

Article Information

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Service: Class Actions, Defence Against Employee Class Actions, Dispute Resolution & Litigation, Employment & Labour, Employment Disputes & Litigation, Franchising, Industrial Relations

McDonald's the latest employer to face potential employee class action - could your organisation be next?

The rise of class actions is well documented in Australia. While shareholder class actions are trending downwards, we are seeing an increasing number of consumer class actions (arising out of, for example, the Hayne Royal Commission) and employment class actions alleging underpayment of wages, including as against employers such as Woolworths, Coles, and now possibly McDonald's facing significant claims by groups of workers.

What are class actions?

Class actions (formally known as representative proceedings) are commenced on behalf of a class of people (at least seven) whose claims arise out of the same, similar or related circumstances, and which give rise to a substantial common question of law or fact. There are class action regimes in both the Federal Court and most state Supreme Courts. Class actions are increasingly being commenced with funding from third party litigation funders, who typically enter into an agreement to bear the financial cost risk of the proceedings in exchange for a share of the amount awarded if the claim is successful, be that through settlement or judgment. From the perspective of employees, third party litigation funding can reduce the barriers which would otherwise prevent employees from commencing proceedings – particularly where the size of claims by individual employees are too small to warrant the cost associated with litigation when proceedings are commenced alone.

Why should I be alert to a potential class action?

Unlike typical employment claims, which are often commenced by an individual, or unions on behalf of their members, employee class actions can be much larger in scale. Employers may face claims by a particular category of existing employees (for example, all casual employees, or all full and part-time employees), or from a group of independent contractors. Given their scale, class actions can be substantially more time consuming, disruptive, complex and costly for employers.

Additionally, although not unique to class actions, many employers are surprised to discover that the Federal Court and Federal Circuit Court are empowered to make any such orders as the Court considers appropriate in claims under the *Fair Work Act*. Commonly, this includes orders requiring an employer to engage a qualified third party to undertake a compliance audit of payments made to a broad group of employees.

What are the key 'risk areas'?

In the employment space, we are seeing an increasing number of claims in the following areas:

- **Sham contracting**

These kinds of claims are brought by workers engaged as independent contractors, who claim that they are employees, and therefore have rights and entitlements associated with employment (for example, minimum wages, leave entitlements and entitlements payable under an applicable industrial instrument such as penalty rates and shift loadings). Significant civil penalties can (and often are) imposed by courts when sham contracting is found to have occurred.

- **Misclassification of casual employees**

This kind of claim is brought by employees who are treated as casual employees, but who assert that their engagement is in reality full-time or part-time (i.e. permanent) employment. Employees who are found to have been misclassified as casual employees, may be entitled to seek compensation for unaccounted leave entitlements, and associated civil penalties may be imposed by the court. These claims are likely to increase, following the Federal Court's decisions concerning labour hire provider Workpac (commonly referred to as the *Skene* and *Rossato* decisions). You can find further information on those decisions from our colleagues: [WorkPac v Rossato - Apparently double-dipping is fine](#), although we note for completeness that the *Rossato* decision is currently the subject of an appeal to the High Court.

- **Underpayments and breaches of industrial instruments**

We are also seeing a rise of class actions in the underpayment space, including a high-profile class action against Woolworths. The Applicants in that action are asserting that Woolworths engaged in underpayments and systemic wage theft, amounting to an estimated alleged underpayment of \$620 million.

Concerning potential breaches of industrial instruments, the Retail and Fast Food Workers Union is currently investigating a class action against McDonald's concerning an alleged failure by McDonald's to provide employees with a 10 minute paid rest break, where employees worked a shift of four hours or more duration.

Finally, given the impact of COVID-19 on workers, many employees will have a greater incentive to commence proceedings, particularly where their employment has been terminated and they are facing increased difficulty in securing alternative work. Given this heightened risk, employers would be well advised to:

- review their compliance with applicable industrial instruments. Do you know the modern award and/or enterprise agreement coverage of your workforce, and their classifications? Are the rates your organisation is paying sufficient? Are employees being provided with the required meal and rest breaks?
- consider whether casual employees are truly 'casual'. Have casuals been given a 'firm advance commitment' of continuing work in the future? How long have they been employed by your organisation and is this likely to change going forward?
- consider the basis upon which independent contractors are engaged, and whether there are risks the engagement is one of employment.

Does your organisation need assistance?

Piper Alderman has extensive experience in both prosecuting and defending class actions.

We can assist your organisation by:

- working with your organisation to identify any potential for employment claims, and particularly areas which may be the subject of a future class action claim;
- providing strategic advice in relation to the rectification of any matters which currently or may in the future, create risks to your organisation; and
- in the unfortunate situation that your organisation is the subject of a class action claim, assist in the representation of your organisation using our extensive experience and knowledge in the area.

If your organisation requires advice on any of the above issues, or if you would like further detail about our capabilities in this area, please contact Martin del Gallego, Ben Motro or another member of Piper Alderman's Employee Class Action team.