RISE IN CLASS ACTIONS CANNOT BE PUT DOWN TO RISE IN CORPORATE MISCONDUCT, SAYS HERBERT SMITH FREEHILLS

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Firm news

An ongoing narrative that the growing frequency of shareholder class actions is a response to an increase in corporate misconduct does not hold water, according to Australia's leading class actions defence law firm.

As the federal government continues its inquiry into Australia's class actions regime, Herbert Smith Freehills is reiterating its call for important reforms to address the incidence of competing or "copycat" class actions against listed Australian entities.

Herbert Smith Freehills partner and class action specialist Jason Betts said the growth of shareholder class actions has been taken very seriously and addressed responsibly by boards and executives of Australian listed entities for many years.

"Australian companies are fully conscious of the rise in shareholder class actions and, especially over the last five years, have developed complex, sophisticated and careful corporate governance protocols to reflect the increasingly challenging regulatory and class action environments in which they operate," Mr Betts said.

"The narrative being put forward by some in our market that the exponential growth in class actions is the result of greater levels of corporate misconduct is nonsensical. There simply has not been a sudden deterioration in the continuous disclosure standards in Australia over recent years that would justify this type of growth. In fact, the opposite is true.

“The growth in class actions has made corporate Australia more conscious of disclosure risk. Boards around the country take their disclosure obligations extremely seriously and do all they can to ensure they are operating in an informed market in a responsible way. Further, if the narrative of more corporate misconduct were true, we would see a commensurate rise in regulatory proceedings alongside class actions, which we have not.

“The well-publicised increase in class action filings is due to the fact that class actions are a profitable enterprise for those that promote them.

“The historical position that most shareholder class actions settle (which is rapidly changing as more corporations look to defend their position at trial) means that class action funding has become a lucrative exercise in this country, particularly across a portfolio of claims, hence the current acute focus on introducing more regulation for funders.

“It is simplistic and wrong to think the recent rise in shareholder class actions in Australia is about providing more access to justice. Increasingly, companies are faced with competing shareholder actions brought by different funders and law firms in respect of the *same* alleged conduct and the *same* group of claimants. Why are multiple class actions necessary when one is enough?

“Competing class actions do not provide more access to justice. They simply demonstrate that we have an oversupply of class actions in the corporate governance space in this country. This phenomenon is only causing delay and wasted costs for companies, shareholders and the insurance industry.

“For businesses and shareholders, class actions are a long and painful process. Class actions are distracting for boards and senior executives who have to provide thousands of documents in discovery and pages of witness evidence to advance their defence in Court. It is easy to see why some companies may have formed the view in the past that settling can be more appealing than continuing to defend the claim to trial, even if the merits are in favour of the company. That is changing. The heavy burden that these actions place on the insurance industry and an increasing appetite within corporate Australia to defend claims right through to trial will eventually disrupt the attractive equation for class action promoters in this country.”

Mr Betts said this procedural imbalance is compounded by the incidence of multiplicity.

“Copycat claims can emerge immediately (that is, two competing claims being filed within days of each other) or in some cases many months after the initial claim is commenced. Typically, substantive steps in the proceedings are placed on hold until multiplicity issues are resolved (and necessarily so in order to provide certainty as to the pleadings and the identity of those prosecuting the claims). The time it takes to resolve multiplicity issues at first instance is significant and can take months if not years.

“Today, as the federal government’s parliamentary inquiry begins its second day of hearings, a number of prominent Australian businesses are facing competing class action claims where only one is required, costing shareholders, corporate Australia and the insurance industry in a time of great economic upheaval. We have proposed reforms to address this issue.”

In a recent report, the Australian Law Reform Commission recommended that, wherever possible, a single class action should be preferred to multiple class actions when litigating claims. However, the current processes for resolving multiplicity can generate uncertainty. Competing class actions are currently resolved through discretionary case management mechanisms of the courts, and the approaches adopted have varied between four or five quite different approaches.

“It is widely accepted that competing class actions increase uncertainty and costs, are causative of delay, result in unnecessary procedural burdens and create prejudice for defendants. There is no doubt that statutory reform is desperately needed.”

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