

Class action risk 2024

MARCH 2024

Class action filings rebounded in 2023, making it the second biggest year for filings of all time. While consumer claims continue to dominate, claims from shareholders and employees remain significant areas of risk. With filings spread over many sectors and the emergence of new forms of claims, class action risk is a reality across corporate Australia.



Key trends

Class action filings rebound.

With the number of class action filings at their second highest of all time, it's important to be familiar with where the risk lies.

The sectors at risk are expanding, competing claims are on the rise and new areas of risk are coming to the fore. When these developments are coupled with a largely unregulated and highly competitive funding environment, there is added complexity and risk associated with navigating a claim.

This year's edition of Class Action Risk provides an update on the current indicators and drivers of class action risk, with a particular focus on how that risk evolved during 2023.



Filings rise dramatically

The number of class action filings in 2023 is the second highest on record, marking a return to the trend of elevated filings seen over recent record-setting years.



A flourishing class action funding environment

A lack of regulation of litigation funders and a magnet-like attraction to the contingency fee regime in Victoria is fuelling a range of increasingly innovative funding models and a high degree of competition in financing claims.



Consumer claims dominate

Consumer claims accounted for roughly 40% of class action filings in 2023. The biggest drivers of these claims involved proceedings alleging defects in motor vehicles and the sale and promotion of alleged high-risk financial products.



Cyber claims are here to stay

During 2023, the first significant wave of data breach class actions were filed following several high-profile cybersecurity incidents. With some reform in the works that will make these claims easier to pursue, all signs point to a potential escalation in these claims moving forward.



Employment claims double

In 2023, the number of employment class action filings almost doubled. Most of these claims involved allegations of underpayments and breach of employment terms – in particular, in connection with unpaid overtime and loadings, or failure to provide rest breaks.



Shareholder claims

Shareholder class actions continue to account for a significant proportion of filings, with the subject matter that is driving these claims continuing to expand.



ESG to keep pace with overseas growth

The continued regulatory focus on greenwashing and bluewashing, and the proposed introduction of mandatory climate and modern slavery reporting requirements, are likely to serve as the catalyst for future class action risk.



Crypto claims on the horizon

Potential class actions involving digital asset platforms loom large on the horizon as an emerging area of risk.

2023 in review

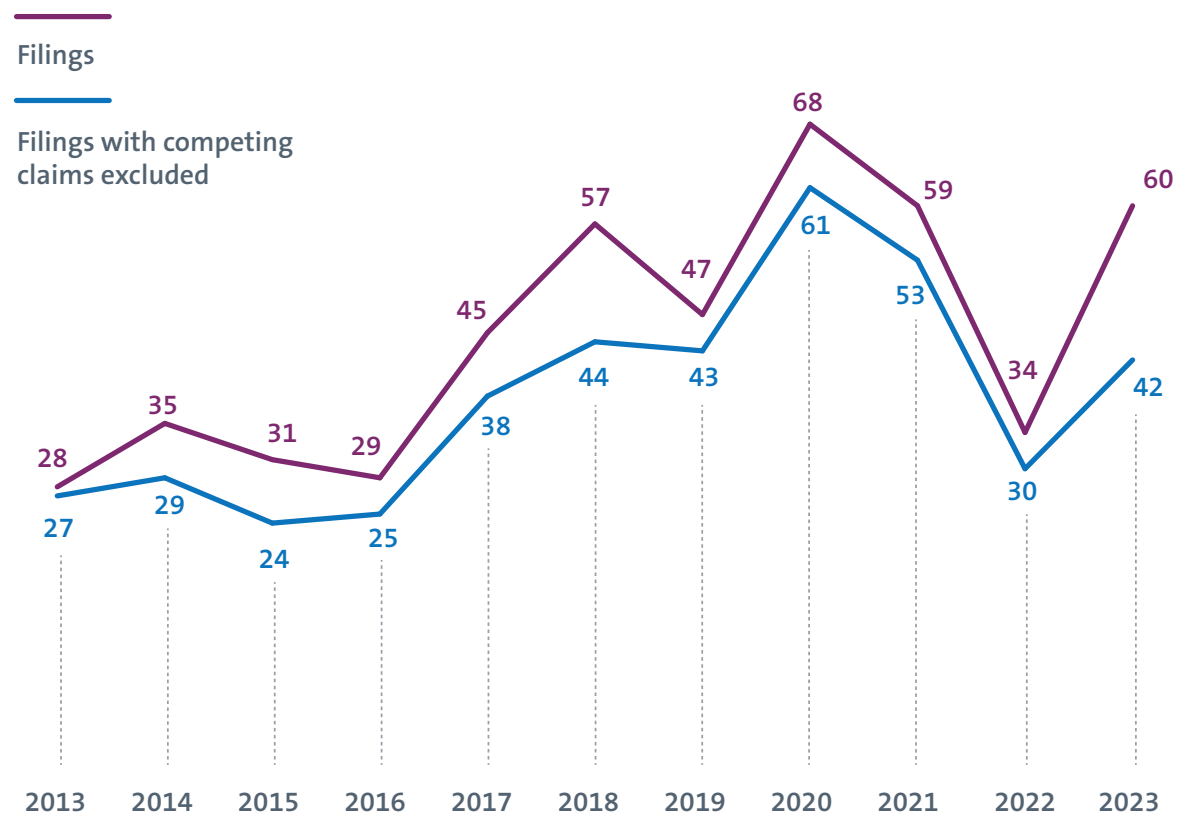
Bounce-back in class action filings

The headline trend is that class action filings in 2023 bounced back to reflect longer-term trends after a marked downturn in 2022.

Filings in 2023 were in a similar ballpark to filing levels over the last five years (save for the anomaly of 2022). For that reason, we do not view this as an escalation in class action risk and, as discussed further below, it may not necessarily mean abandoning any hope that class action risk might be subsiding.

A core factor in the 2023 filings is the relatively high number of competing class actions (ie multiple claims against the same defendant in respect of the same or similar issues). Our analysis indicates that competing claims account for roughly one-quarter of total filings—the largest proportion in at least the last decade. While competing claims have typically been seen in the shareholder class action context, in 2023 the competing claims were comprised of roughly one-third shareholder claims, one-third consumer claims and the balance being made up with various other types of claims.

Total filings



2023 in review

Consumer and shareholder claims continue to dominate

In a continuation of trends seen in recent years, consumer and shareholder claims accounted for roughly 60% of claims filed in 2023. Within that trend, consumer claims returned to the fore, accounting for almost 40% of claims filed, while shareholder claims accounted for roughly 20%.

The biggest driver of consumer claims in 2023 was alleged defects in motor vehicles. The other notable trend was the first class actions in relation to high-profile data breaches (against Medibank and Optus). We discuss both of these trends later in this report.

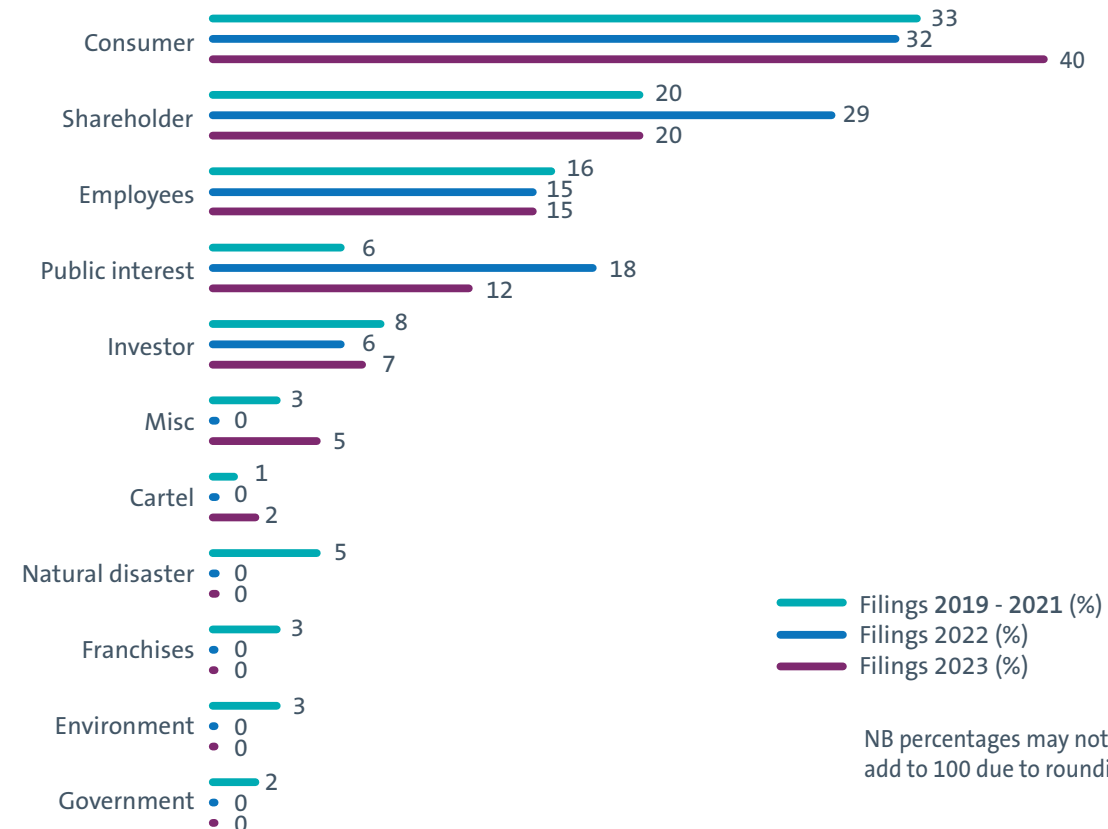
The subject of other consumer claims included travel experiences, building defects, superannuation fees, inflated prices and general products claims.

Shareholder class action filings have remained fairly steady for a number of years now, with between 10-12 claims having been filed in each of the last five years. As in previous years, a large percentage of the claims in 2023 (just under half) were competing claims—indeed, three of the shareholder class actions filed in 2023 were the fourth claim filed against a defendant for the same or similar conduct.

The other notable contributors to 2023 filings were:

- employee claims for underpayments and rest breaks—a continuation of a growing trend in recent years; and
- public interest claims, including in respect of the ‘stolen generation’, racial discrimination and the treatment of women and young people in custody.

Types of claims



2023 in review

A broad range of sectors targeted

Another trend that has remained fairly stable for a number of years is that class action filings have been spread across a broad range of sectors—with no obvious focus on particular sectors since the decline in focus on the banking and financial services sector after about 2020.

In 2023, the biggest target was the retail, hospitality and leisure sector (being the subject of about one-quarter of claims filed). The most obvious trend driving this outcome is the number of class actions brought on behalf of retail employees for alleged underpayment and/or rest break issues. Beyond that trend, the claims in this sector are varied—including in respect of product complaints, shareholder claims, traveller experiences and claims against the AFL for racial discrimination and concussion-related injuries.

After a brief reprieve in recent years, the banking and financial services sector was the second biggest target for class action filings in 2023. However, for the second year in a row there were no class actions filed against the major banks in 2023 (although one case was filed against a subsidiary on behalf of superannuation members). The claims in this sector covered a range of circumstances,

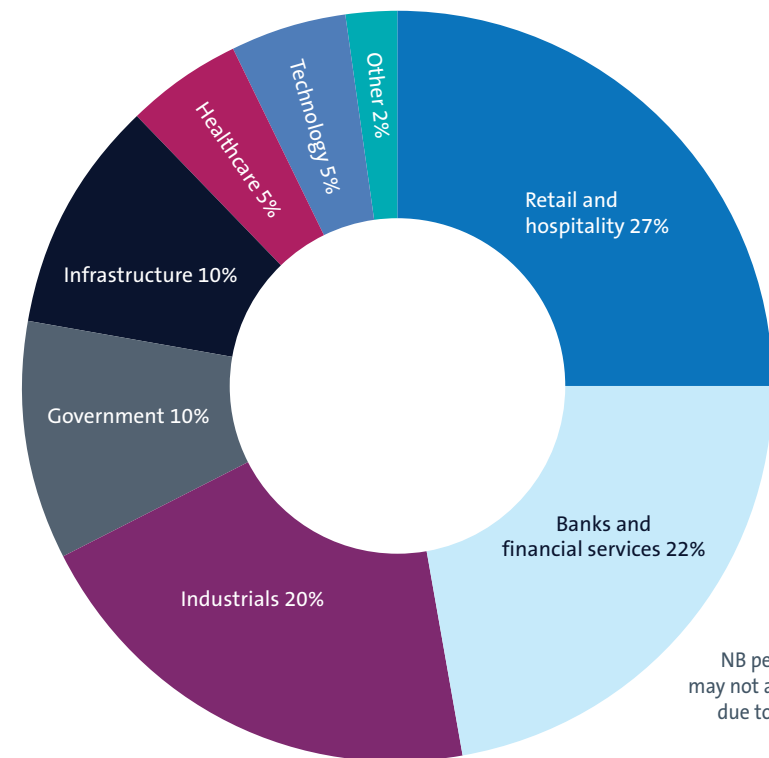
including superannuation, conduct in selling complex financial products (a return to the type of claim commonly seen in the wake of the global financial crisis), shareholder class actions and data breach.

The third biggest target was the industrials sector, primarily driven by the ongoing trend of claims against auto manufacturers.

Also of note is:

- the trailing off of claims against the government sector—which was the biggest target in both 2021 and 2022, largely driven by a broad range of public interest claims; and
- the relatively small number of claims in the technology, telecommunications and media sector—a sector we expect to become a target given the increasing focus on data/privacy issues, and also because many businesses in this sector are mass consumer-facing.

Sectors



NB percentages may not add to 100 due to rounding

2023 in review

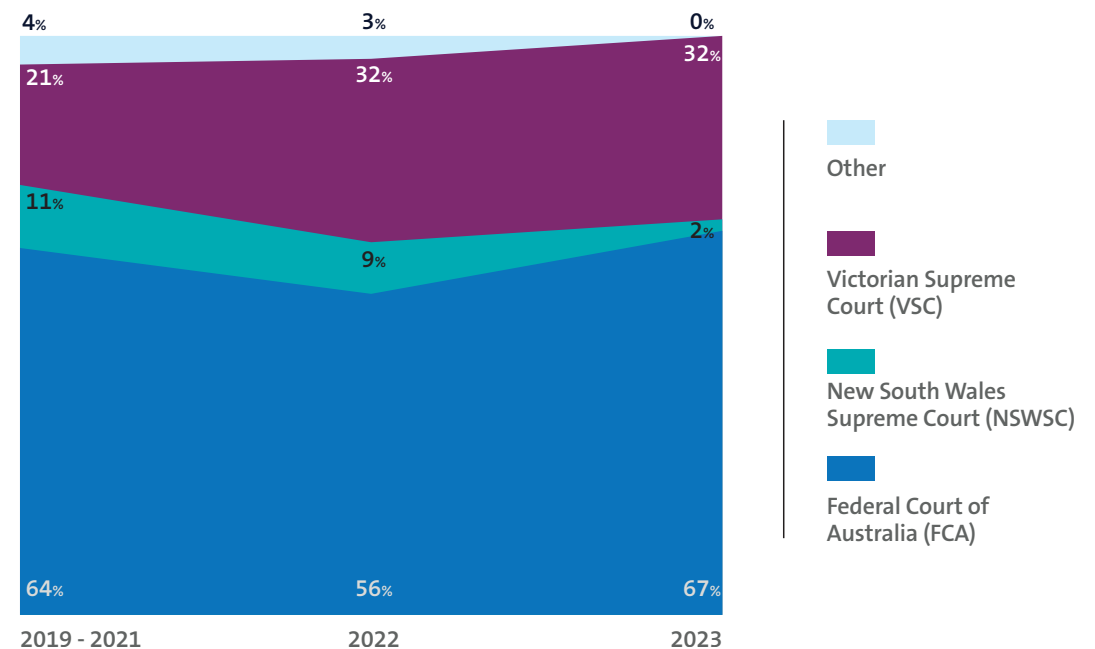
Preferred jurisdictions: Federal Court and Supreme Court of Victoria

The Federal Court continues to attract the majority of class action filings—roughly two-thirds in 2023, which is broadly in line with overall trends in recent years.

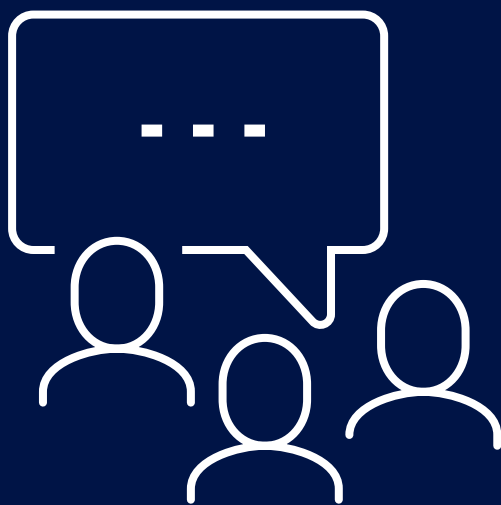
There has, however, continued to be an increase in the claims filed in the Supreme Court of Victoria—which accounted for all but one of the other class actions filed in 2023, cementing Victoria as the clear second jurisdiction of choice for class action filings. While there may be other factors at play, one obvious reason for this trend is the availability of contingency fees in class actions in that court.

The remaining claim in 2023 was filed in the Supreme Court of NSW— a new low for this jurisdiction which, up until 2020 when contingency fees became available for class actions in the Supreme Court of Victoria, had received between roughly 20-30% of class action filings.

Preferred jurisdictions



What does it all mean for class action risk in 2024?



Class action risk remains a significant factor for doing business in Australia. Perhaps more than in any other year, filings in 2023 reflect a broad-based risk that is not focused on particular issues, conduct or sectors.

Based on the fewer filings in 2022 and other broader indicators, in last year's report we noted the possibility that class action risk *may* be subsiding from the record levels seen in prior years—with a return to the levels of the mid-2010s potentially on the cards. Despite the number of filings in 2023, we think that remains a possibility, particularly given:

- the absence of clear trends in the 2023 filings;
- the fact that the record filings in 2018-2021 were largely driven by claims against the banks and other financial services companies in the immediate aftermath of the Financial Services Royal Commission; and
- the unusually high percentage of competing claims bolstering the 2023 filings.

There also remains a range of other developments that will impact the complexion of class action risk in the coming years, including:

- the impact of the reduced regulatory burden (and increased certainty) for litigation funders;
- increasing familiarity and understanding about the way in which the Supreme Court of Victoria is dealing with applications for contingency fees;
- important legal developments affecting prospects for shareholder class actions and consumer claims; and
- emerging areas of risk (in particular, data privacy, digital asset platforms and climate change).

These issues, and other new developments, are addressed in the following sections of this report.

Class action funding

2023 saw some interesting developments in class action funding as the regulatory environment became more certain for funders following the election of the Labor Government in 2022, and as funders and plaintiff law firms continued to develop innovative funding models.

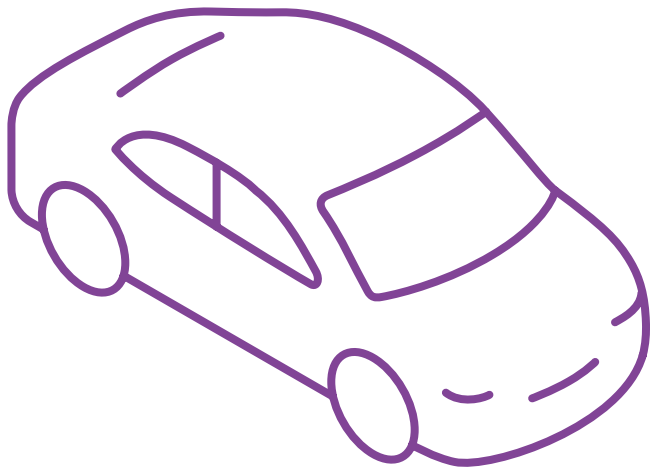


A number of interlocutory decisions illustrate how the funding landscape continues to evolve.

- In October, the Full Federal Court resolved the uncertainty about whether common fund orders could be made at the settlement stage of a class action. Following the High Court's 2019 decision in *Brewster*, which held that *early-stage* common fund orders were beyond power, a divergence emerged in the Federal Court about whether CFOs could be made at a later stage in a class action proceeding (eg at settlement, or following judgment). In a development welcomed by litigation funders, the Full Court in *Elliott-Carde v McDonalds Australia Ltd* held that the court has the power to make a CFO at the settlement stage under its settlement approval powers.
- Also in October, in the context of a carriage application, Justice Lee of the Federal Court expressed the view that a 'solicitors' CFO'—a funding proposal that would include a commission-based payment to the plaintiff's solicitors—was not precluded by Part IVA of the *Federal Court of Australia Act 1976 (Cth)*, notwithstanding the general prohibitions on solicitors entering into a costs agreement that provides for contingency fees. Justice Lee has since referred the question of the Federal Court's power to make a 'solicitors' CFO' to the Full Court for determination this year.
- In Victoria, Group Costs Orders (**GCOs**) permitting plaintiff lawyers to recover contingency fees have been permitted since 2020. In July 2023, the Victorian Court of Appeal considered the question of whether, if a class action proceeding were transferred from Victoria to another jurisdiction, a GCO made in the Victorian Court could 'travel' with the proceeding, notwithstanding the unavailability of GCOs in the transferee court. The Court of Appeal held that a GCO would not be enforceable on transfer, although it also held that the existence of a GCO is a factor relevant to whether a proceeding should be transferred from Victoria to another jurisdiction. That decision is subject to an application for removal to the High Court.

Consumer and automotive claims

Consumer claims were a standout once again in 2023, accounting for around 40% of all class action filings. This reflects an even higher proportion of claims than in previous years, notwithstanding the overall growth in filings. We expect strong rates of consumer claims across all sectors to continue in 2024.



Following past trends, automotive manufacturers and suppliers remained a key target for consumer claims, focused on alleged defects in popular vehicle models. Interestingly, all of these new filings occurred in the first half of the year, prior to the Full Federal Court's decision in *Toyota v Williams*. That decision concerned the availability and calculation of damages for the 'reduction in value' of goods as a result of a defect—a mainstay of previous auto class actions and a driver of substantial damages awards.

In summary, in *Toyota v Williams*, the Full Court held that:

- When assessing 'reduction in value' damages, it is appropriate to have regard to events that occurred after the time of supply, such as the provision of a fix or other repairs (or even the potential availability of one). Previously, some first-instance judges had not been prepared to take subsequent repairs into account.
- The court also emphasised the need to focus on the residual utility of the goods notwithstanding the defect (such that, if a vehicle remained useful and safe to drive, then the quantum of any damages might be expected to be reasonably modest).

The *Toyota* judgment was a welcome shift for auto (and other goods) manufacturers. However, special leave has since been granted to both parties to appeal to the High Court. While too early to tell, we expect plaintiff law firms and litigation funders may be adopting a 'wait and see' approach until the High Court clarifies the law and they can assess how favourable the landscape remains.

Another noticeable trend in 2023 was claims relating to the sale of allegedly unsuitable or risky financial products, especially to vulnerable consumers. This included class actions alleging the sale of so-called 'junk insurance' products and 'addictive' online games, as well as suggestions of 'overcharging' of insurance premiums and loan interest rates. These actions—which commonly allege the making of misleading representations or unconscionability—are one to continue to watch. This is especially so in light of ASIC's robust 2024 enforcement agenda, with its focus on the misuse of financial products. We expect this will continue to generate ample opportunities for entrepreneurial class action promoters in the year ahead.

Privacy and data breach claims

The last twelve months have seen a significant increase in class action risk associated with cyber incidents for Australian companies, accompanied by unprecedented scrutiny from government, regulators and consumers.



A clear pattern of data breach class actions has emerged, including both consumer and shareholder claims.

Since our last Class Action Risk Report, a further four class actions have been brought on behalf of Optus and Medibank Private customers and shareholders with subsequent consolidations resulting in three ongoing class actions:

- The **Medibank consumer class action** in the Federal Court of Australia relating to losses associated with the release of personal information arising out of the data breach, as well as emotional damage;
- The **Optus consumer class action** in the Federal Court relating to losses associated with the release of personal information arising out of the data breach, as well as emotional damage; and
- The **Medibank shareholder class action** in the Supreme Court of Victoria relating to allegations of financial losses by Medibank shareholders referable to the decline in share price after the data breach.

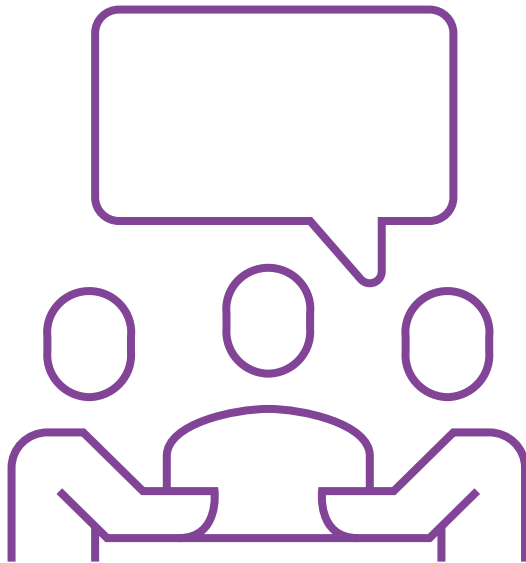
A key theme of these claims is cyberwashing—each case includes allegations relating to statements about compliance with data-handling and cybersecurity obligations. These types of claims are high risk for consumer-facing organisations, especially those with a significant volume of personal and sensitive data—including those in the healthcare or financial services sectors. We expect to see a significant shift in how plaintiffs will approach claims associated with cyber incidents due to changes expected to the *Privacy Act 1988* (Cth), introducing a direct cause of action to individuals for breaches of the Act and the introduction of a statutory tort for serious invasions of privacy.

The current class actions have also turned the spotlight on legal professional privilege as it applies to cyber incident investigations, with the Federal Court finding Optus could not maintain a privilege claim over a report on an external review by Deloitte of the cyberattack and Optus's cybersecurity systems, controls and processes.

These developments have materially shifted the risk profile for organisations in relation to cyber incidents and it will be incumbent on companies to carefully consider how they should respond.

Employee claims

The proportion of employment class actions filed during 2022 and 2023 has remained relatively stable, comprising about 15% of filings each year. Most employment class actions involved allegations of underpayment or employment terms (or some combination of the two).



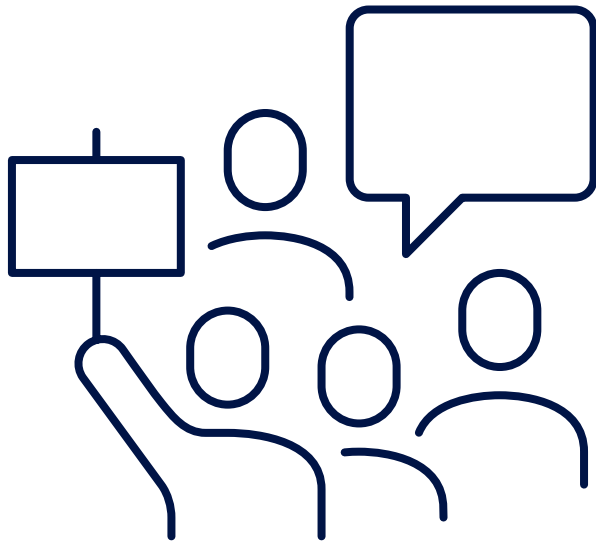
There are several notable trends in employment class action risk, including:

- (a) The retail, hospitality, healthcare and government sectors continue to be the key sectors exposed to employment class action risk. However, we may see more sectors being targeted as class action promoters are diversifying and more plaintiff firms enter the arena.
- (b) Consistent with the general trend in 2023 across all class action filings, there has been an increase in competing class actions, sometimes alongside proceedings brought by the Fair Work Ombudsman or unions. While courts have developed mechanisms for addressing competing class actions, they still have an impact on the cost, time and complexity for defendants responding to them.
- (c) We have previously reported that several High Court decisions and law reforms had dealt a fatal blow to certain forms of employment claims—including those involving mischaracterisation of casual employees. However, the Federal Government’s Closing Loopholes Bill may open the door for employees to bring claims against their employer for unpaid permanent employment entitlements (such as annual leave) on the basis that, even if their employment terms reflect casual employment, the reality of their position is that of a permanent employee. The Bill has been passed and is awaiting Royal Assent. The new laws regarding casual employees will come into effect six months after the Act receives Royal Assent.

All of this means businesses need to remain vigilant against an increasingly mainstay class action risk, including by reviewing existing casual arrangements and employment contracts to assess the risk the employees are permanent, and examining their compliance with industry awards and enterprise agreements in relation to payment of hours worked and provision of entitlements such as rest breaks.

Shareholder class actions

Shareholder claims have accounted for a substantial proportion of class action filings for over a decade. While reforms have been implemented with a view to stemming the tide of these claims, there are no indications that shareholder class action risk is poised to shift over the year ahead.



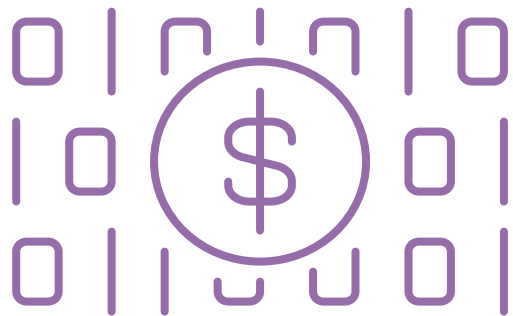
The trends that emerge from recent shareholder class action activity include:

- Increasing diversity in the conduct upon which the claims are made. While ‘conventional’ claims based on revisions to earnings guidance continue to trigger a substantial proportion of filings, plaintiffs are demonstrating an ongoing willingness to venture into uncharted waters, pursuing a broad base of claims including novel claims associated with the disclosure of cybersecurity risks.
- Ongoing (and stiff) competition between plaintiff firms to run shareholder class actions, with two thirds of all shareholder claims commenced in 2023 involving competing proceedings. This competitive landscape continues to place pressure on funding commissions and may lead some class action promoters to cast a wider net in assessing the viability of claims to pursue—potentially fuelling further growth in unique subject matter claims.
- The Supreme Court of Victoria being the jurisdiction of choice for shareholder class actions, with all shareholder claims filed in 2023 either commenced or transferred to the Supreme Court of Victoria. This appears to reflect a strong attraction among plaintiff firms to the GCO regime for shareholder class actions, potentially due to the relative ease with which these claims may be prepared, unlike other forms of class actions which often carry a higher degree of factual and legal complexity.
- Continuing willingness by parties to run shareholder class actions to judgment. We expect this trend to continue into 2024, with judgments currently reserved in a number of proceedings and additional trials scheduled to commence over the short term.

On the horizon

Crypto

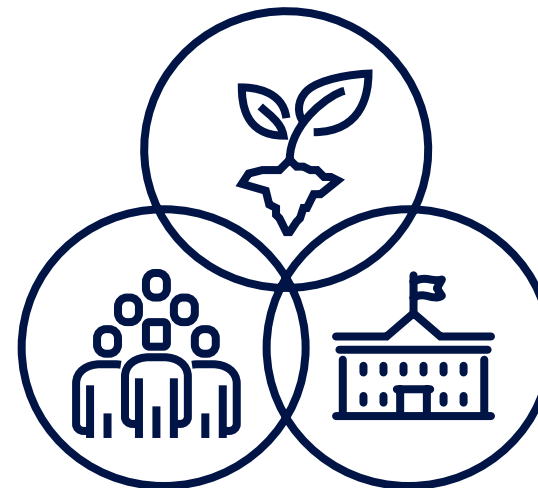
While we have seen only one crypto-based class action in Australia (which is still making its way through the courts), growth in claims involving digital asset platforms loom large on the horizon as an emerging area of risk. At present, the position of most digital asset platforms is that cryptocurrency is not a financial product and that issuers do not provide a financial service. However, with a proposed regulatory framework for digital asset platforms in the pipeline and ASIC challenging the positions of crypto issuers in the courts, it may be only a matter of time until there are developments in the legal landscape that provide ammunition to plaintiff law firms assessing the viability of these claims.



ESG

In line with our last Class Action Risk Report, the scope of ESG matters featuring in class actions continues to widen as more novel forms of class actions are filed that seek to bring about changes in the law or conduct, or to hold businesses and government to account (including the claims against the AFL for racial discrimination and concussion-related injuries). We expect the trend of ever-expanding ESG class actions to keep pace with developments abroad.

In Australia, we are seeing continued regulatory focus on greenwashing and bluewashing, and we expect to see increased enforcement activity across a broader range of ESG matters—including sanctions and anti-bribery compliance. Legislative reforms in those areas, as well as the proposed introduction of mandatory climate reporting and increased modern slavery reporting and due diligence requirements, will also fuel class action risk. Australian corporations should remain vigilant of the class action risks that might follow any regulatory prosecutions or shareholder activism in this space.



Connect with us

The breadth and depth of our experience across all sectors give our team the practical knowledge and insights to deal with the unique legal, strategic and reputational issues that arise when a class action is threatened or commenced. Our team is scanning the horizon for tomorrow's challenges, and we're at the forefront of discussion around reform, and defending the cutting-edge claims that continue to shape the modern class action practice.



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