

Class Actions and Social Value

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Introduction

Meritorious and successfully concluded class actions can be of great value to society. Not only are the victims of wrongful conduct compensated by the wrongdoer, but those who engage in offensive conduct and who cause others to suffer losses or injury are thereby held accountable. The benefits of these private actions are not limited to class members alone but flow through to society generally. While this proposition is clear to many, it has become increasingly popular among those who market themselves as the “go to” defendant class action lawyers to disparage those conducting class actions as “entrepreneurial” or “opportunistic”.²

This concept has been bandied about by big business and its supporters for many years. In *Mobil Australia Pty Ltd v Victoria* [2002] HCA 27 at [172], Justice Callinan, when determining the validity of the Victorian class actions regime, said:

The question here is not whether, by their nature, group or class proceedings are oppressive to defendants, give rise to entrepreneurial litigation, in fact proliferate and prolong court proceedings, undesirably substitute private for public law enforcement or are contrary to the public interest, with disadvantages outweighing a public interest in enabling persons who have been damnified but who would not, or could not bring the proceedings themselves, to be compensated for their losses. The question simply is whether the Victorian Act is valid.

Big business defendant lawyers reinforce their message of doom with statistics that suggest that there is an “explosion” of investor and consumer class actions driven by an increasingly “US-style litigation culture”, which is “fuelled by unregulated litigation funders”.³

Before one gets too caught up in this rhetoric, it is worth taking stock and considering the facts. In its first 22 years, the federal class actions regime appears to be an effective market-based mechanism by which people who have been wronged can be heard and properly compensated.⁴

The reason for class actions

Parliaments in Australia have, for many years, seen the need to pass legislation that provides protection to the community from the wrongs of others and to give the victims of wrongful conduct the right to be compensated. The common law has developed many protections. Those injured by the negligence of others who owed them a duty of care, those who suffer loss by another’s misleading conduct or by conduct in breach of statutory requirements, and those who are injured by defective products, have rights to be compensated and to sue if that compensation is not forthcoming.

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² See: “Crackdown on opportunistic class actions”, *The Australian*, 23 May 2014, p31.

³ See, for example, J Emmerig and M Legg, “Securities class actions escalate in Australia” <http://www.jonesday.com/securities-class-actions-escalate-in-australia-05-14-2014/>.

⁴ Part IVA of the *Federal Court of Australia Act 1976* (Cth). See also Part 4A *Supreme Court Act 1986* (VIC) and Part 10 *Civil Procedure Act 2005* (NSW). The Victorian and NSW regimes are similar but have had a shorter life, so the Federal Court statistics are used in this article.

Statutory and common law rights are of little value if not enforceable. Class actions facilitate the enforcement of rights when it would otherwise be impractical; the cost of individual pursuit is often greatly outweighed by the value to the individual claimant, yet the right to be compensated is no less important. The class action allows individual victims to pool the effort with other victims so that the claim for compensation is cost-effective.

As recently noted:

*Many people with legal grievances would face serious financial hurdles in seeking legal redress through the courts without class actions. For the most disadvantaged members of our society, those hurdles are near insurmountable.*⁵

The benefit of class actions is not restricted to individuals who are otherwise unable to pursue their rights. Class actions are often a sensible and cost-effective means by which investors can obtain redress from corporations that mislead them.

When the federal class actions regime was introduced, Parliament recognised that it had a dual purpose:

*The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action. The second purpose of the bill is to deal efficiently with the situation where the damages sought by each claim are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.*⁶

The Statistics

Professor Vince Morabito's most recent empirical study on the numbers of class actions in Australia reveals that there have been 15 class actions filed in the Federal Court every year since the regime began in 1992. If related actions are counted as one, the number falls to 10 per year.⁷ In total, about 5,000 cases are filed in the Federal Court every year. Class actions, comprising only 0.3 per cent of all actions filed, cannot be accused of dominating the scene, although the claim values in class actions are certainly often significant.

The suggestion that the number of class actions is increasing at alarming rates also does not withstand scrutiny. The annual number of class action filings in the Federal Court has been steady since the regime commenced and while the nature of the claims has changed over time, the numbers have not. Professor Morabito's study found that for the first 11 years, product liability, industrial and migration class actions dominated the landscape, whereas in the second 11 years, after litigation funding commenced, investor and consumer claims were more prevalent.⁸ Shareholder class actions, the sort that appears to worry big business the

⁵ V Morabito and J Ekstein, *Class actions filed for the benefit of vulnerable persons – An Australian Study* (2015) 34 *Civil Justice Quarterly* (forthcoming).

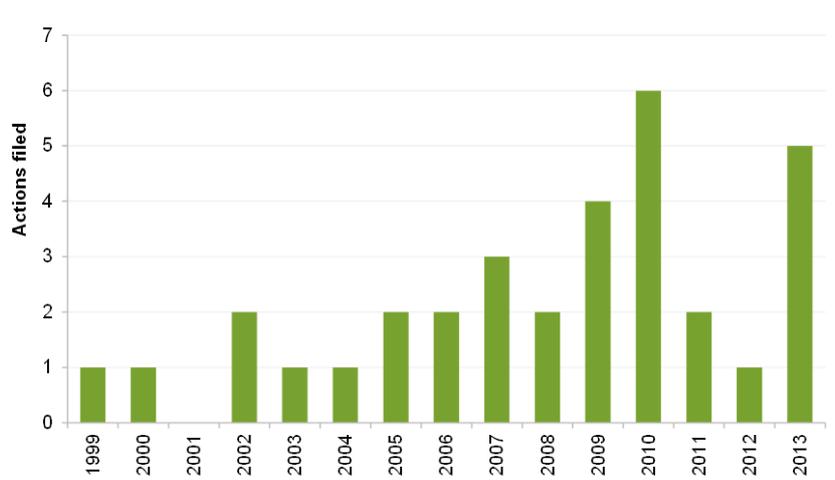
⁶ Second Reading Speech for the *Federal Court of Australia Amendment Act 1991* (Cth), House of Representatives, Parliamentary Debates, *Hansard*, 14 November 1991 at 3174 (and noted by the High Court in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 when interpreting Part IVA of the *Federal Court of Australia Act 1976* (Cth)).

⁷ Professor Vince Morabito, Empirical study of Australia's class action regimes (Third report), *Class Action Facts and Figures – Five Years Later*, Monash University, November 2014.

⁸ *Ibid* at p8.

most, have not increased significantly over the past 11 years, as can be seen in the graph below:

Shareholder class actions filed



Sourced from Allens Linklaters, Class Actions in Australia Report, 2014. Displayed as it appears in the Productivity Commission's report, 2014, figure 18.3, p620.

Comparisons have been made with US class action filings.⁹ The suggestion that the number and type of Australian class actions are similar to that in the US is misleading. The Productivity Commission's 2014 report, *Access to Justice Arrangements*, compared Australian and American shareholder class action statistics for 2013 and concluded as follows:

2013	Shareholder class actions	Population (approx.)	Actions per million people	Listed companies	Actions per company
Australia	5	23 mil	0.2	2195	0.002
US	166	319 mil	0.5	4972	0.03

Based on the table, when compared by:

- *population – actions were 2.4 times more likely in the US;*
- *listed company – actions were almost 15 times more likely in the US.*

The economic impacts of these actions also differ. The largest securities class actions in the US settle for over 35 times the values of the largest in Australia. To 2013, the top ten settlements in the US range from around \$1-7 billion, while the top ten settlements in Australia range from \$35-200 million. This is partially explained by greater use of punitive damages in America, with the anticipated judgments impacting settlement amounts.

Therefore, the suggestion that Australia is becoming as litigious as the US is unwarranted. Such an outcome is also unlikely because the loser pays rule will continue to provide a strong deterrent to bringing unmeritorious claims and the comparatively limited use of punitive damages reduces the expected return from litigation.¹⁰

⁹ J Emmerig and M Legg, above note 3.

¹⁰ Productivity Commission's Access to Justice Arrangements report, 2014, Box 18.3, p 618.

According to a King & Wood Mallesons report, as of July 2014 there were 27 class actions on foot in the Federal Court, New South Wales and Victorian Supreme Courts. Of these, seven related to allegations of breach of continuous disclosure obligations and a further seven related to financial products. The report stated that the total value of significant securities class actions settled since 2003 was, at the time, around \$1.113 billion.¹¹

As at May 2015, the number of class actions on foot in Australia has fallen slightly, with settlements and dismissals being greater than the number of new filings.

The lack of available data makes it difficult to identify the total value of class action settlements since the commencement of the regime in Australia, but it appears that it is well over \$2 billion.

This suggests that a significant number of class actions settled to date had substantial merit.

Litigation funding

Litigation funders are often blamed for the alleged explosion of class actions. The Business Law Section of the Law Council of Australia made a submission to the Productivity Commission that claimed that “unregulated litigation funding allows unmeritorious claims that would not otherwise be litigated”.¹²

This extraordinary claim must be challenged. It is in the nature of litigation that unmeritorious claims are inevitable, but examples of third-party funded shareholder class actions lacking in merit are difficult to find.

A few class claims can be identified that were commenced without sufficient merit but each one, when carefully considered, can be explained. The reasons include:

- it was conducted by those unfamiliar with the complexities of class actions;
- the enormity of the plaintiff’s task was underestimated by the lawyers;
- the class representative struggled to prove individual causation; or
- the complex web of facts ultimately failed to convince a judge.

Very few claims can be criticised as being opportunistic. The few filings that appear to be a “try on”, an abuse of process or mere folly should carry no weight in this debate because they are so few in number and because, in all likelihood, they will be struck out or fail if they have not done so already.¹³

There are also very few unmeritorious class actions, if any, that one could sensibly argue have settled for significant sums purely because, as is sometimes alleged, the defendant considers it simpler to pay for the case to go away rather than to defend it.¹⁴ There are no known examples of shareholder class actions that have settled, even though they were arguably lacking in merit, that were funded by litigation funders.

¹¹ Moira Saville and Peta Stevenson, The Review, Class Actions in Australia 2013/2014 (<http://www.kwm.com/en/au/knowledge/downloads/the-review-class-actions-in-australia-2013-2014-20140701>).

¹² Annexure B to the Law Council of Australia’s Submission to the Productivity Commission’s Access to Justice Inquiry, June 2014 (see: http://www.pc.gov.au/_data/assets/pdf_file/0019/137530/subdr266-access-justice.pdf); Maurice Blackburn’s response dated 7 August 2014 can be seen at http://www.pc.gov.au/_data/assets/pdf_file/0005/139172/subdr320-access-justice.pdf.

¹³ See, for example, *Treasury Wine Estates Limited v Melbourne City Investments Pty Ltd* [2014] VSCA 351.

¹⁴ One example may be *Taylor v Telstra Corporation Limited* [2007] FCA 2008.

It has been suggested that the existence of a litigation funder behind an action distorts the principle that damages are awarded to compensate loss.¹⁵ This is not the case. Litigation funders contract with those claiming compensation to carry the risk of litigation in return for payment that is set by reference to a proportion of the compensation. The payment and the amount thereof is a decision for the claimant. It does not distort the compensatory principle.

Furthermore, the suggestion that litigation funders are more likely to risk less meritorious claims than an individual plaintiff is also flawed.¹⁶ The history of litigation funding in Australia suggests that the wrongful conduct targeted by funded class actions is more likely to be egregious than borderline because litigation funders are concerned about the adverse costs risk. Litigation funders also indemnify a representative plaintiff if ordered to pay the defendant's costs. In class actions, the Federal Court practice note requires a representative plaintiff to reveal the existence of litigation funding and recent decisions have reinforced the fact that a defendant can demand sizeable security for costs.¹⁷

The skill of litigation funders, whose business depends on positive outcomes, means that even greater care is taken to identify strong claims than might be the case for those commenced by emotionally involved plaintiffs.

In Australia, defendants can move to strike out class action proceedings or have them "decertified" under ss33C, 33M or 33N of the *Federal Court of Australia Act* (and the equivalent sections in Victoria and NSW). This regime gives defendants greater protection than the US certification requirement, a conclusion supported by another of Professor Morabito's empirical studies,¹⁸ which found that there is:

*... no evidence of claimants taking advantage of the absence of a compulsory certification device by regularly filing class actions with respect to claims that could not possibly be advanced fairly or efficiently through the class action device.*¹⁹

Class actions that have been commenced without sufficient merit are generally struck out or otherwise dismissed. The dismissal of a claim with costs suggests that the system is working.

¹⁵ Annexure B to the Law Council of Australia's Submission, above note 11.

¹⁶ *Ibid.*

¹⁷ CM17, *Kelly v Willmott Forests Ltd (in liquidation)* (No. 3) [2014] FCA 78.

¹⁸ Vince Morabito & Jane Caruana, *Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia*, in *The American Journal of Comparative Law* Vol 61 2013, p 580.

¹⁹ *Ibid* at p 614.

Types of class actions

The table below lists the class actions currently being conducted by one Australian law firm as at May 2015. It illustrates that the causes of actions and the nature of claims are varied and are not, as some suggest, dominated by shareholder claims or litigation funders.²⁰

MAURICE BLACKBURN'S CLASS ACTIONS AS AT JUNE 2015				
Name of action	Short title	Type of action	Estimated number of group members²¹	Third-party funded (Y or N)
<i>Matthews v AusNet Electricity Services Pty Ltd and Others</i>	2009 Kinglake Bushfires	Compensation for negligent management of power lines	5,000	N
<i>Rowe v AusNet Electricity Services Pty Ltd</i>	2009 Murrindindi Bushfires	Compensation for negligent management of power lines	1,000	N
<i>Erin Downie v Spiral Foods Pty Ltd and Others</i>	Bonsoy Milk	Compensation for negligent manufacture of soy milk	500	N
<i>Stanford v DePuy International and Johnson & Johnson Medical Pty Ltd²²</i>	Defective hip implants	Compensation for injuries caused by defective hip implants	4,000	N
<i>Inabu Pty Ltd v Leighton Holdings Limited</i>	Leighton	Shareholder class action that settled for \$69.5m	3,000	Y
<i>Gray v Cash Converters International Limited & Ors</i>	Cash Converters	Two consumer class actions seeking a refund of excessive interest charges on payday loans	40,000	N
<i>McAlister v State of NSW & Ors</i>	Grand Western Lodge	Compensation for disabled residents of a home for injuries caused by the State's negligence and the licensee's alleged intentional torts	70	N
<i>Amom v State of NSW</i>	Children in detention	Claim for false imprisonment against NSW Police	50	N

²⁰ Some of these cases have settled but are yet to be finally concluded. The information in the table is descriptive and the allegations are, in the main, not conceded by the defendants.

²¹ These estimates are just that, estimates, as some classes are ongoing.

²² Maurice Blackburn is on the record with Shine, Lawyers.

MAURICE BLACKBURN'S CLASS ACTIONS AS AT JUNE 2015				
Name of action	Short title	Type of action	Estimated number of group members²¹	Third-party funded (Y or N)
<i>Clasul Pty Ltd and Others v Commonwealth of Australia</i>	Equine influenza	Claim by businesses for losses caused by the negligent management of the Commonwealth's quarantine station	570	N
<i>Hopkins v AECOM and Ors</i>	RiverCity	Compensation for investment in the failed CLEM7 tunnel in Brisbane	1,000	Y
<i>Blairgowrie Trading Ltd and Others v Allco Finance Group Ltd and Others</i>	Allco Finance	Shareholder class action	1,000	Y
<i>De Brett Seafood Pty Ltd & Anor v Qantas Airways Limited & Ors</i>	Air Cargo Cartel	Compensation for businesses over-charged by price fixing cartelists	200	Y
<i>Paciocco v ANZ Banking Group & Ors and similar claims against another 12 financial institutions</i>	Bank fees	Claim by consumers for refund of exorbitant bank fees	>200,000	Y
<i>AS v Minister for Immigration & Border Protection & Commonwealth of Australia</i>	Asylum seekers	Compensation for asylum seekers detained in Christmas Island and injured by negligent management	1,000	N
<i>Casey v Casey DePuy International Ltd and Johnson & Johnson Medical Pty Ltd</i>	Defective knee implants	Compensation for injuries caused by defective knee implants	400	N
<i>Jones v Treasury Wine Estates Ltd</i>	TWE	Shareholder class action	600	Y
<i>Tyson Duval-Comrie v Commonwealth of Australia</i>	Workers with intellectual disabilities	Claim by workers with intellectual disabilities to be compensated for wage discrimination	10,500	N

MAURICE BLACKBURN'S CLASS ACTIONS AS AT JUNE 2015				
Name of action	Short title	Type of action	Estimated number of group members ²¹	Third-party funded (Y or N)
<i>Rodriguez & Sons Pty Ltd v Queensland Bulk Water</i>	Queensland floods	Claim for compensation for damage caused by the negligent management of the Wivenhoe Dam in January 2011	5,000	Y
<i>State of Victoria & Anor v Regent Holdings Pty Ltd</i>	Abalone	Compensation for losses suffered by abalone fishers caused by the negligent release of a virus	90	Y

The Social Value of Class Actions

The gradual increase in the number and frequency of representative proceedings over the past 22 years is a positive development. Successfully concluded or settled class actions suggest that those wronged achieved some redress. This is what our justice system is meant to provide.

The class actions regime and the pursuit of such claims can be a very good thing, not only for the victims of the wrongful conduct, but also for the wider community through improved accountability. Those who might think they can get away with wrongful conduct need to be aware that they may be taken to task not only by market regulators but by the victims in a private class action.

There are many examples of Australian class actions that have wide community support and which have undoubtedly added social value. A number of these are portrayed in Professor Morabito and Jarrah Ekstein's soon to be published paper, "*Class Actions filed for the benefit of vulnerable persons – an Australian Study*".²³

The two recently settled class actions for survivors of the 2009 Black Saturday bushfires are good examples of socially valuable claims.²⁴ The \$800 million paid to settle these claims suggests that the class actions were well considered and well conducted. These actions will provide real and meaningful compensation to survivors and greatly assist in rebuilding devastated communities.

The bank fees cases²⁵ and the Cash Converters claims²⁶ play a very important role in calling financiers to account for conduct that offends many Australians. Charging a \$35 fee every time a computer detects late payment on a credit card or tricking a pensioner into paying 633 per cent interest on a payday loan is considered offensive by many. It is conduct that should not go unchecked.

²³ V Morabito and J Ekstein, *Class actions filed for the benefit of vulnerable persons - An Australian Study* (2015)

³⁴ Civil Justice Quarterly (forthcoming).

²⁴ *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663 (23 December 2014); *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 8.

²⁵ *Paciocco v Australian and New Zealand Banking Group Limited* [2015] FCAFC 50.

²⁶ *Gray v Cash Converters International Ltd* [2014] FCA 420.

Class actions have made price-fixing cartellists refund their victims.²⁷ As well, several class actions that have been commenced have forced, or will force, governments to confront claims of negligence and neglect.²⁸

Does anyone seriously suggest that these claims are bad? That society is poorer for them? Can one honestly suggest that intellectually disabled persons should not be able to challenge their miserly pay or complain that the state stood by and did nothing while they were abused for a decade?²⁹ Should people whose homes were destroyed by the apparently negligent management of a dam cross their fingers and hope that the government will see fit to compensate them?³⁰ Should children who have been falsely imprisoned due to the NSW Police Force's blind reliance on a flawed database just suck it up?³¹ Does society expect seriously injured victims of defective medical devices to live crippled lives without redress?³²

The much-maligned shareholder class action may irritate those companies that wish to ignore their obligations to the market but the reality is that such actions, or the threat of such actions, have a direct and positive impact on corporate governance standards. Companies that have been subject to securities class actions have been shown to have weaker levels of corporate governance than other firms.³³

Contrary to the view expressed by Callinan J, as quoted in the introduction, both the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission have supported the role of class actions as private enforcement complements to their own regulatory role.³⁴

Of the actions mentioned in this article, not one class member would have been compensated adequately or at all without the class action facility. The evidence is that class actions add value to our society by forcing wrongdoers to account for their actions. The only people honestly irritated by such claims are the wrongdoers themselves.

²⁷ *Jarraah Creek Central Packing Shed Pty Ltd v Amcor Limited* [2001] FCA 671; *De Brett Seafood Pty Ltd v Qantas Airways Limited* (No. 6) [2013] FCA 591.

²⁸ *Giles v Commonwealth of Australia* [2011] NSWSC 582; *McAlister v State of NSW* Federal Court NSD 1968/2013; *Tyson Duval-Comrie v Commonwealth of Australia* Federal Court VID 1367/2013; *Clasul Pty Ltd v Commonwealth of Australia* [2014] FCA 1133; *Konneh v State of NSW* (No. 3) [2013] NSWSC 1424; *AS (by her litigation guardian Marie Theresa Arthur) v Minister for Immigration and Border Protection & anor* – Supreme Court of Vic No. S CI 2014 04423.

²⁹ As is alleged in *Tyson Duval-Comrie v Commonwealth of Australia* and *McAlister v State of NSW* (see note 27 above).

³⁰ *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority trading as Seqwater* Supreme Court of NSW No. 2014/200854.

³¹ *Konneh v State of NSW* (now *Amom v State of NSW*) (see note 27 above).

³² *Courtney v Medtel Pty Ltd* [2002] FCA 957 (pacemakers); *Casey v DePuy International Ltd* (No. 2) [2012] FCA 1370 (knees); *Stanford v DePuy International Ltd* (No. 5) [2015] FCA 340.

³³ See, for example, Chapple, Clout and Tan, *Corporate governance and securities class actions*, Australian Journal of Management, November 2013.

³⁴ See, for example, *ASIC backs private litigation*, Money Management, 25 June 2014.