond negligence claims against both government and corporate respondents toward statutory causes of action that do not require the recognition of a novel duty of care. This has already been seen in the way misleading conduct prohibitions have been used in 'greenwashing' cases. The review period saw the continued trend of 'greenwashing' claims globally, with the first case brought in Australia against a company for false 'carbon neutral' advertising settling just prior to the review period in May 2025. [36]
- **Applicants in other jurisdictions continue to push the boundaries with novel arguments:** For example, during the review period, a class action was brought in the United States against major oil companies, alleging those companies have concealed the effects of their activities on climate change, resulting in increases to home insurance premiums.[37]

A DIGITAL DUTY OF CARE?

The review period also saw the first successful consolidated action in the United States resulting in a jury verdict against social media companies for harm caused by their platform design choices based on a finding that the relevant platforms were defective products under Californian law.[38] While this decision is under appeal, it has been reported that Australian plaintiff class action firms have been 'assessing the viability' of whether a class action could be run in Australia on similar grounds, with one such firm publicly stating it is investigating *'whether the evidence supports a sustainable cause of action'*.[39]

Reform is also afoot, with the Federal Labor Government committing in May 2026 to legislating a 'digital duty of care' on online services — including social media platforms — to prevent serious online harms to Australians. It is proposed that the duty:

> *'will focus on ensuring that services have effective systems and processes in place that are reasonable, risk-based and proportionate, and which mitigate the risk of reasonably foreseeable serious harm to their users'*.[40]

This was a key recommendation of the Statutory Review of the *Online Safety Act 2021*, which recommended the adoption of *'a singular and overarching duty of care that encompasses due diligence, and is underpinned by safety by design principles, risk assessment, mitigation and measurement'* and which *'shifts… the burden for remaining safe online away from individual users and onto those most capable of identifying and addressing harms – the service providers themselves'*.[41] This proposal is subject to an ongoing consultation process and there is no date scheduled yet for any draft Bill to be tabled in Parliament. While it is not proposed to be enforceable as a private right (including as a class action), it is contemplated that the eSafety Commissioner will be able to seek civil penalties for non-compliance.

Further, on 19 July 2026, the Victorian Labor Government announced an intention to legislate *'nation-leading laws to keep AI and tech companies accountable and protect our kids'*.[42] The reforms would remove the need for an applicant to prove a permanent impairment of 10% or more in claims for negligence causing psychiatric harm in the specific context of claims brought on behalf of minors against social media and AI providers.

We do not, however, expect class action litigation to await the enactment of a specific statutory framework, and anticipate claims concerning alleged harms from online services will be among the next to be tested in the Australian class action environment.

36 *Parents for Climate Ltd v EnergyAustralia Pty Ltd* (NSD833/2023).
37 *Kennedy v. Exxon et al* (U.S. District Court for the District of Western Washington, case number 2:25-cv-02378).
38 *Social Media Cases*, No. JCCP 5255, Lead Case No. 22STCV21355, 2023 WL 922262 (California Superior Court, 25 March 2026).
39 Cat Woods, *'Tide of social media cases could follow US court rulings over child safety'*, Law Society Journal, 2 April 2026.
40 Department of Infrastructure, Transport, Regional Development, Communications, Sport and the Arts, *A Digital Duty of Care for Australia—Developing duty of care framework for online services used by Australians* (Report, May 2026).
41 Delia Rickard PSM, *Report of the Statutory Review of the Online Safety Act 2021* (Report, October 2024) at p. 12.
42 The Hon Jacinta Allan MP, *Big Tech Must Prevent Hate and Keep Kids Safe* (Media Release, 19 July 2026).

'BATTLEGROUND' CLAIMS: OTHER EMERGING FRONTIERS

Beyond the claim types discussed above, other claims that could emerge as novel causes of action in representative proceedings in Australia include:

BLUEWASHING: THE 'S' OF ESG

As mentioned above, greenwashing claims are already the subject of heightened regulatory scrutiny and private actions – and governance claims have long been the subject of securities and superannuation class actions. Beyond the 'E' and 'G' in ESG, the representations or disclosures a company makes about modern slavery, Diversity, Equity & Inclusion, and human rights may also become a feature of the class action environment.[43]

RACIAL DISCRIMINATION AND VILIFICATION

Racial discrimination and vilification claims have already featured in representative proceedings in recent years,[44] whilst others are being investigated with possible filings on the horizon.

The Royal Commission on Antisemitism and Social Cohesion may also act as a catalyst for future vilification class actions.

ARTIFICIAL INTELLIGENCE

Use of AI is likely to become an area of class action risk as companies use it in customer-facing, workplace and creative settings. Claims may focus on 'AI washing',[45] discriminatory outcomes from recruitment or workplace monitoring tools, or consumer-facing uses of AI.

CYBERSECURITY AND DATA BREACHES

Data breach and cybersecurity claims may be framed differently in the future now that the new statutory tort for serious invasions of privacy allows claims for non-economic harm. Likely areas of focus include third-party vendor breaches, basic security failures and allegations that companies did not adequately disclose known cyber risks.

43 For instance, the review period saw the first modern slavery-related disclosures proceeding filed in the Federal Court of Australia: *Australian Uyghur Tangritagh Women's Association Inc v Kmart Australia Limited* (VID1007/2025).
44 See for instance, *Kaylyn Caulton v North West Hospital and Health Service* (QUD624/2025), *Adrian Burragubba & Ors v Adani Mining Pty Ltd t/a Bravus Mining and Resources* (QUD541/2025) and *Coedie McAvoy v Adani Mining Pty Ltd t/a Bravus Mining and Resources* (QUD542/2025).
45 See by way of comparison *City of St. Clair Shores Police and Fire Retirement System v. Microsoft Corporation*, case number 2:26-cv-02071 (W.D. Wash.) (a securities claim filed in the US on 12 June 2026 regarding alleged false and misleading statements about Microsoft's AI products) and *In re Evolv Technologies Holdings Inc. Securities Litigation*, No 1:24-cv-10761 (D. Mass.) (a securities claim filed in the US regarding alleged false and misleading statements about an AI-driven weapons detection system, which reached a settlement agreement in April 2026).

Why are there no copyright class actions?

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Since 2023 in particular, United States courts have entertained a series of copyright class actions against AI developers. The most prominent, *Bartz v Anthropic*, produced a settlement of US$1.5b that received final approval in July 2026 and stands as the largest copyright class action settlement in history. No equivalent proceeding has (ever) been commenced in Australia. Why?

COPYRIGHT IS THE CAUSE (OF ACTION)

Four features of Australian copyright law make it hard to consolidate claims into a representative proceeding.

First, **ownership**. Copyright is unregistered in Australia and arises automatically for eligible authors. Unlike trade marks and patents, no database exists to search, and no certificate exists to produce. The lack of a central ownership register means that any person who wishes to sue must individually establish ownership, tracing title through assignments, employment agreements, or publishing deals with the author. Each 'work' or 'subject-matter' in issue demands its own analysis.

Who is an 'author'? *In copyright law, the 'author' is the natural person who creates the work. That means the human whose skill and labour produces the original expression. The author is not necessarily the owner. Copyright in a work created by an employee in the course of employment vests in the employer, not the employee. And authors routinely assign their rights to publishers, record labels, production companies, or other parties. The result is that the 'author' and the 'owner' of a work are often different people, and the current owner may be several steps removed from the original creator.*

Second, **infringement**. To establish infringement by reproduction, a claimant must prove that the respondent copied their work, and that what was copied constitutes a 'substantial part' of it. Both inquiries are claimant-specific:

Did they copy from you?

Even if the respondent copied thousands of works through the same course of conduct, each claimant must prove copying. Did the respondent copy this claimant's work? Copyright complainants must establish a 'causal connection' between their work and the defendant's conduct, and the answer may differ for each group member.

Did they copy enough?

Copyright does not protect ideas, facts, or style, only original expression. Even if copying is proved, the Court must assess whether what was taken is a 'substantial part' of that claimant's work. The inquiry is qualitative. A small but highly original passage may be substantial; a large and commonplace passage may not.

Consider an AI claim as an example. Two authors whose novels appeared in the same training dataset may have quite different infringement claims. One author's prose may have been reproduced verbatim in model outputs, while another's may not have surfaced at all. One author's work may be highly original literary fiction, while another's may be formulaic genre writing with less protectable expression. The infringement analysis must be repeated work by work, claimant by claimant.

What is a 'work'? *Copyright does not protect a book, an album, or a portfolio as a single unit. It protects each discrete 'work' or 'other subject-matter', meaning each novel, each song, each photograph, each article. The Copyright Act 1968 (Cth) distinguishes between 'works' (literary, dramatic, musical, and artistic works) and 'subject-matter other than works' (sound recordings, films, broadcasts, and published editions). Each attracts its own bundle of rights and its own authorship and ownership rules.*

Third, **damages**. Even if a claimant establishes ownership and infringement, they must still prove loss. Unlike the United States, Australia does not permit copyright claimants to elect fixed statutory damages without proving actual loss. Under s115 of the *Copyright Act 1968* (Cth), a successful claimant may recover compensatory damages or an account of profits, but must prove what those damages are. A bestselling novelist and an obscure blogger may both appear in the same AI training dataset, but the hypothetical licence fee for the novelist's work may vastly exceed the blogger's. The Court must assess, for each claimant, what a reasonable licensee would have paid for the right to use that work in that way.

What is the 'user principle'? *Where a respondent has used a claimant's property without permission but the claimant cannot prove actual financial loss, Courts may award 'negotiating damages', sometimes called the 'user principle'. The measure is the fee that a willing licensor and willing licensee would hypothetically have agreed for the use in question. The concept originated in patent and property cases but applies equally to copyright. It asks: what would the parties have agreed, bargaining in the shadow of the claimant's legal right to refuse?*

Compare the position in the United States. Under 17 USC § 504(c), a copyright owner may elect statutory damages of between US$750 and US$30,000 per work infringed, or up to US$150,000 if the infringement is wilful. This obviates the need to prove actual loss and allows complainants to aggregate claims across thousands of works with ease. It is therefore no coincidence that the wave of AI-related copyright litigation has concentrated in US Courts, where statutory damages make class-wide recovery commercially viable.

Australian claimants have no equivalent mechanism, and no shortcut to an overall damages figure exists. Litigation funders typically demand a credible model of aggregate recovery before committing capital. Each claimant must prove damages separately, and the returns remain uncertain, which may make it difficult for litigation funders to justify their investment.

The same individualisation problems that complicate the merits may also invite a de-classing application under s33N of the *Federal Court of Australia Act 1976* (Cth) (and cognate provisions in other jurisdictions), compounding the applicant's and funder's risk that the Court will unwind the proceeding before trial.

Fourth, **jurisdiction**. Australia has no text and data mining exception, and no equivalent to the US fair use doctrine, the EU's DSM Directive, or even the UK's narrow research exception that could provide defences. This might make Australia an attractive forum for copyright claims. But large-scale AI training occurs where infrastructure and legal conditions permit, and there is little evidence suggesting substantial training activity occurs onshore in Australia. In *Getty Images (US) Inc v Stability AI Ltd* [2025] EWHC 2863 (Ch), the UK High Court confronted this issue. Because training occurred on US servers, Getty abandoned its primary infringement claims, on the basis that there was no evidence to demonstrate that the relevant conduct occurred in the UK. The Court held that the model weights did not 'store or reproduce' the training images. Accordingly, those copyright claims failed.

What is text and data mining? *Text and data mining (TDM) refers to the automated analysis of large volumes of text, data, or other content to identify patterns, trends, or relationships. In the AI context, it describes the process by which models train on datasets of text, images, or other works, extracting statistical patterns rather than 'reading' in the human sense. The Australian Law Reform Commission considered TDM in its 2013 report, Copyright and the Digital Economy, noting that 'there is no exception in the Copyright Act that covers data and text mining' and recommending a fair use exception that would accommodate non-expressive uses. The Government did not implement that recommendation. In October 2025, the Attorney-General confirmed that Australia would not introduce a TDM exception.*

CASE STUDY: THE BARTZ V ANTHROPIC SETTLEMENT

The *Bartz v Anthropic* settlement, approved by the US District Court for the Northern District of California in July 2026, provided a US$1.5b non-reversionary fund with an estimated per-work payment of approximately US$3,000, much higher than the US statutory minimum for wilful infringement (US$750) or for innocent infringement (US$200). The settlement obviated the need for individual proof of damages. Class members submitted claims through an administrative process, and funds were distributed pro rata based on the number of works claimed.

The settlement benefited claimants by reference to a 'Works List' of 482,460 books with ISBNs or ASINs that were registered with the US Copyright Office and appeared in pirated datasets (LibGen and PiLiMi) downloaded by Anthropic. The Works List served as *'a defining record of which works are covered by the Settlement and which works are not'*. Works not on the list were excluded from the release embodied in the settlement, preserving those claims for future litigation. The claims rate reached 91.3% of the Works List.

The settlement administrator sent notice to 506,194 potential class members identified through submissions from the Authors' Guild, the Science Fiction Writers of America, the Authors' Registry, more than 170 publishers, and third-party sources including Bowker ISBN Services and the US Copyright Office. Only 350 class members submitted valid opt outs, spanning 1,802 works.

While Anthropic agreed to destroy all original files of works from the pirated datasets, the settlement preserved claims about past outputs and all future conduct.

WHAT TO WATCH

On 15 July 2026, the Federal Labor Government announced that it would establish a new Office of AI within the Department of the Prime Minister and Cabinet, and confirmed that it would legislate to ensure Australian creators retain ownership and control of their work. The Prime Minister stated that *'no company should use Australian books, music, art or news to build or train AI without the artist's control. That includes the artist's control of the price and value of their work.'* The detail remains unclear.

The Attorney-General has previously flagged 3 priority areas for reform:

- First, a new collective licensing framework, whether statutory or voluntary, to govern the use of Australian works in AI training.
- Second, legislative clarification of how copyright applies to material generated through the use of AI.
- Third, a small claims forum to provide a cheaper avenue for lower-value copyright disputes.

Without seeing the form of any proposed legislation, fundamental questions remain unanswered. Would a licensing scheme operate extraterritorially, and if so, how would it bind AI developers training models on foreign servers? Would it require developers to identify and compensate individual rightsholders, or would it function as a blanket levy distributed through collecting societies? And how would enforcement work when the allegedly infringing conduct occurs entirely offshore?

This jurisdictional paradox will not be solved by domestic licensing reform alone. Unless Australian law can reach conduct occurring on foreign servers, or unless AI developers voluntarily submit to Australian licensing requirements, the structural barriers to class-wide recovery will remain.

Fee, Fi, Fo, Fund: The state of play in Australian class action financing

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The review period has seen important developments across the class action funding environment, both in respect of how lawyers and funders are paid, and the use of innovative forms of security to enable lawyers and funders to carry a high volume of cases on their books at the same time. In particular:

- The High Court has confirmed that contingency fees for lawyers by way of a 'solicitors' common fund order' (**CFO**) **are not available** in the Federal Court.[46]
- Victoria's 'group costs order' (**GCO**) regime, which provides a lawful avenue for solicitors to earn contingency fees for class actions in the Victorian Supreme Court, has continued to evolve, including key decisions addressing the Court's power to vary GCOs.
- Courts have continued to examine the use of 'After the Event' (**ATE**) insurance by funders as a means of defraying costs risks, with novel rulings on the use of anti-avoidance endorsements to ATE policies and continued scrutiny of ATE premium deductions.
- The High Court has found that funding commissions are not recoverable as damages in actions for nuisance, with reasoning that may extend to other causes of action.[47]

This chapter considers each of these developments.

SOLICITORS' COMMON FUND ORDERS – HIGH COURT SAYS NO

Historically, lawyers in Australia have been prohibited from earning 'contingency fees' in class actions that constitute a certain percentage of the settlement sum over and above fair remuneration for their professional services.

In 2020, the Victorian Parliament legislated to permit lawyers' contingency fees under the GCO regime in the Victorian Supreme Court. In *Kain*, the plaintiff solicitors sought to extend that to the Federal Court by arguing that the powers conferred on the Court by ss33V and 33Z of the *Federal Court of Australia Act 1976* (Cth) extended to orders approving a 'solicitors' CFO' – essentially, a contingency fee for lawyers.

46 *Kain v R&B Investments Pty Ltd; Ernst & Young (A Firm) v R&B Investments Pty Ltd; Shand v R&B Investments Pty Ltd* [2025] HCA 28 (**Kain**).
47 *Hunt Leather Pty Ltd v Transport for NSW* [2025] HCA 53 (**Sydney Light Rail**).

The High Court **unanimously rejected this argument** and held that the Federal Court class action regime does not permit solicitors' CFOs.

The issue arose out of a consolidated Federal Court class action against Blue Sky Alternative Investments Limited (in liquidation), as well as certain of its former directors and its former auditor. The applicants' solicitors reached an in-principle agreement about the conduct of the proceeding which included, among other things, an order that the solicitors receive, subject to Court approval, a percentage of any resolution sum as remuneration for assuming the risks of funding legal costs and disbursements.

The High Court declined to reopen its decision in *Brewster*,[48] which held that the Federal Court and NSW Supreme Court do not have power to make CFOs in favour of third-party litigation funders at the commencement of class actions. The Court held that there is no power to make CFOs of any kind in favour of solicitors, because of the prohibition on contingency fee arrangements in State and Territory legal profession laws.[49]

The consequence of this decision is that absent legislative change, the status quo in Australia is preserved — and **Victoria remains the only jurisdiction** in which solicitors can earn contingency fees and fund class actions on that basis.

Following *Kain*, there has been an increased push for reform to funding regimes in other jurisdictions:

- At the federal level, Attorney-General Michelle Rowland has publicly indicated that the Commonwealth Government is considering replicating the Victorian GCO model in the Federal Court — although there is no draft legislation currently before Parliament.
- In NSW, there are indications that the State Government is considering legislation to establish a form of GCO. Justice Pike of the NSW Supreme Court (who becomes the Class Actions List Judge from 7 September 2026) has publicly supported reform, including the implementation of uniform class action legislation between Victoria and NSW. The Association of Litigation Funders of Australia has also made a submission to Attorney-General Michael Daley advocating various non-GCO reforms directed at supporting the competitiveness of NSW as a forum for class actions.[50]

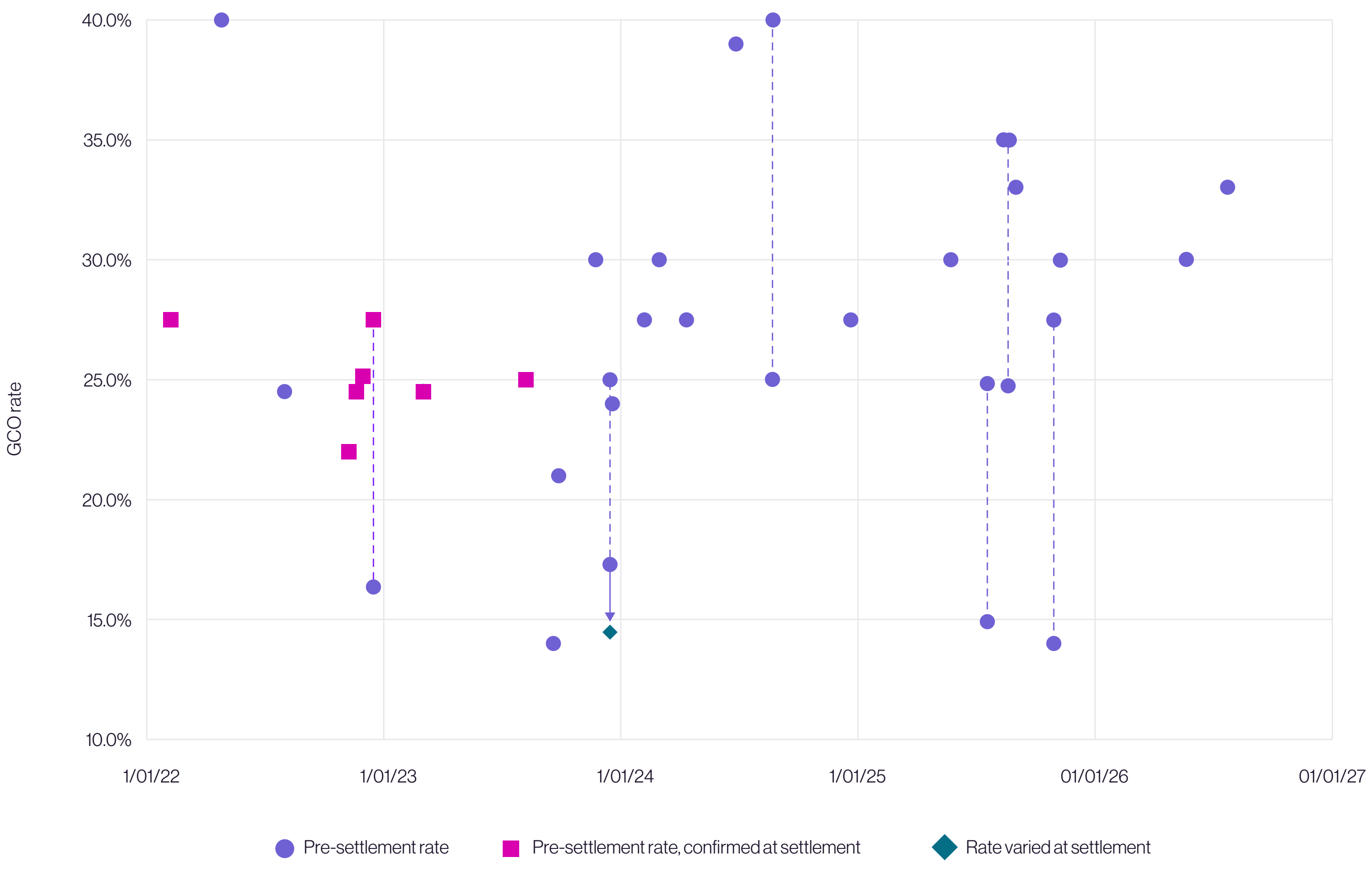
It remains to be seen if or when such changes will be implemented.

48 *BMW Australia Ltd v Brewster; Westpac Banking Corp v Lenthall* (2019) 269 CLR 574; [2019] HCA 45.
49 *Kain* at [96]-[104].
50 Association of Litigation Funders of Australia, 'Submission to the Office of the Hon Michael John Daley on Litigation Funding & Case Management Reforms in Class Actions' (9 March 2026).

GROUP COSTS ORDERS – TO VARY OR NOT TO VARY

Until legislative reform occurs in other jurisdictions, the GCO regime will likely guarantee the popularity of the Victorian Supreme Court as a forum of choice to commence class actions.

Since the regime was introduced in 2020, over 30 GCOs have been granted, at rates typically in the range of 25% to 30%, depicted in the graph below. Dotted lines are used to indicate the upper and lower rate for tiered GCOs, where the rate decreases as the quantum recovered increases.



GCOs are subject to Court approval and, even after they have been made, are also subject to variation by the Court. The review period saw significant developments in the jurisprudence of GCO variations, including the first instances of a GCO being varied:

- **at settlement**, pursuant to s33V of the *Supreme Court Act 1986* (Vic) (**VSC Act**) (in *McCoy*[51]); and
- **before settlement**, pursuant to s33ZDA of the VSC Act (in *Byrnes*[52]).

These decisions are discussed below, and may demonstrate a trend towards the Victorian Supreme Court taking a more active role in monitoring GCO rates in the interests of group members, consistent with similar decisions of the Federal Court regarding common fund order rates for third-party funders.[53]

51 *McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553.
52 *Byrnes v Origin Energy Ltd (No 2)* [2026] VSC 97.
53 The Federal Court has treated a 50% return to group members as an important benchmark when scrutinising funding commissions and other deductions in recent settlement approval applications: see for example *Miciulis Superannuation Pty Ltd v CIMIC Group Ltd* [2025] FCA 307; *Impiombato v BHP Group Ltd (No 6)* [2025] FCA 1594.

MCCOY V HINO MOTORS LTD (NO 2) [2025] VSC 553

Facts	Variation	Reasons
Proceeding settled for $87m at a relatively early stage (before discovery and expert evidence).	24.66% reduced to 17.392%, and then to 13.253%.	• Appropriate and necessary to ensure that justice was done in the proceeding. • Only approximately one third of the costs budget had been expended at time of settlement, and the modelling undertaken at the time of the original GCO had assumed an expenditure of at least 50%. • Maurice Blackburn's rate of return under the original rate would have been above the 75th percentile of its own historic range, and other relevant financial metrics.

Interestingly, the Court-appointed contradictors did not argue for a rate reduction. Justice Delany ordered the downward variation in any event, finding that to leave the rate undisturbed would provide a return substantially outside the contemplation of the Court and of Maurice Blackburn at the time the original GCO was made. We discuss this decision further in the Contradictors chapter of The Review.

BYRNES V ORIGIN ENERGY LTD (NO 2) [2026] VSC 97

Facts	Variation	Reasons
Application to increase GCO rate on the basis that the plaintiff's solicitors (Phi Finney McDonald) would not continue to fund the proceeding under the existing rate.	30% increased to 35% (on first $42.5m) and 25% for amounts above.	• Appropriate and necessary to ensure that justice was done in the proceeding. • No better alternative funding path was demonstrated, and changing solicitors would duplicate work, increase cost and cause delay. • Loss of the solicitors' class action expertise would be detrimental to group members. • Effective rate under the varied GCO still sat within the range of rates ordered in other proceedings, and was lower than median third-party funding commission rates.

Justice Waller found that the applicable test is whether, having regard to all circumstances, it is appropriate and necessary to amend the GCO to ensure justice is done, and that while proof of changed circumstances will often be relevant, it is not a precondition to the exercise of the power. His Honour also indicated that standing to bring an application to vary the GCO rate is not confined to plaintiffs, but extends to any person with a sufficient interest in the amendment of the GCO.

Despite approving the upwards variation, Waller J made significant cautionary observations. His Honour emphasised that the decision should not be taken as establishing a precedent for the routine variation of GCOs during the course of proceedings: applications to increase GCO rates prior to settlement should be regarded as exceptional and approached with considerable caution, and outside settlement the threshold will not readily be met.

ATE INSURANCE

ATE insurance is cover taken out after a dispute has arisen to cover some or all of the insured party's exposure to adverse costs orders and orders to provide security for the respondent's costs. It is now commonplace in funded class actions for ATE insurance to be held by plaintiff law firms or litigation funders to protect against adverse costs risk. However, the review period has seen notable developments in the treatment by Courts of ATE insurance in relation to security for costs and settlement deductions.

ATE insurance and security for costs

ATE insurance alone has generally been regarded as insufficient to satisfy the requirements for adequate security because, unless the respondent has a direct, unconditional and readily enforceable right against the insurer, such policies cannot provide the practical equivalent of traditional security (monies paid into Court and bank guarantees).[54] Without such a right, the respondent seeking to recover costs may be exposed to coverage disputes, avoidance, satellite litigation and the insolvency of the insured.

The traditional mechanism to overcome these concerns has been for the insurer to enter into a deed of indemnity in favour of the respondent. Courts have treated such deeds as providing adequate security depending on their terms, with key considerations including directness and enforceability, whether the insurer's obligation is irrevocable and unconditional, the insurer's financial standing, the governing law and jurisdiction, and whether foreign enforcement risk is neutralised by additional security or undertakings.[55]

A more controversial mechanism to overcome these concerns has been the use of an 'anti-avoidance endorsement' to an ATE policy. This is a policy term by which the insurer agrees that, as against the respondent, it will not avoid, rescind or deny liability under the policy on specified grounds, thereby seeking to reduce the risk that the respondent will be unable to recover if an adverse costs order is made.

In *i-Prosperity*,[56] the NSW Supreme Court for the first time recognised that an ATE policy with an appropriately worded 'anti-avoidance endorsement' can constitute adequate security. The plaintiffs, funded by LCM, held an ATE policy with 7 Lloyd's syndicates. They argued that security could be provided by way of an anti-avoidance endorsement in the defendant's favour. The defendant resisted on the basis that it would not be a party to the insurance contract, would have no direct claim against the insurers, and faced a real risk of non-payment.

Justice Peden held that the insurance contract, as amended by the endorsement, would give the defendant a directly enforceable right against the Lloyd's insurers. Her Honour rejected the contention that security was deficient because the insurers were Lloyd's syndicates with allocated liabilities; each had demonstrated substantial net assets, and the location of those assets outside Australia was not dispositive given the existence of a Lloyd's security trust fund held in Australia.

Her Honour also distinguished previous cases involving differently worded anti-avoidance endorsements,[57] including those purporting to limit insurer liability until proceedings are finally concluded (which can create a risk that appeal rights might first have to be exhausted before the policy can be enforced).[58]

Following *i-Prosperity*, a shift away from deeds of indemnity and towards anti-avoidance endorsements may emerge. Litigants appear to have already adapted: recent consent orders in the *Johnson & Johnson* class action included a notation that security for costs was to be provided in the form of ATE insurance with an anti-avoidance endorsement confirming the respondent was a third-party policyholder.[59]

ATE insurance and settlement deduction

A distinct question concerning ATE insurance arises at settlement: to what extent should group members bear the cost of premiums as deductions from settlement sums? As we observed in The Review 2023/2024, courts will look closely at the reasonableness of such deductions and applicants should not assume ATE premiums will be recoverable. Recent Federal Court decisions continue to illustrate the point and demonstrate that a central concern is whether the party that acquired the insurance has already been compensated for assuming adverse costs risk.

Where a litigation funder justifies its commission by reference to adverse costs risk, seeking a separate deduction for the cost of defraying that very risk through ATE insurance may amount to 'double-dipping'. In *Mallia*,[60] for example, the Court refused to approve a $4,488,400 deduction for ATE costs where Woodsford was already receiving a 27.5% commission on a $140m settlement. The Court accepted that an effective return of 30.7% was disproportionate to the risks incurred, emphasising that a central obligation of funders is to provide an indemnity against adverse costs, which the ATE insurance had significantly reduced. The commission was approved but the ATE distribution was not.

54 See for example *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699.
55 See for example *DIF III Global Co-Investment Fund LP v BBLP LLC* [2016] VSC 401; *Re Tiaro Coal Ltd (in liq)* [2018] NSWSC 746.
56 *i-Prosperity Pty Ltd (in liquidation) v Crown Melbourne Ltd* [2025] NSWSC 1525 (**i-Prosperity**).
57 See for example *APFC No.1 Corporation v Insurance Australia Limited* [2024] NSWSC 534.
58 *i-Prosperity* at [41].
59 Orders of Moshinsky J made on 19 May 2026 in VID1395/2024.
60 *Mallia v Colonial First State Investments Ltd* [2026] FCA 463.
61 *Challenor v QSuper Board* [2026] FCA 617.

In *Challenor*,[61] by contrast, Button J adopted an aggregate approach to deductions, assessing the combined funding commission and ATE costs holistically. The funder sought $2,620,800 for premiums in addition to its 27.5% commission on a $67m settlement. The Court found that the evidence did not support a *'neat dividing line'* between the reward for capital risked and reimbursement of deferred ATE premiums, particularly where the funder's commission-setting process had already built in the cost of upfront insurance premiums.

The Court approved aggregate deductions of $16.75m (encompassing commission, ATE premiums and other costs) representing a material reduction from the total sought.

The decision in *Janssen*[62] has demonstrated that double-dipping analysis also applies in solicitor-funded proceedings conducted on a no-win, no-fee basis.[63] Slater and Gordon sought a $1.76m deduction for ATE premiums in addition to a 25% uplift on professional fees, asserting the uplift related solely to the risk of non-recovery of fees. Justice Button rejected this as *'overly simplistic'*, noting the firm had indemnified the applicants against adverse costs from the outset, before ATE insurance was obtained, and at a time when it anticipated being remunerated on a contingency fee basis where attempts would not have been made to recoup the ATE costs above the contingency fee. The Court allowed only 50% of the deduction sought ($880,000 of the $1.76m).

The Court in *Janssen* also identified an important structural conflict in ATE insurance that may inflate costs to group members. Where solicitors claim ATE premiums as a disbursement, their interests often lie in minimising the initial out-of-pocket premium while the deferred contingent premium, payable only upon success, is borne by group members. Justice Button observed that such a procurer *'has little incentive to opt for'* a higher upfront premium with a lower deferred premium, *'even if it would ultimately be more economical for the group members'*. The same incentive applies equally in third-party-funded proceedings, since it exists wherever the procurer is not the party who ultimately bears the deferred premium.

FUNDING COMMISSIONS AS DAMAGES

Issues concerning funding commissions were also addressed by the High Court during the review period. In *Sydney Light Rail*, the High Court held that funding commissions are not recoverable as damages in an action for nuisance. Funded group members sought to recover commissions of 25% to 40% of any settlement or judgment sum, arguing that the commission was a cost of vindicating their claims because it eliminated exposure to legal costs, adverse costs and security for costs. Justices Gordon and Edelman (with whom the other members of the Court agreed) held that the commission was not *'the kind of damage'* the defendant was under a duty to prevent.[64] Private nuisance is a tort against land; damages are limited to decreased land value and losses consequential upon injury to land. The commission was neither.

The Court's approach of asking whether the claimed loss is the kind of damage properly recoverable for the particular cause of action is capable of being generalised to other torts, and potentially other kinds of claim as well. That approach does not make the nuisance holding automatically determinative in other contexts, but it does suggest that a funding commission will usually be difficult to characterise as damage falling within the protected interest or duty engaged by the underlying claim.

The Court also referred to several 'reinforcing' reasons for its conclusion, drawing on reasons identified in the decision of the NSW Court of Appeal, including that recovery would make damages depend on each plaintiff's voluntary funding arrangements; that the claim was analogous to irrecoverable costs of financing litigation; and that the funder's entitlement crystallised only on settlement or judgment.[65] These reasons are not cause-of-action specific and provide further support for the proposition that funding commissions are not recoverable as damages for other kinds of actions as well.

62 *Janssen v OnePath Custodians Pty Ltd (No 2)* [2026] FCA 291.
63 See Mallesons Insight Having it both ways? Reflections on conflicts and recoverability of after the event insurance premiums in Janssen v OnePath 24 March 2026.
64 *Sydney Light Rail* at [169].
65 *Sydney Light Rail* at [170].

The rise of the court-appointed contradictor

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The review period has underscored the willingness of Australian courts to appoint contradictors to kick the tyres on settlement distribution schemes and costs-related issues on behalf of group members.

During the review period:

- 30% of all class action settlements involved a contradictor, representing a noticeable increase from previous years.[66]
- While courts had regard to the contradictor's position when assessing what was fair and reasonable, the fact that the contradictor did not take issue with a particular aspect did not constrain the Court from adopting a different position to the parties.
- Courts repeatedly affirmed the value provided by contradictors, even in cases where the contradictor's arguments or approach were not ultimately accepted.[67]

WHAT IS THE ROLE OF A CONTRADICTOR?

Contradictors are appointed by the Court to represent the interests of group members.

The precise role that a contradictor is required to play is determined by the scope of their appointment, as ordered by the Court. The appointment can be framed broadly (for example, assisting the Court at large to perform its judicial function in relation to a settlement approval application)[68] or limited to addressing particular matters (such as making submissions in relation to a proposal to vary a GCO).[69]

In representing the interests of group members who would not otherwise be represented, contradictors have the potential to fill an adversarial void. It has been said that the contradictor's role *'should be fundamentally understood as ensuring there is a real contest between conflicting interests where the outcome will be a res judicata'*.[70]

An essential by-product of appointing a contradictor is the assistance a contradictor may provide to the Court in exercising its supervisory and protective function. For that reason, contradictors are commonly appointed in relation to settlement approval applications where the Court's central task is to determine whether the proposed settlement is fair and reasonable and in the interests of group members as a whole, including as between group members *inter se*.

HOW DOES A CONTRADICTOR ASSIST THE COURT?

First, a contradictor may assist the Court merely by providing an independent evaluation and perspective, bringing to bear *'the normal and proper forensic judgements of counsel in determining what submissions ought be made in the interests of Group Members'*.[71] The value of the contradictor lies in ensuring the issues are properly tested, not in the outcome being advocated or in taking every arguable point that might be thought to be in the group members' interests.

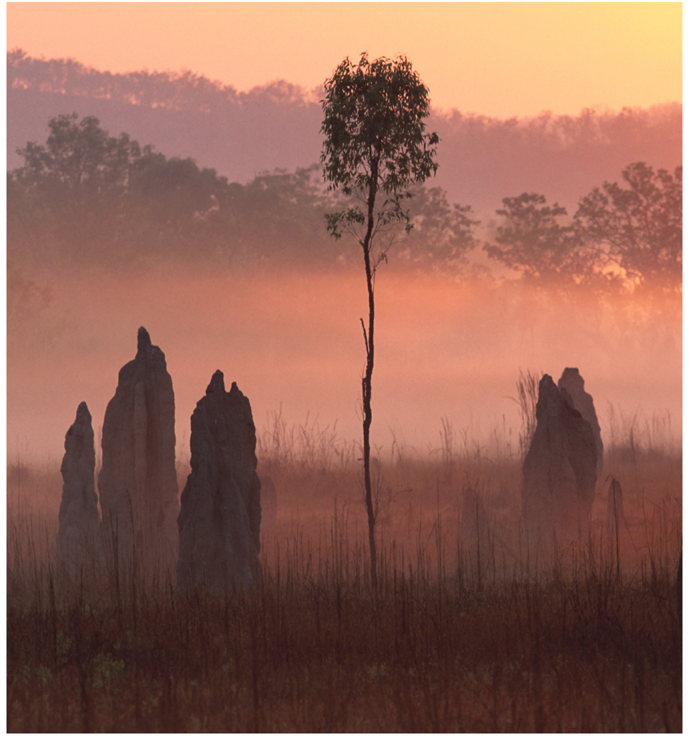
Second, a contradictor ensures the possibility of a 'real conflict' in settlement approval applications. As the respondent often supports the settlement, there will be no effective opposition or contest unless objectors to the settlement are represented or a contradictor is appointed. In *Challenor*, the Court observed that the applicant was contractually obliged to support the deductions sought by the funder and therefore the applicant was *'effectively gagged… [which] makes the appointment of a contradictor all but inevitable in many cases'*.[72]

Third, appointment of a contradictor has been looked on favourably by some judges as a means of sharpening the applicant's focus on whether a proposed settlement distribution is fair as between certain group members. For example, in *Janssen*, Button J found that the applicants' willingness to revise the settlement distribution scheme in response to the contradictor's submissions demonstrated the utility of appointing a contradictor:

> *'The preparedness of the Applicants to give consideration to the Contradictor's submissions and change course — rather than sticking doggedly to their guns — presents an example of the value of the role of Contradictor. It is somewhat regrettable that the Applicants previously strenuously resisted the appointment of a Contradictor.'*[73]

On the more nuanced question of whether the courts actually find contradictors to be helpful, the answer emerging from recent cases appears to be yes, and perhaps decidedly so. In *McCoy (No 2)*, the Court stated that the contradictors' submissions *'helpfully identify and systematically consider the evidence'*[74] relevant to the application to vary a GCO. Even where a contradictor ultimately supports the settlement and proposed distribution, rather than opposing it, courts have treated the appointment as valuable.[75]

It is evident that courts will temper any assistance expected to be obtained from a contradictor against the costs and delays a contradictor may add, which are often borne by the group members. In *Laricchia*, for example, the Court was satisfied that the appointment of a contradictor *'would not significantly assist, or at all, the decision of this Court'* in circumstances where the application for a GCO did not concern any novel interpretation of provisions, the available material addressed the relevant counterfactuals, and the Court was mindful of not unnecessarily delaying the progress of the proceedings and ensuring a timely and efficient outcome for the group members.[76]



66 In FY26, a contradictor was appointed in 6 out of 20 class action settlements: *Excel Texel Pty Ltd v Wilson (No 2)* [2026] FCA 154 (**Excel Texel**); *Janssen v OnePath Custodians Pty Ltd (No 2)* [2026] FCA 291 (**Janssen**); *Mallia v Colonial First State Investments Ltd* [2026] FCA 463 (**Mallia**); *Challenor v QSuper Board* [2026] FCA 617 (**Challenor**); *Prygodicz v Commonwealth of Australia (Robodebt settlement)* [2026] FCA 102 (**Prygodicz**); and *McCoy v Hino Motors Ltd* [2025] VSC 447 (**McCoy**) (in McCoy, the Court determined to appoint a contradictor at the time of settlement in relation to a GCO amendment application, which was heard after settlement approval). Between FY21 and FY25, there was an average of 2 settlement approval applications per year which involved a contradictor.

67 *McCoy; McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553 (**McCoy (No 2)**); *Janssen; Challenor; Byrnes v Origin Energy Ltd (No 2)* [2026] VSC 97 (**Byrnes**).

68 *Janssen* at [9].

69 *McCoy (No 2)* at [7] and *Byrnes* at [6].

70 *Bolitho v Banksia Securities Ltd (No 6)* (2019) 63 VR 291; [2019] VSC 653 at [110], cited with approval in *Laricchia v WiseTech Global Ltd* [2025] VSC 482 at [19] (**Laricchia**).

71 *Janssen* at [9] and [87].

72 *Challenor* at [70].

73 *Janssen* at [92].

74 *McCoy (No 2)* at [69].

75 *Janssen* at [87]; *Excel Texel* at [38] and [137].

76 *Laricchia* at [47]-[50].

77 See *Byrnes; McCoy (No 2)* and *McCoy v Hino Motors Ltd (No 3)* [2026] VSC 195.

HEADLINE TRENDS FROM THE REVIEW PERIOD

Settlement approval applications remain the primary context in which contradictors are appointed, with applications to vary a GCO coming in second. In the review period, the courts appointed a contradictor in 6 class action proceedings at the settlement approval stage and when hearing applications to vary a GCO.[77]

Settlement approval applications

Contradictors continue to assist the Court in assessing whether a funder's remuneration and after-the-event (**ATE**) insurance costs are fair and reasonable at the time of settlement approval.

Some recent decisions of note are set out below.

Judgment	Assistance provided by a contradictor
Prygodicz v Commonwealth of Australia (Robodebt settlement) [2026] FCA 102	The contradictors urged the Court to adopt a return-on-investment methodology rather than the funder's preferred percentage-of-settlement approach to arrive at a commission of approximately $22m, compared to the funder's claim for $71.25m and the Commonwealth's proposed range of $5.9m to $35.3m. The Court agreed with the contradictors that a straight percentage approach was inappropriate and largely accepted their risk analysis based on the funding agreements' staged structure, but ultimately allowed a higher commission of $35m.[78]
Challenor v QSuper Board [2026] FCA 617	The Court accepted the contradictor's submission that it was appropriate to assess the reasonableness of the funder's remuneration in a 'holistic' way, and considered that the contradictor had *'exposed that there are in fact significant flaws and inconsistencies in the Funder's evidence'*.[79] The Court brought the funder's total recovery (for commission, ATE insurance, managed investment scheme costs, deeds of indemnity, and legal costs) to approximately $23m or 34.34% of the settlement sum. This was higher than the payments of approximately $21m (31.5%) that the contradictor submitted would be reasonable.
Mallia v Colonial First State Investments Ltd [2026] FCA 463	The Court agreed with the contradictor that awarding ATE insurance premiums on top of a 27.5% commission (equating to 30.7% of the total settlement sum) was *'disproportionate to the risks incurred by the Funder in the context of this specific proceeding'*.[80] It was not to the point that the ATE insurance costs represented a small proportion of the overall settlement sum of $140m. Consistent with the contradictor's position, the Court decided not to allow the ATE insurance costs and fees for the deeds of indemnity.
Janssen v OnePath Custodians Pty Ltd (No 2) [2026] FCA 291	The contradictor did not object to the $1.76m ATE insurance deduction sought by Slater and Gordon. The Court, however, found that allowing the ATE deduction in addition to legal costs (including a 25% uplift) would amount to impermissible 'double-dipping' given the law firm's hedging between a common fund order and a 'no win, no fee' model, and incomplete disclosure to group members about the ATE arrangement. Her Honour decided to allow only half the deduction sought for the ATE insurance.
Excel Texel Pty Ltd v Wilson (No 2) [2026] FCA 154	The contradictor submitted that the settlement was fair and reasonable but that a funding commission of 30% was too high. The Court agreed the funding amount was excessive and disproportionate to the sum available for distribution to the group members, ultimately allowing a commission of approximately 25%.

78 *Prygodicz* at [213].
79 *Challenor* at [88].
80 *Mallia* at [78].

GCO amendment applications

During the review period, contradictors were also appointed by the Victorian Supreme Court in the context of applications to vary GCOs. Following the enactment of s33ZDA of the *Supreme Court Act 1986* (Vic) in 2020, contradictors were appointed in the first 4 GCO applications made under that provision.[81]

Since then, over 20 GCO applications have been heard (not including variation applications), with a contradictor appointed in only 1 of those applications.[82]

See further discussion of GCOs in the Funding Developments chapter of The Review.

Some recent decisions of note are set out below.

Judgment	Assistance provided by a contradictor
Byrnes v Origin Energy Ltd (No 2) [2026] VSC 97	This was the first time an applicant had applied to vary an initial GCO during a proceeding (as distinct from at the time of settlement).[83] The Court made orders appointing a contradictor in relation to the GCO variation application. The contradictor identified 11 factors bearing on the Court's discretion under s33ZDA(3), and submitted that 7 factors weighed in favour of the variation, 1 against and 3 were neutral. Not only did Waller J embrace the contradictor's approach as *'a useful and disciplined framework for working through the material considerations'*,[84] but having considered the contradictor's detailed analysis of the relevant factors, his Honour observed that he was *'fortified'* in his conclusion that the initial GCO should be varied.
McCoy v Hino Motors Ltd (No 2) [2025] VSC 553	Following settlement approval, the Court considered whether the initial GCO should be varied in light of an early settlement. The Court made orders specifying that the contradictors' role was limited to *'making any submissions which the Contradictors consider might assist the Court'* in determining whether there should be a variation. While the contradictors submitted that the GCO rate should not be reduced, Delany J disagreed (despite having *'been very much assisted by their detailed and systematic analysis of the evidence'*). His Honour reduced the effective GCO rate from 24.66% to 17.392% to ensure the costs payable to the plaintiff law practice remained proportionate.
McCoy v Hino Motors Ltd (No 3) [2026] VSC 195	At a subsequent hearing following the identification of an error in the modelling relied upon when varying the GCO, the Court was again assisted by the contradictors' submissions (and again disagreed on the GCO percentage, determining that a percentage below the range advocated for by the contradictors was appropriate).[85]

LOOKING AHEAD

In the past year, court-appointed contradictors have assisted the courts in exercising a supervisory jurisdiction to protect the interests of group members. Parties should expect more contradictors to be appointed in the future, particularly in cases involving significant settlement amounts, large classes, or complex costs or funding issues. And if other jurisdictions were to replicate Victoria's GCO model, or similar, there could well be a rush to appoint contradictors.

81 See *Laricchia* at [23].
82 *DA Lynch v Star Entertainment Group* [2023] VSC 561. This application also required resolution of a complex multiplicity dispute.
83 The applicant sought to increase the initial GCO, which was calculated at 30%, to a tiered rate of 35% on the first $42.5m and 25% above that.
84 *Byrnes* at [83].
85 Justice Delany determined that a GCO percentage of 13.253% was appropriate and was satisfied that it would not serve as a disincentive to engaging in early settlement discussions (in contrast to the contradictors who proposed a higher percentage range with that consideration in mind).

Opt out and soft class closure notices: Balancing privacy, reach, and the interests of class members

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In the review period, courts have continued to refine the requirements for opt out and soft class closure notices, balancing the need to effectively reach group members with privacy, cost and practical concerns.

Key considerations include:

- the requirement for adequate notice, with courts refusing soft class closure orders where the proposed notice regime is unlikely to reach a sufficient proportion of the class
- privacy and data minimisation, including preferences for neutral sender domains and limiting personal details in notices to address phishing and cyber security concerns
- multi-channel distribution strategies combining traditional media with digital channels to maximise reach across diverse class compositions, and
- timing and cost allocation, with courts requiring sufficient time for group members to consider their options and confirming that notice costs are generally borne by the applicant in the first instance.

This chapter examines recent cases and sets out practical guidance for developing notice regimes that are economical while maximising reach.

THE REQUIREMENT FOR ADEQUATE NOTICE

Opt out notices

Except with leave of the court, parties must complete an opt out process before the hearing of a representative proceeding can commence.[86] Opt out notices inform group members of their rights, protecting them from the unwanted extinguishment of their right to pursue separate proceedings. Notices that fail to adequately inform group members of their rights pose a significant hurdle to court approval of a proposed settlement, because a judgment binds all group members unless they have opted out.

Soft class closure notices

A court may also order that notice be given of a party's intention to apply for a 'soft class closure' order, requiring group members who wish to participate in any pre judgment settlement to register by a specified date.[87] Parties can seek approval to distribute a notice informing group members of that requirement. Courts often approve a combined 'opt out and claim registration' notice, particularly in larger class actions where the group's identity and size are difficult to determine.

The paramount factor a court will consider in determining whether to make such orders is the extent to which a soft class closure is likely to improve the prospects of achieving a reasonable settlement. Whether a sufficient proportion of the group is likely to be properly notified and decide to register is integral to this assessment.

86 *Federal Court of Australia Act 1976* (Cth) s33J(4) (and cognate provisions in other jurisdictions); *Fisher v Isuzu Motors Ltd (No 2)* [2025] FCA 1168 at [13].
87 *Lendlease Corporation Ltd v Pallas* [2025] HCA 19.

This was illustrated in *JB Hi-Fi*,[88] where Delany J refused JB Hi-Fi's application for soft class closure orders in a class action concerning extended warranties sold over nearly 13 years. The applicant estimated the class was likely to comprise approximately 8m people, which was objectively 'very large'. JB Hi-Fi proposed to contact potential group members using its records, but there was no available contact information for more than 60% of potential group members. JB Hi-Fi did not propose any alternative communication to reach those members (such as advertising via press, radio, or television).

Justice Delany determined that a soft class closure order was not appropriate because JB Hi-Fi had not articulated a satisfactory proposal for how notice would be communicated to group members for whom no contact information was held. In the absence of an effective notice regime, it was not in the interests of group members to make soft class closure orders.

The decision indicates that parties seeking soft class closure orders must put forward a clear and detailed notice and registration regime that is tailored to the particular class. The court may decline to make orders if the regime will not be effective to attract a sufficient proportion of the potential class.

PRIVACY AND DATA MINIMISATION

Qantas: Balancing privacy considerations

On 18 September 2025, the Federal Court delivered several key rulings in the *Qantas* class action concerning Qantas' alleged conduct during the COVID-19 pandemic regarding flight cancellations, consumer credits and refunds.[89]

All customers who had a flight cancelled during the period 1 January 2020 to 1 November 2022 are group members in the class action. The parties disputed 2 issues regarding the proposed opt out notice:

- whether the notice should be sent from the 'qantas.com' domain, and
- whether to include personal details (including booking references and flight dates) in the notice.

Justice Moshinsky accepted there was a real risk of confusion or suspicion if a 'qantas.com' domain was used, particularly given recent cyber incidents and phishing concerns. His Honour also held that, due to privacy concerns and data minimisation principles, group member details should not be included in the notice.

Since the introduction of the statutory tort for serious invasions of privacy under the *Privacy Act 1988* (Cth), privacy considerations may feature more prominently in support of data minimisation in opt out notices. Although the tort is unlikely to be directly engaged by a court-approved opt out process, its introduction signals a broader legislative shift towards stronger privacy protections that reinforces the court's approach.

Bain: Prioritising data minimisation and security

The Federal Court's judgment in *Bain*[90] further illustrates how courts balance the level of detail in an opt out notice against privacy considerations. This class action was filed on behalf of retail investors who traded contracts for difference with IC Markets.

The parties disagreed on the level of 'personalisation' of the opt out notice. The applicants submitted that the opt out notice should include various personal details because it would help group members validate the notice and reduce the risk that the opt out notice would be perceived as a scam or phishing. The respondents proposed limiting the notice to include only names, emails and client IDs, with further personalisation raising privacy concerns. The respondents also objected to the relevant underlying data being provided to the applicants given the absence of evidence regarding the security measures in place to safeguard the information.

The Court accepted the respondents' approach, finding that the less detailed opt out notice was sufficient to achieve the primary purpose of informing group members of their right to opt out. The decision prioritised privacy, data minimisation and clear communication. The Court was not persuaded that additional personalisation would meaningfully reduce the risk of recipients perceiving the notice as a scam. The Court was also not persuaded that the personal data should be provided to the applicants, placing weight on the absence of evidence regarding measures that would ensure the security and confidentiality of the data.

This decision reinforces that opt out notices serve the narrow function of informing group members of their right to opt out. It indicates that courts are likely to prioritise privacy and will be reluctant to require the inclusion of extensive personal data absent a compelling necessity.

88 *Clarke v JB Hi-Fi Group Pty Ltd* [2025] VSC 664.
89 *Haverkort v Qantas Airways Limited* [2025] FCA 1147.
90 *Bain v International Capital Markets Pty Ltd (No 4)* [2025] FCA 1060.

MULTI-CHANNEL DISTRIBUTION STRATEGIES

To maximise reach, courts will favour multi-channel strategies that best target potential group members:

- In *Fisher*,[91] the Court ordered traditional newspaper notices in tandem with electronic dissemination (email, SMS, websites) to ensure broad reach across different segments of the group, reflecting the specific context and audience diversity.
- Similarly, in *Preece*,[92] Anderson J ordered opt out notices to be distributed by email, in-app inbox notification and newspaper publication, as well as display on the Federal Court website. His Honour held that the inability to reach all group members by email was no reason to forgo that channel for those who could be contacted, and preferred in-app inbox notification over a 'pop-up' on the app (as the applicants had sought). His Honour held that this was sufficient to bring the notice to the group members' attention while minimising impact on the operation of the app (which could cause commercial harm).

TIMING CONSIDERATIONS

Whether sufficient time has been allowed for an opt out and registration process turns on whether group members have a genuine opportunity to consider the information and make an informed decision.

In *Arrium*,[93] Matthews J approved opt out, registration and soft class closure orders in a shareholder class action. Her Honour accepted that a 3-month period between issue of the notice and the class deadline was appropriate, including because it took place before the Christmas holiday period and gave group members *'sufficient time to consider their position, obtain advice if they choose to do so, and decide whether to opt out or register'*.

Similarly, in *Merrett*,[94] Williams J made orders for opt out and registration, including soft class closure orders, which included a 3-month period to opt out or register. Her Honour considered that was *'adequate to consider the information, get advice if someone chooses to do so, make a decision regarding opting-out or registering, completing the appropriate form and filing/lodging it as required'*.

PRACTICAL IMPLICATIONS

- In considering whether to make soft class closure orders, courts are likely to scrutinise whether a proposed notice regime will effectively reach the relevant group members to ensure that the soft class group is not 'artificially low'. Where registration or soft class closure is sought before settlement, parties should put forward a clear notice regime demonstrating that a sufficient proportion of group members will be reached.
- Although personalised notices may be intended to reduce group member confusion, courts will balance the benefits of personalisation against privacy concerns.
- Privacy concerns must be kept front of mind when developing opt out notice procedures. Creative solutions that maximise reach while balancing these concerns may be welcomed by courts.
- Set a realistic timeframe for opting out and registration, having regard to the group's characteristics and holiday periods. Consider carefully whether the proposed timing and form of any registration or soft class closure process is justified to enable group members to properly consider their position (including by obtaining advice) and make an informed decision.

91 *Fisher v Isuzu Motors Ltd (No 2)* [2025] FCA 1168.
92 *Preece v Aristocrat Leisure Limited* [2025] FCA 742.
93 *Bogan v The Estate of Peter John Smedley (Deceased) (Soft Class Closure Ruling)* [2025] VSC 434.
94 *Merrett v Queensland (Queensland Police Service) (No 2)* [2026] QSC 154.

Outlook – What's next for class actions in Australia?

ON THE RADAR

A large number of hearings have been set down, including:

	2026 Q4	2027	2028
Consumer	Toyota Diesel Particulate Filters; JB Hi-Fi (extended warranties)	Jetstar COVID credits; European River Cruise; Sun Princess gastro outbreaks; Optus data breach; Medibank data breach	Isuzu – Diesel emissions; AMP – life insurance fees; Iplex Pipelines
Employment		Lovisa	McDonald's
Financial products	Super fees – Colonial	Fitch Ratings; IG Markets; CMC Markets; Rest Employees Superannuation	
Government liability	NT public housing in Aboriginal communities	Indigenous fishing rights – NSW; Racial discrimination in policing; Glenmore Park	Racial discrimination – Community Development Program
Securities		Virgin Australia; WiseTech; Westpac – AUSTRAC; James Hardie Industries	

JUDGMENTS AND APPEALS

We await the results of:

- **Initial trials:** a class action relating to credit ratings of synthetic collateralised debt obligations (*Fitch Ratings*).
- **Appeals:** securities class actions against *Brambles* and *Quintis*; *Cladding*; *Count Financial*; climate change class action on behalf of Torres Strait Islanders (*Pabai*); *Queensland electricity generators*.
- **High Court special leave applications:** *MLC – super fees*; securities class action against *Worley*.
- **High Court reserved judgments:** *Zonia* (see Securities chapter of The Review).

STOP PRESS

Just outside the review period we have seen:

- **Class actions commenced:** at least 4 class actions have been filed, including a securities class action against Web Travel Group, claims relating to alleged discrimination against Aboriginal Community Police Officers by the Northern Territory Police Force, claims relating to an Army helicopter crash, and claims involving aged care fees.
- **Settlements:** at least 3 settlements have been approved since 1 July 2026 and at least a further 11 settlements are awaiting Court approval. Together, these represent over $650m in potential settlement funds.
- **Judgments:** the applicant was successful in the employment class action against Domino's in relation to staff underpayments, and the applicants established one continuous disclosure contravention in the securities class action against Boral (with no findings made yet on causation or loss).

ACKNOWLEDGMENTS

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Our class action & 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: successfully settled a consumer class action against Westpac Banking Corporation and St. George Finance Limited 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 2 class actions in relation to superannuation fees and insurance.

OnePath Custodians: successfully settled a class action against OPC, a subsidiary of Insignia Financial Limited, brought by members of OPC's superannuation fund.

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

QSuper Board: successfully settled a class action in relation to changes to insurance policy premiums.

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

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 at first instance and on appeal against the trustee of the MLC Super 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: 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.

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

Medibank: acting in defence of a shareholder class action alleging breach of its disclosure obligations and misleading or deceptive conduct in relation to the adequacy of its privacy and information security protections.

Competition and consumer law

Woolworths: acting in defence of consumer class action proceedings commenced in the Federal Court of Australia arising out of Woolworths' 'Prices Dropped' Program and matters 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: acting in defence of class action proceedings alleging breaches of contract and consumer laws arising from franchise and commission agent arrangements.

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

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.

Queensland Motorways Management: acting in defence of a long running class action in relation to alleged mistake of payment for fees charged on Queensland toll roads.

Employment

BHP: acting for OS MCAP and OS ACPM in a class action relating to continuous shift and FIFO employees working on public holidays.

Environment

Gladstone Ports: successfully settled the long running $150m class action brought by commercial fishermen alleging financial loss suffered as a result of alleged dredge spoil discharged from a reclamation Bund constructed as part of a dredging project in the Port of Gladstone.

Commonwealth of Australia (Department of Defence): successful defence of class actions arising from environmental contamination at Defence facilities, relating to the legacy use of AFFFs containing PFAS brought by the residents and business-owners in relation to 9 different communities proximate to defence bases, alleging negligence and nuisance.

Privacy

Medibank: acting in defence of a class action in relation 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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