

What is a class action?

A class action is a legal action taken on behalf of multiple parties, usually a group of individuals. The action seeks compensation for damages relating to the conduct of someone else, usually a company (called the “defendant”).

Often the specific circumstances of just one, or a small number, of the people affected is used in the action to demonstrate the alleged conduct. This person is the “representative” of the class.

Class actions can be instigated in the Federal Court, or the Supreme Courts of NSW, Qld, Vic, Tas and WA.

Some examples of past class actions relevant to financial counselling include those taken against Cash Converters for breaches of State interest rate caps¹, Radio Rentals for breaches of consumer credit disclosure laws and the collection of debts for Robodebt where the Federal Government accepted that the scheme was illegal. All of these class actions settled successfully and many people received sums of money as a result.

Who runs a class action?

Class actions are usually run by lawyers on behalf of the members of the class. Some legal firms specialise in this work.

Who bears the cost of running a class action?

Costs incurred in conducting a class action can be borne by the law firm taking the action or can be funded by a third-party litigation funder.

If the action is successful, the law firm and any third-party litigation funder will seek to recover their costs from any damages awarded as part of the settlement (see next).

Members of the class will usually not be liable for any costs related to the action (unless the members in signing up, have agreed to contribute to the costs, but this is unusual).

What happens if the class action is successful?

If the class action results in damages being awarded by a court, the proceeds are distributed to the members of the class, the lawyers and, if there is one, a litigation funder. This only happens however after the court approves a settlement as being in the best interests of all the class members.

¹ These related to breaches of the law prior to the National Consumer Credit Protection Act.

In approving amounts for distribution, the court considers three things:

- Whether the proposed settlement will result in a fair return to class members;
- What an independent cost expert report says about the reasonableness of the costs and disbursements claimed by the lawyers;
- If a third-party funder has funded the proceedings, what percentage of the pool of funds is a reasonable commission to be paid to it in the circumstances of the case.

The amount the court approves for the lawyers and the litigation funder will not be known until the end of the class action, that is when the court is being asked to approve the terms of settlement

What happens if the class action fails?

If the class action fails, it is possible that the defendant (the other party) will seek to recover their legal costs.

If the class action was funded by a third-party funder, it will be required to pay those costs. Sometimes, the law firm may be required to pay and in some circumstances, some of the costs may fall on the representative applicant/s (but this risk should have been made clear at the outset). Importantly, the other members of the class will not be liable.

How do individuals find out about class actions?

Litigation funders and legal firms proposing to take class actions, or if they think a settlement is likely, may advertise through multiple channels for potential members to come forward. They may also be seeking representative applicants or plaintiffs.

In some cases, lists of potential members may have been obtained from the defendant entity – for example by court order, or by agreement.

Are all class actions the same?

No. Two common differentiating features are:

Closed or open

A class action can be commenced as a closed class or an open class.

A closed class is when the membership of the class is defined by some limiting definition. For example, to be a “group member” or “class member” a person must be signed up with the law firm and/or the funder.

An open class means that membership is open to all those who suffered the loss arising from the alleged conduct of the defendant. In an open class action, class members do not need to do anything until the time comes to register to participate in a settlement. If a person does not register by the specified date, then they will miss out on any distribution from the settlement.

Opt-in or opt-out

Signing up to a closed action means that a person has made a decision to opt-in.

In each of closed and open class actions, class members are given the opportunity to opt-out at some stage. If there is no cost to participating, the only reason to opt-out is if a person wants to sue the defendant personally instead.

Do members of a class action have to be witnesses in court?

No. Members who are not representative applicants are not required to be witnesses or participate in court proceedings. Sometimes, but very rarely, some class members are asked if they are willing to help give evidence but if that happens they will be given the choice whether to help or not.

Can anyone join a class action?

Class actions are defined by the alleged misconduct of the defendant entity resulting in loss to multiple people. There may be other defining characteristics of the action e.g. location. If it is a closed class, a person must agree to a law firm's or funder's terms to join the class. This is not common in consumer class actions. Most consumer class actions are open class actions. That is, they are open to all those who have suffered the alleged misconduct. A person still needs to satisfy the relevant criteria to be a class member, but in an open class action, as noted, they do not need to do anything unless to join the class until a settlement is proposed.

What is the impact of class actions on systemic issues?

Class actions can also play a broader role in addressing systemic issues. They can do this by drawing attention to the systemic failings that led to the misconduct. For some clients, this is also another reason they may wish to be involved. The Robodebt class action is a case in point, because as noted above, this led to the Federal Government admitting that the scheme was operating in breach of the law.

What advice can a financial counsellor provide a client who may be eligible to participate in a class action?

It is critical to check with the lawyers running the case to understand how the case is being funded, and if any costs will be incurred by members. Ask for documentation and review it carefully. There are two scenarios:

- The most likely scenario is that participating as a member in a class action will not require a person to incur any upfront or ongoing costs or be exposed to any cost risk if the action is unsuccessful. On that basis, being involved in a class action holds few risks.
- However, while unusual, sometimes a law firm may request a fee for signing a person up to a class action or require them to contribute to the costs of running the class action. If any cost may be incurred, your client should seek legal advice, or simply decide not to participate.

If there are no costs to participating as a member, your client will be no worse off by being a member and may benefit if there is a settlement. However, there are no guarantees as to whether a class action will be successful, or how much any settlement may be.

As a class member, your client will not be required to and almost never are they asked to participate in any court proceedings. If a class member is asked to play a role in a court proceeding, that will only be with their consent and only after they have been fully informed by the class lawyers about what is expected.

Clients also need to be aware that if they participate in a class action, they will not be able to sue the defendant individually.