MALLESONS

The Review

Class Actions in Australia 2025/2026

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.

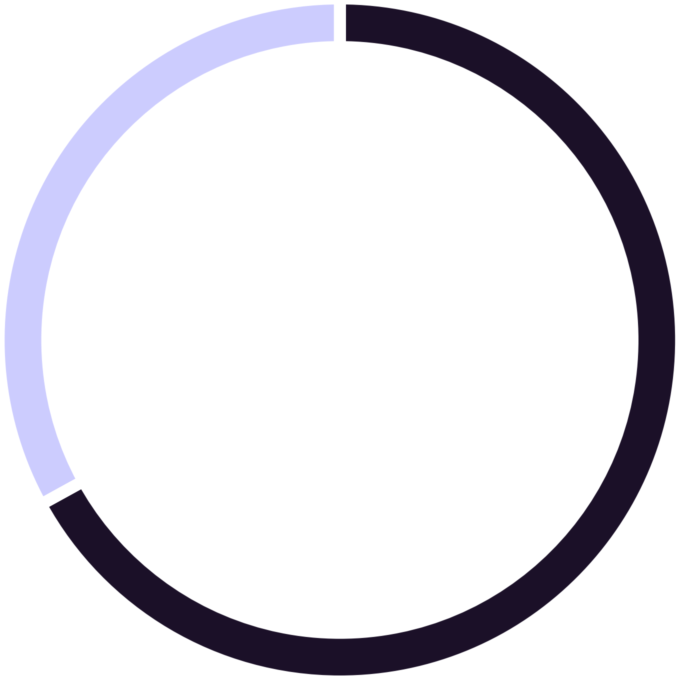
Almost a third of the class actions commenced in the review period intersected with a parallel regulatory proceeding, investigation or inquiry on the same subject matter. Significant decisions in the review period have sharpened the interplay between class actions and regulatory proceedings:

- 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].

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