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# RETHINKING RISK

INSIDE CLASS ACTIONS

A SURVEY ON CORPORATE  
AUSTRALIA AND THE RISKS  
KEEPING THEM UP AT NIGHT

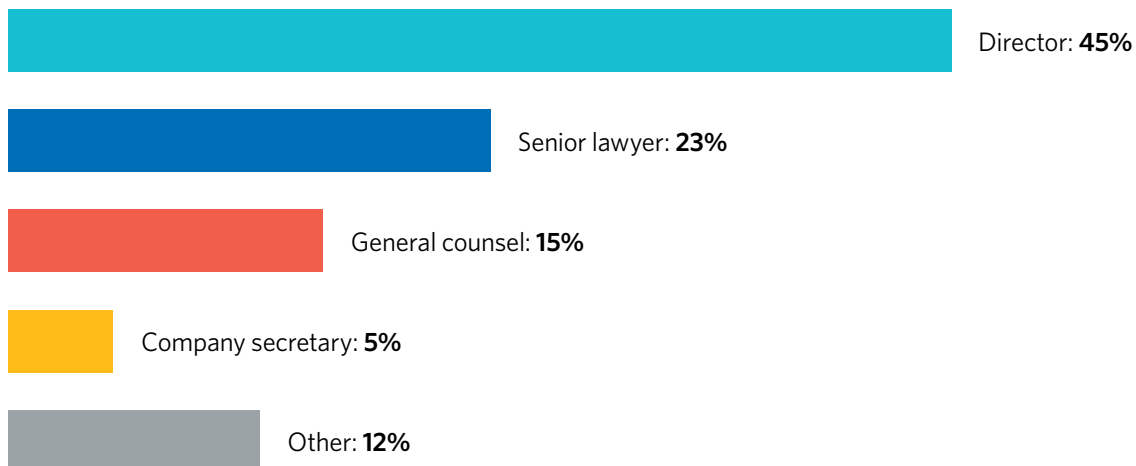


# Navigating Class Action Risk in Australia: A Survey

This report examines the changing environment of class actions in Australia and provides practical steps on how to reduce risk and plan strategically.

To understand the experiences and concerns of corporate Australia, we conducted a survey of the country's leading organisations for their views on class action risk and mitigation plans.

## Our survey participants:



The Australian class action environment continues to evolve. This transformation is driven by a combination of case developments, legislative reforms and the increasing avenues of litigation funding. Class actions continue to be firmly entrenched in the legal landscape, now encompassing a broader range of subjects. These include a variety of employment-related issues, cyber security and privacy claims, and Environmental, Social, and Governance (ESG) matters, all of which are gaining prominence.

Against this backdrop, corporations are confronted with the challenges of navigating the changing terrain and evaluating the effectiveness of their risk mitigation strategies.

In this report we delve into a variety of perspectives on the current state of class actions and how the risks have evolved.

Our survey included participants from a diverse range of sectors, including finance, energy, technology, traditional manufacturing, consumer markets, transportation, healthcare, pharmaceuticals, infrastructure and construction, resources, aged care, government and agriculture.

## Survey participants by sector:



Finance



Technology



Energy, infrastructure  
and resources



Medical



Traditional  
manufacturing



Pharmaceutical



Transport



Consumer  
markets



Other including aged care,  
government, construction  
and agriculture

# Corporate Australia's class action concerns: unveiling perceptions and risk

Our survey leaves no doubt: class actions rank high among the concerns of corporate Australia. But what specifically about class action risk dominates the discussion? And is the perception of this risk evolving?



## 68%

of participants said their level of concern has increased in the past five years

## 55%

of participants are concerned about facing a class action

## 18%

are very concerned about facing a class action

**This level of concern is unsurprising given the number of plaintiff law firms and litigation funders in the market, the broad range of class action subject matter and sectors that experience class action risk and the relatively steady rate of class action filings over recent years.**

Over the last 12 months to 31 December 2023, at least 50 class actions were commenced nationally, filed across the three major jurisdictions (Federal, Victoria and New South Wales) – approximately one new case each week.

While class actions maintain a consistent filing rate, with some fluctuations year to year, there has been a shift in the nature of those claims. Notably, there is a reduced emphasis on financial products and institutions in the post-Royal Commission era, accompanied by a rise in claims relating to government liability, employment and consumer issues.

Later in this report we explore whether this trend is expected to continue.

Participants articulated a heightened concern about facing a class action, a worry that has intensified over the last five years. Although this is our inaugural

survey, participants were asked to retrospectively evaluate their level of concern regarding class action risk five years ago compared to the present day.

The survey results are clear – companies are increasingly concerned about class actions.

The concern is understandable considering the potential for reputational impact, financial risk and the time, cost and uncertainty potentially arising from a class action. However, what might come as a surprise is the heightened level of concern, despite data indicating that the overall number of filings remains steady. This increased concern could be attributed to the anticipated surge of class actions in areas such as privacy, data, employment, ESG and consumer claims, which potentially impact a wide range of sectors.



### Reputational impact



**53%**

Over half of respondents said reputational impact is what concerns them the most about facing a class action

This concern is understandable. A strong corporate reputation, built over time, significantly can be impacted by the commencement of a class action. Unfortunately, negative public perception can develop without any regard to the merits of the case, particularly where serious corporate misconduct or regulatory non-compliance is alleged. Negative perception can erode client and customer trust and investor sentiment, weaken confidence in the company's leadership or cast doubt on its standing as a responsible corporate citizen. These impacts may have long-lasting effects and so managing potential reputational impact is crucial.

### Financial impact



**34%**

Over a third of respondents ranked financial impact as their second highest concern

### What are the main concerns for participants regarding class actions?

Our survey participants provided insightful perspectives into the hierarchy of concerns regarding class actions and proceedings. They identified a variety of concerns, including financial impact, effects on employees, uncertainty about potential issues that might surface during litigation and, for publicly traded companies, impacts on the company's share price.

Surprisingly, concerns surrounding the time, uncertainty and cost of class actions were not as pronounced as expected given the duration of class actions (commonly running for over three years) and the inherent unpredictability of large scale litigation. The lower ranking of these concerns may not indicate "unimportance" but may point to companies being well versed in the realities of defending litigation.

Companies can also take positive steps to be prepared and mitigate some uncertainty by planning ahead and understanding what to do should they be faced with a class action. Concerns also focus on the high reputational impact of defending class action litigation.

# Exploring the major risks

We asked participants about the major risks impacting their organisations. This allowed us to consider how class action risk fits into the broader corporate risk assessment.

**Participants identified their current legal and commercial risks and compared them to their concerns from five years ago:**



## Cyber

Risks relating to cyber security and data integrity including the risk of data leaks or breach, malware attack, and data espionage.

## Financial

Risk of financial loss including credit and liquidity risk, cash flow issues, sovereign risk, accuracy of forecasts and financial reporting.

## Social and governance

Broad spectrum of risks including customer and employee relations, diversity, occupational health and safety, ethical standards and supply chains, regulatory compliance, and corporate governance.

**Assessing risk: Where does the risk lie?**

We asked participants to evaluate various risks from two distinct angles: the operational risk posed to their corporations and the potential for these risks to trigger class action lawsuits.

The findings revealed a unanimous consensus regarding the prominence of cyber, governance and environmental risks.

Existing privacy class actions (including against Optus, Medibank and the investigation into Latitude Financial Services) under the current legislative scheme validate participants’ concerns about cyber risk.

The consensus aligns with the increasing focus on these risks given the Government’s May 2024 indication of legislating changes to the *Privacy Act 1988* (Cth) imminent. The Government has previously expressed

support for significant changes, including a direct right of action for privacy breaches and a statutory tort for serious privacy invasions, both of which could lead to class actions.

While cyber risk was the leading concern, participants were also alive to other business risks that may trigger class action risk.

**ESG risks remains front of mind:**



**Governance risk**

Governance was identified as just one of the operational concerns for companies, yet it ranked as the top risk for class action exposure among corporations.

This sentiment aligns with the prevalence of shareholder claims related to continuous disclosure and other regulatory compliance issues.

It’s noteworthy that, to date, class action plaintiffs have not recovered any damages in the class actions that have proceeded to final judgment. Settlement rates for governance actions remain reasonably high.

Most recently, the Federal Court dismissed a shareholder claim action against the Commonwealth Bank of Australia concerning the risk of regulatory action arising from the Anti-Money Laundering (AML)/Counter-Terrorism Funding (CTF) compliance issues. This Judgment provides useful guidance for defendants facing shareholder class actions, particularly in clarifying the test regarding constructive knowledge and the operation of ASX Listing Rule 3.1. This decision has been appealed and at the time of publishing, an appeal date has not been set.



**Environmental risk**

While environmental risk received high ratings in terms of class action exposure, it ranked mid-field among operational concerns. This sentiment reflects the continued significant continued attention given to the “E” in environmental, social and governance (ESG).

It’s significant to note that class action exposure in this realm is likely to remain elevated. This is primarily due to two factors: firstly, the increasing organisation of activists, whether environmental or shareholder, contributing to heightened awareness and scrutiny of environmental practices. Secondly, corporations face limited agency in mitigating climate change on a broad scale. However, it’s important to highlight that corporations do retain control over their susceptibility to ‘greenwashing’ claims. This presents an opportunity for Boards to proactively manage their exposure in this regard. As explored in our recent ESG Report: *‘Stuck in the Middle? Unlocking ESG Investment in Australia 2024’*, the risk of greenwashing claims necessitates consistent company messaging.

**These concerns have been shaped by factors including increased cyber risk, continuous disclosure obligations, current market conditions and an increased focus by customers and regulators on ESG risk management.**

# A spotlight on cyber: the emerging front line in class actions

Data breaches dominate and the potential for cyber class actions looms large.

Cyber risk emerged as the top concern among class action risk areas. The survey respondents had valid reasons for feeling this way.

As data breaches continue to dominate news coverage, including related issues of investigation privilege and the overlap between the class action proceedings and the Office of the Australian Information Commissioner's (OAIC) role, it is not surprising that a dominant and recurring theme was the risk of cyber class actions.

Whilst Australia is a developing market when it comes to experience with data class actions, it has the hallmarks of many of the features which drive claims in the UK and the US.

Companies are now at a material risk of claims arising from cyber incidents. This is because plaintiff law firms and funders have turned their attention to these incidents, seeking ways to support those affected. There are certain sectors where this will be particularly acute, including the healthcare and insurance industries and government, given the level of personal data held.

Corporations have a limited window to enhance their capabilities before stricter enforcement measures are implemented. The Attorney-General has indicated plans to introduce legislation for some proposed reforms to the *Privacy Act 1988* (Cth) in late 2024. However, it is uncertain whether this draft will include a direct right of action for privacy

breaches and a statutory tort for serious privacy invasions, which would create a clearer pathway to defining group member loss and increase the viability of these types of consumer class actions. These changes received 'in-principle' support from the Australian Federal Government in its September 2023 response to the Privacy Act Review. Given that the Government has confirmed 'agreed' reform proposals will be included in the upcoming legislation, it's wise to anticipate the inclusion of direct rights of action, but this remains to be confirmed.

## Steps you can take now

A company's initial response to a cyber-attack can be crucial to containing legal risk, preventing flow on litigation, and mitigating the company's potential financial exposure if a claim does arise.

Here are three steps you can take now to prepare:



Seek proactive **reviews and assessments** of the current state of the evidence that your company would rely upon if an issue arose and it had to defend itself. Our team can assist with testing the evidence that your company would point to in demonstrating that it is identifying and responding to cyber risks appropriately.



Ensure that appropriate **privilege protocols** are ready to be deployed. Consider preparing a draft privilege protocol in advance to ensure that clear guidance can be followed at the outset by key personnel involved in any initial response to cyber-attacks and work done as a result.



Have a **multi-disciplinary team on standby**. Ensure that your proposed response team includes cyber law experts who will work together with a team of litigators, so that the potential for follow-on litigation risk can be appropriately managed upfront.





## Your thoughts on the key risks:

“

Cyber security is now ahead of financial risks due to increased sophistication of threat actors and prevalence of cyber related security breaches.

”

“

The focus now is on externalities that are harder to manage – eg. environmental and climate risk (although greenwashing is within Board’s control) and cyber.

”

# Active mitigation: corporate Australia's approach to class action risk

We asked participants about the steps companies take to mitigate class action risk.

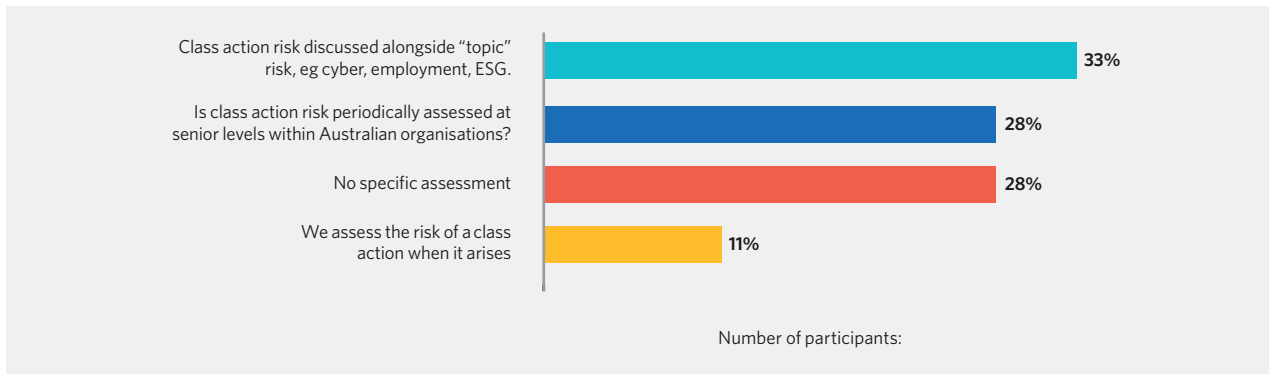
The responses revealed that companies are taking a variety of actions aimed at addressing the underlying 'causes' of class action exposure, eg avoiding cyber incidents or employment issues, having strong corporate governance.

However, our survey findings on this issue indicate that a significant portion of participants either did not conduct a dedicated class actions risk assessment or only briefly discussed it within broader risk conversations.


We recommend that organisations look to whether, based on their specific business and sector risks, a more holistic class action risk assessment is appropriate. A holistic risk assessment should consider factors such as regulator focus, litigation and funding landscape, and business-specific issues such as customer complaints or other 'adverse event' reporting. Litigation preparedness helps an organisation to be in the best position to defend any class action.

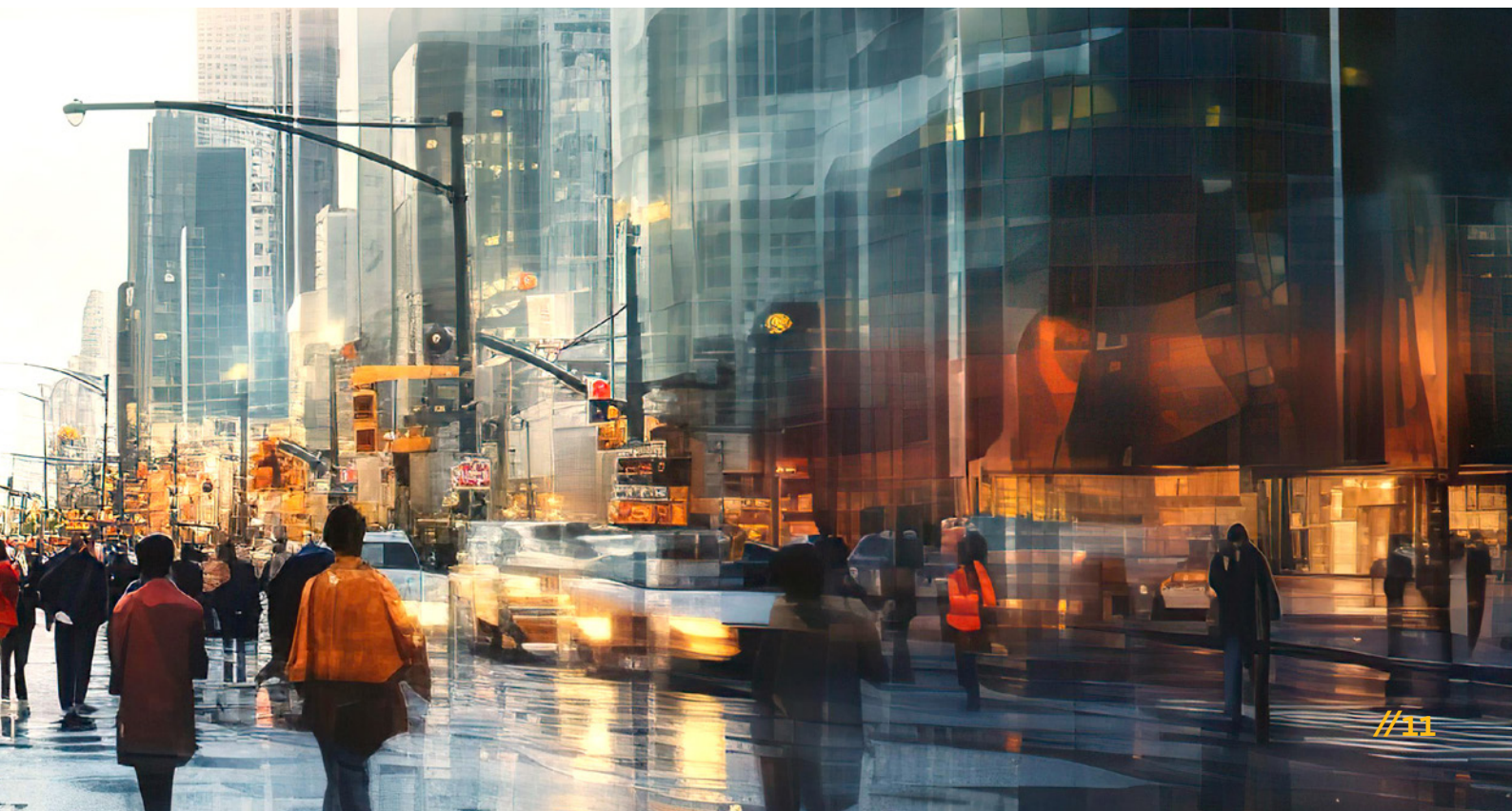


### Class action risk periodically assessed at senior levels of organisation as part of overall risk assessments







### How are our participants managing class action risk?

 New board members with broader experiences Ensuring broad experiences in board composition	 Specialised class actions training	 Significantly heightened focus on safe data management and cyber security	 Board/senior management accountability	 Using expertise of external advisers and service providers where appropriate	 Strategic planning to diversify financials
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# Class action health check: what you need to do now

	Action	Steps	Tick
1	 <p><b>Stay alert to current trends</b></p>	<ul style="list-style-type: none"> <li>• It is not uncommon for class actions to manifest following regulator (eg ACCC, ASIC, AUSTRAC) focus, both within Australia and other jurisdictions (UK, EU, US). Remaining alert to those trends can provide an early warning sign for related class actions at home</li> <li>• Set up systems to track industries, products, and regulator activity relevant to your business</li> <li>• Keep class action risk front of mind in dealings with regulators</li> </ul>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
2	 <p><b>Corporate governance</b></p>	<ul style="list-style-type: none"> <li>• Class action risk can be mitigated, and even avoided, by ensuring that Boards are provided with timely, accurate and fulsome information.</li> <li>• Regularly review and assess the strength of corporate governance structures to ensure transparency and accountability</li> <li>• A significant portion of class actions are brought by shareholders as a result of alleged disclosure deficiency. Timely, tested and informed ASX disclosures supported by a strong disclosure policy is the best defence against shareholder claims. Refresh continuous disclosure policies and practices to stay up to date with the most recent guidance and practices</li> </ul>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
3	 <p><b>Compliance programs</b></p>	<ul style="list-style-type: none"> <li>• Establish or update comprehensive compliance programs that align with current laws and regulations</li> <li>• Conduct regular audits and risk assessments to ensure compliance with industry standards, regulator expectations and legal requirements</li> <li>• Conduct a cyber security and document retention health check. Ensure cyber security systems are robust and fit for purpose</li> </ul>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
4	 <p><b>Proactive risk management</b></p>	<ul style="list-style-type: none"> <li>• Regularly assess potential legal and business risks associated with products, services, or corporate activities</li> <li>• Implement risk mitigation strategies, including by obtaining appropriate insurance coverage</li> <li>• The first 48 hours after a class action threat emerges are critical for how the company faces the litigation. Having a playbook that is tailored to class action risk is central to the company's response plan. Establish a risk management response team with predetermined and understood roles who are ready to mobilise if required</li> </ul>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>

# We can help you

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