


# Debunking the myths around shareholder class actions

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So much for the so-called “explosion” in shareholder class actions backed by unscrupulous litigation funders.

This claim, used by sections of corporate Australia and their US big business allies to justify self-serving attacks on the litigation funding industry, was always based on dubious accounting.

But now we have incontestable evidence that it is nothing more than a myth.

Three pieces of analysis have all come to the same conclusion: although there was a small increase in class actions filed in the past year, the proportion of shareholder class actions (typically against ASX-listed companies) and funded class actions is actually in decline.

Predictably, the analysis also confirms a sharp increase in class actions filed in Victoria – from seven to 22 in the space of a year – following the passage of contingency fee legislation that many parties, including Omni Bridgeway, warned would make it the most class action-friendly jurisdiction in Australia.

The federal government is considering its response to the recommendations of the parliamentary inquiry into litigation funding and the class action industry. Legislation is before parliament to change Australia’s continuous disclosure regime, including the misleading and deceptive conduct provisions. Canberra is also examining how to guarantee a minimum return of class action proceeds to class members.

It is imperative that research by Australia’s leading class action academic Vince Morabito and top tier law firms Allens and King & Wood Mallesons informs those deliberations.

Morabito has long disputed claims of an explosion in class actions, particularly shareholder class actions, based on his analysis of Australia's three-decade-old class action regime. His new research only reinforces his argument.

His research reveals a total of 69 class actions were filed in the year to March 3, 2021, up from 54 in the previous 12 months and little changed from 64 in 2018-19.

Importantly, the increase has not been driven by opportunistic actions against companies for inadvertent breaches of their disclosure obligations. In its report, *Class Action Risk 2021*, Allens found that consumer claims dominated the landscape for the second consecutive year, representing 39 per cent of class actions filed.

“This continuing trend was largely driven by the long tail of consumer filings against banks, superannuation trustees and insurers following the financial services royal commission,” Allens says. “2020 also saw several product liability claims, as well as some Covid-related consumer claims alleging a failure to prevent infection or address infection risks.”

Morabito says the overall increase could also be explained by a desire to file class actions before the government's tougher class action regime – requiring litigation funders to hold an Financial Services Licence and for class actions to be registered as a managed investment scheme – came into effect in August 2020.

Most importantly, what Morabito, Allens and KWM all found was a decrease in proportion of shareholder class actions and actions supported by litigation funders.

They each calculated their data over slightly different time periods but are all broadly in line.

The Allens report says that, while there has been an increase in the number of class actions filed in 2020, far fewer actions are backed by a litigation funder. “Only one third of 2020 filings are known to have received third-party funding, down from 59 per cent in 2019, 75 per cent in 2018 and an average of 60 per cent in the four years prior,” Allens says. It also found that shareholder class actions had fallen from an average of 31 per cent of actions filed in 2012-2018 to 21 per cent in 2020.

KWM data shows a decrease in the proportion of class actions funded by a litigation funder – down from 74 per cent in 2017-18 to 30 per cent (to date) in 2020-21. It also found there had been a decrease in the number of shareholder claims filed (from about 23 in 2017-18 to about seven (to date) in 2020-21).

Morabito found funded class actions had decreased from 37 (or 72.5 per cent of all class actions) in 2017-18 to 32 (46.3 per cent) in 2020-21. The number of shareholder class actions fell from 21 (41.1 per cent of all class actions) in 2017-18 to 14 (20.2 per cent) in 2020-21 – up only marginally on the 11 filed in the preceding 12 months.

Morabito says: “The fact that over the last two years the overall ‘significance’ of shareholder class actions has halved ... is of some importance in determining the appropriateness or desirability of any legislative reform that will diminish the ability of shareholders to seek legal redress with respect to losses they have suffered.”

Presented with these figures, any rational observer would recognise that claims of an explosion in class actions cannot be justified. But reason has so far been a casualty of this debate.

Even though just 142 class actions have been filed against just 71 Australian corporations in the 29-year history of our modern class action regime, critics of litigation funding will not rest until shareholders have no recourse through the courts for corporate negligence.

What these figures show is that with the changes to the class action regime introduced by the government last year, which were supported by Omni Bridgeway, there is a reasonable balance between the rights of the wronged to seek justice and the rights of all other parties to be shielded from frivolous or meritless litigation.

What they also show is that claims shareholder class actions are the primary driver of rising directors’ and officers’ (D&O) liability insurance costs do not stand up to scrutiny. In the face of sharply falling numbers of shareholder class actions, directors should be asking their insurers why their D&O premiums continue to rise.

Good public policymaking should wait for the impacts of the mid-2020 changes to play out before further regulatory measures are contemplated.

Any further reform of class actions, particularly on returns to members and the continuous disclosure regime, must be based on facts not myths.

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