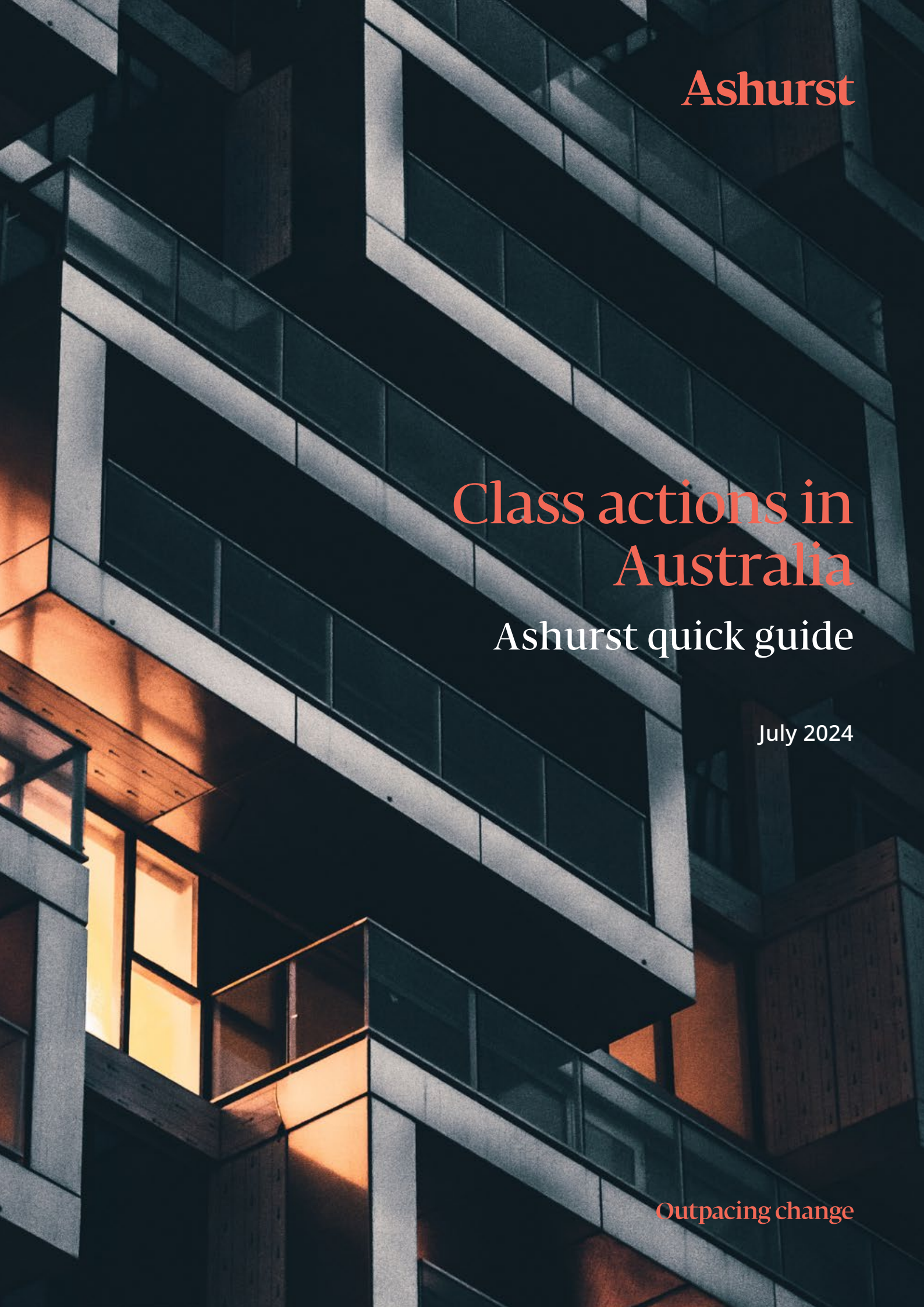


Ashurst

Class actions in Australia

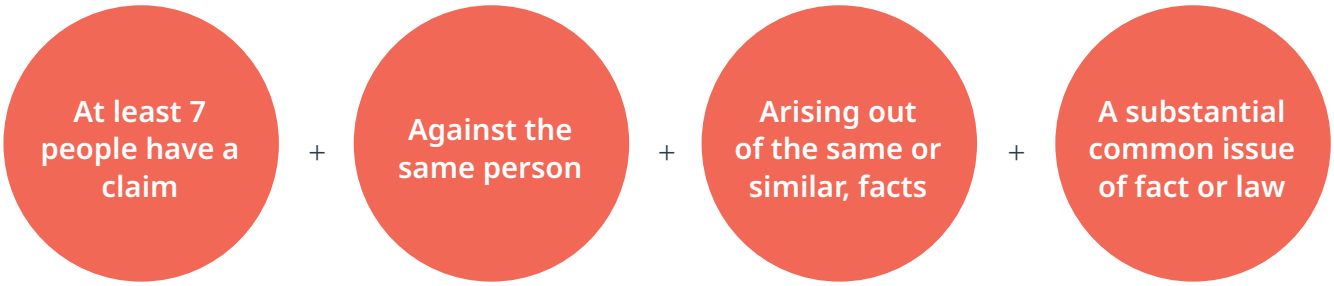
Ashurst quick guide

July 2024

Outpacing change

contents

The fundamentals



What is a class action? The formal requirements

The requirements to start a class action are straightforward. They are set out in the diagram above.

Courts take a liberal approach to these requirements: generally they aren't hard to satisfy. Each person's claim doesn't have to be the same – they just need to have a substantial common issue. The common issue doesn't have to dominate individual issues – it just has to be substantial.

And if there are claims against multiple respondents, it isn't necessary for every class member to have a claim against every respondent. All that is needed is for seven or more people to have a claim against each respondent.

The courts

Class actions can be filed in the Federal Court, as well as five of the state Supreme Courts. Class action regimes were introduced in the Federal Court in 1992, and then progressively in Victoria (2000), NSW (2011), Queensland (2017), Tasmania (2019) and Western Australia (2023).

The formal requirements are the same, as is most of the class action procedure (although Victoria has some differences – see page 22).

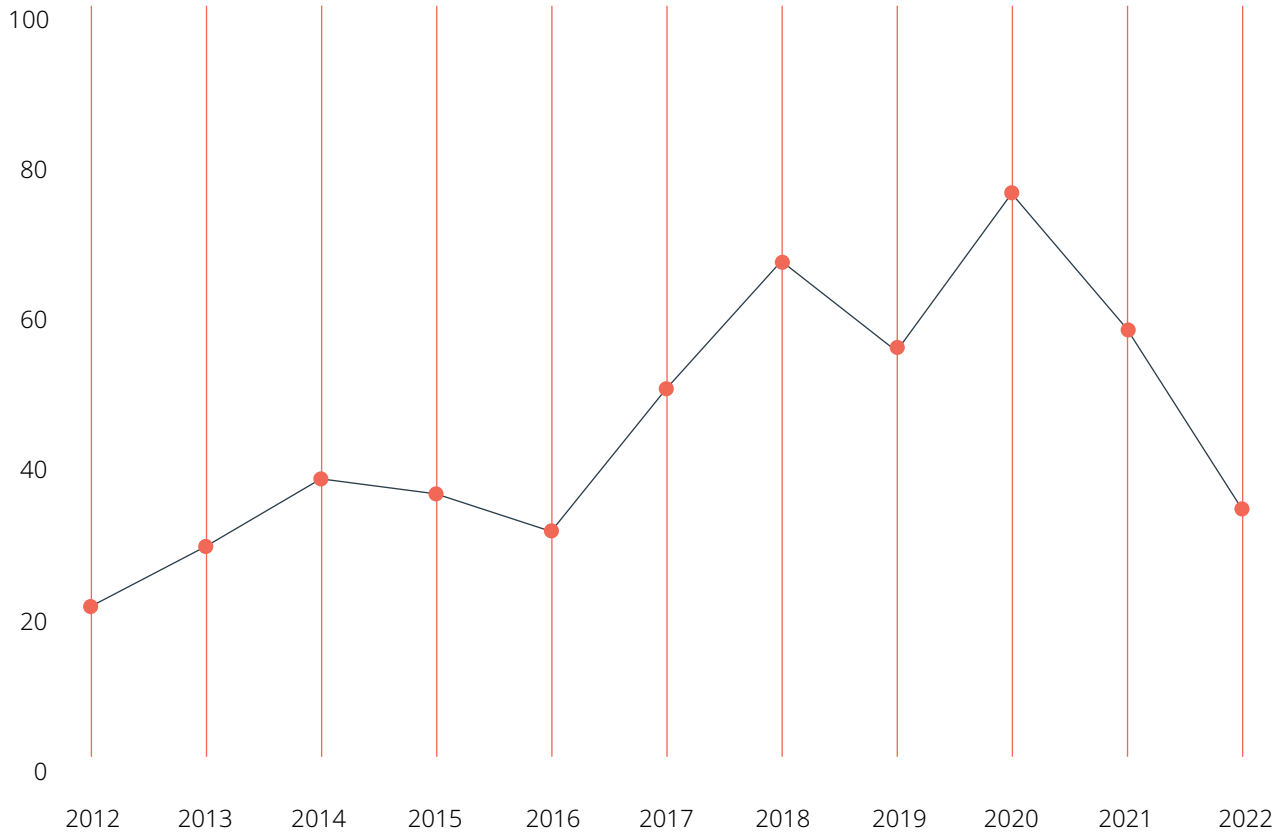
There's been an average of 30 class actions per year since litigation funding for class actions began around 2000. The Federal Court is by far the most used (over 70% of cases historically). There's been an increase in Victoria to about 30% since 2020 when contingency fees were allowed in the form of Group Costs Orders. The Federal Court is now about 60%, and there are only a handful of cases in the other courts.

The Federal Court has confirmed that solicitors can now seek common fund orders at the time of settlement, which may lead to a swing back to the Federal Court (see page 11).

Source of data: Vince Morabito, Empirical perspectives on twenty-one years of funded class actions in Australia, April 2023.

Class action filings

Class actions filed in Australia from 2012 to 2022



2020 saw the highest number of class action filings (75). This is partly due to plaintiffs rushing to file before legislative reforms came into effect requiring litigation funders to hold AFSLs and comply with the managed investment scheme regime. (Litigation funders are currently exempt from these requirements.)

Filing numbers returned to 33 in 2022 – the lowest number of class actions filed since 2016.

Source of data: Vince Morabito, Empirical perspectives on twenty-one years of funded class actions in Australia, April 2023.

Who actually brings the claim and how is the class formed?

The applicant vs group members

One or two actual parties – the rest are just a defined (but usually unidentified) group

There are usually one or two representatives who are the named parties to the court proceedings.

The "class" or "group members" usually aren't identified by name in the initial case – they are just defined according to characteristics. For example, it could be everybody who bought a certain product or share in a certain period.

The "opt out" (as opposed to "opt in") model

Everyone fitting that definition automatically becomes part of the class, whether they are aware of it or not. They don't need to take any step to remain a group member.

However, group members can "opt out" if they want. That involves the person sending a document to that effect. They are then excluded from the class and not bound by what happens in the court case.

There is a court process to notify group members of the claim and give them the chance to opt out.

The initial hearing usually only deals with the applicant's claim

The initial trial usually deals with the applicant's full claim (and sometimes some sample group members), and the common issues. At that stage, group members generally aren't required to take any steps.

That can mean that even a successful judgment for the applicants in the initial hearing might only be for a small amount. We talk about the exceptions to this, and how group members get compensation, on the next page.

The difficulty in understanding exposure

The opt out structure can make it hard to know how many people will actually seek compensation – and therefore how big the exposure is.

There are some steps that can be taken as part of a settlement process – see page 21.

Open vs closed class

The class can be defined in a way that requires people to take a step. Eg an element of the class definition could be people who have entered into a litigation funding agreement or a retainer with the plaintiff law firm.

That was the practice some years ago, before courts started making "common fund orders" (which we talk about below). It is very rare now.

The term "class closure" is also used in the settlement context. That is different and relates to extinguishing the claims of group members. We discuss that at page 21 below.

How do group members receive compensation if the initial hearing is just the representative?

01

Individual follow on claims

The starting point is that if the applicant is successful (at least on the common issues), then group members can bring their own individual follow on claims.

In those claims the rulings on common issues apply, and the group member just has to prove their individual issues (eg the amount of their loss – although it isn't necessarily as simple as that). The idea is that the rulings on common issues make the follow on claims much cheaper and simpler.

In theory, this could involve an extremely large number of individual follow on claims – although that hasn't happened.

02

Aggregate damages

The exception to this is that the court can award "aggregate damages". This is a lump sum to be divided up among the class.

This is rare. The court can only do it if a reasonably accurate assessment can be made of the group's total entitlement.

This area hasn't been fully explored, particularly because so many cases settle. This is one of the areas to watch over the next 5 to 10 years.

03

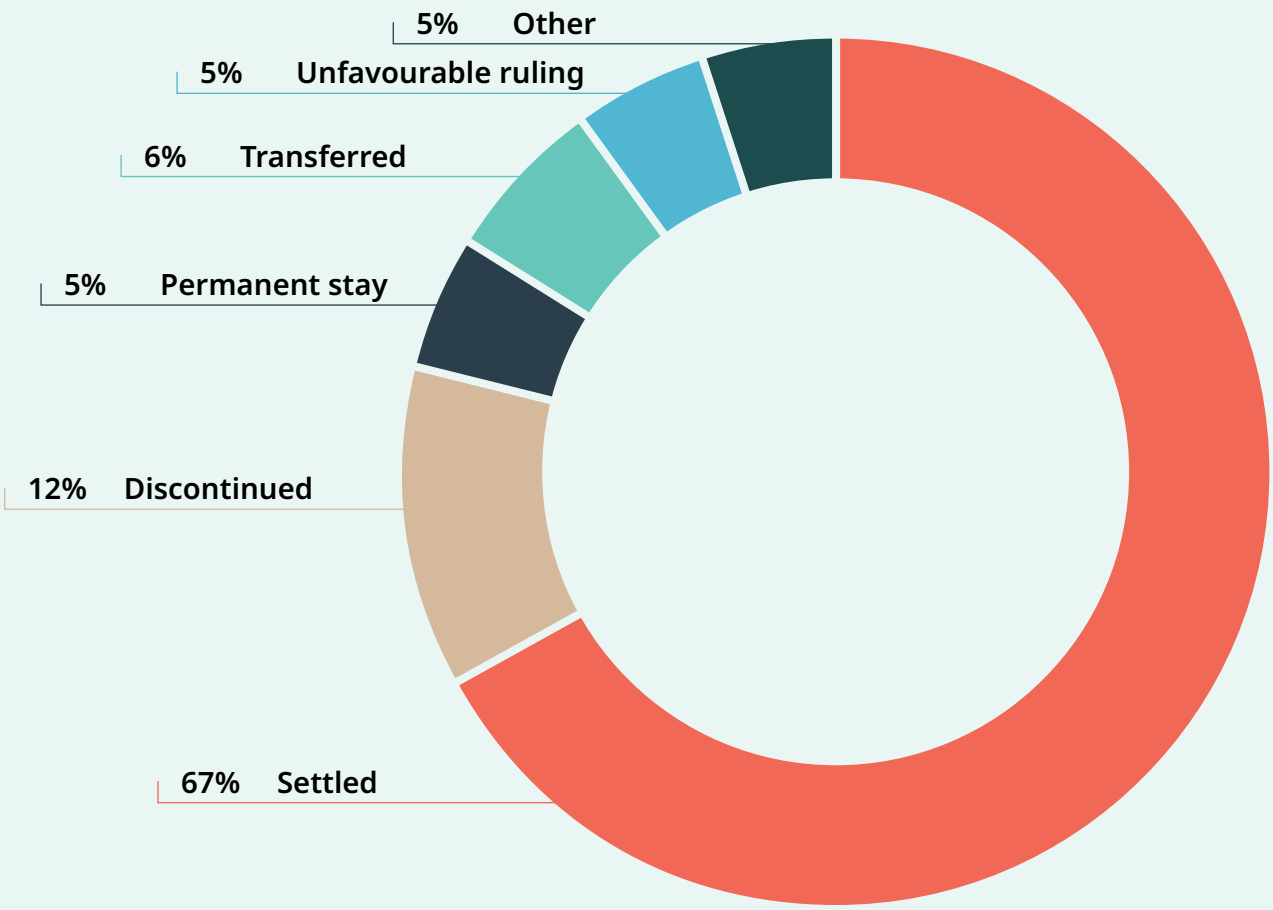
Settlement

Most class actions settle before there is even an initial trial of the representative's claim – and the settlement deals with the claims of all group members.

We talk about the settlement process below.

How do class actions generally finish up?

Class actions where there is a litigation funder



This chart shows the results in finalised class actions where there was a litigation funder.

The numbers are slightly different when non-funded class actions are considered, although the overall point remains the same: most class actions settle.

In that regard, whereas 67.6% of funded class actions have settled, the overall position including all class actions is a settlement rate of 53.7%.

Source of data: Vince Morabito, Empirical perspectives on twenty-one years of funded class actions in Australia, April 2023.

How long do class actions last before they settle, and how big are the settlements?

How long do class actions last?

The time between a class action being filed and a final outcome depends on the nature of the claim, size of the class, facts of the case and complexity of issues.

Recent research shows that the median duration of funded class actions that settled was approximately 3 years and 4 months (compared to approximately 2 years and 3 months for unfunded class actions that settled).

One of the reasons that funded class actions may take longer to settle is that funded class actions often settle for larger sums. In our experience, most class actions take between 2-3 years to settle.

How big are the settlements?

Nearly $8 billion has been paid by defendants in class action settlements in Australia. Over 40 class actions have settled for $50 million or more. The majority of these settlements were in funded class actions.

The largest settlement sum recovered by class members in Australia is $494 million (including costs) in proceedings against multiple defendants arising from the "Black Saturday" bushfires near Kilmore East Kinglake in Victoria in 2009. That is more than triple the largest settlement in a shareholder class action, which was ~$150 million in the Centro Group shareholder class actions.

Top 6 settlement sums

The six largest class action settlements (between $222 million and $494 million) concerned either:

- negligence claims arising from bushfires or floods seeking damages for property damage and personal injury;
- product liability claims arising from allegedly defective medical implants seeking damages for personal injury, out of pocket expenses (including health care expenses), economic loss, non-economic loss and need for gratuitous and/or commercial care; or
- product liability claims arising from alleged defects in motor vehicles seeking damages for diminution in value and out of pocket expenses.

Litigation funders

Litigation funders are behind many commercial class actions

Litigation funding for class actions started in the late 1990s, and was effectively approved by the High Court in 2006. It has grown to the point that the Federal Court's case management handbook describes it as "the life-blood of most of Australia's representative proceeding litigation".

The arrangement usually involves the funder paying the representative's legal fees, indemnifying them against any adverse costs orders, and providing security for costs. In return, from the proceeds of the class action the funder is usually reimbursed for the costs it paid and gets a percentage of the total proceeds.

The funding agreement usually sets out that percentage, although the court has to approve it and has become increasingly interventionist in adjusting the rate based on various factors such as the size of the claim, how long it took and the risk of the case.

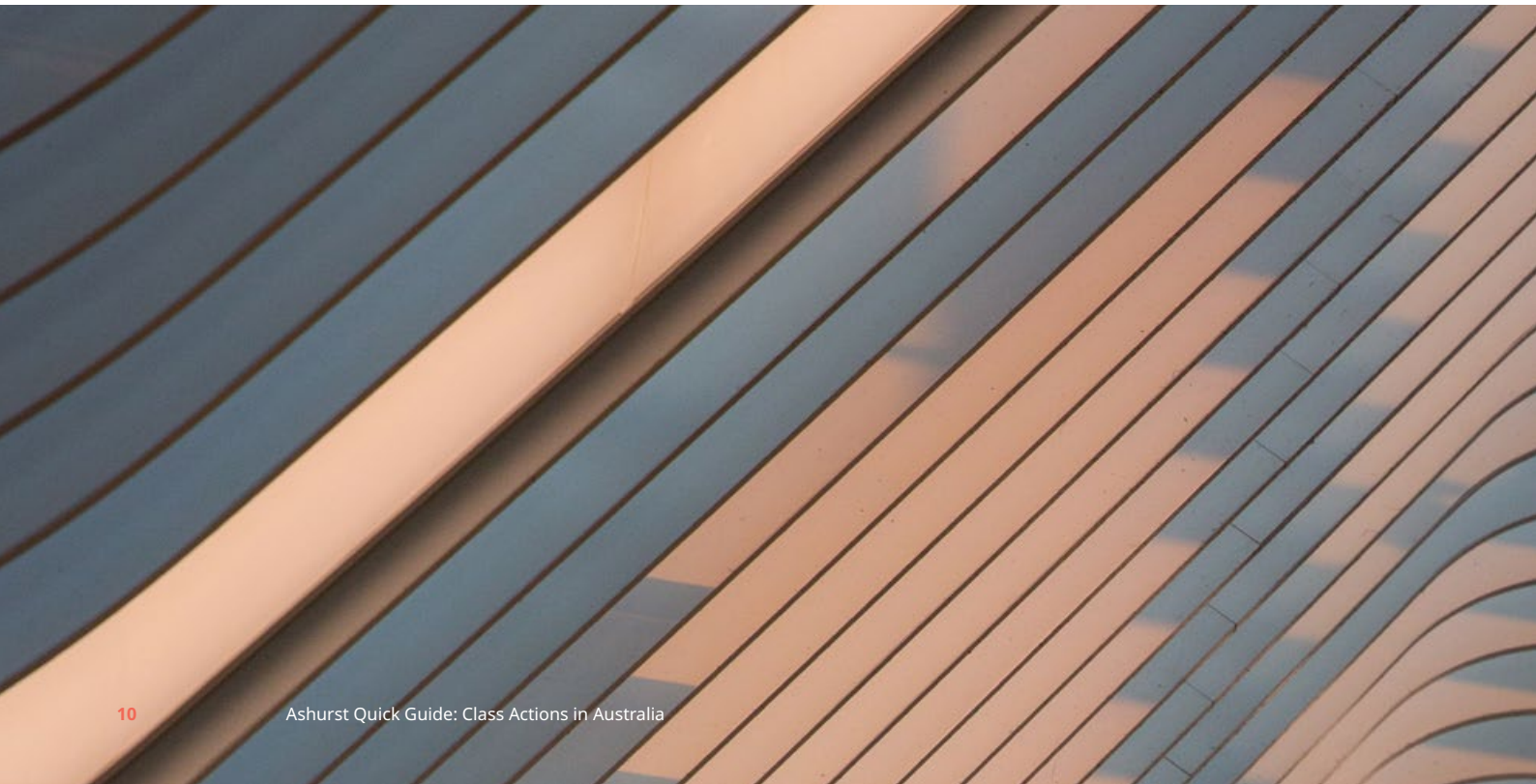
Historically the percentage has generally been between about 20% and 40% (in addition to reimbursement of costs), but there is a downward trend and some judges now refer to a starting benchmark of about 25%. Recent figures have tended to be a bit less than that – in the low 20s.

"Common fund" orders

Historically, funders only received a percentage of the proceeds from group members who they had an agreement with. That made it important to the economics of the class action that funders get that agreement – sometimes in what is referred to as a "book building process". It was also a reason to have a "closed class" as discussed at page 6 above.

More recently, courts have made "common fund orders", where the funder gets a percentage of the total proceeds of all group members regardless of whether all have agreed to give a percentage to the funder.

Common fund orders are controversial, and the law on them isn't completely settled. The High Court has held that common fund orders can't be approved or confirmed early in proceedings. The Full Federal Court has held that common fund orders can be made at the end of proceedings under the Court's powers to approve settlements and make orders that are just with respect to the distribution of settlement funds.



Plaintiff law firms, including contingency fees

No win no fee

Most plaintiff law firms have relationships with funders, and have their fees paid by funders as mentioned above.

Law firms sometimes conduct class actions on a no-win no-fee basis, with their fees to be taken out of the proceeds. That often involves an uplift on their fees based on a successful outcome.

There have also been split arrangements, where a funder pays some percentage of the plaintiff firm's costs, and part of it is no-win no-fee.

Contingency fees in Victoria and solicitor common fund orders in the Federal Court

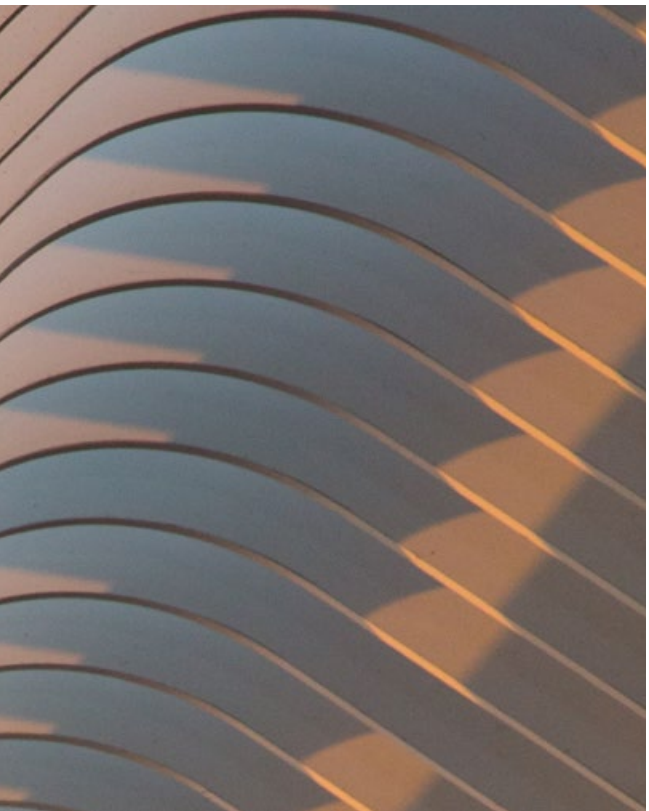
Contingency fees are prominent in America, but generally haven't been allowed in Australia.

In 2020, Victoria introduced a new regime that enables contingency fees in class actions (called "Group Costs Orders"). Since then there has been an upswing in filings in Victoria, including cases where most of the case has centred outside of Victoria and so would ordinarily be expected to be brought somewhere else.

There have been a handful of contingency orders approved. They range from 14% to 40%, with a median of 24.5%. (Source of data: Vince Morabito, Group Costs Orders and Funding Commissions, January 2024.)

The other states haven't allowed them yet, although many people believe they eventually will. The Australian Law Reform Commission has recommended they be allowed in class actions (see further article).

However, the Federal Court has said it can order common fund orders in favour of solicitors. These are technically different to contingency fees but they have the same commercial effect – they involve the plaintiff's solicitors getting a percentage of the proceeds of the litigation. Whether the Court will make a solicitor CFO depends on whether it is "just" in the circumstances (see further article).



What characteristics of claims attract funders and law firms?

The high level economics

01

An arguable cause of action

Funders and plaintiff firms are prepared to take risks on novel causes of action. There have been cases that were ultimately abandoned.

But the riskier the claim, the more return needed.

02

The right kind of (large) damages

The damages claim needs to be big enough to generate sufficient return for funders or plaintiff firms.

That can be through the accumulation of low value individual claims – but usually that is where there the individual claims don't require much proof (eg shareholder claims relying on market based causation).

Where the individual claims do require significant individual proof (eg personal injury), then each claim generally needs to be worth enough to justify the costs of proving it.

03

A workable cost/benefit (and risk/reward) equation

There are exceptions, but class actions often cost plaintiffs about $10M. There needs to be a return of some multiple of that to justify the risk.

If the funding return is around the 25% benchmark (see page 10 above), then plaintiff actors may target cases with a claim value high enough to give a prospect of settlement in which 25% would generate enough return for the funder.

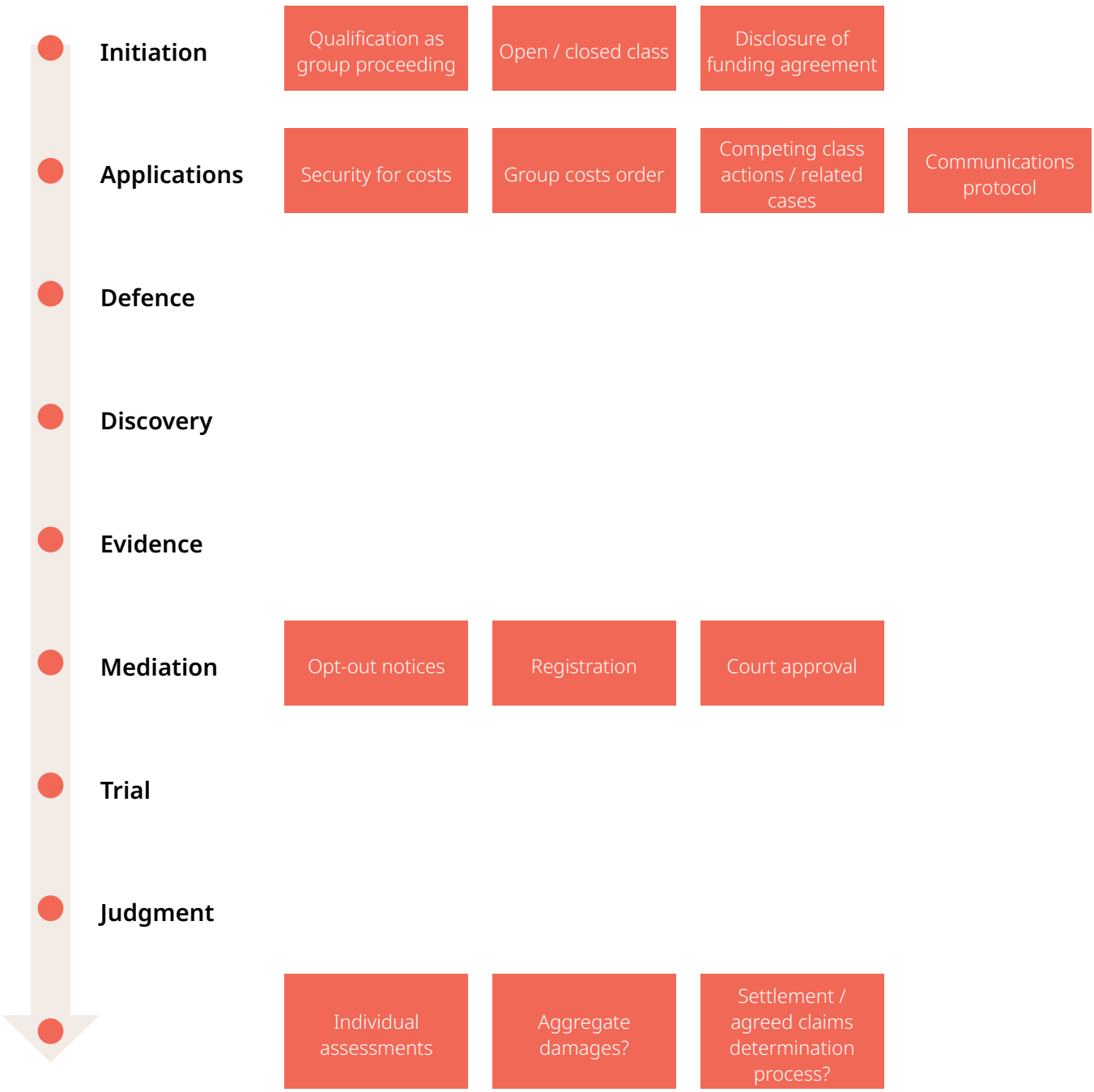
We can talk more about this with you.

So what types of claims are most commonly brought?

Category	What the claims are often about
Shareholder claim against company, directors, auditors (~19% of all class actions)	These most commonly concern statements about actual or expected financial performance in financial statements, ASX announcements, prospectus documents or investor presentations. They can also include statements or failures to disclose issues about regulatory compliance, corporate governance or company systems. Key issues include the availability of market-based causation (see article), availability of particular causes of action, and apportioning damages among the defendants.
Claims by investors – financial products and services (~15% of all class actions)	Fees and other payments associated with financial products (e.g. bank fees; credit card interest; fees on superannuation productions). There is often a related regulatory action. Key issues include what constitutes adequate risk disclosure, what constitutes personal advice.
Consumers - product liability claims (~12% of all class actions)	Faulty motor vehicles, medical devices, and products that cause harm. Key issues include the scope of the statutory acceptable quality guarantee, quantification of damages if there has been a product recall, damages for diminution in value.
Employment / industrial action (~11% of all class actions)	Underpayment of wages or other entitlements. These claims often also seek penalties (as the Fair Work Act allows claimants to seek penalties be paid to them). There is often also a regulatory or union action.
Mass tort claims (~9.5% of all class actions)	These claims are often associated with events such as Equine Influenza, PFAS contamination, Brisbane floods. They often involve establishing a novel duty of care, and questions of pure economic loss.
Infrastructure and real estate (~2.5% of all class actions)	Recent examples include claims in relation to combustible cladding and building defects. Key issues often include apportionment between developers, builders and consultants.
Data & Privacy breaches	Data breaches are a potentially developing area, although views are mixed about that.

Class Actions Road Map

Overall journey - A comparison with standard litigation



Standard litigation steps in **black**; class action steps in boxes.

Mediation/settlement can take place earlier.

Class certification / stopping class actions?

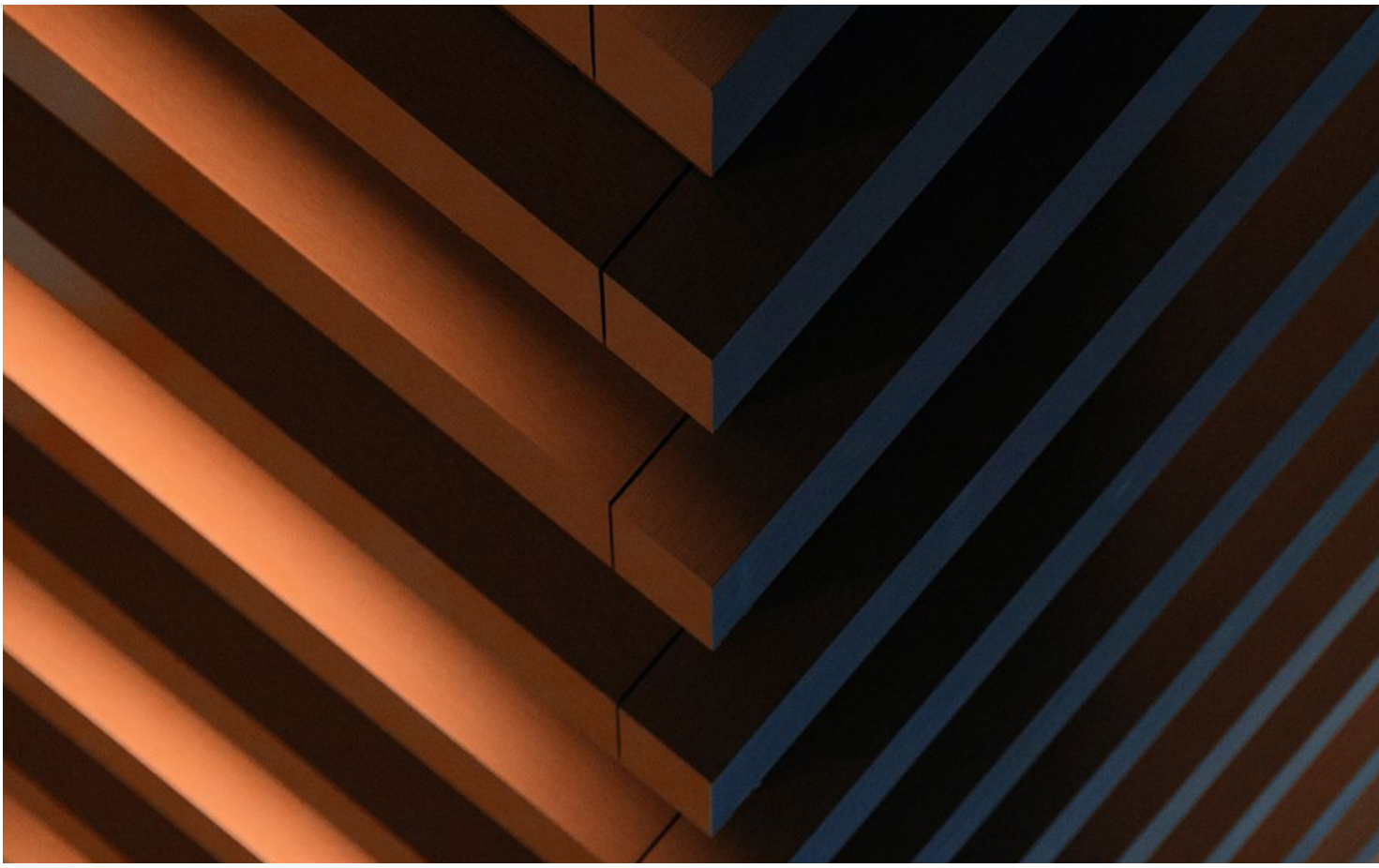
Stopping class actions

There is no "class certification" in Australia like there is in the USA.

The onus is on the defendants to apply to stop the class action (and to prove why it should not proceed as a class action). The result of that might be that the representative's personal claim can proceed, but the class action aspect can't. It isn't common.

Some reasons a class action might be stopped are:

- if the formal requirements discussed at page 4 above aren't met;
- if the costs of the case continuing as a class action are likely to exceed the costs of separate proceedings;
- if the relief sought could be obtained by other proceedings;
- if the proceedings are not an efficient and effective means of dealing with the claims;
- if it is otherwise inappropriate to bring the claims as a class action.



Class action waivers

It may be possible to contract out of Australian class action risk – at least for foreign companies

Class action waivers are contractual terms where people agree not to participate in class actions, and to opt-out if an open class action is commenced.

The USA has frequently enforced them, but the position in Australia is unsettled.

A recent Full Federal Court decision found a clause to that effect was enforceable. However, there is still uncertainty as that case involved particular facts, it was a split decision, and the two judges that upheld the clause had differing reasons.

Key issue: Australia's unfair contract regime

The key issue is that the unfair contract regime applies to clauses in standard form contracts with consumers or small business. Unfair terms are unenforceable and can attract penalties (see further here). Unfairness depends on whether the term:

a) creates a significant imbalance between the parties;

b) is reasonably necessary to protect a legitimate interest; and

c) causes detriment.

That case involved foreign aspects

That case focussed on US passengers on a cruise ship. Two judges found the waiver not unfair, and so enforceable. Derrington J did so essentially because the clause did not prevent individual claims, and there was no evidence that individual claims were economically unviable. His Honour also noted the international company had a legitimate interest in requiring actions to be in its home jurisdiction (the USA), and there was no evidence of detriment as a result of the waiver including because it was brought to people's attention.

Allsop J emphasised the international aspect.

Would it work for an Australian company?

It might, but this remains to be tested. Aspects of Derrington J's rationale could apply to Australian companies in some situations, but Allsop J said "there might be little doubt in many cases of Australian consumer contracts it would be unfair and unjust for standard form contracts…to seek to impose a waiver."

We discuss these issues further here.

Exposure to claims by non-residents

Non-residents can participate in Australian class actions

The High Court has confirmed that all people, including foreign residents, can participate as group members in Australian class actions.

That case involved non-residents who had bought shares in an Australian company on the London and Johannesburg stock exchanges.

The decision means that:

1. Companies with multiple listings could face multiple class actions, and their Australian exposure is not necessarily limited to trades on the ASX. A similar point applies to companies doing business with consumers globally.
2. There may be added complexity in achieving finality with foreign class members. As discussed at page 21, class action settlements in Australia usually include involve extinguishment of group member claims. But Australian judgments are not necessarily enforceable in other jurisdictions (and vice versa).
3. Global companies should consider class action waivers or other clauses (such as exclusive jurisdiction clauses) that limit the jurisdictions in which they can be sued (as discussed at page 16 above).

We discuss this more in our article here.

It is important to adopt a global approach to class action risk

With a more integrated global economy, companies face class action risk in Australia from their response to investigations, civil claims and representative actions taken in foreign jurisdictions about similar products to those supplied in Australia, or representations made in Australia.

While Australian courts will consider issues afresh, international conduct may be used to support claims in Australian class actions. And of course, class action developments in other countries (particularly the USA) can be an indicator of what might follow in Australia.

We can talk more about this with you.

Costs in class actions

Loser pays rule

The "loser pays" rule generally applies in Australia, including class actions. In practice, costs awards are materially less than the costs actually incurred.

As touched on at page 10 above, litigation funders generally indemnify the representative in relation to costs orders.

Are group members exposed to costs orders?

Costs orders are generally only made against the parties. That is, the representative applicants – not group members. However, if they bring follow on proceedings they will be exposed to costs of those proceedings.

Security for costs

The representative applicant generally also has to provide security for costs. This means money in court (or other security) in case they lose and a costs order is made against them. The litigation funder usually provides this.

In some cases the court can't order costs at all

There are some types of claims where courts generally can't order costs except in special circumstances. Most notably, Fair Work Act (ie employment) claims, where costs can't be ordered unless:

- the party brought proceedings vexatiously or without reasonable cause;
- unreasonable conduct caused the other party to incur those costs; or
- the party unreasonably refused to participate in a matter before the Fair Work Commission and the proceedings arise from the same facts.

There was initially some authority suggesting costs might be ordered against litigation funders in employment class actions (and so they might have to provide security for costs), but the Full Federal Court overturned that.

Costs where claims settle

Where class actions settle, part of the deal usually involves the representative's legal fees being taken out of the settlement fund.

Courts have become increasingly interventionist in supervising the amount of costs that are taken out. The shortfall is usually borne by the plaintiff law firm or the litigation funder – depending on the arrangements.

Competing class actions (and regulatory matters)

Competing actions are common

There have been plenty of examples of multiple law firms bringing similar class actions against the same defendant.

The High Court has said there is no "one size fits all" approach to working out what to do with competing class actions. The options include:

1. Consolidating them into one class action.
2. Stopping all except for one of the class actions.
3. A "wait and see approach" – a joint management and potentially trial of all proceedings (which effectively puts off a decision).
4. Limiting the scope of one of the claims (eg closing the class to a limited, identified group).

The factors at play

When deciding on the best approach – and in particular whether one claim should be chosen over another – the following factors are relevant:

- funding proposals and the net cost to group members. There is generally a preference for claims that take the least from any proceeds, and no-win no-fee proposals have also been favoured.
- proposals for security for costs;
- the nature and scope of the causes of action alleged, the size of the class and any book build;
- the experience of the legal teams, availability of resources and conduct of the proceedings to that point.

Class actions and regulatory prosecutions

There have also been cases where there is a regulatory prosecution and a class action covering the same ground. They have tended to be managed together, although practices have varied.

In some cases the court has listed consecutive hearings where evidence in one case is not evidence in the other. In other cases the court has held joint hearings of multiple matters at the same time.

Communicating with group members

Some general rules

Communicating with group members is tricky. This can be particularly important if the claim is by people with an ongoing relationship (eg customers or employees).

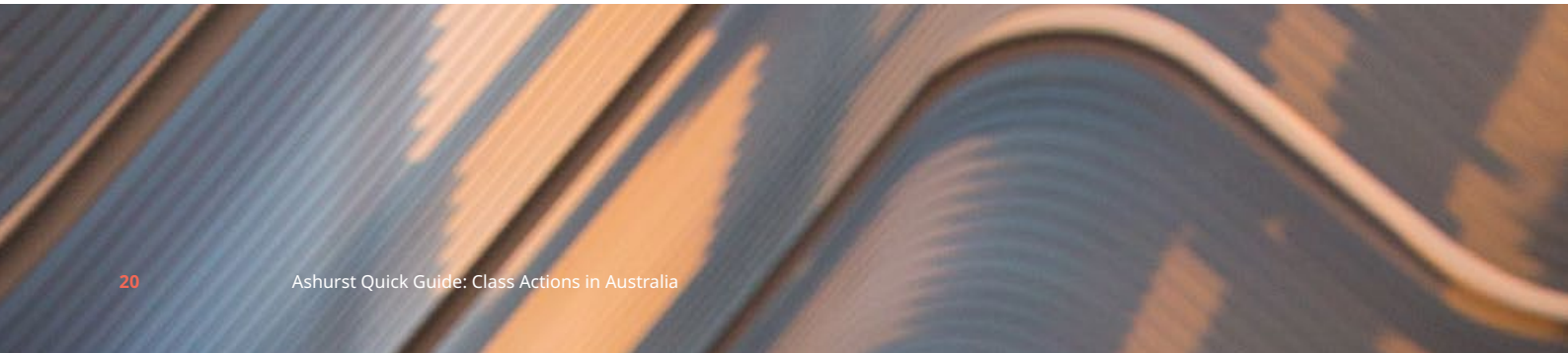
The key rules are:

- There is no restriction on communicating about other things – eg business as usual communications.
- It is generally ok to communicate about the class action so long as it is not misleading or confusing or unfair, and there is no other ethical constraint.
- The Federal Court practice note says that if the group member is represented, then communications about the class action should be to their lawyers.
- The practice note also says that if the group member is not represented, then the communication should generally be in writing, and if it suggests the person should do something (or not) it should explain the consequences and encourage the person to get legal advice. Written communication also helps with the risk of misunderstandings or disputes about what was said.
- There are particularly sensitive and high risk times, such as during settlement discussions or the opt out and registration process – when group members are considering what to do.

Court ordered protocols?

Courts generally only impose protocols where they have determined it is necessary to ensure that communications are accurate and not misleading. That generally requires evidence that the respondent has or is likely to communicate in a misleading or unfair way.

Plaintiff firms sometimes push hard for protocols anyway, with the central feature being them getting advance notice of communications with group members. It can sometimes be in a defendant's interests to agree to this. We can talk more about that with you.



Settling class actions

A major topic of itself

Settling class actions is a topic worth its own paper. The key points are:

- The court needs to approve the settlement. The test is whether it is fair and reasonable, and in the interests of group members as a whole.
- Notice of the proposed settlement is given to group members before a public hearing.
- The court has a protective jurisdiction, similar to situations involving minors and disabled people. Courts are increasingly scrutinising settlements, and they consider all aspects including the litigation funding commission, plaintiff costs and distribution schemes.
- A number of factors are taken into account. At its core, there is an interplay between prospects, quantum, costs, and ability to pay.
- The court is usually given a confidential opinion from the applicant's senior counsel to explain why it is reasonable, as well as a public affidavit and submissions.
- It is usually a term of the settlement (and order sought from the court) that claims of all group members are extinguished, regardless of whether they are getting a benefit from the settlement. This gives the defendant finality.

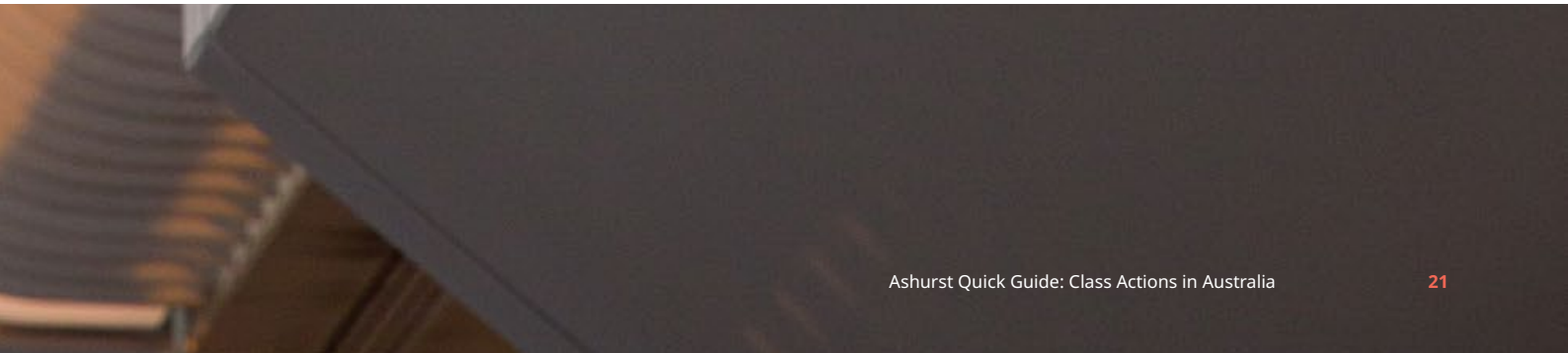
The challenge with open classes

A difficulty with open classes is knowing how many people are actually seeking compensation – and so the amount of an appropriate settlement.

In practice, there is usually a notification to group members before a mediation, encouraging them to register their claims if they want them considered. If the matter settles, then a further notice is given of the proposed settlement – which involves a further opportunity to register to participate in the settlement. If a lot more people register after the second notice, that can affect whether the settlement is reasonable.

There have been cases where the court made orders before mediation to the effect that people who did not register before mediation would not be able to register afterwards. Their claims would be extinguished if the matter settled, and they would not get a further chance to register.

There is controversy about whether that can still be done. The NSW Court of Appeal has said extinguishment orders can't be made before mediation, and has also refused to allow pre-mediation notices foreshadowing the intention to apply for such orders after mediation. The Federal Court has allowed a notice foreshadowing an intention to apply for such orders as part of a settlement approval, but it hasn't actually made an order extinguishing claims without a further registration process. That is discussed more here.



Comparing the key Australian jurisdictions with the US

Differences between Federal court, Victorian & US class actions

Jurisdiction	Common Issues	Class Certification	Costs	Contingency Fees	Class Closure	Tribunal
Federal Court of Australia	Only one substantial common issue of law or fact required. It does not need to dominate other issues – just be substantial.	No "class certification". Onus on defendant to establish that "threshold requirements" have not been met.	Loser (usually) pays victor's costs, although there are some exceptions such as Fair Work Act claims.	Litigation funders and solicitors can get a percentage of the proceeds at settlement or judgment as part of a common fund order.	Extinguishment orders can be made if there has been a further registration process. Power to order that notices be given of proposal to close class without further registration process. Order for "soft" class closure may be made (currently untested).	Judge only – selected by area of expertise or "suitability" to hear case.
Supreme Court of Victoria				Permitted for lawyers (subject to Court approval). Permitted for third party funders in the same way as the Federal Court.	Yes, section 33ZG registration. (However, application of that power is untested.)	
US Jurisdictions	Common issues must predominate over individual issues.	Court certifies class. Lead plaintiff must satisfy the Court that the claim should proceed as a class action.	Each party usually bears own costs irrespective of outcome.	Allowed.	Class certification closes class. Members register to participate in settlement program.	Jury trial common.

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