SIMPSON GRIERSON

Winds of change: Class actions & litigation funding in Aotearoa New Zealand

November 2023

What we cover

Snapshot of class actions regime in New Zealand

01

Current state of play

There is currently no statutory class actions regime in New Zealand. To date we have been reliant on the courts to develop the law as and when cases arise. Legislative reform is now dependent on whether the new Government will implement Te Aka Matua o te Ture | Law Commission's recent recommendations for new class action laws and litigation funding. See section 2 for further details.

Key statistics

The Law Commission report shows a steady increase in class action filings in New Zealand. We expect that trend to continue now there are established litigation funders in New Zealand. If legislative reform is introduced, numbers may increase even more. See section 3 for statistics on class actions in New Zealand.

New Zealand cases

Recent judicial decisions have confirmed that class actions in New Zealand can proceed on an 'opt-out' basis, that courts can common fund orders in opt-out class actions, and that the Trans Tasman Proceedings Act 2010 can justify a stay of a class action here pending the outcome of a related class action in Australia. See section 4 for further details.

Trends

There have been a number of shareholder and consumer class actions in New Zealand in recent years, and claims of that nature will inevitably continue. Similar to the UK and Australia, we also expect to see privacy (data breach) and ESG related claims in the future. We may also ultimately see AI-related class actions similar to those recently filed in the US. See sections 5, 6 and 7 for further details.

Litigation funding

Litigation funders frequently sit behind plaintiffs and fund the class action. Their future in New Zealand appears more certain following the Law Commission report, and the arrival of Omni Bridgeway as a permanent presence in the New Zealand market signals that funders are here to stay. Funders are also looking at broader opportunities to fund solvent entities to bring individual claims, providing an alternative form of risk management for New Zealand corporates, as they have done overseas. See section 8 for further details.

"Class actions have become a permanent feature of the New Zealand litigation landscape. The Law Commission has made clear that it considers they are an important mechanism for enhancing access to justice, and it has acknowledged the role litigation funders play in this. Corporates and their directors therefore need to be alive to the particular risks that arise in this type of litigation, and ensure they are best placed to respond to those risks should they eventuate."

NINA BLOMFIELD, PARTNER | SIMPSON GRIERSON

Law Commission's recommendations

02

In May 2022 the Law Commission made 121 recommendations to the Government in relation to creating new laws for class actions and litigation funding in New Zealand.

The key recommendations include:

- **Certification:** Class actions would need to be approved by the court before they can proceed, and the representative plaintiff would need to show they have at least one reasonably arguable cause of action.
- **Opt-in or opt-out:** Class actions would proceed on either an opt-in or opt-out basis. Opt-in requires class members to actively sign up to the proceeding, whereas in an opt-out claim any person falling within the class definition will be a member unless they expressly exclude themselves.
- **Cost sharing orders:** Courts would be able to make cost sharing orders to enable costs to be spread equitably among all class members. This is particularly important where, in an opt-out proceeding, some class members will not have entered into an agreement with the litigation funder.
- **Multiple class actions:** Each time a class action is filed, public notice of the proceeding would need to be given. Any subsequent class action dealing with the same or substantially similar issues and with at least one common defendant would need to be filed within 90 days. The court would then decide at the certification stage which class action(s) can proceed.

- **Class member information:** The court would be able to require a defendant to disclose the names and contact details of potential class members eg customers of a certain product, investors etc.
- **Litigation funding:** Agreements for litigation funding could only be enforced if they have been approved by the court. Among other things, the court would need to be satisfied the agreement is fair and reasonable (including as to the circumstances in which the funder can terminate). There would also be a rebuttable presumption that security for costs should be awarded against a funded representative plaintiff.
- **Court oversight:** The courts would play an important role in overseeing class actions, including at the certification stage. As well as the funding agreement, the court would also need to approve notices to class members, settlements, and the distribution of proceeds to class members if the claim is successful.
- **Public class action fund:** In order to improve access to justice, the Government should consider creating a public class action fund that can indemnify a representative plaintiff for legal costs in public interest litigation (including where the relief sought is non-monetary eg a declaration).

In addition to creating a new Class Actions Act, the Law Commission also recommended the introduction of a new suite of High Court Rules 2016 to supplement the regime, as well as changes to the Lawyers and Conveyances Act (Lawyers: Conduct and Client Care Rules) 2008 to clarify the duties of a lawyer acting for the representative plaintiff and class members. The torts of maintenance and champerty would be abolished.

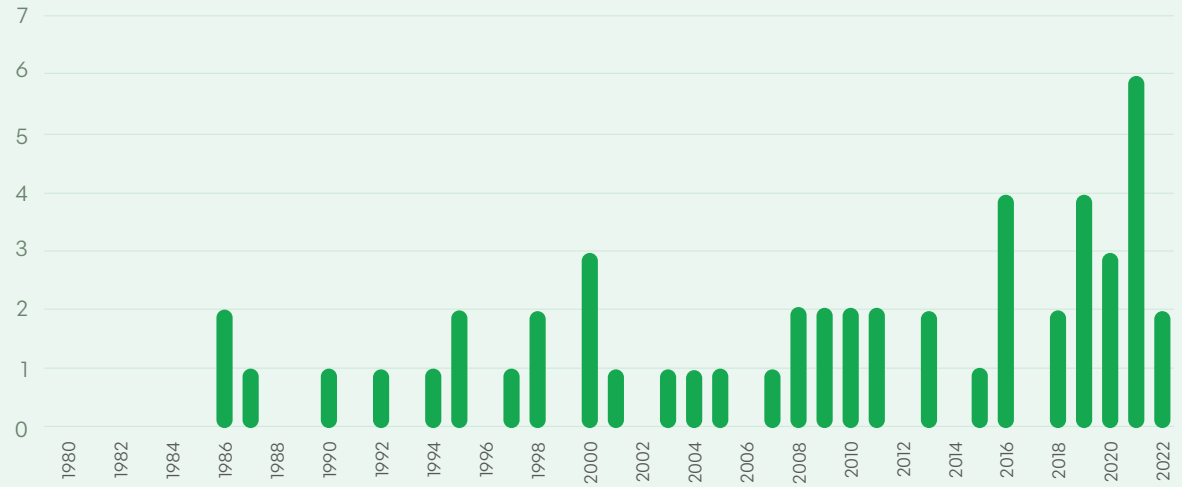
The former Government accepted some of the key recommendations in principle, but said in November 2022 that advancing the reforms will “take a period of time”.

We expect to see the number of class actions continue to increase over time, particularly with the continued presence of litigation funders in New Zealand and statutory change in the pipeline.

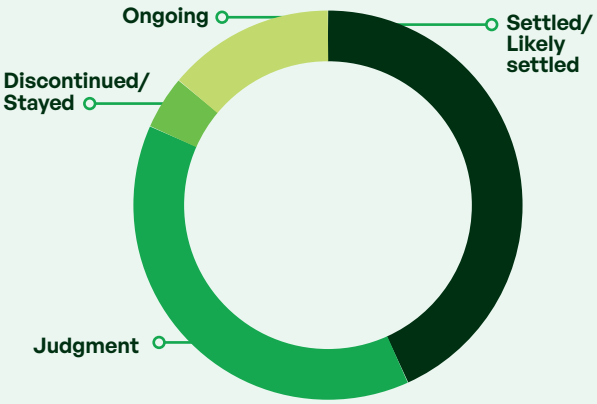
Key statistics

03

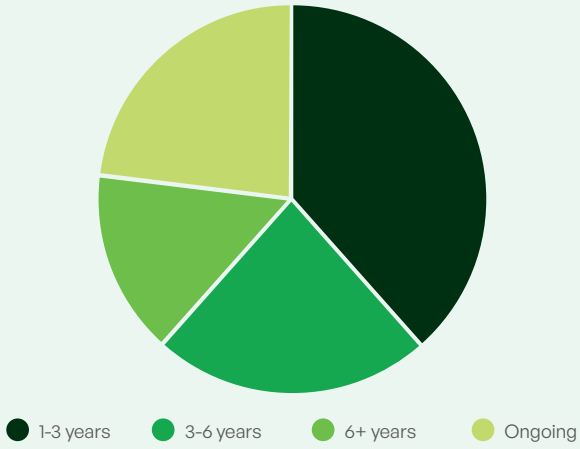
Number of new cases



Outcome of cases*



Length of cases*



Disclaimer: These figures are based on data available for representative actions referenced in the Law Commission Report on Class Actions and Litigation Funding dated May 2022, and claims identified subsequent to the date of that report. Due to limitations in this data, these figures are intended to be indicative only.

"The number of representative actions being initiated is steadily increasing, and the nature of the claims being brought is also changing. They now include, for example, insurance, shareholder and product liability claims."

TE AKA MATUA O TE TURE | LAW COMMISSION

** Excludes cases where the outcome or length of the case is unclear.*

Important New Zealand Court decisions

04

While New Zealand waits for a statutory class action regime and legislation regulating litigation funding arrangements, the courts continue to develop this area of the law. Some of the key decisions that have had an impact on the class action and litigation funding landscape in New Zealand are set out below.

Southern Response Earthquake Services v Ross

A class action was brought against insurer Southern Response Earthquake Services on behalf of policyholders alleging that Southern Response failed to provide complete information about the cost of remedying their homes, which had been damaged following the Canterbury earthquakes.

The Supreme Court unanimously agreed that class actions can proceed on an 'opt out' basis, pending development of a comprehensive legislative framework. Under an opt-out approach, all people who share a common interest in the proceeding are automatically included in the class and bound by the judgment on common issues or settlement, unless they choose to exclude themselves within the relevant timeframe. This decision has a significant impact on the operation of class actions in New Zealand.

The decision also confirmed that courts have the ability to oversee and approve settlements and the methods of distributing settlement funds in a class action.

Simons v ANZ Bank & ASB Bank

Customers of ANZ and ASB brought a class action alleging they overpaid millions of dollars in interest and fees.

The High Court confirmed that New Zealand courts have jurisdiction to make "common fund orders as part of their inherent powers". Common fund orders are where the litigation funder takes a percentage of any money recovered in the class action and all members bear a proportionate share of that obligation, regardless of whether those members have contractually agreed with the funder to do so.

Opt-out proceedings are likely to increase, since common fund orders make opt-out proceedings more attractive to litigation funders by addressing potential 'free-rider' problems.

Whyte v The a2 Milk Company

Class actions were filed in both Australia and New Zealand by shareholders of a2 Milk against the company alleging various breaches of financial markets and fair trading law.

The High Court in New Zealand granted a stay of the New Zealand class action under the Trans Tasman Proceedings Act 2010 (TTPA) as there was already a class action in Victoria which covered New Zealand investors.

The TTPA's stated objective is to streamline the process for resolving civil proceedings with a trans-Tasman element to reduce costs and improve efficiency. The Australian court was found to be the most appropriate forum for determining the case as the proceedings were substantially similar in both jurisdictions, and the Australian proceedings alleged breaches both in Australian and New Zealand law.

Livingstone v CBL Corporation Ltd (in liq)

Two shareholder class actions were filed against former NZX-listed CBL Corporation and its directors, alleging failures in disclosure at the time of the initial public offering as well as continuous disclosure failures subsequently.

Both class actions recently settled. The plaintiffs asked the High Court to approve a discontinuance application and the distribution of the settlement funds. The proposed distribution methodologies differed as between the two class actions.

The Court applied *Southern Response*, stating that settlement terms are to be approved if they fairly and reasonably resolve the plaintiffs' claims and class members' interests.

One shareholder class wanted to make distributions on a pro rata basis relative to each class member's loss, while the other distinguished between members who purchased at the time of the IPO and those who purchased on-market. Both were accepted as fair methods for apportioning distributions between class members.

Class action trends: Australia

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The following trends have been seen across the Tasman, with Australia (unsurprisingly) seeing a greater level of class action activity than New Zealand.

Recent trends

- After a drop in the number of new class actions filed last year, filings have bounced back this year and are looking likely to finish closer to the level seen in 2021 and 2020. To date, there have been 22 claims filed in the Federal Court in 2023.[1]
- There continues to be multiple class actions brought in respect of the same events (also known as 'copycat' filings).
- The majority of class actions continue to fall within 'commercial and corporations' matters, and relate to corporate insolvency, regulator and consumer protection, product liability, contracts, banking and finance, and insurance. However, there are an increasing number of claims against 'big-tech' companies.

Recent cases

Qantas Airways

Qantas customers recently brought a class action in relation to Qantas issuing credits instead of full refunds for cancelled flights during the pandemic. The customers claim Qantas unjustly enriched itself since the credits were not comparable to a full cash refund as they had an expiry date.

The class action comes on the back of the Australian Competition and Consumer Commission (ACCC) bringing a claim against Qantas that it engaged in false, misleading or deceptive conduct by advertising tickets for flights it had already cancelled during the early days of the pandemic.

Medibank

Private health insurer Medibank is facing multiple class actions following a 2022 cyber attack that exposed the data of 9.7 million customers. The claims include allegations of misleading or deceptive conduct and that Medibank breached privacy laws and breached its contracts with customers.

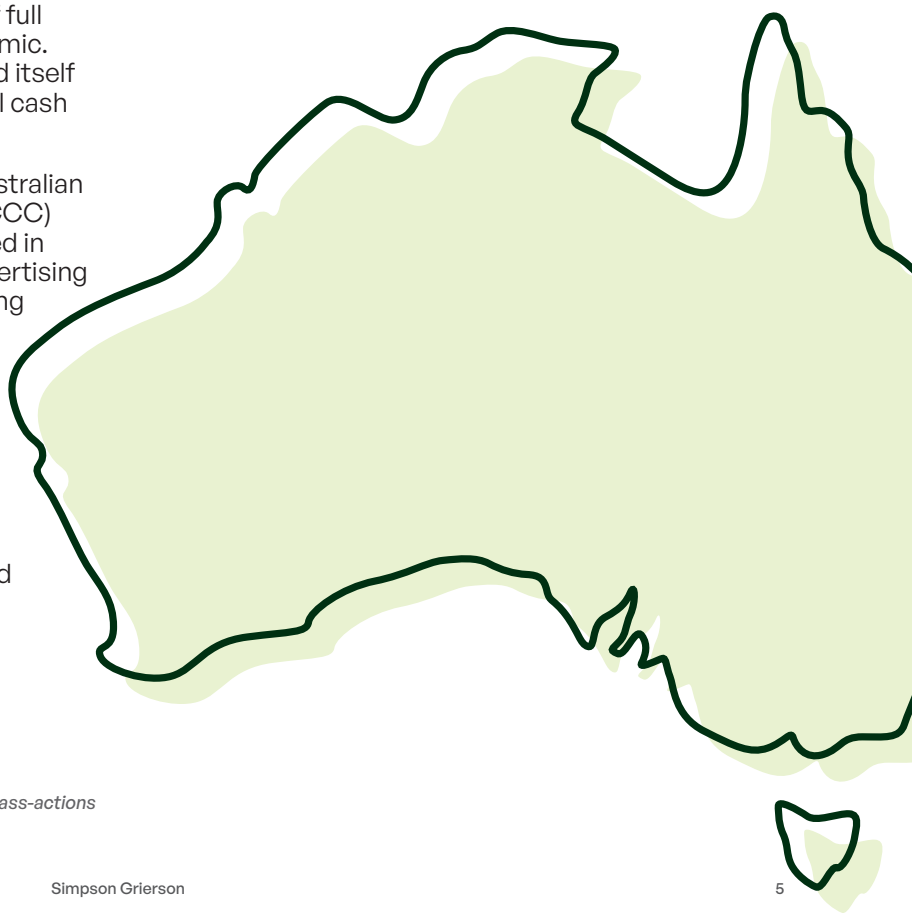
AMP

After five years, AMP has agreed to pay $110 million to settle a shareholder class action relating to market disclosure of certain matters that were raised in the 2018 Banking and Financial Services Royal Commission.

Optus

A class action was filed against Optus earlier this year following a cyber attack in September 2022. The attack compromised Optus' systems and resulted in the personal information of millions of customers (including identification documents) being unlawfully accessed.

The Federal Court has recently rejected an attempt by Optus to assert legal privilege over a report by Deloitte, who was engaged by Optus to undertake a forensic assessment to determine what had led to the cyber attack.



1. https://www.fedcourt.gov.au/law-and-practice/class-actions/class-actions

Class action trends: UK

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The UK also provides some insight into the types of class action claims we may see in New Zealand in the future.

Competition

The UK has a specific regime for competition law class actions in the Competition Appeal Tribunal (CAT). The CAT process requires certification (a collective proceedings order, CPO) and uses an 'opt-out' procedure. *Merricks v Mastercard* – a £14 billion claim brought by the former Chief Ombudsmen of the Financial Ombudsmen Service (FOS) on behalf of consumers in relation to certain fees charged between 1992 and 2007 – was the first claim to receive CAT certification. The process involved a series of appeals and guidance from the UK Supreme Court on the approach to certification of collective proceedings under the CAT. Following the *Merricks* certification decision, there was a considerable spike in applications for CPOs, with 15 applications in 2022 alone. (In the five years prior to that there had been an average of less than three applications per year). That trend has been tempered somewhat in 2023, although there have still been five applications made to date.

Technology

Many of the applications for CPOs in 2022 and 2023 have been filed against the world's largest technology companies, including Google, Apple, Amazon, Sony and Meta. There have also been a series of applications against musical instrument manufacturers Casio, Yamaha, Roland, Korg and Fender alleging resale price maintenance.

ESG

Recent years have seen a rise more generally in the number of claims being brought in relation to ESG issues, including greenwashing claims. This includes an unsuccessful claim by ClientEarth against Shell's board of directors alleging that they breached their statutory duties to the company by adopting an inadequate climate plan. Such claims are now starting to appear as collective actions in the CAT, with the first environmental application for a CPO reportedly filed against Severn Trent Water, one of the UK's largest water companies, for allegedly misleading regulators about the frequency of sewage discharge into waterways. Similar claims against other water companies are also tipped to be filed.

Privacy and data protection

In the last two years, separate class actions have been unsuccessfully attempted against Google and TikTok.

The claim against TikTok was brought by the UK Childrens' Commissioner on behalf of millions of child users of the app. It alleged that TikTok's data collection practices did not comply with UK and EU law, but was withdrawn before trial.

The class action against Google, on behalf of four million iPhone users, centred on cookies, but fell at the first hurdle when permission was refused to serve Google in the US.

While these decisions have provided a degree of comfort for data controllers, the door is not closed on further class actions in this area and it very much remains an area to watch.

Where to next for New Zealand class actions?

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ESG

We anticipate there will be an increase in overseas class actions in the ESG space.

This encompasses actions relating to a business' impacts on the environment, approaches to social issues such as employee treatment, as well as its ability to uphold governance standards.

In New Zealand, we are awaiting the decision of the Supreme Court in *Smith v Fonterra*, a claim against Fonterra Co-Operative Group Ltd and other corporations in relation to the impact of their greenhouse gas emissions.

There is also a new mandatory climate reporting regime for businesses coming into effect for reporting periods next year.

Privacy

Privacy is another area where we expect to see class action filings in the future.

Large scale data breaches are on the rise in New Zealand and while the Privacy Act currently lacks a civil penalty regime, the Privacy Commissioner has called for one to be introduced. In the meantime, affected organisations could potentially face claims in negligence, contract and breach of confidence such as those brought against Optus and Medibank in Australia.

These proceedings allege, among other things, that the companies failed to comply with their data handling and cybersecurity obligations, resulting in the theft of highly sensitive personal information. Medibank is facing four class actions, while Optus faces one, brought on behalf of over 100,000 registered participants.

AI

The ongoing proliferation of AI tools has already resulted in class actions overseas, largely in relation to privacy and intellectual property infringements.

A high-profile US example is the recent class action by authors including Pulitzer Prize winner Michael Chabon, claiming that Open AI is infringing copyright by using their works to train ChatGPT. Open AI is also facing a breach of privacy class action, which alleges that its tools are trained on private information taken without permission from hundreds of millions of internet users.

We may eventually see similar filings from other creatives whose work is being used to train up other AI tools without permission of the creators.

Consumer/Shareholder

We also expect to see continued class actions in the consumer and shareholder space.

There have been a number of class actions in this area in recent years, including CBL, the banking class action, a2 Milk, Intueri and the James Hardie product liability class actions. There is no indication that such claims are likely to reduce, particularly as we are sometimes seeing them brought alongside, or on the back of, actions taken by regulators.

"Class actions based on data breaches are increasingly frequent overseas. This trend is likely to be mirrored in New Zealand, where a steady uptick in privacy breaches (whether through cyber-attack or simple human error) is matched by increasing awareness of consumer rights, and a developing propensity for pursuing class actions. The close to home example of the Medibank data breach in Australia resulting in a number of class actions and regulatory investigations is a stark warning. As hackers become ever more innovative and resourceful, it is essential for businesses holding sensitive data to ensure not only that they are Privacy Act compliant but that they have in place a comprehensive cyber-breach response plan."

JANIA BAIGENT, PARTNER | SIMPSON GRIERSON

Litigation funding growth

There has been an increased presence of overseas litigation funders in the New Zealand market in recent years, as well as steady and now expanding domestic funding. This is forecast to fuel growth in class actions and litigation generally.

New Zealand

The Law Commission's report identified six overseas funders operating in New Zealand in addition to a New Zealand based funder, LPF. Since that report, Omni Bridgeway – one of the largest global litigation funders – has opened a New Zealand office and Australian-based funder, CASL, has been involved in jointly funding a case with LPF.

We expect the litigation funding market in New Zealand will continue to grow, particularly as the proposed regulatory reform is expected to bring much needed clarity to claimants and funders around class action procedure and litigation funding arrangements.

Further, as class actions resolve - such as the CBL shareholder class actions - we expect that the funders involved will be looking to reinvest their capital in further cases in the New Zealand market.

Although litigation funders have traditionally looked to provide finance for class action proceedings, the industry has developed in overseas markets with funders now involved in a variety of disputes including non-class action disputes and arbitrations, including for solvent plaintiffs. We are starting to see this type of funding play out in the New Zealand market and expect it to grow as the awareness of litigation and its benefits increase.

Australia

Uncertainty around the regulatory status of litigation funders likely contributed to a decrease in class action filings in Australia last year.

In *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* the High Court held that in certain circumstances a "litigation funding scheme" (i.e. a funded class action) may constitute a managed investment scheme (MIS) for the purpose of the Corporations Act, which would require funders to comply with the relevant MIS regulatory requirements.

Following the *Brookfield* decision, the Federal Labour government amended the Corporations Regulations to exempt funded class actions from the managed investment scheme provisions.

However, in 2020, new regulations were introduced which required litigation funders to hold an Australian Financial Services License (AFSL) and comply with the managed investment scheme regulatory regime if they advised on or operated a litigation funding scheme. This resulted in a number of litigation funders scrambling to obtain an AFSL.

In 2022, the new regulations and the decision in *Brookfield Multiplex* were tested by the full Court of the Federal Court in *Stanwell Corporation v LCM and Stillwater Pastoral Company*. The Federal Court unanimously held that litigation funding schemes are not managed investment schemes and therefore did not need to comply with the relevant regulatory requirements.

The Government has indicated it may revoke the 2020 regulations, however until it does litigation funders remain required to hold an AFSL if they advise about or operate a litigation funding scheme.

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United Kingdom

The UK litigation funding market has continued to see growth, particularly in funded 'opt-out' class actions going through the CAT.

However, a recent Supreme Court decision has come as something of a shock to those in the industry. In *Paccar Inc v Road Haulage Association Ltd* - a competition case in the CAT - the UK Supreme Court held that litigation funding agreements which provide for the funder to recover a percentage of damages constitute damages-based agreements (or DBAs). If they do not comply with the relevant regulatory requirements for such agreements, they are unenforceable and unlawful.

Since funders have generally proceeded on the basis that their litigation funding agreements are not DBAs - and do not need to comply with the regulatory requirements - the consequences are potentially far-reaching.

The decision is UK-specific and we will wait to see whether the UK Government will seek to address this issue with legislative reform. The issue has already come back before the Courts in the subsequent case of *Therium Litigation Funding A IC v Bugsby Property LLC*.

Further, the UK market has also seen the development of a secondary funding market whereby all or part of a funder's interest in a claim is sold to a secondary investor.

"Compared to some other jurisdictions, litigation funding in New Zealand is still largely undeveloped. That will change as the status of litigation funding becomes more certain through future legislation or court rulings, and as consumers gain a better understanding of the role that litigation funding can play in the dispute resolution process. Increased litigation funding will not only fuel growth in the number of class actions brought, but also impact on commercial litigation generally."

JAMES CAIRD, PARTNER | SIMPSON GRIERSON

Key takeaways for your business

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Class actions are here to stay and, for potential defendants, they raise a number of potential risks. However, there are some steps that can be taken to mitigate the possibility of a class action, and the impact on your business if one does eventuate.

Identify and actively manage areas of specific legal risk for your business

This might sound obvious, but ensuring your business complies with relevant laws and regulations is the fundamental place to start. Make sure you have a comprehensive compliance programme in place, and that internal policies and procedures are reviewed and updated frequently to reflect any legal changes. More importantly, check they are being appropriately implemented within the business. This is especially key for those relating to consumer protection, data privacy, and employment. Compliance training should also be rolled out to employees across the business on a regular basis.

Communicate clearly and openly with customers, investors and other stakeholders

Many class actions involve allegations concerning inadequate or misleading information provided to customers or investors. It is therefore important to ensure that product information, terms and conditions, and potential risks are communicated clearly and in a transparent way. Seek appropriate advice on communications as needed. If complaints do arise, address these promptly and substantively in order to reduce the risk of escalation.

Ensure good records are kept

Demonstrating compliance with legal requirements can be crucial for defending some class actions, and so maintaining accurate and thorough records of your business practices and communications is important. Consider if standard document retention policies are appropriate, and any routine destruction should be suspended as soon as any legal action is indicated.

Product safety and quality control

Product liability claims frequently form the basis of class actions, and so ensuring safety standards and applicable regulations are met is paramount, as well as ensuring product advertising and labeling is accurate. Businesses should have rigorous quality control processes, and any product issues that arise should be dealt with immediately to minimise the risk of more widespread problems occurring.

Prioritise data privacy and security

Your business will inevitably collect and store confidential information, whether that be employee information, customer contact details, credit card data, or something else. Not only do data breaches and cyber attacks raise significant operational and reputational issues for a company, it is becoming clear that they also provide a foundation for class action litigation. Priority should be given to data protection measures that reduce the risk of a potential data breach, and security protocols should be regularly updated.

Obtain appropriate insurance cover

Where possible, obtain insurance cover for the potential risks to your business, such as in relation to an initial public offering, statutory or public liability insurance, a directors and officers policy, or cyber insurance, to name a few. The devil is always in the detail, however, so make sure you carefully check and understand exactly who is insured by the policy (does this include relevant subsidiaries, directors and/or officers), what it will cover (whether this includes the types of risks that could result in a class action, and the extent of cover for defence costs), and any applicable exclusions.

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