Class actions are firmly established as a means by which a large group or class of persons can bring a claim in Australia. The amounts claimed are often large, proceedings are procedurally complex, legal costs are significant and adverse publicity may be significant.

Over the last 25 years, there have been over 500 class actions filed and a large number that have resulted in substantial settlements. The development and availability of litigation funding, increased access to information, and the growing number of law firms willing to represent claimants have contributed to the continued growth of class actions. In particular, since 2017, there has been an increased number in shareholder class actions commenced. Clearly, this is of concern to Australian business, financial institutions and professional advisors.

Ashurst has been involved in defending many significant and high-profile class actions and has developed a specialist expertise in class action procedure. This guide adopts a Q&A approach to discuss:
- what is a class action;
- how they are commenced;
- how they are funded;
- their recent history;
- the types of claims which are being brought; and
- the main issues and trends with regard to their future.
WHAT IS A CLASS ACTION?

A class action – or “representative proceeding” as it is formally known - is a court proceeding where the claims of a group or “class” of persons are brought by one or a small number of named representatives.

In Australia, there are class action regimes in both the Federal Court and in the State Supreme Courts. The New South Wales, Victorian and Queensland Supreme Court regimes mimic that of the Federal Court, while some of the other States have a different model. In June 2019, a bill was introduced which, if passed, will introduce in the Supreme Court of Western Australia a similar class action regime as the Federal Court.

WHY ARE CLASS ACTIONS CONTROVERSIAL?

When class actions were introduced in Australia in 1992, there was concern that their introduction would result in a flood of “US-style litigation”. Commentators warned that their introduction would increase the cost of doing business in Australia and would lead to the rise of unmeritorious claims. On the whole, there has not been the flood of class actions that some predicted. However, their introduction has resulted in a number of cases being brought which may otherwise not have been pursued.

More recently, increased entrepreneurialism on the part of law firms representing plaintiffs and litigation funders has resulted in the commercialisation of the class action industry. As a result, we are seeing an increase in:

• the number and types of class action filings;
• the number of law firms pursuing claims;
• the number of third party litigation funders in the market;
• speculative and marginal claims; and
• competing class action claims.
HOW ARE CLASS ACTIONS COMMENCED?

What are the threshold requirements before a class action can be commenced?

A class action can be commenced where:

• seven or more people have claims against the same person(s);
• the claims are in respect of, or arise out of, the same, similar or related circumstances; and
• the claims give rise to at least one substantial common issue of law or fact.

These threshold requirements have been liberally interpreted by the Courts and as a result are generally not difficult to satisfy.

For example, the Full Court of the Federal Court confirmed that when commencing class actions against multiple respondents, there is no requirement for every class member to have a claim against every respondent. All that is required is that seven or more persons (including the class representative) have a claim against the same respondent.

Who can bring a class action?

Class actions are usually brought by a single class representative who becomes the applicant in the proceedings. The representative brings the proceedings on behalf of all the class members. There can be more than one class representative, in which case each becomes an applicant in the same class action. This is common where the threshold criteria are met but there are other differences between groups of class members which make it appropriate to distinguish between sub-groups.

Class members are not listed by name in the pleadings and play a largely “passive” role. However, in certain class actions, particularly shareholder or investor class actions, respondents often seek to obtain discovery of documents or particulars from sample class members, to assist in assessing issues of liability and quantum.

Are class actions “opt-in” or “opt-out”?

The Australian class action regime employs an “opt-out” model. The “opt-out” model works as follows:

• All potential claimants who fall within the definition of the class become members of the class on the filing of the claim whether they are aware of it or not.
• They will all be bound by the judgment of the Court or any approved settlement unless they opt-out of the proceedings before a date which is fixed by the Court. The Court will require that all class members are notified of the action, their right to opt-out, and the process for doing so.
• If a class member chooses to opt-out, they will no longer be bound by the outcome of the proceedings and will be able to pursue whatever claim they may have in separate proceedings.

The “opt-out” model can be distinguished from the “opt-in” approach which requires potential class members to indicate positively that they want to be part of the class. If they do not opt-in, they will not become members of the class and will not be bound by the final judgment or approved settlement.

What are “open” and “closed” classes?

The “class” can be defined so that only people who have retained a particular law firm and/or entered into an arrangement with a particular litigation funder are members. Such classes are commonly described as “closed,” as all the members are known to the law firm and/or litigation funder (as opposed to “open” classes which are not limited in this way). The real effect of closed classes is to convert the opt-out regime into an opt-in regime for these actions.

Until the introduction of common fund orders (see below), closed classes were attractive to third party litigation funders as they provided greater certainty in relation to the number of persons in the class and the returns to the funder if successful.

Closed classes can also encourage settlement as respondents are able to better assess their potential overall exposure and reduce the issue of “free riders” as all class members must register with the litigation funder and agree to contribute to costs. The Court has powers to order “class closure” and this has generally been used in order to facilitate the settlement of an “open class” action.

It has been said that closed classes ignore the public policy behind the opt-out regime and ignore the benefit of allowing those who are poor, less educated or located in remote locations to access justice. In its report, An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, the Australian Law Reform Commission (ALRC) has recommended that all class actions be commenced with an “open” class. See our publication on the ALRC report here.
HOW ARE CLASS ACTIONS FUNDED?

What is third party litigation funding?
Third party litigation funders have become an entrenched and accepted part of the class action landscape. According to the Federal Court of Australia Case Management Handbook, “litigation funding has proven to be the life-blood of most of Australia’s representative proceeding litigation at Federal and State level.” There are approximately 25 active funders in the Australian market.

Third party litigation funding has been criticised as allowing someone with no direct interest in the actual dispute to conduct and control the litigation, and has been the subject of numerous legal challenges. However, in 2006, the High Court of Australia effectively gave its stamp of approval to litigation funding in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386. Following this decision, the Australian litigation funding market has continued to grow, with an increasing proportion of class actions backed by funders.

Funders enter into an agreement, primarily with the class representative, to pay the legal costs of the class representative and to pay the respondent’s costs if the class action is unsuccessful. In return, if the claim is successful, the funder receives its money back together with a share of the amount awarded which is normally between 20% and 40% depending on the size of the case, the timing of the settlement and the costs incurred. More recently, litigation funding arrangements have become more innovative, with variations to the traditional fixed percentage model – including the incorporation of caps and staged increases in commissions.

Other types of private funding that are encountered in class actions include:
- funding by the lead plaintiff or a subset of the group of claimants; and
- joint funding through agreement between insurers and third party litigation funders.

The ALRC has recommended that there be increased Court supervision of litigation funders, including recommendations that Court approval be required for litigation funding agreements and that there be a presumption that the litigation funder provides security for costs.

Can law firms fund class actions?
Law firms can conduct class actions on a “no win, no fee” basis and recover the legal fees expended, plus an uplift on those fees following a settlement or successful outcome. Unlike third party litigation funders, law firms are not permitted to charge their fees based on a percentage of their client’s recovery in litigation – known as “contingency fees”. Attempts by lawyers to become involved in funding without contravening this rule have generally been unsuccessful, although recently the Federal Court did potentially open the door to lawyers getting a share of a settlement as part of a common fund order, with one judge describing that as being “not unlikely” – see our article.

This is an area of continued debate. The ALRC has recommended that percentage based fee agreements should be permitted in class actions, with the leave of the Court, and that the Court should have an express power to reject, vary or amend the terms of such agreements. If the prohibition on percentage based fees was removed, this could result in an increase in law firms competing with litigation funders to fund larger claims or smaller firms pursuing a greater number of lower value claims.

Does the “loser pays” rule apply?
The “loser pays” rule generally does apply but successful respondents can only obtain costs orders against the class representative. The Court is not permitted to make an adverse costs order against the remaining class members.

It is common for litigation funders to meet costs orders made against class representatives and to provide security for costs (where sought by respondents). In other words, independently funded class actions enable class representatives to avoid exposure to costs orders.
HOW ARE CLASS ACTIONS RESOLVED?

Class actions can be resolved in a number of ways. The outcome of class actions over the last 25 years is summarised in the below graph:

![Class Action Outcomes Graph]


Can the Court stop a class action?

The Court has the power to order that a proceeding no longer continue as a class action where it is satisfied that it is in the interests of justice to do so, for any one of the following reasons:

- the costs incurred if the proceedings were to continue as a group are likely to exceed the costs incurred if there were separate proceedings;
- the relief sought could be obtained by other proceedings;
- the proceedings will not provide an efficient and effective means of dealing with the claims; or
- it is otherwise inappropriate to bring the claims as a class action.

Does the Court have to approve any settlement?

Yes. There is a formal process of seeking approval which requires a number of steps including notification to class members. The Court will consider whether the proposed settlement is a fair and reasonable compromise of the claims of the class members.

The Courts are increasingly scrutinising settlements (including with respect to legal fees and funding commissions) and settlement distribution schemes. Courts have demonstrated a willingness to disallow or amend proposed settlements, for instance where:

- not all class members have been provided with the opportunity to share in a premium for contribution to the funding of the proceedings;
- the proposed settlement fails to adequately differentiate between class members’ claims;
- the proposed settlement provides for commissions to a litigation funder greater than the funder is contractually entitled to; and
- the legal fees and funding commission are disproportionate to what could reasonably be expected to be achieved in the litigation.
WHAT TYPE OF CLAIMS ARE THE SUBJECT OF CLASS ACTIONS?

Class actions impact all sectors and industries. The types of class actions also vary and include:

- product liability actions;
- claims by investors and/or shareholders;
- consumer protection claims;
- industrial claims; and
- mass tort claims.

Shareholder class actions continue to be the predominant type of claim, particularly as the majority of these claims are supported by litigation funding. In the last five years, shareholder actions have grown to represent 34% of all filed class actions and investor class actions have grown to represent 24% of all filed class actions.

Class actions relating to financial products and services or consumer protection are likely to continue to be a focus of class actions, particularly in light of the conduct identified in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

Other likely focus areas include claims relating to:

- employment status and underpayment of wages (see our update here);
- environmental liability (such as bushfires or floods);
- infrastructure and real estate, such as in relation to combustible cladding and building defects;
- cartel conduct; and
- data and privacy breaches.

WHAT HAS BEEN THE LARGEST AMOUNT RECOVERED IN AN AUSTRALIAN CLASS ACTION?

The largest sum recovered by class members in Australia is $494 million (including costs) - more than double the largest settlement in a securities/shareholder class action. That amount was recovered by way of settlement in proceedings against three defendants arising from the “Black Saturday” bushfires near Kilmore East Kinglake in Victoria in 2009. The settlement was reached following a trial that had lasted some 208 days. The settlement was approved in December 2014.

HOW BIG ARE THE CLASSES?

While class actions only need 7 class members to commence, in practice, class actions can have tens of thousands of class members, particularly consumer claims that impact large sectors of the community.

Some examples of recent large class actions are set out below.

- **Bank fees**: the bank fees class action commenced in 2010, with tens of thousands of customers registering as class members in claims against all of Australia’s leading banks.
- **Cash Converters**: three class actions against Cash Converters in relation to interest rates on cash advances, including two actions each involving over 30,000 class members.
- **Insurance**: the class action concerning insurance issued by Westpac Life on the recommendation of financial advisers at Westpac, St George Bank, Bank of Melbourne, BankSA or BT Advice, where more than 80,000 people are part of the class.
- **Airbags**: the class action concerning defective airbags, where the total number of class members is approximately 200,000.
- **Superannuation**: class actions filed against Colonial First State Limited and AMP Limited where affected members are likely to be in the hundreds of thousands.
- **Uber**: the class action against Uber Technologies Incorporated (and various other Uber entities) in May 2019 on behalf of the taxi, hire-car, limousine and charter vehicle industry, where 6,000 class members have signed up to date. However, this class could have as many as approximately 80,000 members.
WHAT ARE THE CURRENT TRENDS IN AUSTRALIA IN CLASS ACTIONS?

Set out below are observations on recent trends in the constantly evolving class action landscape.

- **Increase in claims:** We expect to see a rise in the number of class actions filed and the subject matter of claims. This is particularly as more litigation funders enter the Australian market (including from the US, UK and Singapore) and more law firms are now willing to act for claimants in class actions. Recently, medium sized commercial law firms have entered the market and are establishing stronger relationships with third party litigation funders.

- **Participation of institutional investors:** We expect to see continued participation by these groups in shareholder and investor claims. Some see it as a low risk way of potentially recovering part of their lost investment. The involvement of institutional investors is often pivotal in securing the funding of a potential class action. Institutional investors are attractive class members for litigation funders as they can increase the number and size of class actions.

- **Increasing interplay between regulatory investigations and class actions:** ASIC investigations and proceedings can be an impetus for class actions where there has not already been a significant client remediation program, as they can signal where possible misconduct has occurred and the outcome of such proceedings can inform parties as to the prospects of success in class action proceedings. Further, class action lawyers are accessing reports and documents obtained by regulators, such as ASIC and the ACCC, through their evidence collection powers, to support their clients’ claims. These same regulators have publically given their support to class actions as having a positive role to play in enforcement and in deterring misconduct. We are now also starting to see instances where regulatory investigations and proceedings follow class action proceedings.

- **Developed case management principles for competing claims:** There has been an increase in the number of multiple class actions arising out of single events. The NSW Supreme Court and Victorian Supreme Court have each entered into protocols with the Federal Court. The protocols require the Courts to convene a joint case management hearing to ascertain the issues in each proceeding with a view to determining the most appropriate way to manage the competing class actions. The Courts have developed a multi-factorial approach to managing competing claims – see our publications here, here and here. Management options include consolidation, joint hearings, a stay of proceedings, and allowing one proceeding to continue as an open class and the others as closed classes.

- **Tightening of the D&O insurance market:** The increased number of securities class actions has also led to concerns as to the availability of directors and officers insurance and to the higher pricing of premiums to compensate for increased claims. The number of claims relating to securities class actions are currently significantly exceeding the total insurance market premium pool.

- **Validity of common fund orders:** The Full Federal Court has endorsed a “common fund order”, which requires all class members of an open class action to contribute to the funder’s commission out of any settlement or judgment, even if they have not signed a funding agreement. The validity of common fund orders was recently endorsed in a historic joint sitting of the Full Federal Court and the New South Wales Court of Appeal, although judgment is awaited in the High Court appeal which may impact the future of common fund orders.
## WHAT ARE THE MAIN DIFFERENCES BETWEEN AUSTRALIAN AND US CLASS ACTIONS?

<table>
<thead>
<tr>
<th></th>
<th>AUSTRALIA</th>
<th>UNITED STATES</th>
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<tbody>
<tr>
<td><strong>Common issues</strong></td>
<td>One substantial common issue of law or fact.</td>
<td>Common issues must “predominate” over individual issues.</td>
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<tr>
<td><strong>Court certification</strong></td>
<td>No “court certification” process. Respondents can challenge satisfaction of threshold requirements, but that is generally difficult.</td>
<td>The plaintiff must satisfy the Court that the claim meets requirements regarding size of class, commonality of issues, typicality of claims and adequacy of the representative to protect the interests of the class. With actions for damages, the Court must also be satisfied that common question of law or fact “predominate” over individual issues, and that the class action procedure is superior to other available methods of adjudication.</td>
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<tr>
<td><strong>Judge/jury trial</strong></td>
<td>Will be heard by a judge alone.</td>
<td>Often heard before a jury.</td>
</tr>
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<td><strong>Punitive damages</strong></td>
<td>Rarely awarded.</td>
<td>Potential for significant punitive damages.</td>
</tr>
<tr>
<td><strong>Contingency fees</strong></td>
<td>Litigation funders often receive a percentage of the amount paid by the respondents to the class members. Lawyers cannot have agreements with clients that provide for contingency fees, although the Federal Court recently suggested it may be possible for them to share in settlement proceeds as part of a common fund order. In most Australian states lawyers can charge “conditional fees” which involve acting on a “no win, no fee”, often with an uplift based on the amount of fees charged (rather than size of settlement or judgment).</td>
<td>Lawyers are able to charge contingency fees.</td>
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<tr>
<td><strong>Other party’s costs</strong></td>
<td>Loser (usually) pays, although funder usually pays if a costs order is made against the applicant.</td>
<td>Each party bears their own costs irrespective of outcome.</td>
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