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SparkeWatch

What you need to know about D&O risks in Australia

Update on Australian class actions, regulatory and D&O emerging risk trends

December 2025

INTRODUCTION

As corporations and financial institutions navigate a changing regulatory and class action landscape, D&O risks continue to evolve. Insurers, faced with a softer market, are following developments closely. We are pleased to present our annual report for the period 1 July 2024 to 30 June 2025, which includes empirical data on claims together with our analysis and key legal updates.

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CLASS ACTIONS

Class actions are an established feature of the Australian litigation landscape, with low thresholds to bringing claims, a thriving third-party funding market, and the more recent introduction of a contingency fee regime in Victoria.

In the previous edition of SparkeWatch, we identified the following developments in the class actions space:

- A slow-down in shareholder class actions compared with other types of action. In the first half of 2024, there were no new shareholder class actions filed.
- Proceedings brought in late 2023 and the first half of 2024 included those concerned with emerging risks or issues not commonly dealt with in class actions before: environmental, social and governance (ESG) issues (including greenwashing), nuisance, employment (unpaid wages claims), and privacy/data breaches.
- There was a modest increase in class actions filed in Victoria following legislative changes that allowed lawyers to charge contingency fees.

Key developments we have seen in the 12 months to June 2025 included:

The absence of new shareholder class action filings did not last: Four were filed in the six months to 31 December 2024[1], with a total of eight filed between 1 July 2024 and 30 June 2025. 76 class actions of all kinds were filed during the 12 months to 30 June 2025. The vast majority were filed in the Federal Court of Australia, with the Victorian Supreme Court a distant second.

Defendants were successful in most class action judgments delivered: This included the only final trial judgment in a shareholder class action this year.

Relatively low shareholder class action filings, compared with other types of claim: This trend is ongoing from the previous year. While overall class action filings were substantially higher this year than previously, they were 'inflated' by a significant spike in employment class actions relating to a single issue in the health industry (junior doctor remuneration).

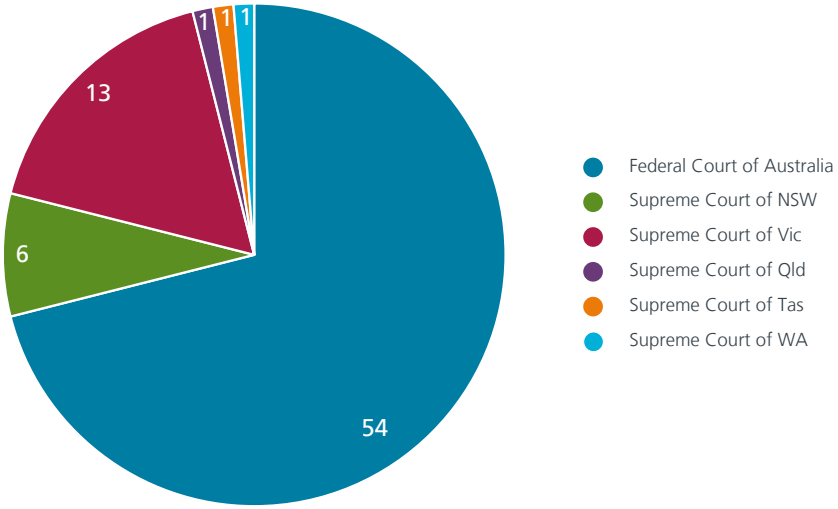
Solicitors' contingency fee orders more limited: In two High Court judgments concerning contingency fees (also known as 'group costs orders' (**GCOs**) or 'solicitors' common fund orders') the Court focused on the legality (or otherwise) of contingency fees under relevant state law. In *Bogan v Estate of Smedley*,[2] the High Court refused a transfer from the Supreme Court of Victoria, where GCOs can be made in favour of solicitors, to New South Wales, where they cannot. In *Kain v R&B Investments*[3] ('Blue Sky', handed down in August 2025), the High Court held that the Federal Court had no power to make a GCO in favour of solicitors who practised in New South Wales, as that would give effect to an agreement contrary to the state's prohibition on contingency fee agreements. Unless legislation changes the position, this means that GCOs can be made in favour of solicitors only where the Victorian law applies.

Ruling on 'soft class closures': The High Court[4] has held that the Supreme Court of New South Wales has power to make orders related to closing a class for the purpose of settlement. This brings the New South Wales Court into line with the position taken by the Federal Court.

Class Action Snapshot: July 2024 – June 2025

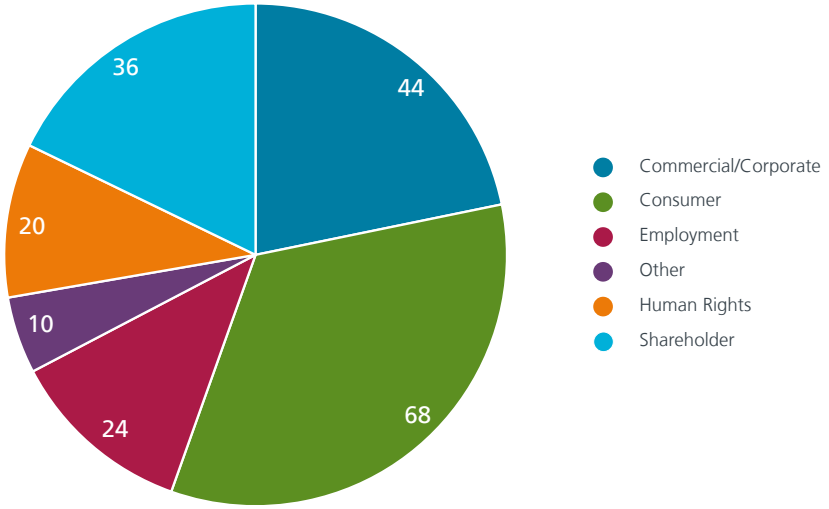
There was an increase in class action filings from 1 July 2024 to 30 June 2025 compared with the year before: at least 76 new filings, increased from 45. Filings were nearly evenly split across the year, with 37 filed between July and December 2024, and a further 39 in the first half of 2025. While higher than in previous years, a significant driver of the increase was a large number of new employment class actions alleging underpayment of junior doctors – each of which was filed by the same firm, although against different employers.

Class actions filed 1 July 2024 to 31 June 2025 (by jurisdiction)



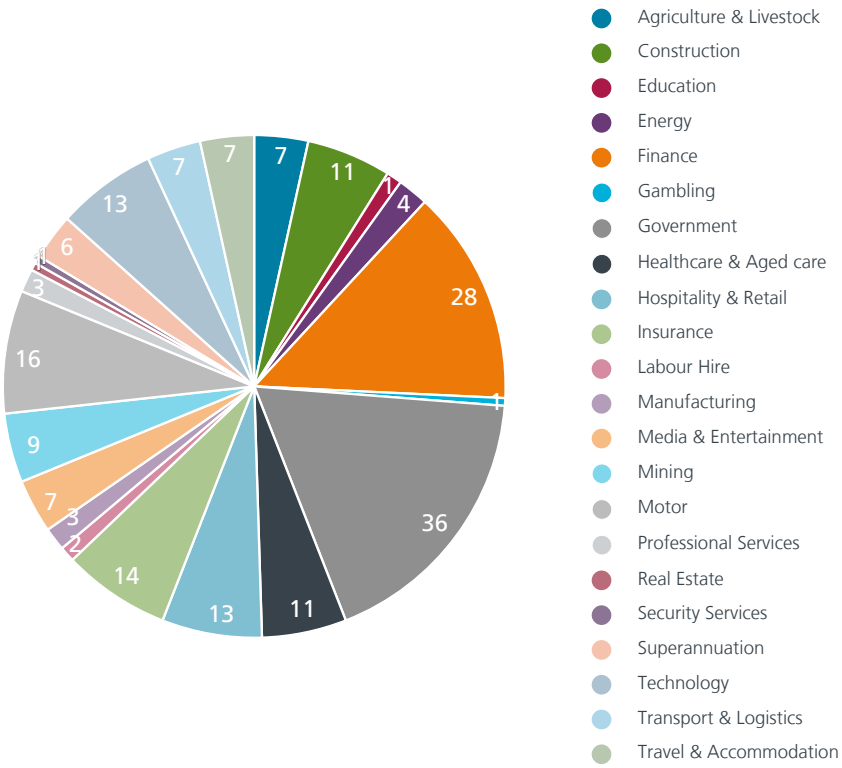
Class plaintiffs continued to prefer the Federal Court of Australia over other jurisdictions. However, following the decision in *Blue Sky*, discussed below, we may see a greater number of actions commenced in Victoria where group costs orders are permissible in favour of solicitors.

Types of claims: active class actions as at 1 July 2025



There is significant ongoing class action activity in Australian courts. By July 2025, there were more than 200 cases (most commenced in prior years) under active case management, awaiting judgment, appeal outcomes or settlement approval, including 36 shareholder claims.

Types of industries: active class actions as at 1 July 2025



Class actions are active across virtually every Australian industry. Claims against financial firms, insurers and superannuation trustees together made up more than 20% of current proceedings.

It has always been possible for claims to be made against directors and officers, including for misleading statements they personally make or as accessories to contraventions by their companies. However, the frequency of current claims against individuals remains low.

Active class actions involving companies and individual D&Os as parties at 1 July 2025

Type	Corporates Only	D&O
Shareholder	30	6
Consumer	64	4
Commercial/Corporate	41	3
Employment	24	0
Human Rights	20	0
Other	10	0

Shareholder Class Action Filing Trends

In our August 2024 edition of SparkeWatch we commented on the diminishing historical hesitation to take shareholder claims to trial. The 'caution to litigate' had prevailed for several decades after class actions were first introduced in Australia in 1992. We observed that:

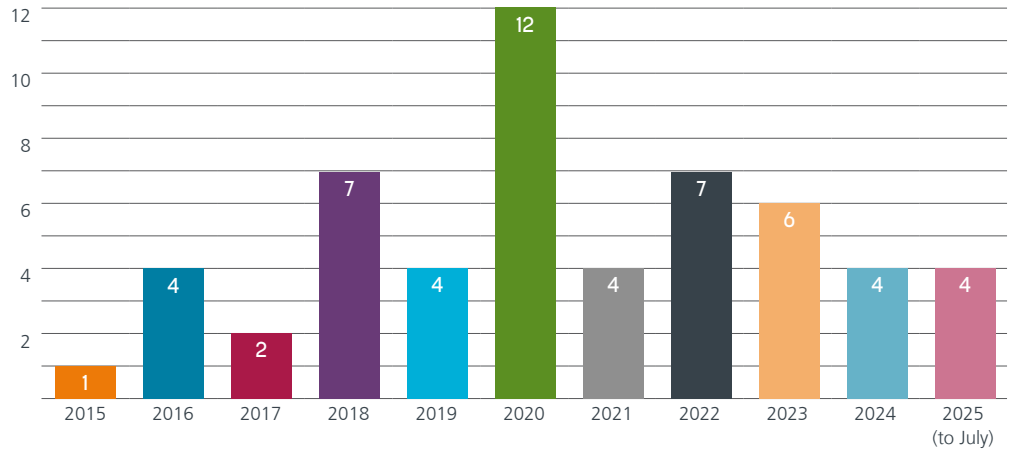
- Influencing the changing appetite to contest matters were the first five consecutive shareholder class actions that proceeded to first instance judgment between 2019 and 2024, all of which secured successful results for listed entities (and their insurers) defending the claims.
- Subject to any appeal outcomes, those decisions demonstrate that a fall in a company's share price does not guarantee a win for group members in a shareholder claim, with nuanced issues of liability, causation, quantum and loss arising in each case.
- The recent losses for applicants may have contributed to a drop in shareholder class action filings, with no filings in the first half of 2024.

We are now seeing an increase towards the shareholder claims activity of earlier years. In the second half of calendar year 2024, four shareholder class actions were filed (three in the Federal Court, and one in the Supreme Court of Victoria) each in distinct industries: hospitality and retail, finance, transport and logistics, and mining. The issues are as follows:

- All cases are centred around alleged failings in market disclosures, misleading or deceptive conduct, and breach of continuous disclosure obligations.[5]
- One case includes additional allegations centred on fraud and accounting irregularities, with two former individual executives[6] and the auditor also named as respondents in that claim.[7]

A further four shareholder claims were filed in the first half of calendar year 2025 in the following industries: energy, mining and finance.[8]

Shareholder class action filings by calendar year



Wins, Losses and Appeals

Trials

Defendants were successful at first instance in most class actions judgments this year. For those delivered between July 2024 and December 2024, there was a strike rate of 5:1 – applicants were successful in one commercial/corporate class action,[9] but lost in three consumer, corporate or product liability actions; one anti-competitive behaviour claim; and one concerning superannuation fees.[10] Defendants won at trial again in the six months to June 2025, including in the only judgment handed down in the period in a shareholder class action.[11]

That case was *Davis v Wilson*,[12] where the applicants had bought shares in Quintis Limited. They alleged they had done so because of misrepresentations made in relation to the company's FY15 and FY16 financial reports. By trial, the only remaining respondents were the managing director and the auditor. The Federal Court held that, while the applicants had partly established their case on liability, they had not proved causation (either direct or market-based).

In J&J Richards Super, a cut-through claim against the insurers of a failed advisory firm,[13] the group members were successful in claiming indemnity under the insurance policy for the directors' breaches of statutory duties.[14] The applicants successfully relied on the *Civil Liability (Third Party Claims against Insurers) Act 2017* (NSW) to claim indemnity under the policy. The Court found the insurer had waived the company's duty to disclose relevant matters because (a) it was aware of potentially further (relevant) information to be obtained arising from answers in the company's proposal form; and (b) decided to bind cover without obtaining the claims circumstances information that would have been required to be provided had the insurer pressed for a completed proposal form. The Court held that the investment activities undertaken by the insured, a professional trustee, were not third party professional services so that the professional services exclusion did not apply.[15]

Appeal activity

In developments since our August 2024 publication, appeals were heard in two of the earlier shareholder class actions that previously resulted in losses to the Applicants:

- In November 2024, the Full Federal Court heard the appeal in the consolidated securities claims against the Commonwealth Bank of Australia (**CBA**).[16] The two class actions piggyback on civil penalty proceedings against the CBA pursued earlier by the Australian Transaction Reports and Analysis Centre (**AUSTRAC**). CBA is alleged to have made misrepresentations to the market and breaches of its continuous disclosure obligations concerning anti-money laundering/counter-terrorism financing (**AML/CTF**) laws and CBA's compliance policies. Judgment in the appeal was delivered on 7 May 2025.[17]
- In March 2025, a further appeal in the *Worley Parsons* class action was heard.[18] The primary judge previously found that Worley had engaged in misleading or deceptive conduct and breached its continuous disclosure obligations in making its FY14 guidance, and had accepted market-based causation, but the Plaintiff had not established that the conduct had caused loss. The Appellant (plaintiff) contends that the primary judge erred in failing to find that the Worley's conduct caused some loss or damage to the Appellant. As at December 2025, judgment is pending.

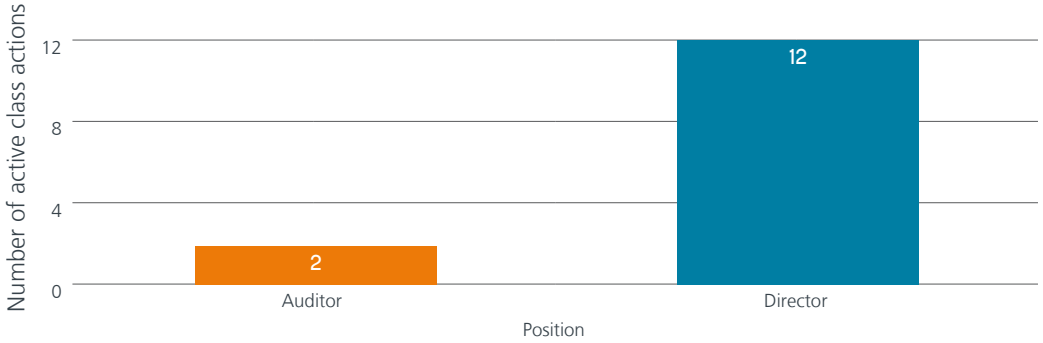
The appeal outcome in *Worley* is likely to provide important guidance on matters of causation and loss in shareholder class actions. In CBA, we had expected the appeal may clarify threshold liability questions around: (a) exceptions to disclosure in the ASX Listing Rules; and (b) materiality of information, had it been generally available, which a reasonable person would expect to influence share price. However, the Court of Appeal concluded that the primary judge erred in concluding that certain forms of the pleaded information were not material, but there was no error shown in the primary judge's conclusion in relation to quantification of loss. As such, the primary judge's orders dismissing the proceedings at first instance remain undisturbed, with the appeal maintaining the track record of successful outcomes for corporate entities/insurers.

Active class actions involving companies and individual D&Os as parties at 30 June 2025

The executive risk – how real is it?

It has always been possible for claims to be made against directors/officers either directly or as accessories to contraventions of companies for which they have key management obligations. Whilst the claims are not frequent, when a D&O is sued as a party, or third-party professional advisers such as auditors, these tend to be high in monetary value. Our review of the data shows that the frequency of current claims against individuals is low. Further, given the fault-based regime, conduct of individual executives can be featured in claims against the entity, without needing to join those individuals personally.

Active Class Actions with D&Os or other individuals involved



The fault-based regime

During the COVID-19 pandemic, to reduce opportunistic securities class actions in difficult trading conditions, a fault element was introduced by the Australian Government into the *Corporations Act 2001* (section 674A(2)(d)) on 14 August 2021. For liability to attach, the plaintiff must establish that a company, or its officers, acted with either **knowledge**, **recklessness** or **negligence** in breaching their continuous disclosure obligations. This is a departure from the prior regime, in which a plaintiff only needed to demonstrate that information requires disclosure if a reasonable person would expect, if it were generally available regime, to have a material effect on the price or value of that entity's securities.

There are several cases pending before the Courts that are expected to involve a determination of liability under the newer regime, including the Ansell class action (in Victoria), and (at least) two regulatory cases filed by ASIC in 2024 (***Magnis***[19] and ***Rex***[20]). The Magnis matter is fixed for a liability hearing in February 2026, and we predict it will be one of the first cases where a Court applies the new regime, such that there is likely to be a determination in a regulatory matter before any shareholder class action on these reforms.

Litigation Funding and Contingency Fees — In SparkeWatch - August 2024 edition we commented on the fact that Australia's well-established third-party litigation funding market, as the traditional source of funding for class actions, was facing competition from plaintiff law firms permitted to charge 'contingency fees' (no win/no fee, where fees are calculated with reference to a judgment or settlement):

- Since 2020, the **State of Victoria** has allowed contingency fees to be charged by law firms in the form of a group cost order (**GCO**).
- In July 2024, a landmark first instance judgment in *Blue Sky* appeared to give the green light for plaintiff law firms to charge contingency fees in class actions in the **Federal Court** for the first time in the form of a solicitors' common fund order (**CFO**).[21]

In November 2024, the High Court of Australia granted special leave to two of the respondents in *Blue Sky* to appeal the Federal Court decision, in which they seek a definitive answer to the question of whether the Federal Court has statutory power[22] to make CFOs in favour of anyone, and if that power extends to making a **Solicitors' CFO**. The latter is somewhat distinct from the GCOs in Victoria which provide for payment of 'legal costs' calculated as a 'percentage of any award or settlement that may be recovered in the proceeding', with the solicitors' CFO being an additional amount of remuneration calculated as a percentage of the settlement or judgment reflecting the risks taken on by the law firm in funding the legal costs and disbursements.

On 6 August 2025, the High Court unanimously allowed the appeal and held that ss 33V and 33Z of the Federal Court Act would not prohibit the making of a CFO at settlement or judgment in favour of a **litigation funder**. However, given the Federal Court exercises power in federal jurisdiction against the background of the scheme of regulation of the legal profession in the state or territory in which the solicitors in the proceeding are practising, the Federal Court has no power to make a solicitors' CFO in New South Wales. That would give effect to an agreement entered into contrary to the prohibition on contingency fee agreements in section 183 of the *Legal Profession Uniform Law* (NSW).

In an earlier case in 2025, *Bogan v Estate of Smedley*,[23] the High Court had refused a transfer from the Supreme Court of Victoria, where GCOs can be made in favour of solicitors, to New South Wales, where they cannot.

We will likely see the impact of these two High Court decisions in the coming months which may result in a change to class action filing trends. Watch out for a swing away from filings in the Federal Court towards the Victorian Supreme Court (at least for those plaintiff firms practising in states other than Victoria).

Victorian update: Contingency fees approved at June 2025

An active plaintiff bar in Victoria?

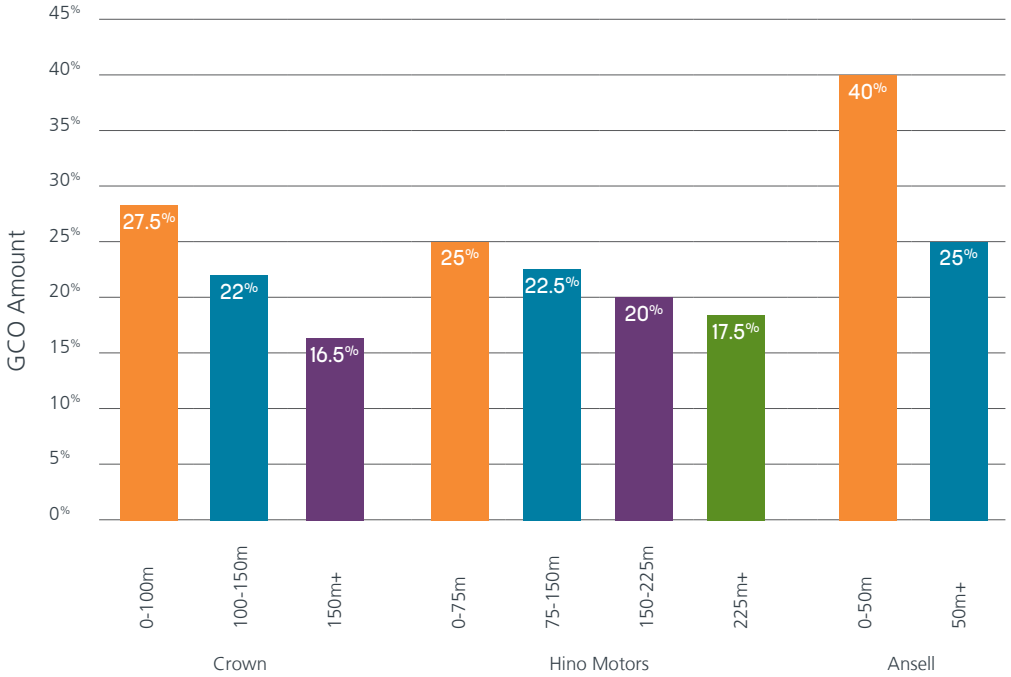
Plaintiff law firms have increasingly filed class actions in the Supreme Court of Victoria since the introduction of GCOs. As reported by Prof. Vince Morabito in his February 2025 analysis of class action litigation,[24] there are at least 29 different law firms that have acted in Victorian class actions since the GCO regime was introduced.[25] Whilst the bulk of claims are heavily weighted towards the traditional class action 'first mover' plaintiff law firms in Australia,[26] there are a diverse spread of firms in pursuit of at least one (or several) class action victories.

Approved contingency fees as at 1 July 2025 (Supreme Court of Victoria)

Date Commenced	Percentage	Is it a shareholder class action	Status
18-Jun-20	24.50%	✗	Settlement approved
14-Aug-20	40%	✓	Active
14-Oct-20	24.50%	✗	Settlement approved
15-Oct-20	24.50%	✗	Settlement approved
02-Nov-20	27.75%	✓	Settlement approved
20-Nov-20	27.50%	✓	Settlement approved
30-Sep-21	25%	✗	Settlement approved
05-Oct-21	24%	✓	Active
25-Nov-21	24.50%	✓	Active
15-Dec-21	24.50%	✓	Settled - awaiting court approval
16-Dec-21	22%	✓	Settlement approved
29-Mar-22	14%	✓	Active
28-Apr-22	30%	✗	Active
29-Jul-22	30%	✓	Active
14-Sep-22	16%	✓	Active
23-Sep-22	0.25%	✗	Settlement approved
17-Apr-23	17.39%	✗	Settlement approved
04-May-23	21%	✓	Active
08-May-23	27.50%	✓	Active
09-Aug-23	Up to $50m: 40%; and over $50m: 25%.	✓	Active
06-Sep-23	27.50%	✓	Active
06-Nov-23	39%	✓	Active
08-Dec-23	30%	✗	Active
28-May-24	27.50%	✗	Active
12-Nov-24	35%	✓	Active
24-Dec-24	33%	✗	Active
26-Feb-25	30%	✓	Active

Tiered Group Costs Orders at June 2025

In the second half of CY2024, the Supreme Court of Victoria ordered a sliding scale GCO for only the third time. The sliding scale GCOs are set out in the table below, where the percentage paid for legal costs is linked to the outcome achieved i.e., as determined by the value of any award or settlement that may be recovered in the proceeding, subject to any further adjustment at the settlement approval or judgment stage.



Rise in Non-Shareholder Class Actions — Filings of non-shareholder class actions were higher than they had ever been in the 12 months to 2025 with consumer actions remaining steady and an increase in employment claims. Discounting employment claims related largely to a single issue (junior doctor pay), the number of non-shareholder claims is closer to (but still more than) the prior year.

Emergence of Data Breach Class Actions — No new class actions were filed in this space in the 12 months to 30 June 2025. The data breach actions relating to the widely publicised Medibank and Optus data breach incidents remained on foot.

In the ***Medibank*** class action, there was an interlocutory decision of the Federal Court[27] which determined that three reports prepared by Deloitte in the wake of the data breach incident were not protected by legal professional privilege. The Court found that other reports, prepared by forensic experts involved in investigating and responding to the breach, met the dominant purpose test and Medibank could maintain their claim for privilege over the reports.

Since July 2025, at least two representative complaints have been made to the Office of the Australian Information Commissioner (**OAIC**):

- against Genea Limited, in respect of a data breach early in 2025 that involved patient data;[28] and
- against Qantas, over a data breach in July 2025 involving millions of customer records.[29]

OAIC representative complaints have previously been made against Medibank and Optus. Under the *Privacy Act 1988*, the OAIC may investigate complaints made on behalf of class members and can make declarations of entitlement to compensation.

Reflections on class action settlement values

Three of the ten largest class action settlements in Australia occurred in the second half of CY 2024. However, the largest (up to July 2025) remained the Black Saturday bushfires settlement of AUD494M in 2014, following the devastating fires in 2019 in the state of Victoria.

Of the larger settlements in 2024, it is notable that one was for several related Uber class actions in Victoria, a junior doctors' class action in NSW, and a stolen wages class action in the Northern Territory. Despite all the hype about commercial and securities claims, the greater risk remains in areas such as consumer protection, employment, and wage-related claims rather than the more entrepreneurial shareholder type claims.[30]

The other large settlements in 2024 and first quarter 2025 ranging from AUD50M to AUD100M were all in consumer protection/investor matters.[31]

REGULATORY RISKS

Companies in Australia, and their directors and officers (D&Os), operate in a complex and challenging regulatory environment. They face substantial legislative compliance measures (which in turn are subject to regular legislative reforms) and are often required to deal with multiple regulators, facing the ongoing prospect of enforcement or prosecution actions.

Regulatory Risks – ASIC

The Australian Securities & Investments Commission (ASIC)

ASIC is Australia's integrated corporate, markets, financial services and consumer credit regulator. It monitors and promotes market integrity and consumer protection in the Australian financial and payments system, including by investigating and where necessary taking enforcement action against corporates and their D&Os.

ASIC's broad mandate, together with the inadequate funding it receives and its internal issues, have resulted in the regulator coming under sustained criticism - as documented in a July 2024 Senate Committee Report,[32] which we explored in the previous edition of SparkeWatch. Scrutiny of ASIC has continued and was further critiqued in a House of Representatives Standing Committee on Economics (**Standing Committee**) report released in March 2025.[33] The Standing Committee were, however, more understanding of the challenges faced by ASIC and legislators appear willing to give ASIC more time to internally reform and deliver on its outcomes.

ASIC's enforcement priorities for 2025

- Misconduct exploiting superannuation savings
- Unscrupulous property investment schemes
- Failures by insurers to deal fairly and in good faith with customers
- Strengthening investigation and prosecution of insider trading
- Business models designed to avoid consumer credit protections
- Misconduct impacting small businesses and their creditors
- Debt management and collection misconduct
- Licensee failures to have adequate cyber-security protections
- Greenwashing and misleading conduct involving ESG claims
- Member services failures in the superannuation sector
- Auditor misconduct
- Used car finance sold to vulnerable consumers by finance providers

ASIC's focus and enforcement priorities for 2025

ASIC's enforcement priorities have evolved to prioritise the increased risks consumers face as a result of cost of living pressures. 'These priorities are about protecting Australians from financial harm and targeting the people who try to take advantage of them', said ASIC Deputy Chair Sarah Court. In practical terms, this has meant renewed focus on consumer credit protections, savings and on what ASIC sees as unscrupulous investment schemes.

ASIC's enduring enforcement priorities also remain, and are largely unchanged. These include misconduct damaging market integrity, misconduct impacting First Nations people, misconduct involving a high risk of significant consumer harm, systemic compliance failures by large financial institutions, new or emerging conduct risks within the financial system and governance and directors' duties failures.

ASIC[34]**:**

Commenced **38 civil proceedings** against 195 defendants

Obtained court orders for **$104.1M** in civil penalties

Issued **16 infringement notices and $5.6M** in infringement penalties

Increased **investigations by 50%**

Notable ASIC enforcement actions, and significant penalties, between 1 July 2024 and 30 June 2025

First proceeding commenced against an Australian financial services licensee for failing to protect its customers from scams.

Three successful civil penalty proceedings for greenwashing, resulting in civil penalties totalling over $30M.

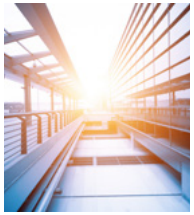
Two significant penalty outcomes in proceedings relating to design and distribution obligations (DDOs), a 2024 enforcement priority, resulting in combined penalties of $16M.

Federal Court fine of $27M to AustralianSuper (a superannuation fund) for failing to have adequate policies and procedures in place to merge multiple accountants.

Two proceedings commenced against trustees of superannuation funds for failing to take action on death benefit claims.

Federal Court penalty of $11.03M for breaching conflicted remuneration rules and inappropriate cookie cutter advice.

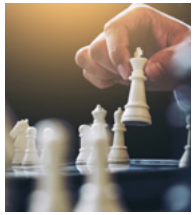
Enforcement trends



Duty of utmost good faith – After losing its first action for breach of the duty of utmost good faith under s 13 of the Insurance *Contracts Act 1984* (Cth)[35] , ASIC has brought a further proceeding alleging a breach of that section. This time, the proceedings are brought against an insurer who ASIC alleges took nearly three and a half years to resolve a home building claim arising from storm damage. ASIC is seeking declarations and a civil penalty.

Anti-scam practices – ASIC has continued its focus on scams by examining the prevention, detection and response processes of 15 banks. The review culminated in a report that was highly uncomplimentary of the industry. Separately, ASIC commenced a Federal Court proceeding against a bank that it alleges failed to put in place adequate systems and processes to prevent significant, widespread or systematic noncompliance with that entities' obligations regarding unauthorised transactions and to put in place adequate controls for the prevention and detection of unauthorised payments. ASIC says that some $23m in customer losses occurred during the time of these inadequate systems and processes. It is seeking declarations, pecuniary penalties, adverse publicity orders and costs.

Cyber security – Cyber risk management and operational resilience remain a focus, with ASIC continuing to make clear that it may take regulatory and enforcement action to drive changes in behaviour. ASIC commenced proceedings against an Australian financial services licensee who it says failed to adopt adequate cyber security measures. The hacking and subsequent release of sensitive client data by the hackers resulted in the disclosure of personal information of some 18,000 clients. ASIC seeks declarations of contraventions, civil penalties and compliance orders against the licensees, and more broadly to send a message to licensees (and others) that appropriate cyber security measures are of critical importance



Internal dispute resolution (IDR) – ASIC published its first IDR insights report in December 2024, assessing how general insurers supported customers through th IDR process. ASIC found that, in one of every six complaints, an insurer failed to even identify that a complaint was being made. Customers also raised broad issues about the handling of their complaints. ASIC has set out the key issues it identified and insurer are expected to act on the findings of the report. It would not be a surprise to see future enforcement action by ASIC in this area.

Crypto – ASIC successfully brought a proceeding against a crypto and digital asset margin lender, establishing that lending money to invest in crypto falls within margin lending laws such that the DDO rules apply. That said, ASIC has had mixed success in other cases where it sought to establish that crypto products were financial products and subject to existing legislation regulating such products.

- With legislative reform necessary, in March 2025 the Treasury released a statement which outlined a proposed framework for the regulation of digital asset platforms, to better mitigate risks for consumers and to allow the sector to innovate and grow, safely and securely.[36]
- Under the proposed framework, digital asset platforms will need to operate under an Australian Financial Services Licence and will face compliance requirements similar to those in traditional financial services. An exposure draft of the legislation which will give effect to this proposed regulatory regime has been released and is under consultation at this time.
- It is anticipated that the proposed regulation will relieve ASIC of the difficulties with effectively enforcing financial services laws on crypto providers operating in grey legal areas.

Regulatory Risks – Other regulators and their jurisdictions

Australian Prudential Regulation Authority (APRA) – Prudential Regulation

APRA supervises institutions across banking, insurance and superannuation, and is the prudential regulator primarily concerned with maintaining the safety and soundness of those institutions.

Operational Risk Management

In the previous edition of SparkeWatch, we noted that APRA's operational risk management regime would come into effect on 1 July 2025. This was primarily through prudential standard CPS 230 Operational Risk Management, which aims to ensure that APRA-regulated entities are resilient to operational risks and disruptions. The transition period in respect of existing contracts will continue to apply 1 July 2026.

In March 2025, APRA further released a proposal for eight key reforms, with a view to strengthening governance, risk management, and compliance processes for banks, insurers, and superannuation trustees. The reforms include stricter requirements for board skills, fitness and propriety, conflicts management, independence, performance reviews, role clarity and director tenure. Finalised Prudential Standards and updated guidance are expected in 2026 with the updated framework to be published in 2027 and proposed implementation in 2028.

Financial Accountability Regime

The Financial Accountability Regime (FAR) establishes a stronger responsibility and accountability framework for entities in the banking, insurance, and superannuation industries, including their directors and senior executives. The FAR aims to improve the risk management and governance practices in Australia's financial institutions.

The regime took effect for banks on 15 March 2024 and extended to insurers and superannuation entities from 15 March 2025.

The FAR has presented a significant challenge for regulated entities and their directors and senior executives, revealing for many that long standing informal governance arrangements are simply no longer fit for purpose, and a deep reconsideration of the boundaries of every individual's responsibilities and sphere of control has been undertaken.

Penalties for breaching the accountability obligations can include a civil penalties of up to 2.5 million penalty units (currently, AU$825,000,000) for the largest institutions. Other enforcement outcomes can include entering into a Court enforceable undertaking, or the issuing of directions to resolve non-compliance. Individuals are also subject to penalties (as discussed in our D&O Risks section below).

Office of the Australian Information Commissioner (OAIC) – Privacy/Cyber

The OAIC is Australia's regulator for privacy and freedom of information. Among its functions, the OAIC manages Australia's notifiable data breach scheme which applies to organisations and agencies and requires them to notify the OAIC when a data breach involving personal information is likely to result in serious harm.

Keeping up to date!

For the latest developments in technology, privacy, artificial intelligence and cyber generally, see our quarterly Sparke Bytes

In 2024, Australia saw significant advancements in both privacy and cyber reform following high profile data breaches and the Australian Government's ambitious goal of being the "*world leader in cyber security by 2030.*"[37] In late 2024, the Australian government passed a suite of significant reforms to Australia's digital legislative and regulatory landscape.

Notable legislative changes include:

Privacy – Review of the Privacy Act 1988 (Cth)

- The **new tort of a serious invasion of privacy** came into force on **10 June 2025**. The tort allows individuals to sue an organisation that has invaded the individual's privacy either through the intrusion upon the individual's seclusion or by misusing the information of that individual. Notably, an individual need not show damages, however non-economic loss is limited to just under $500,000.
- New **civil penalties** for interfering with privacy and a stronger enforcement toolkit for the OAIC.
- A shift from the European formulation of suitable protection standards to "*technical and organisational measures*" (frequently called TOMs). It is no longer enough for entities to think about privacy and cyber security as technical issues - positive steps are required to ensure an entity has suitable policies and training in place.
- There is an obligation that will come into force on 10 December 2026 that requires privacy policies to be updated to include when **automated decision-making** is used in the collection or use of personal information.

Cyber – Australia's first standalone Cyber Security Act 2024

On 29 November 2024, Australia's first standalone *Cyber Security Act 2024* (Cth) became law.

Key measures include:

Mandating **minimum cyber security standards** for smart devices.

An **obligation to report within 72 hours** of making a ransomware or cyber extortion payment.

Establishing a "**Limited Use**" obligation for the National Cyber Security Coordinator to encourage industry engagement with the government following cyber incidents.

Creating a **Cyber Incident Review Board** to evaluate significant cyber incidents and share lessons learned.

OAIC – regulatory priorities

The OAIC has released its regulatory action priorities for 2025-2026, revealing four key areas of focus:

- rebalancing power and information asymmetries in specific sectors and technology
- rights preservation in new and emerging technologies
- strengthening the information governance of the Australian Public Service
- ensuring timely access to government information.

Artificial intelligence – AI regulation is in its early stages, as there is currently no comprehensive legal framework governing the development and use of AI. Industry guidance for the use of AI from the OAIC has already emerged, and with industry consultation in late 2024 focused on the regulation of AI in the context of the Australian Consumer Law (**ACL**), further regulatory reform is a possibility.

Cyber Breach – The risk of a cyber breach continues to grow. Reported data breaches rose 15% in the 2nd half of 2024. With malicious attack up 17% and human error up 10% with human error and social engineering being the likely cause of the recent Qantas breach.[38] And whilst some breaches may not of themselves be dangerous or put users at risk, they can lead to other breaches through 'credential stuffing', where username and password combinations from one attack can lead to another attack.

Australian Transaction Reports and Analysis Centre (AUSTRAC) – AML/CTF

Australian Transaction Reports and Analysis Centre (AUSTRAC) AUSTRAC is Australia's anti-money laundering/counter-terrorism financing (AML/CTF) regulator. It aims to ensure regulated businesses comply with their obligations to have systems and controls in place to manage risks and to protect them and the community from criminal abuse. AUSTRAC regulates more than 17,000 Australian businesses that provide financial, gambling, bullion, remittance and digital currency exchange services

On 7 January 2025, the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024* (Cth) (the **AML/CTF Act**) came into force. From **31 March 2026**, new obligations for current reporting entities apply and new services, industries and entities (including professional service providers, such as accountants and trust and company service providers) will fall within AUSTRAC's remit.

Entities' AML/CTF programs are required to be risk-based and outcome-orientated, rather than compliance-based, meaning entities have to perform appropriate risk assessments, implement suitable policies and appoint fit and proper compliance officers to oversee their AML/CTF programs. With new information gathering powers available to AUSTRAC, entities (particularly those new to AML/CTF obligations) face heightened risk of regulatory action from AUSTRAC.

In recognition of the challenges businesses may face due to the tight timeframe for implementing the AML/CTF legislation, AUSTRAC has committed to providing comprehensive guidance in the second half of 2025 to support businesses prepare for the commencement of the industry reforms and navigate the new regulatory landscape.

Notable AUSTRAC enforcement actions and outcomes between July 2024 and June 2025

16 businesses issued with infringement notices for failing to meet their AML/CTF reporting obligation for the 2023 lodgement period.

Application for civil penalty orders against online betting company for non-compliance with AML/CTF laws.

External auditor appointed for non-bank financier regarding concerns about AML/CTF compliance.

Audits ordered for casino operators to be assessed for their AML/CTF compliance.

Cancellation of crypto ATM operator's registration due to displaying ongoing risks for money laundering (**ML**) and terrorism funding (**TF**).

Conditions placed on crypto ATM operators including $5,000 limit on transactions, mandatory scam warnings, and robust transactions monitoring to ensure responsibilities regarding AML/CTF are met.

External auditor appointed for cross-currency money transfer company due to concerns about AML/CTF compliance.

D&O RISKS

Australian directors and officers are operating in an increasingly complex regulatory environment and continue to face heightened risks of liability. Cyber threats, ESG and legislative reforms continue to present emerging risks, however, the increasing prevalence of insolvencies focussed in certain industries and sectors (including construction, food and beverage and healthcare) provide the greatest threat in 2024-2025 and beyond.

D&O insurers will want to continue to carefully review their policy wordings and consider emerging risks.

Examples of ASIC enforcement actions against individual D&Os in 2024/25

24 individuals prosecuted on criminal charges by the DPP following ASIC referral

19 convictions with 14 custodial sentences imposed

235 individuals prosecuted for strict liability offences

Market Trading Conditions: Insolvency Risk

ASIC's annual insolvency data demonstrates that:

- Between 1 July 2024 and 30 June 2025:
  - **14,722** companies entered external administration in 2024–25, up **33%** from 11,053 companies recorded between 1 July 2023 and 30 June 2024.
  - The ratio of companies entering external administration in the 12 months to 30 June 2025 was 0.41%, compared with 0.33% for the previous 12 months.
  - In the months leading up to 30 June 2025 and since, the number of companies entering external administration appears to be moderating and is now averaging around 1,200 to 1,300 per month, with a decreasing trend observed prior to publication.[39]

The Reserve Bank of Australia considered the rise in insolvencies to be as a result of a combination of '*challenging economic conditions and a catch-up effect from exceptionally low insolvencies during the pandemic*'.[40] Importantly, they considered the threat to financial stability from these insolvencies to not be substantial because '*most insolvent firms are small with little debt, many have a chance of recovery, and indirect effects on financial stability via job losses have been limited*.'[41]

Watch out for:

The spike in insolvency activity may create a corresponding increase in claims activity. Whilst traditionally considered a heightened risk factor for D&Os who may face personal liability for unpaid company debts, class actions, claims of breaches of directors' duties or other breaches, regulatory actions or liquidators' claims, safe harbour defences may be available but remain largely untested in Australia.

Careful attention to policy wording is required to ensure that insurers do not inadvertently cover insolvency risks where that is not intended under the policy.

Australian Taxation Office (ATO) Enforcement Activity: Director Penalty Notices (DPNs)

Individual current and former directors can be personally liable for a company's unpaid tax, superannuation and GST liabilities if these are not paid on time. The ATO can issue DPNs on directors requiring payment of the company's outstanding debts. If this is not paid, the ATO may issue garnishee notices or pursue bankruptcy against individuals to recover amounts unpaid.

As a result of the COVID-19 pandemic and the economic impact of a number of natural disasters in Australia, through the early 2020's the ATO adopted a more lenient approach to payment. During this time, however, the ATO's book grew at a greater rate than the economy – which the ATO considers to be '*out of pattern*'.[42] Collectable debt grew from $26.5 billion as of 30 June 2019 to over $50 billion as of 30 June 2025.

In October 2024, the ATO announced its adoption of a more targeted approach to tax and super collection, declaring its intention to take swifter action in the form of DPNs and garnishee notices for companies which refused to cooperate.[43] The introduction of stricter rules increases the risk for non-compliant companies, potentially posing serious personal financial risks for D&Os who may be held personally responsible for the company's unpaid tax or superannuation.

In the 2024–25 financial year the ATO issued:

- over 84,000 DPNs to individual directors in respect of around 64,000 companies
- over 28,000 businesses an intent to disclose notice, with 24,000 debts ultimately disclosed to credit reporting bureaus
- over 15,000 garnishee notices

Watch out for:

The ATO to continue its robust pursuit of recovering debts post COVID-19 including through DPNs. Insurers should carefully consider the terms of their D&O policies. If there is no intention to cover tax liabilities or penalties, these need to be excluded.

Financial Accountability Regime

Individuals that fail to meet their individual accountability obligations face the possibility of disqualification from acting as an accountable person of any regulated entity in Australia or the reduction of their remuneration.

An accountable person who aids an accountable entity to contravene its accountability obligations can face a civil penalty of at least 5,000 penalty units (currently, $1,650,000).

There are also criminal offences for failing to comply with directions from the Regulators.

Watch out for:

The first disqualifications under FAR took place in October 2025:

- APRA disqualified the former CEO and one other director of a start-up online bank from being or acting as accountable persons of any authorised deposit-taking institution (ADI)
- The disqualifications were based on APRA's findings that such persons failed to comply with their accountability obligations
- The deputy chair of APRA has said: '*The FAR means greater accountability standards for regulated entities, their directors and senior executives, and tougher consequences for when they are not met. APRA recognises that the actions of directors and senior executives shape the conduct and operating culture of the entities they lead. Where accountable persons fall short, APRA will hold them to account*.'

Fault-Based Regime – Securities Claims

As noted in the previous edition of SparkeWatch, the Treasury published their report on their independent review of changes to continuous disclosure laws in May 2024. The Government published their response in August 2024, agreeing to the following substantive recommendations:[44]

- **ASIC enforcement**: In civil proceedings brought by ASIC, removal of the fault element for breaches of continuous disclosure obligations to facilitate efficient enforcement.
- **Private litigants**: Retention of the requirement for private litigants to prove in civil compensation proceedings for a breach of continuous disclosure laws that the disclosing entity acted knowingly, recklessly or negligently. The Government may reconsider retention of the fault element for private litigation based on longer terms impacts on disclosure standards or practices.
- **Attribution of fault to disclosing entity**: Amendment of the Corporations Act to expressly provide how state of mind can be attributed to the entity within the continuous disclosure regime.

Watch for:

On page 9 we have noted the cases currently before the courts that are expected to involve determinations of liability under the new regime. These are eagerly awaited.

Discussion around legislative reform will likely increase after determinations are made in those matters.

Climate change mandatory reporting

Mandatory climate-related financial reporting disclosure commenced for certain large companies from 1 January 2025, with a staged approach meaning the progressively smaller companies will fall within the regime from 1 July 2026 and from 1 July 2027. At this stage there is no intention to extend the regime to companies that have two of the following three features: revenue below $50m; assets below $25m; and/or less than 100 employees.

Companies subject to the regime are required to lodge a 'sustainability report' with their annual financial reports disclosing information about the company's climate-related risks and opportunities. For directors, the obligation through to 31 December 2026 is that they sign a directors' declaration declaring that, in their opinion, the company has taken **reasonable steps** to ensure compliance with the Corporations Act. After 1 January 2027, however, directors will need to make a declaration equivalent to that of the company.

In March 2025 ASIC released Regulatory Guide 280 Sustainability Reporting, which amongst other things, addresses the modified liability settings applying to directors through to 31 December 2027.

Watch for:

How directors adapt to meet their reporting obligations, and the processes that are put in place in the coming years to ensure companies and their D&Os are well placed when the transition periods come to an end.

ENDNOTES

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4. *Lendlease Corp Ltd v Pallas* [2025] HCA 19.
5. Bruce Henderson v Evolution Mining Limited; Mark Laricchia v WiseTech Global Limited; Ramjay Proprietary Limited as trustee for LaborPoint Superannuation Fund v Domino's Pizza Enterprises Limited.
6. Chairman and Managing Director.
7. Edwin Paul Cayzer v Phoslock Environmental Technologies Limited.
8. Scott Byrnes v Origin Energy Limited (ACN 000 051 696); Peter Collens and Gai Collens atf The Collens Superannuation Fund v Mineral Resources Limited (ACN 118 549 910) & Christopher James Ellison; Brydi Pty Ltd (ACN 122 736 501) atf The Brydi Super Fund v Southern Cross Payments Ltd (ACN 075 419 715); Ian Weatherlake atf The Weatherlake Family Trust v Paladin Energy Limited (ACN 061 681 098).
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10. Mallonland Pty Ltd v Advanta Seeds Pty Ltd; Patrice Turner v Bayer Australia Ltd; Kelvin McNickle v Huntsman Chemical Company Australia Pty Ltd; Stillwater Pastoral Company Pty Ltd v Stanwell Corporation Ltd & CS Energy; Mervyn Lawrence Brady v Nulis Nominees (Australia) Ltd in its capacity as trustees of MLC Super Fund.
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22. Under Part IVA of the Federal Court of Australia Act 1976 (Cth) (**FCA Act**).
23. [2025] HCA 7.
24. See Prof. Vince Morabito Department of Business Law and Taxation Monash Business School Monash University, 'Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements' dated 4 February 2025 (**Morabito Report**).
25. See Morabito Report, page 9 and 29.
26. For example, based on the Morabito figures Maurice Blackburn pursued 17 of the class action filings, the Slater & Gordon (S&G) spin off Phi Finney McDonald filed 8 claims, S&G has filed 7, and Banton Group with 6.
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