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Class actions in FY 2023

JUL23

W+K INSIGHTS



This year's statistics¹



New class actions filed in FY23

- 24 Federal Court
- 17 Victorian Supreme Court
- 2 NSW Supreme Court
- 1 Tasmanian Supreme Court



Shareholder actions

Nine of these are competing actions (Downer EDI, Medibank and Star) so the number of actions that will ultimately run will be reduced once carriage is resolved



Consumer actions



Employment actions



¹ These statistics are based on our own tracking of Australian class actions from publicly available information. There may be some actions we have missed, but this will provide a good overview of what has been happening in the past year.

In April we had the benefit of detailed statistics coming out of a report by Professor Morabito which considered the past 21 years of funded class actions.²

The findings in Prof. Morabito's report correlate with some of our observations this financial year, but it is important to note that Prof. Morabito's figures are based on calendar years.

The Victorian Supreme Court is the favoured state-based jurisdiction for claims.

This comes as no surprise given the group costs order (**GCO**) regime that was introduced in 2020. The Federal Court still receives the most class action filings nationally, but the popularity of the Victorian Supreme Court is growing.

There has been a reduction in the number of funded class actions.

Only 42% of total class actions funded in calendar year 2022 compared to almost 70% in 2017. There are several factors that are impacting this trend, including the growing number and size of plaintiff law firms, their ability to take on more risk, and developments in fee arrangements (especially the GCO regime in Victoria).

We also expect more funders are involved than the statistics suggest. For example funders may still be involved where a GCO is obtained but the action is not regarded as a funded action because of the GCO.

The flip side to Victoria's popularity is that there has been a reduction in claims filed in NSW.

In the calendar year 2018 there were 18 actions filed in the NSW Supreme Court compared with just two in 2022. In the last financial year there have only been two new actions filed in the NSW Supreme Court (one of those was in 2022 and is one of the two reported by Prof. Morabito).

Securities class actions appear to be holding steady.

In Prof. Morabito's study, 24% of class actions filed in 2022 were shareholder class actions. That figure is likely to be around 29% in FY23, based on our tracking data.

However, it's worth noting the trend we are seeing in competing class actions being filed in this space. There are currently four overlapping actions filed against Downer EDI and Star Entertainment and two Medibank shareholder matters. Only one is likely to proceed in each dispute.

² "Empirical Perspectives on 21 Years of Funded Class Actions in Australia" by Professor Vince Prof. Morabito https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4422278



UNDERPAYMENT OF WAGES

In recent years there has been an increase in employment actions relating to the underpayment of wages.

There are currently more than 16 proceedings that raise issues relating to the underpayment of wages. While most of these actions involve employees in the retail space, there are also proceedings commenced by doctors.

Two employment actions were settled in the last 12 months, although they involved small group numbers and, as a result, smaller settlements. There are also several similar actions that are being investigated by plaintiff firms, so we expect to see more of these kinds of actions in the coming year.

| CONSUMER

It was business as usual in the consumer space.

The last few years have seen a steady rise in consumer actions, in particular against car manufacturers. There are 12 current proceedings against car manufacturers, 10 of which were commenced this year. That represents 58% of the consumer actions and 23% of all actions commenced this year. These kinds of matters are not new and almost always arise from product recall announcements – a risk the market understands well.



Many of the consumer financial services class actions, commenced in response to findings in the 2018 Financial Services Royal Commission, are now reaching their typical window for settlement as seen with the recently approved settlements for three consumer credit insurance class actions against ANZ, CBA and Westpac.

| NOVEL ACTIONS

There have been some novel actions filed this year, notably the actions regarding data breaches and the AFL concussion proceedings.

The data breach actions against Medibank and Optus will be important ones to watch. They are the first claims of this kind and it will be interesting to see how the issues unfold, in particular how the issue of damage plays out.

The AFL concussion class actions (currently there are two, which will be subject to a carriage contest later this year) are similarly novel, although they have taken their lead from US proceedings involving concussion in sport.

While damage is less of an issue in those proceedings, plaintiffs are likely to grapple with the issue of causation.

Limitation period issues are also likely to be a feature, as they will serve as a significant lever for the size of the class and the assessment of historical risk for many sporting industries.

SETTLEMENTS

In September 2022, one of the largest settlements in a class action in Australia was reached in the Johnson & Johnson mesh case (\$300m).

The Commonwealth Government also settled the two actions regarding PFAS contamination at Defence bases for just over \$152m, which was substantially less than the 2020 settlements for similar PFAS matters.

One issue that has arisen in recent settlements involves attempts by funders to recover the costs of after the event insurance (ATE) from settlement sums. In hearings this year, several Federal Court judges have criticised funders for attempting to recover ATE costs, which one judge observed is just the ordinary cost of providing funding.

In one case, the application to recover the costs was rejected and in another ongoing matter Murphy J indicated that he was considering appointing a contradictor to assist with the question. This is one of several issues to watch in the coming year.



Areas to watch



| Multiplicity

Competing class actions are becoming increasingly common, especially regarding highly publicised issues like data breaches or major announcements by ASX-listed companies.

While the courts have grappled with this issue in the past, it is becoming more prevalent and complex in some cases – particularly given the various funding arrangements plaintiff firms are proposing and the increasing number of firms developing plaintiff-focused practices.

A recent example is the extant carriage decision regarding the four claims against Star Entertainment. That was the subject

of a two-day hearing before Nicholas J in the Victorian Supreme Court in June 2023, where the four plaintiff firms, the defendant and a Court-appointed contradictor, made submissions on which of the proceedings should progress. The Court is considering four different funding proposals (three are GCOs at varying rates and the other is a ‘no win no fee’ proposal) and differences in the claims, including group member definitions. Often defendants have little to say in carriage applications, but Star picked up the group member definition issue, noting that its preference was for one of the proceedings with a broader group definition to proceed to ensure the largest possible group is represented by the claim.

This demonstrates that defendants are willing to take a pragmatic approach and advocate for a broader claim to proceed, rather than risk facing multiple narrower actions with distinct time periods. The decision is currently reserved.

Group Cost Orders

The introduction of GCOs in 2020 has, as expected by many commentators, increased the volume of proceedings commenced in the Victorian Supreme Court. To date the Court has ordered most of the GCOs sought, including granting a GCO on a second application, after the first was unsuccessful.

The availability of GCOs in Victoria is also having an impact in current proceedings in other courts.

For example, in a recent hearing in the Federal Court in the BlueSky class action, the applicants mooted a transfer application to allow them to take advantage of the GCO regime if the Federal Court declines to grant the solicitors' request for a common fund order.

Common Fund Orders (CFOs)

Following the High Court decision in *Brewster*, CFOs have received a lot of press in the past few years – and this year was no exception. In February, O'Callaghan J found that there was no power for the Court to make a CFO as part of the settlement approval process, which other judges consider to be beyond the Court's decision in *Brewster*.

When the issue arose in the context of a settlement approval in March, the judge reserved the question to the Full Federal Court to seek clarity on the issue. The Full Court heard the application in March and its decision is pending.

What's next

With the advent of novel claims, new and creative funding structures, and the ongoing evolution of procedural rules, the significance of class actions in Australia continues to grow for governments, investors, corporate boards and consumers alike.

To help keep you up-to-date with these key developments, we will be launching a class action series later this year.

It will cover the areas to watch and dive into some of the trends, such as data breach class actions, in more detail.



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