Class actions are an established and important part of the Australian legal landscape. They are conducted as representative proceedings and there are no restrictions on the persons or entities who may bring them. There is no class certification process and it is not necessary for common issues to predominate. It is an opt out regime, but classes may be defined in a way that is limited to persons who have opted in. Class actions are most frequently brought in the context of securities and investor claims but also arise in product liability, consumer, environmental, natural disaster claims and claims alleging anti-competitive conduct.

The level of class action activity in Australia is being increasingly driven by the entrepreneurial pursuits of both plaintiff law firms and third party funders. This has led to a steady increase in filings over the course of the last decade - although the effect of those entrepreneurial forces is under review by the Australian Law Reform Commission.

What forms of collective actions are permitted in this jurisdiction and under what authority?

Australian class actions are representative proceedings – that is, claims brought by representative plaintiff(s) on behalf of a broader class.

The Federal Court of Australia and Supreme Courts of New South Wales, Victoria and Queensland each have regimes for the bringing of representative proceedings. Those regimes are almost identical in all material respects.¹

Who may bring them?

There are no restrictions on the persons or entities who may bring representative proceedings but any claim must satisfy the following threshold requirements:

> there must be seven or more persons with claims against the same defendant;

> the claims must be in respect of, or arise out of, the same, similar or related circumstances; and

> the claims must give rise to at least one substantial common issue of law or fact.

¹ For more details on class actions in Australia, see Allens’ publications: Class actions in Australia and Shareholder class actions in Australia.
The representative plaintiff(s) are the only class members who are parties to the proceedings. There is an implied requirement that the representative adequately represent the class members’ interests and a court may permit the substitution of a representative who is unable to do so (although this has never been properly tested).

Unlike class actions in the United States, there is no class certification process and it is not necessary for common issues to predominate. A defendant may, however, challenge the constitution of the proceedings as representative proceedings on the basis that the threshold requirements have not been satisfied and/or it would not be effective, efficient or otherwise appropriate for the claims to be dealt with by representative proceedings.

Some regulators are empowered under legislation to bring representative proceedings. For example, the Australian Competition and Consumer Commission is entitled to act as a representative party on behalf of claimants that are consumers; and the Australian Securities and Investments Commission is entitled to act as a representative who is unable to do so (although this has never been properly tested).

The commercial imperatives of third party funders have pushed the boundaries of what is permissible under Australia’s class action regimes. This has become a common example of this is the way in which they have changed the essential nature of many class actions they fund from opt out to opt in cases.

In recent years, funders have sought to further cement their entrenchment in class action proceedings by asking the courts to make orders that would entitle them to receive a funding commission from all class members who participate in a settlement or judgment in an ‘opt out’ claim, rather than only those class members who have signed a funding agreement. Although early attempts were rejected on the basis that they were not in the interests of class members, this approach has been accepted by the Federal Court on qualified terms that, among other things, involve the Court determining on qualified terms that, among other things, involve the Court determining the appropriate funding commission.

The action must satisfy the threshold requirements set out above.

The court has power to grant the usual remedies sought in civil proceedings, including damages, specific performance, declarations and injunctions.

How are such actions funded?

Third party funding is the most common form of funding for Australian class actions. Class actions may also be funded by the representative plaintiff and/or class members themselves, or by lawyers acting on a conditional fee (i.e. ‘no win, no fee’) basis. Lawyers may not, however fund the proceedings in return for the share of any proceeds (although, as discussed below, there is some momentum in favour of the lifting of this prohibition).

A significant factor in the development of the third party funding sector has been Federal Government support for third party funding of class actions as an important means of facilitating access to justice. This has manifested itself through a so-called ‘light touch’ approach to the regulation of third party funders which has resulted in there being very few barriers to entry.

Not only has third party funding resulted in more class actions being commenced, the commercial imperatives of third party funders have pushed the boundaries of what is permissible under Australia’s class action regimes. The most obvious example of this is the way in which they have changed the essential nature of many class actions they fund from opt out to opt in cases.

The role of third party funding in class actions is currently under review. In December 2017, the Federal Attorney General announced an Australian Law Reform Commission inquiry into class actions and third party litigation funders. The aim of the inquiry is ‘to ensure that the costs of [class actions] are appropriate and proportionate and that the interests of plaintiffs and class members are protected.’ It was originally expected that the focus on the inquiry would be on whether, and to what extent class action proceedings and third party funders should be subject
to regulation. It has, however, become clear that the ALRC is engaging in a broader review of the various ways in which entrepreneurial pursuits are affecting the class actions regime. The ALRC delivered its report to Parliament in December 2018, but it has not yet been released to the public.

The acceptance of third party funding has led to increasing calls for the lifting of the prohibition on lawyers charging contingency fees. Lawyers acting in the litigation are the only persons not able to fund the litigation in exchange for a share of the proceeds. In December 2014, the Productivity Commission recommended lifting the prohibition on charging contingency fees by the legal profession, but there have not been any steps taken to implement these recommendations. This issue is also under consideration in the ALRC inquiry mentioned above.

Is pre-trial disclosure available?

In the ordinary course, the parties will be required to give pre-trial ‘discovery’ (akin to disclosure). In some limited circumstances, the class members (i.e. non-parties) have also been ordered to give pre-trial discovery.

Discovery can be a substantial undertaking for class action defendants, who may be required to disclose many thousands of documents. Having regard to the costs of this burden, there has been increasing judicial attention in recent years on attempting to limit the nature and scope of discovery required in large civil proceedings (including class actions), including through the use of technology assisted review.

Likely future scope and development?

Originally, product liability claims were the most likely subject of an Australian class action. In more recent years, however, securities and investor claims have become the most common types of claims. There have also been a number of mass consumer claims, claims alleging anti-competitive conduct and environmental damage, and claims arising from natural disasters such as bushfires and floods.

Despite the so-called ‘perfect storm’ conditions for class actions in Australia, the ‘floodgates’ have not burst open. Class actions have, however, become an increasingly significant and evolved part of the Australian legal landscape and there has been a marked increase in the number of high-profile and high-value claims filed. There is every reason to expect that upward trend to continue.

Aside from the entrenchment of third party funding, there have been a number of other sustained and long-term drivers for the growing significance of class actions in Australia including the following:

> firms other than the traditional plaintiff firms have seen the significant business opportunities this confluence of circumstances has created and have developed plaintiff-focussed class action practices and relationships with third party funders – this is the most significant contributor to increasing class action filings;

> there continues to be a growing focus on corporate governance and the role of private litigation in enforcement – indeed, the heads of some of Australia’s peak regulators have openly endorsed the role that class actions play in enforcement and deterrence; and

> the Australian public is slowly becoming more accustomed (and less suspicious) of class actions and, as a result, participation levels are increasing.

“Despite the so-called ‘perfect storm’ conditions for class actions in Australia, the ‘floodgates’ have not burst open.”