COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Australia

CLASS ACTIONS

Contributor

Colin Biggers & Paisley Lawyers

Adrian Konstantinidis

Partner | adrian.konstantinidis@cbp.com.au

Michael Russell

Partner | michael.russell@cbp.com.au

This country-specific Q&A provides an overview of class actions laws and regulations applicable in Australia.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

AUSTRALIA
CLASS ACTIONS

1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

Australia is one of the most prolific class action markets in the world. Outside of the United States, Australia is the jurisdiction where a company is most likely to be the recipient of a class action. The class action regime has been in place since 1992 with the introduction of Part IVA of the *Federal Court of Australia Act 1976* (Cth). In addition to the federal regime, cognate legislation has been enacted in most state jurisdictions. Since the class action regime was introduced, there have been in excess of 800 class actions filed in Australia.

Under the Australian class action regime, a representative plaintiff (or a number of representative plaintiffs) may bring a claim on behalf of all class members where the proceeding meets the following threshold requirements:

- there are seven or more persons with claims against the same defendant;
- the claims are in respect of, or arise out of, the same, similar or related circumstances; and
- the claims give rise to a substantial common issue of law or fact.

The Federal Court of Australia and many of the state courts, namely those in New South Wales, Victoria, Queensland, Western Australia and Tasmania, have enacted legislation and rules which govern class actions in Australia. All class action jurisdictions in Australia follow a similar legislative framework, which govern (amongst other things) the commencement and maintenance of proceedings, determination of common issues, limitation periods, settlement, judgment and the powers of the courts.

2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

A class action can be brought by any legal person with standing, including individuals, trustees, companies and other entities that have been affected by the alleged conduct of a defendant. A class action proceeding can be commenced by a single representative plaintiff or group of representative plaintiffs.

One of the key threshold requirements for commencing a class action is that claim or claims are in respect of, or arise out of, similar or related circumstances and give rise to one substantial common issue of law or fact. If a claimant has sufficient interest to commence a class action on their own behalf, they are also taken to have a sufficient interest to commence a class action on behalf of the class.

In some instances, it is possible for a representative body, such as an employee union, to bring a class action on behalf of its members who might be affected by wrongful conduct.

Australian regulators such as the Australian Competition and Consumer Commission (consumers) and Australian Securities and Investment Commission (corporations) have separate statutory standing to bring claims on behalf of affected persons and can seek compensation orders for the benefit of those persons.

3. Which courts deal with class actions or collective redress proceedings?

Class actions are heard in both the Federal Court and many of the state supreme courts. In Australia, the majority of class actions are filed in the Federal Court of Australia. However, the state supreme courts – particularly the Supreme Court of Victoria – are becoming increasingly popular with class action plaintiffs and litigation funders.

4. What types of conduct and causes of

action can be relied upon as the basis for a class action or collective redress mechanism?

In Australia, causes of action in class actions most regularly arise from an alleged breach of statutory provisions (particularly the prohibition against misleading or deceptive conduct), negligence, or breach of contract. Most Australian class actions will plead breaches of key federal laws covering corporations, competition and consumers and will often include allegations of misleading or deceptive conduct.

The most common types of claims in Australian class action litigation include the following:

- Securities claims;
- Claims by investors, including relating to investment management, financial advice, or financial products;
- Consumer protection;
- Product liability;
- Employment, including underpayment and employee classification claims;
- Mass torts;
- Data breach claims;
- Claims in relation to property damage; and
- Climate change-related claims.

Securities claims have traditionally been the most common form of class actions in Australia. However, other types of claims are becoming increasingly common, particularly product liability, consumer protection (including financial services mis-selling), mass tort (including those related to natural disasters), data breach, employment and environment-related claims.

5. Are there any limitations of types of claims that may be brought on a collective basis?

There are no express limitations on the types of claims that can be brought as a class action in Australia. There are some areas that are considered less suitable to be run as a class action, such as defamation, personal injury and family law. However, no such limitation exists to prevent these claims from being pursued. Over recent years, the number of claims in non-traditional class action areas has been on the rise.

6. How frequently are class actions brought?

Class actions are prevalent in the Australian litigation landscape. There has been a steady increase in the incidence of class actions since the introduction of the Australian class action regime in 1992. There have been over 800 class actions filed in Australia to date. Over the last 10 years, there has been an average of 46 class actions filed per year. Over the last 5 years, that average has increased to 57 class actions per year.

7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

The top three emerging business risks that are the focus of class action litigation in Australia are data breach, ESG and product liability.

- Australian businesses have seen a number of significant cyber attacks in recent years involving high profile companies including a large health insurer (Medibank), telecommunications (Optus) and financial services provider (Latitude). With the increasing prevalence of data breaches, class actions in this area are likely to continue to grow in number;
- Environment claims, including ‘greenwashing’, are emerging as key risks for companies doing business in Australia. Australian regulators such as the Australian Competition and Consumer Commission and Australian Securities and Investment Commission are keeping a close eye on these areas and the expectation is that class actions will follow. Class action risk is most likely in products, funds management/financial services and securities where consumers and investors and making decisions based on representations made by companies.
- Product liability class actions have increased substantially in the past 5 years in Australia. These have been particularly prevalent in the automotive and health industries. Car defect claims have seen a sharp increase. In 2022, the Federal Court of Australia found that more than 260,000 Toyota owners were entitled to damages for defects in a range of Toyota vehicles. Following this decision, a number of additional class actions were filed against car manufacturers in relation to similar issues.

8. Is your jurisdiction an “opt in” or “opt out” jurisdiction?

Australia is an opt-out jurisdiction. Persons or entities

that fall within the definition of class members form the class and are bound by any settlement or judgment unless they have opted out. The class action regime is designed such that class members are not required to take any positive step in the proceedings until there has been a settlement or judgment. There are some rare exceptions to this principle where a court considers that it is in the interests of justice to require class members to take some positive step (for example, the production of documents in discovery or providing particulars of their individual claim). Given the opt-out nature of class actions in Australia, the court takes a close supervisory role over class action proceedings, including with respect to case management and approval of any settlement.

Class actions can be commenced on a 'closed class' basis – that is, on behalf of a defined group of persons. However, closed class actions have become increasingly rare in the class action landscape as litigation funding has increased in size, funding and sophistication. The majority of class actions are now brought on an 'open' and 'opt-out' basis.

9. What is required (i.e. procedural formalities) in order to start a class action or collective redress claim?

To commence a class action in Australia, a representative plaintiff must file an originating process (or writ) and a Statement of Claim with the relevant court. The Statement of Claim must include a description of the class, the common issues, the material facts, the causes of action and the relief sought. There are otherwise very few procedural hurdles in commencing a class action.

There is no certification process for class actions commenced in Australia. Where more than one class action is commenced in respect of the same subject matter, the courts will manage the issue of multiplicity by consolidating proceedings, staying competing proceedings, or otherwise making case management orders to minimise duplication where competing class actions are allowed to continue.

10. What remedies are available to claimants in class action or collective redress proceedings?

The remedies available in Australian class action litigation are the same as those available in any other type of proceeding. The relief sought generally involves an award of damages or equitable relief, including declaratory or injunctive relief. Class actions in Australia will typically involve an initial trial on the common questions of fact or law, with issues relating to class member damages often determined subsequent to findings on those common issues.

However, the courts are empowered to make an award of damages for class members consisting of specified amounts worked out in such manner as the Court specifies. The courts are also able to award damages on an aggregate basis without specifying amounts awarded in respect of individual class members if a reasonably accurate assessment can be made of the total amount to which class members will be entitled. For example in *Williams v Toyota Motor Corporation Australia Limited (Initial Trial)* [2022] FCA 344, the Federal Court of Australia awarded aggregated damages calculated as a percentage reduction in the value of the defective vehicles.

11. Are punitive or exemplary damages available for class actions or collective redress proceedings?

Awards of exemplary damages are rarely sought and even more rarely awarded in Australian litigation. To date, there have been no awards of exemplary damages in an Australian class action. Australian jurisprudence is focused more on restitution and compensation, rather than punishment. Exemplary damages are limited to cases where a defendant has engaged in conduct that is considered wanton and has engaged in conscious wrongdoing in contumelious disregard of a plaintiff's rights.

Exemplary damages are available for certain intentional torts. In some state jurisdictions, exemplary damages for personal injury claims have been abolished by statute. They are not available in defamation claims, actions for breach of equitable obligations, or for breach of a contractual duty of confidence.

12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

There are no jury trials in Australian class action litigation. Class actions in Australia are heard by a judge or panel of judges. This applies at both first instance and appeal.

13. What is the measure of damages for class actions or collective redress

proceedings?

The measure of damages in class actions varies depending on the cause of action and the specific circumstances of the case. In most cases, damages are sought on a compensatory basis such that the damages sought are to put the class members in the position they would have been in but for the alleged wrongdoing. In the case of securities class actions, damages claimed are measured by reference to the rule in *Potts v Miller* [1940] 64 CLR 282, being the price that shares would have traded but for the alleged wrongful conduct or on a 'no transaction' basis being the amount to compensate shareholders to put them in the position they would have been had they never acquired shares at all.

In product liability, mass tort and personal injury class actions, the loss sought will usually be in the form of damages for economic and non-economic loss including loss of income, and physical and mental injury The aim of damages in this regard is to put a plaintiff in the position they would have been in but for the tortious conduct.

In certain claims arising from a breach of statute, the measure of damages will be measured by reference to the provisions of the applicable legislation.

14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

There are no significant jurisdictional obstacles to commencing a class action in Australia. Australian courts do not have procedural thresholds, such as certification, that need to be satisfied for a class action to be commenced or continue. Provided that there are at least seven class members, claims which arise out of the same or similar circumstances and which give rise to a substantial common issue of law or fact, a proceeding will be able to continue a class action.

There are some jurisdictional differences between the matters that federal and state courts are empowered to hear. The Federal Court of Australia has an accrued jurisdiction that enables it to hear and determine non-federal claims that bear the necessary relationship to claims arising under federal law. However, that jurisdiction does not extend to matters that solely involve non-federal claims, for example, claims related to natural disasters such as bushfires or floods. In those instances, the claims must be brought in the state jurisdictions.

15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?

There are no limits on the nationality or domicile of claimants in class actions in Australia. The High Court of Australia has found the legislative regime governing class actions in Australia permits class action proceedings to be brought on behalf of class members who are not resident in Australia: *BHP Group Limited v Impiombato* [2022] HCA 33. The only fundamental requirement is that the claims by the representative plaintiff and class members need to have a requisite connection to Australia.

16. Do any international laws (e.g. EU Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?

There are no international laws that impact the conduct of class actions in Australia. However, some international treaties and conventions ratified by Australia may impact substantive causes of action. For example, the Montreal Convention establishes a regime for the liability of airlines in the event of accidents, injuries or deaths during air travel, which therefore impacts claims which might be brought against airlines in connection with personal injury.

Further, Australia is a party to a number of international treaties and conventions in relation to emission reductions and climate change, including the Paris Agreement. This was enshrined in the *Climate Change Act 2022* (Cth). Australia's environmental obligations to reduce carbon emissions may give rise to the basis of a claim against the government or large polluters (such as miners, manufacturers and agriculture) for failing to take adequate steps to reduce their carbon emissions and resulting harm to the environment.

17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?

The Australian class action regime operates such any settlement or discontinuance must be approved by the courts. In order to obtain approval for the settlement of a class action, the settlement must be shown to be fair and reasonable, and in the best interests of class members. The court may take into account the views of the representative plaintiff and any submissions made by class members, a defendant, or a court-appointed contradictor. Court-approved notices are issued to all

class members notifying them of a proposed settlement and provides them with an opportunity to object to a proposed settlement.

The factors relevant to a court's consideration of whether it will grant approval of a settlement include but are not limited to. the following matters:

- the complexity and duration of the litigation;
- the stage of the proceedings;
- the risks of establishing liability, establishing damages, and maintaining the class action;
- the ability of the defendant to withstand a greater judgment than the prospective settlement sum;
- the range of reasonableness of the settlement in light of the best recovery;
- the range of reasonableness of the settlement in light of all the risks of litigation; and
- the reaction of the class to the settlement.

Any settlement in a class action will bind all class members who have not opted-out of the proceedings. The courts also have the power to make such orders as are just with respect to the distribution of any funds paid under a settlement.

18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?

missing question

19. How do class actions or collective redress proceedings typically interact with regulatory enforcement findings? e.g. competition or financial regulators?

Private enforcement of regulation has become increasingly common in the Australian litigation landscape, particularly in relation to securities and competition laws. Actions by regulators often form the basis of a derivative claim in class actions. This has been seen in a number of instances involving regulators such as the Australian Competition and Consumer Commission and the Australian Securities and Investment Commission. In other cases, class actions may be brought alongside regulatory enforcement action, although Australian courts will typically require the regulatory action to proceed prior to the class action.

Given the rapid evolution of the Australian class action landscape and participation of litigation funders, it is now commonly the case that private enforcement by way of a class action is commenced much earlier than regulators take formal legal proceedings.

Managing regulatory proceedings and class actions which run in parallel or consecutively has proven to be a fraught endeavour. In 2021, a Federal appeals court overturned a decision of a trial judge to not recuse himself from presiding over a class action where he had heard evidence in enforcement proceedings by the corporate regulator, ASIC. The Full Court of the Federal Court held the primary judge erred in holding that witnesses called in the ASIC proceeding were not of such importance as to constitute extraneous information, the receipt of which gave rise to a reasonable apprehension of bias in respect of the class action proceeding.

20. Are class actions or collective redress proceedings being brought for 'ESG' matters? If so, how are those claims being framed?

ESG-related issues have become an increasingly common part of the Australian class action landscape. Australia has been a particularly fertile ground for environmental and climate change litigation as a result of its sophisticated legal institutions, traditional reliance on heavy industry, and an increasing prevalence of adverse climate-related phenomena. Since 1993, Australia has been second only to the United States in the volume of climate change-related litigation. Taken on a per capita basis, Australia leads the world in the number of climate change related court proceedings. The class action landscape in Australia has similarly experienced an increase in the number of environmental and climate changed related claims.

Environmental and climate change related class actions in Australia have generally been brought in relation to the following matters:

- corporate accountability including 'greenwashing claims'. In these claims, it is commonly alleged that defendants engaged misleading or deceptive conduct in connection with representations made to the market about key climate change-related risks, the extent to which a company has sought to reduce its emissions, or representations as to the nature or characteristics of products;
- claims against the government for enforcement of constitutional or human rights;
- mass torts, where claims are brought in negligence, particularly in connection with natural disasters (bushfires and floods),

product liability, or environmental contamination;
- claims seeking injunctive or declaratory relief to halt the approval of mining and fossil fuel-related projects which may increase climate-related risks.

A number of claims have been filed against corporations and their directors in connection with corporate governance issues, particularly arising from breaches of statutory and regulatory obligations. Some more recent types of claims include:

- claims against casino operators and financial institutions for failures to comply with anti-money laundering laws due to inadequate systems and processes. Many of these claims also involve claims by shareholders following a material decline in share price; and
- claims arising from data breaches.

There have also been a number of claims against government in relation to social issues, including in relation rights of indigenous persons and the administration of social security payments by the federal government.

21. Is litigation funding for class actions or collective redress proceedings permitted?

Yes, litigation funding originated in Australia in the mid-1990s. Australia was also the first jurisdiction in the world to have a class action proceeding financed by a commercial litigation funder. With that history, it is unsurprising that Australia remains one of the most prolific and highly developed litigation funding markets in the world.

Over the last 10 years, over 50% of class actions filed in Australia have involved a litigation funder. There has been a state of flux in the regulatory environment for litigation funders over recent years. However, as of 2022, litigation funders are largely unregulated and oversight of class action litigation and funding arrangements has fallen to the courts.

22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?

Contingency fees are permitted in only one of Australia's state jurisdictions. In 2020, the state of Victoria introduced contingencies fee arrangements in class action proceedings with what is referred to as a 'group costs order' (**GCO**). The introduction of contingency fees in Victoria has resulted in a sharp increase in class actions being commenced in the state.

The Court will make a GCO where it is satisfied that it is *'appropriate or necessary to ensure that justice is done in the proceedings'*. The factors relevant to whether a GCO will be made include the proportionality of costs sought, the rate of return the GCO should provide to the law firm having regard to the anticipated costs and risks, historical returns to class members in comparable cases and commission rates charged by litigation funders in comparable cases.

In all other Australian jurisdictions, harmonised uniform legal profession legislation prohibits contingency fee arrangements.

23. Can a court make an 'adverse costs' order against the unsuccessful party in class actions or collective redress proceedings?

In Australian litigation, the general rule is that 'costs follow the event'. That is, a successful party in proceedings is generally entitled to receive its costs against the unsuccessful party unless it appears that some other order should be made.

Adverse costs are typically awarded on a 'party/party' basis (also known as on an 'ordinary basis'). These are legal costs which have been paid or are owed, where such costs have been agreed or assessed as being fair and reasonable. Recovery on a party/party basis may be in the range of 65-80%.

Courts can also award costs on an indemnity basis where there has been unreasonable conduct by the unsuccessful party which justifies the making of such an order. Indemnity costs include all costs provided they have not been unreasonably incurred.

Litigation funders will typically indemnify a representative plaintiff in respect of any adverse costs orders. This extends to providing security for a defendants costs. In Australian class actions, an order for security for costs is commonplace and regularly ordered so as to protect a defendant's ability to recover costs in the event a plaintiff's claim is unsuccessful. Security for costs can be given by way of cash, bank guarantee, after-the-event insurance, or indemnity.

24. Are there any proposals for the reform of class actions or collective redress

proceedings? If so, what are those proposals?

Currently, there are no concrete proposals for reform of class action litigation in Australia. However, there is often considerable evolution in procedure and substantive law that arises from the common law and close judicial oversight of class action litigation.

Potential areas of reform by the judiciary include whether the Federal Court has the power to hear employment claims as class actions and whether a form of contingency fees (referred to as a solicitors' group costs order') is permitted in the Federal Court.

In 2021, Australia's continuous disclosure laws were amended to introduce a fault element to material non-disclosure. The law now requires that 'knowledge, recklessness or negligence' be established to give rise to a breach of continuous disclosure laws. A statutory review of those changes is due to be undertaken in 2023. Any further changes to the continuous disclosure regime may impact the incidence of securities class actions.

Given the introduction of contingencies in the state of Victoria and the significant increase of claims filed in that jurisdiction, a debate has begun to emerge as to whether contingency fees should be permitted in other state and federal jurisdictions.

Finally, there are suggestions that reforms should be introduced to manage competing class actions, whether by certification process or introduction of a moratorium once a class action has been filed to permit any competing class actions to be filed and a subsequent decision made by the Court as to which of the competing class actions should be permitted to continue.

Contributors

Adrian Konstantinidis
Partner
adrian.konstantinidis@cbp.com.au

Michael Russell
Partner
michael.russell@cbp.com.au