ALL CLASS

Feature

Class actions are on the rise, and listed businesses have an opportunity to take steps now to reduce the risk of one impacting their operations.

By Domini Stuart

There has been talk of an 'explosion' of class actions since 2006, when a High Court ruling legitimised litigation funding. *The Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* case, better known as Fostif's case, effectively endorsed the use of American-style contingency fee agreements in Australia. At first glance, it seems fears of a costly fallout were well-grounded: there were 98 class actions between 2014 and 2018 compared with just 68 in the previous four years.

As Professor Vince Morabito of Monash University points out, however, it took 12 years to exceed the 1998 to 2002 figure of 84 class actions across the period. In his recent report, *An Evidence-Based Approach to Class Action Reform in Australia*, he also debunks the myth Australia's appetite for this form of litigation is second only to the US.

"In Australia, 563 class actions were filed between March 1992 and May 2018 and at least four countries outside the US exceeded that," he says. "Israel, for example, has a population of just over eight million, yet 5,687 cases were filed there between 2007 and 2015."

Explosion or otherwise, class actions are very much a live issue.

"We're seeing increasing sophistication around shareholder class actions from plaintiff law firms and funders," says Ben Allen, a partner in law firm Dentons' dispute resolution and litigation team. "This is definitely sharpening boards' focus on their continuous disclosure obligations."

The breakdown in trust between the public and large organisations is also contributing to the rise in class actions.

"I've no doubt this has fuelled antagonism towards institutions such as banks, churches and aged care facilities, creating an environment where class actions might be able to thrive," says Anthony Tregoning, founder and managing director of corporate communication and investor relations (IR) firm Financial & Corporate Relations.

A matter of disclosure

Many class actions involve a dispute about disclosure.

"Adhering to ASX continuous disclosure rules is always important, but particularly so when there's a development that could have negative consequences for the share price," says Tregoning.

"Companies that don't release such information promptly are opening up opportunities for a class action by investors who buy their shares between the date the information was known and the date it was announced."

Boards also need to consider how material disclosures are worded.

"In the past, companies' announcements tended to focus on the upside," Tregoning continues. "Now it's vital any significant risks are explained. Companies must avoid statements that could be misinterpreted or considered misleading."

This isn't always as straightforward as it sounds.

"Boards might make a decision in good faith on the basis of incomplete information and a gradually unfolding scenario," says Lis Boyce, a partner in Denton's corporate team. "If this is judged retrospectively you could find a court or regulator joins different dots and comes to the conclusion the company should have disclosed more quickly or in a different way."