

PREDICTED TRENDS IN CLASS ACTIONS BEYOND THE PANDEMIC

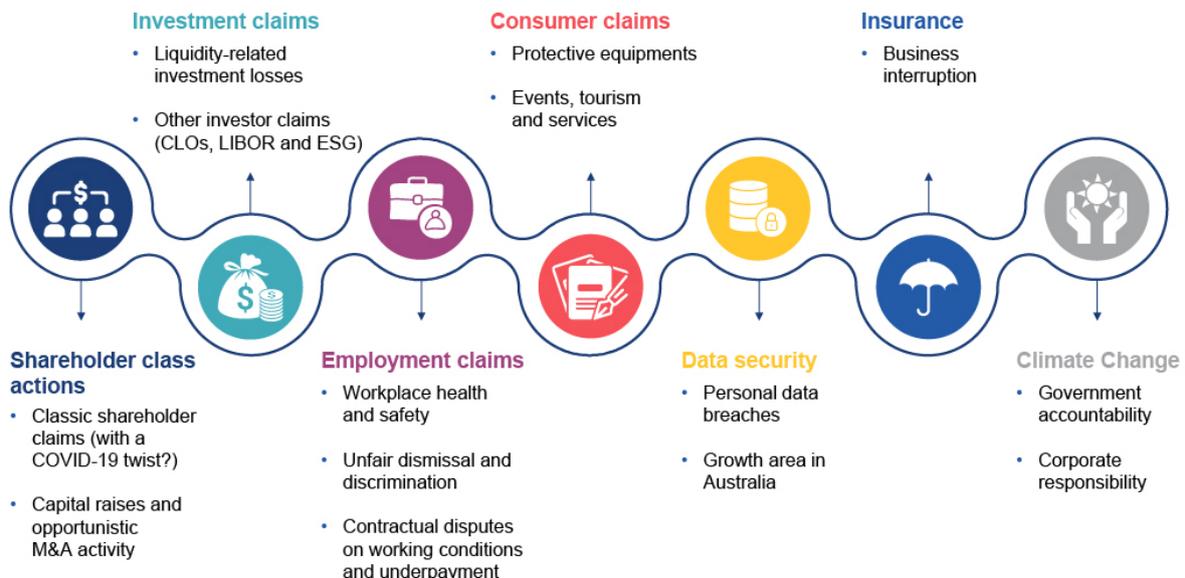
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Legal Briefings - By **Harry Edwards and Dylan O'Keefe**

Covid-19 inevitably raises the prospect of claims but what else is on the class action horizon?

As the economic impact of Covid-19 continues to develop, we can expect promoters of class actions to explore claims which arise from the pandemic - some of these will be in familiar territory, whilst other claim may be novel.

Predicted trends in class actions beyond the pandemic



SHAREHOLDER CLASS ACTIONS

There can be no doubt that the current global pandemic has created turbulent trading conditions and uncertain economic outlooks around Australia and the world, causing both difficulties and opportunities for listed corporates.

'CLASSIC' SHAREHOLDER CLAIMS (WITH A COVID-19 TWIST?)

Board rooms across the country are closely considering shareholder class action risk flowing from their market disclosure obligations and their performance against current forecasts. The recent temporary amendments to Australia's continuous disclosure obligations issued by the federal government have provided some relief. However, the misleading or deceptive conduct provisions (which traditionally form part of shareholder class actions) continue unamended.

CAPITAL RAISES AND OPPORTUNISTIC M&A ACTIVITY

Class action promoters will also be paying particular attention to companies that have raised capital during the crisis to explore whether the disclosures made to the market were accurate and complete, in particular in relation to highlighting risks.

As we progress through the crisis, we may begin to see a rise in M&A activity as those who have survived seek to explore opportunities for inorganic growth. Care will need to be exercised. In the years after 2008, we saw claims relating to the business judgments in respect of merger & acquisition activities pursued in the financial crisis.

INVESTMENT CLAIMS

Turbulent markets can often be a trigger for investor claims as the performance of investments, and the basis on which they were made, are looked at afresh. In addition, market events unrelated to Covid-19 are likely to give rise to losses which are ripe for class actions.

LIQUIDITY-RELATED INVESTMENT LOSSES

As investors seek to withdraw from investment funds in increasingly uncertain market conditions, insufficient liquidity buffers (causing forced sales of less liquid assets) and investment strategies which do not justify management fees, may come into focus and lead to claims. This was another feature of the period following the global financial crisis in 2008/9.

Superannuation funds may be an area of particular focus given early access to superannuation permitted by ATO .

OTHER INVESTOR CLAIMS

Setting aside actions directly related to Covid-19, the rest of 2020 and into 2021 may see investor class actions focussed on stressed asset classes, such as collateralised loan obligations (CLOs) and other securitisations.

Furthermore, the discontinuation of the London Interbank Offered Rate (LIBOR) at the end of 2021 has the potential for significant class action risk from customers who are worse off under replacement rates. For more information on this, see our [FSR Australia Blog](#).

Litigation and regulatory action regarding environmental, social and governance (ESG) indices may also be on the horizon if poor performance causes investors to scrutinise the ESG criteria against which such investments are assessed.

EMPLOYMENT CLAIMS

With economic volatility and government-mandated restrictions affecting industries across the country, employers and businesses have been forced to take drastic measures. These measures may attract:

- workplace health and safety and/or negligence claims in the context of a failure to provide workplaces with effective disease control equipment and for exposing employees to risk of infection;
- dismissal-related claims or discrimination claims in respect of reducing operations, and the needs of employees to take leave or self-isolate; and/or
- contractual claims resulting from variations to employment conditions due Covid-19 restrictions.

Employers will face new challenges in re-opening their businesses amid ongoing Covid-19 risk and ensuring their workplaces remain safe. Underpayment class actions such as the proceedings against Coles and Woolworths were an emerging trend pre-Covid-19 and the workplace disruptions caused by the pandemic may heighten the risk of such claims.

CONSUMER CLAIMS

PROTECTIVE EQUIPMENT

The consumer market for personal protective equipment has grown dramatically in recent months due to health fears and, in the case of face masks in Victoria, government requirements. Manufacturers and retailers of these types of products may face consumer protection claims relating to their marketing representations and their medical efficacy. Similar cases have already been commenced overseas, such as the misrepresentation claims brought in California against Target Corporation in respect of its hand sanitiser.

EVENTS, TOURISM AND SERVICES

Event organisers, tourism companies and other service-industry business may face claims relating to refunds or credits for cancelled events. Separately, claims are possible if such companies proceed with events or remain open to the public in circumstances which gives rise to known infection risk to customers. Australian courts may be asked to examine the tortious duty of care in unprecedented circumstances which may result in novel jurisprudence.

DATA SECURITY

Data security class actions were already a potential growth area in Australia before Covid-19. The widespread collection and use of personal data in commercial contexts has led to a steady increase in data protection litigation, including class actions, in Australia. Increased online activity and reliance on audio-visual platforms to conduct business during Covid-19 may heighten these issues and increase the progress of this trend. Data protection class actions in the US and UK are on the rise and whilst the protection regimes in these jurisdictions differ from Australia, the Australian landscape appears poised to follow.

INSURANCE

As many businesses seek to access their business interruption insurance, the application of common exclusions relating to pandemics and other widespread crises may lead to common issues capable of being addressed by the State and Federal class action regimes. In July 2020, the UK's Financial Authority (FCA) launched a test case to examine of the operation of a number of 'disease and action of competent authorities' clauses in the context of Covid-19. For more on insurance in Australia, see [Covid-19: Governance: Insurance Losses and Considerations for Policyholders \(Australia\)](#).

FURTHER INFORMATION

If you have an interest in discussing the development of class actions, we would be delighted to offer an individual session with your team.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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