



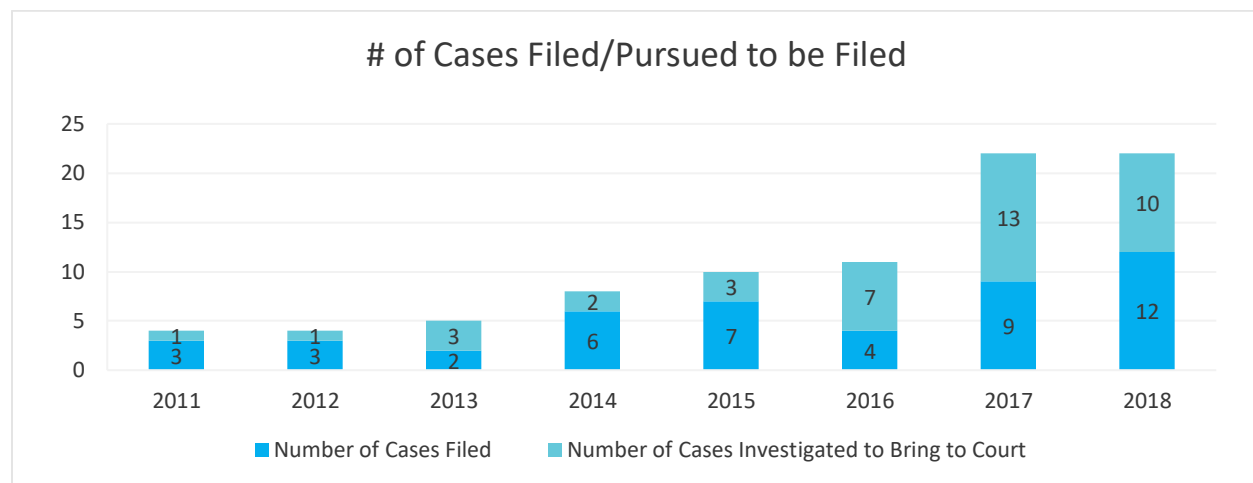
Navigating the Australian Securities Class Action Landscape

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INTRODUCTION

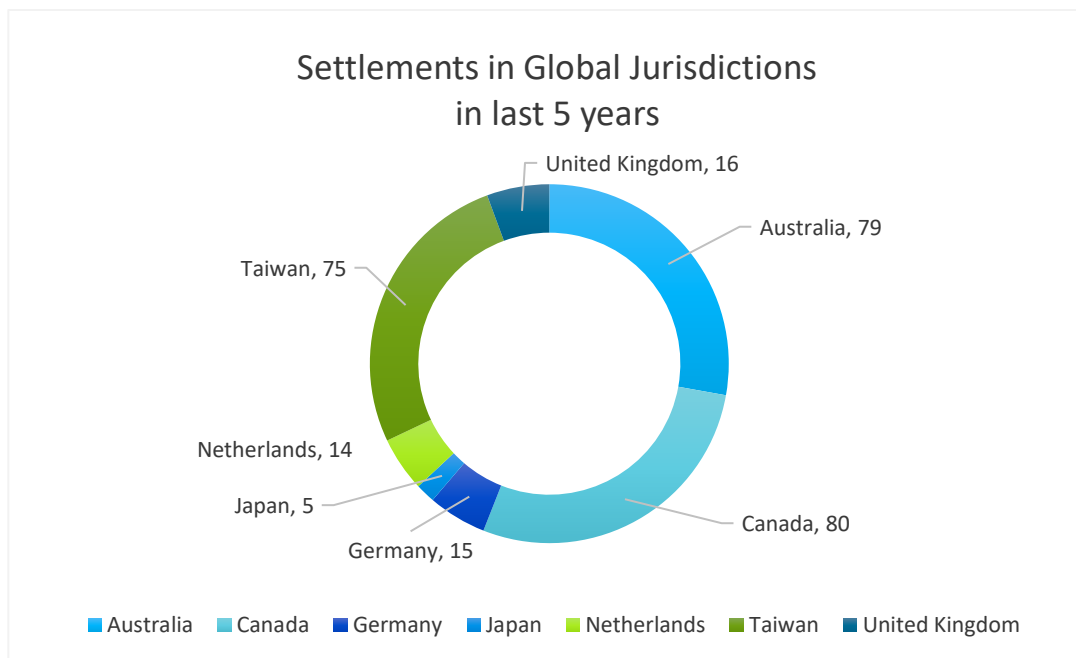
Outside of North America, observers now largely agree that Australia is the jurisdiction in which a corporation is most likely to find itself defending against a class action.¹ Indeed, the number of Australian securities litigation cases has grown markedly in recent years. In 2008, just six (6) cases were filed or investigated to be filed. As of September 2018, and by contrast, twenty-two (22) securities class actions are either being investigated to file or already have been filed in the Courts of Australia with three months remaining before year's end. The chart below illustrates the trend of securities class actions steadily increasing each year from 2011 to the present. It is important to note that some of the "increase" can be attributed to several cases being brought against the same defendant, meaning the number of defendants being sued is not necessarily increasing. However, the trend shows that Australia is pulling ahead of almost all other countries in terms of active securities class action cases before the courts.



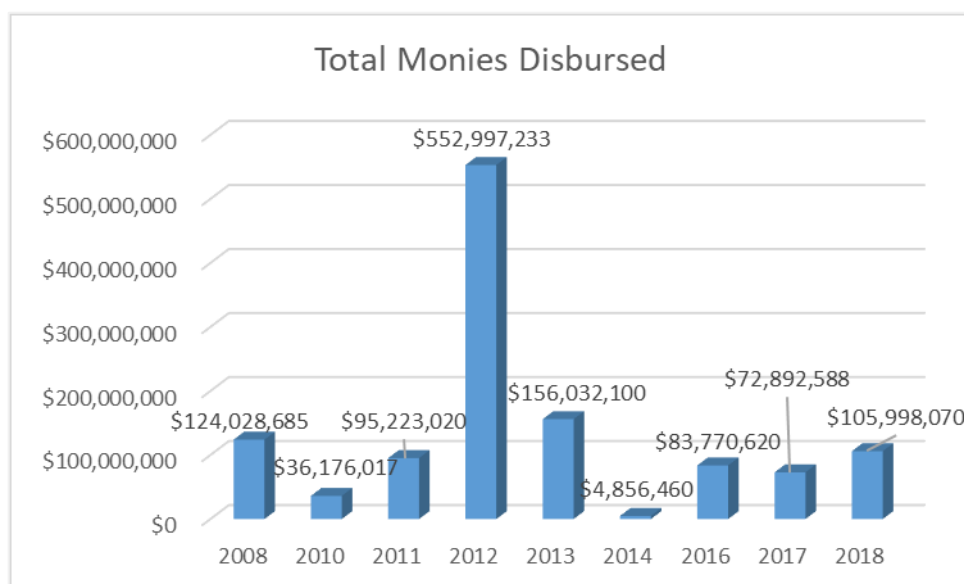
The attraction of Australia as a forum for class actions is largely due to its development as an effective enforcement regime where cases can be brought and settled with significant recoveries being made to shareholders who suffered losses. "Over the last ten years, there has been a rise in the number of shareholder and investor class actions and settlements of securities class actions in Australia have exceeded \$1 billion."² Per ISS Securities Class Action Services (SCAS) research, Australia has almost surpassed Canada in regard to the number of cases filed and settlements reached within the last five (5) years and is now #3 in the world, behind only Canada and the U.S.

¹ Clark, Stuart and Harris, Christina. *The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?* (2008) Melbourne University Law Review 776(32).

² "Class Actions in Australia." *Ashurst*. Ashurst, 9 March 2017. Web. 6 June 2018.



Due to Australia's development as a forum that delivers an effective enforcement regime, there have been many settlements with significant settlement funds. Below is the total amount of monies disbursed for Australian securities class actions over the last ten (10) years.



Given the increased activity, the large settlement amounts, and opportunities to participate in the securities class actions market in Australia, it should be of primary concern to financial institutions and institutional investors to understand the complexities and nuances of this market in comparison to the U.S. system, from which it varies widely in significant areas.

OPT-OUT REGIME – KEY DIFFERENCES FROM THE U.S. OPT-OUT REGIME

Despite the impression that Australia operates as an opt-in regime due to its multiple “closed class” proceedings, The Federal Court of Australia Act 1976 (Cth) (“FCA Act”) was amended in 1992 to introduce representative proceedings as an opt-out regime.¹ This means that similar to the U.S., when a class action is filed, the class or group, as it is termed in Australia, automatically includes all potential claimants who fall within the class definition, and claimants are barred from suing the Defendant individually unless they take affirmative steps to opt-out of the class action. Though it is an opt-out regime, the representative proceedings in Australia differ from the U.S. class action in significant areas: 1) Certification; 2) Common Issues; 3) Costs; and 4) Fees.³ Additionally, the development of representative proceedings along with certain limitations have manifested in key differences between the jurisprudence in Australia and the U.S., such as the rise of the litigation funder, the resultant “closed class” proceedings, and competing claims, which is explained more in depth below.

CERTIFICATION OF A CLASS

By reviewing the differences between the two regimes, investors can take heed of where potential

“The only criteria set out by the FCA Act to commence a “representative proceeding” is that a claim must be brought by seven or more persons, and the claims must be against the same person; the claims must arise out of the same, similar or related circumstances; and there must be a substantial common issue of law or fact.”

issues may need more analysis or attention. The first striking difference between the two regimes is Australia’s approach to the certification issue in comparison to the U.S. approach. The U.S. requires that four threshold matters be met before the action is certified as a class action. Those requirements are numerosity, commonality, typicality, and adequacy.⁴ Numerosity refers to the

requirement that the class of potentially affected claimants have to be so numerous that joinder of all members to an individual litigation would be impracticable.⁴ Commonality means that questions of law or fact is common to the entire class.⁴ The claims of the representatives parties (the lead plaintiff) must be typical of the claims of the entire class, hence typicality.⁴ Finally, the adequacy requirement means that the representative parties will fairly and adequately protect the interests of the class.⁴ In addition, the litigation must fit into at least one of the three following conditions to finally pass muster and be certified: a) the prosecution of separate actions risk inconsistent rulings or establishes incompatible standards of conduct for the defendants; b) the defendants have acted or refused to act on grounds generally applicable to the class; or c) there are common questions of law or fact that predominate over any individual class member’s questions.⁴

By contrast, Australia does not require any certification. The only criteria set out by the FCA Act to commence a “representative proceeding” is that a claim must be brought by seven or more persons,

³ “Article: Overview of the Class Action Regime in Australia.” *Quinn Emanuel Trial Lawyers*. Quinn Emanuel Urquhart & Sullivan, LLP. 2018 Web. 6 June 2018.

⁴ *U.S. Federal Rules of Civil Procedure*, Rule 23.

and the claims must be against the same person; the claims must arise out of the same, similar or related circumstances; and there must be a substantial common issue of law or fact.⁵ Because the criteria in Australia to initiate a representative proceeding is not very hard to meet, “some claims have been commenced on little more than a wing and a prayer.”⁶ Supporters of the current statute would point out that the absence of a certification requirement affords injured shareholders the opportunity to prosecute meritorious claims while still allowing defendants the opportunity to seek intervention during the proceeding if they feel the litigation does not comply with pleading requirements. However, this could leave the court mired in interlocutory applications that increases the cost and delay involved in representative proceedings.⁶ Many of the issues that are the subject of the interlocutory applications deal with questions that are akin to issues examined and settled under the equivalent U.S. certification procedure at the very onset of litigation.⁶ This difference impacts the length of time it takes to bring a case to settlement. Because these issues are settled before the class action can even be certified in the U.S., it leads to the litigation, once the class has been certified, to settle or conclude more quickly compared to the Australian class action regime where these preliminary issues can pop up intermittently as the case proceeds.

COMMON ISSUES VS. SAME, SIMILAR, OR RELATED CIRCUMSTANCES

The next point of distinction is common issues, referenced as commonality and typicality under the certification process in the U.S. Where the U.S. system requires that the questions of law or fact are common to the entire class and the type of claim is typical to all the potential claimants, Australia only requires that the claims arise out of the same, similar, or related circumstances. The U.S. system requires that the common questions of law or fact predominate over individual issues. This means the resolution of the class action should resolve all the claims by the individual claimants simultaneously in the U.S. In Australia, this predominance of commonality and typicality is not required. “[E]ven if the representative applicant succeeds in relation to some or all common issues, individual trials are nevertheless necessary to resolve major elements of group members’ claims, including establishing the element of causation, the need to establish individual reliance, and calculating loss and damage.”⁷ Because individual claims can be litigated as part of the greater representative proceeding results in cases being litigated for many years past the point of when common questions of law or fact have been answered.⁷ Due to this reality, many Australian law firms and their funding counterparts advise that claimants register their claims with one of these entities to represent them. For example, Phi Finney McDonald addresses this in its Frequently Asked Questions publication. The question is “Do I have to sign a funding agreement to “join” the class action?” One of the listed reasons the law firm gives for signing a funding agreement is

[T]he initial trial in a class action will usually only determine the Representative’s claim and the common issues. Issues specific to your individual claims, such as whether you suffered loss and the value of the loss, will not be determined in the initial trial. It may be that further steps will then need to be taken in order to pursue your individual

⁵ *Federal Court of Australia Act 1976 (Cth)*, Section 33C

⁶ Saville, Moira and Peta Stevenson, *Ripe for Reform: Improving the Australian Class Action Regime*. U.S. Chamber Institute for Legal Reform, March 2014: 1-47.

⁷ Saville, Moira and Peta Stevenson, *Ripe for Reform: Improving the Australian Class Action Regime*. U.S. Chamber Institute for Legal Reform, March 2014: 1-47, pg. 12.

damages. This could include a court hearing at which your individual damages are determined. By signing a Funding Agreement, you will secure the Funder's funding at the agreed commission rates that cover not only the initial trial in the class action, but also any additional steps that may be needed to advance your individual claims.

They propose that the individual or unique aspects of the claimant's claim can be pursued in the representative proceeding but only if the claimant has actual representation. In the U.S., there is no need to have individual representation during the trial or settlement negotiations because all common issues of fact and law are settled for each plaintiff simultaneously and the court does not go beyond these threshold issues into individual issues as they do in Australia. This lends another aspect of economy to the U.S. class action regime whereas class action cases litigated in Australia can last anywhere from 3 to 5 years.⁶

COSTS AND FEES

The U.S. and Australia regimes also vary widely with respect to the costs and fees of the litigation and who is responsible for those costs. The U.S. puts the burden of costs on each respective party, meaning the plaintiff must pay for their litigation costs and the defendant must pay their respective litigation costs to defend against the action. The winning party does have an opportunity to request that the attorneys' fees be paid by the other party, but it is seldom awarded unless the requesting party can show some connection to the litigation being longer or more burdensome than normal due to the losing party's actions. In Australia, in contrast, it is standard to have an adverse costs order where the unsuccessful party must pay the costs of the successful party in the action. Additionally, in the U.S., it is common practice that the attorneys can work a case on a contingency basis, meaning "an agreement between a lawyer and client which provides for the lawyer to receive an agreed proportion or share of any judgment or settlement."⁸ Usually the percentage is anywhere from one-third to one-half of the recovery. In Australia, lawyers are prohibited from entering into retainer agreements that impose contingency fees.⁸ This and other restrictions on lawyers acting on behalf of plaintiffs have given rise to the litigation funding structure that is so prevalent today.⁸ The litigation funders are not subject to any restriction in pursuing a contingency fee type arrangement. "The litigation funding mechanism is relatively straightforward. A non-lawyer or corporation, the 'promoter', identifies a potential claim and then enters into agreements with potential applicants."⁸ Under these agreements, the funder receives a percentage of the recovery, typically between one-third and two-thirds of the proceeds, in exchange for providing the legal costs and expenses of running the class action, as well as agreeing to meet any adverse costs order against the representative applicant, or supplying security for these adverse costs.⁶ Thus, due to the restriction against contingency fees, the contingency arrangement has been pushed over to the litigation funder so that Australian class actions can still proceed and provide access to justice for many that could not afford litigation expenses on his own.

On a related note about fees, Australian attorneys cannot charge a contingency fee but Australian law does provide that a lawyer can take their 'normal' fee plus an agreed 'uplift' fee.⁸ These additional fees or "uplift fees" can only be collected if the client succeeds, i.e. there is a recovery on behalf of the client. These fees are distinct and separate from the commission collected by the funder and should be

⁸ Clark, Stuart and Harris, Christina. *The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?* (2008) Melbourne University Law Review 776(32), pgs. 783, 788.

considered alongside the commission the funder is proposing when determining with which law firm/funder combination to register claims.

CONSEQUENCES OF THE RISE OF THE LITIGATION FUNDER

The rise of the litigation funding arrangement in Australia also had consequences on the regime that created further differences between the U.S. and Australian proceedings. With the rise of the litigation funder came the rise of the “closed class” proceedings that ensured that “free riders” could not join in the recoveries of these proceedings. “Free riders” were claimants that, due to the opt-out nature of the regime, could wait until the common issues were settled and then register their claims without retaining the representative applicant’s lawyers or entering an agreement with a litigation funder.⁹ This essentially meant that some claimants were bound by their agreements with the funder to pay for the litigation through the commission mechanism whereas these other claimants were not bound to give over any percentage of their recovery towards the costs of the litigation. In reaction to this perceived unfairness, litigation funders and plaintiff lawyers made attempts to limit or close the class so as to exclude the so-called “free riders.”⁸ Hence, the “closed class” litigations began. Justice Beach explains, “The closed class mechanism has been encouraged if not required by external litigation funders to avoid ‘free riders’ and to inject more certainty into case specific funding models.”⁹ Basically a “closed class” litigation mandates that only those claimants that have signed funding agreements with a specific funder and retainer agreements with a specific law firm will be allowed to participate in the class action they are pursuing. Despite initial conflict about using these in contravention of the aims of the opt-out regime, the Full Federal Court has held that “it is permissible to restrict the group to those who enter a funding arrangement with a particular litigation funder (and/or those represented by a particular firm of solicitors) PRIOR to commencement of proceedings, as this does not offend the ‘opt out’ nature of Part IVA.”⁸ (emphasis added). This practice effectively flip-flopped the opt-out regime into an opt-in regime and gives power to the law firms and funders who can decide to litigate the class action from the onset as an “open class” or “closed class.”

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A TURN TOWARDS COMMON FUND ORDERS

The option to file class actions as a “closed class” from the onset had rippling effects on the class action jurisprudence, particularly in the

areas of common fund orders and competing class actions. In recent years, the courts have applied common fund orders or funding equalization orders to encourage litigants to proceed with “open class” proceedings more in line with the objectives of the opt-out regime. A funding equalization order works by deducting the amount that would have been paid to a funder by unfunded group members and redistributing that amount pro rata among all group members, meaning the funder does not collect more, but the funded group members are “reimbursed” somewhat for a portion of the commission they will have paid to the funder out of their recovery. In contrast, a common fund order directs that all

⁹ Beach, Justice Jonathan. “Structural and Forensic Developments in Securities Litigation.” International Commercial Law Conference (Inner Temple, Inns of Court, London), June, 2016, pg. 1.

group members, regardless of whether they have entered into a funding agreement, pay a funding commission to the litigation funder. In this scenario, the funder ultimately collects a commission from all recoveries, although in many cases, the court will lower the commission percentage across the board so that the funder does not benefit unfairly. The push towards this new trend came from the applicant in the *Money Max Int Pty Limited (Trustee) v. QBE Insurance Group Limited* (“QBE”) case. In 2016, the applicant requested the court to make a “common fund” order to level the field in terms of funded group members versus unfunded group members. Brooke Dellavedova, a principal lawyer of Maurice Blackburn, the law firm representing the lead applicant in the *Money Max Int Pty Limited (Trustee) v. QBE Insurance Group Limited* (“QBE”) action elucidated:

The Applicant sought a common fund order in the action against QBE for several reasons. First, it is fair and in the interests of all group members that express arrangements be made as to how any recovery is to be divided between funded and unfunded group members. The best and simplest approach is for all group members to pay the same amount of commission to the funder if they want to benefit from the class action. Secondly, it makes sense for these arrangements to be made early in the proceeding (rather than at the time of application for settlement approval), so that all group members can consider the proposed arrangement, and take it into account in deciding whether to opt out or remain in the class action. Thirdly, the orders are consistent with the aims of the class actions regime, providing a means by which “open class” proceedings can be used as a viable practical alternative to “closed class” proceedings. (B. Dellavedova, personal communication, July 19, 2018).

Justices Murphy, Gleeson and Beach agreed with the applicant’s sentiments and wrote in the Order, “[I]t is worth observing that a common fund approach to litigation funding charges and legal costs is consistent with the aims of Part IVA. A common fund approach may be said to enhance access to justice by encouraging “open class” representative proceedings as a practical alternative to the “closed class” representative proceedings which are prevalent in funded shareholder class actions.”¹⁰ The Justices expanded on this thought and stated “Further, by encouraging open class proceedings, a common fund approach may reduce the prospect of overlapping or competing class actions and reduce the multiplicity of actions that sometimes occurs with class actions.”¹⁰

COMPETING CLASS ACTIONS

Although the Justices in QBE thought the common fund orders would reduce the multiplicity of actions or competing class actions, they seem to have had the opposite effect. The trend for competing class actions appears to be on the rise in Australia, instead of on the decline, and it is perhaps the most distinguishing factor between the Australian and U.S. class action regime. The U.S., under 28 U.S.C. 1407(a) allows that cases should be consolidated if they cover the same set of facts or questions of law; Australia does not have the same codification or mandate of consolidation, which has led to a variety of competing class action scenarios. The first is directly competing class actions in which actions are

¹⁰ *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Limited* [2016] FCAFC 148, 14.

commenced on behalf of the same class of claimants in respect of the same legal dispute.¹¹ This creates a “race” between the law firms of who will file first and can lead to a scenario where group members are

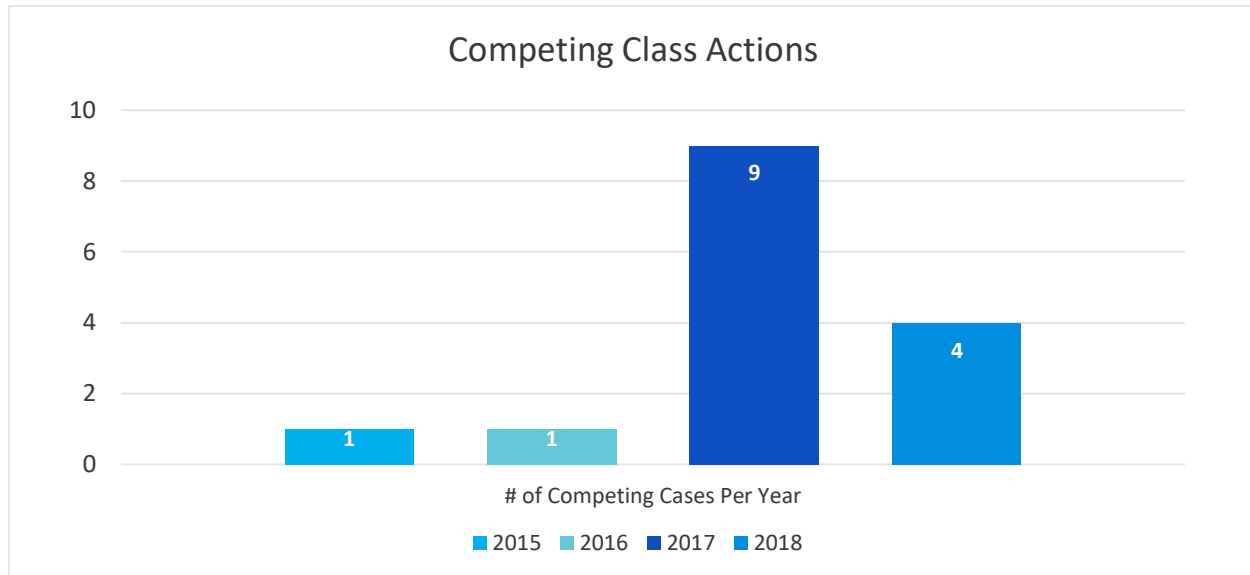
“This potentially means the defendant has to defend itself against the same types of claims twice and that group members would get a windfall, as they could receive payment from each of the competing actions.”

identical for each representative proceeding, if filed on an open class basis.¹¹ This potentially means the defendant has to defend itself against the same types of claims twice and that group members would get a windfall, as they could receive payment from each of the competing actions. This dilemma has occurred in

Nufarm, *OZ Minerals*, *Leighton Holdings* and *Treasury Wine Estates*, and more recently with *Quintis Limited* where Gadens and Bannister Law have competing claims and the courts had to devise a solution to allow all group members to participate on the one hand, but to prevent shareholders from being able to participate in more than one proceeding for the same underlying claims.

Another competing class action scenario is termed “remaindering.”¹¹ This occurs where one action is filed as a closed class action so that only certain claimants are considered group members. Later, another law firm/funder will file an action seeking to represent the remaining claimants that did not sign up for the closed class action. An example of this occurring was with the three class actions against Centro Group. Maurice Blackburn, a law firm, commenced two closed class actions and two years later, Slater & Gordon, another law firm, commenced an action on an open-class basis but defined the class by excluding those group members already participating in the Kirby class actions (the closed class actions brought by Maurice Blackburn). A more recent example of this scenario is the Commonwealth Bank of Australia litigation where Phi Finney McDonald is proposing to pursue this as a closed class action whereas Maurice Blackburn is pursuing the litigation on an open class basis.

¹¹ Saville, Moira and Peta Stevenson, *Ripe for Reform: Improving the Australian Class Action Regime*. U.S. Chamber Institute for Legal Reform, March 2014: 1-47, 21.



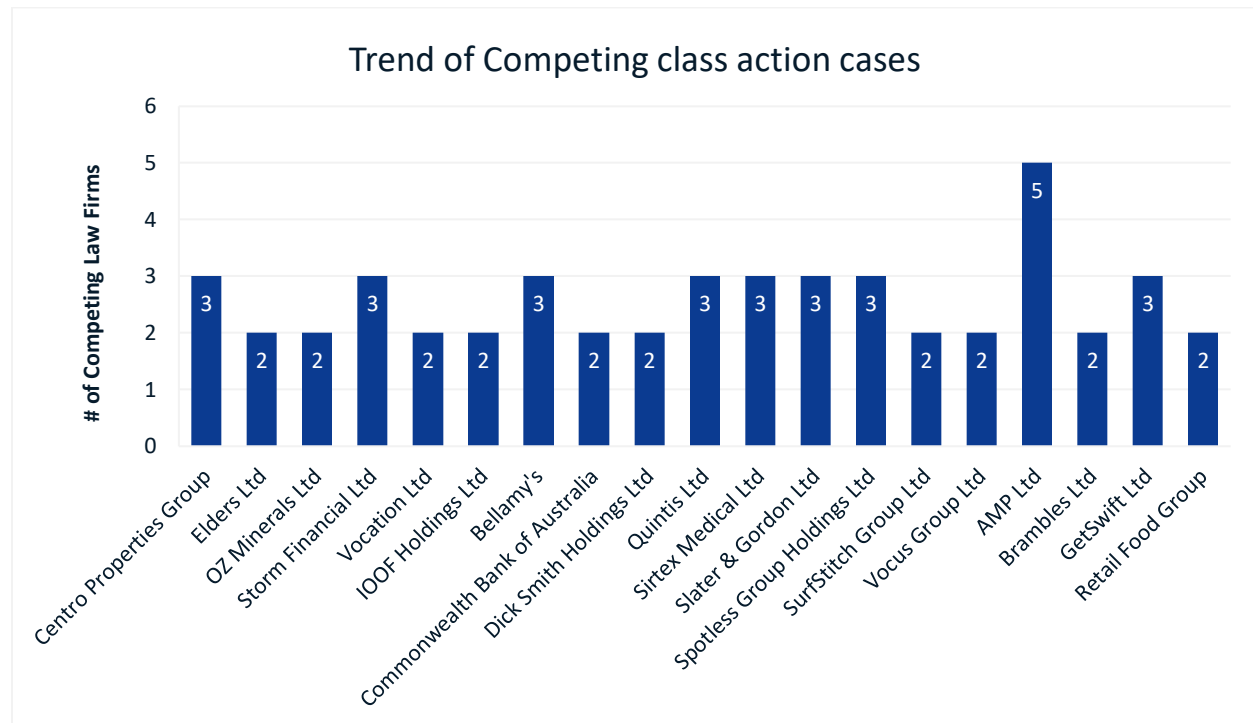
Because there is no codification of consolidating competing cases, and because this is a fairly new area for the Australian courts to encounter, there are no set precedents and the judges have had to make orders regarding these competing cases as they come up. The Court has general powers under which it can order that proceedings be consolidated, heard together, heard immediately after one another or stayed until the determination of any one of the other proceedings.¹² The courts have taken a variety of positions in competing class actions, but the trend is that they are allowing the competing cases to proceed. Hence, the group member with potential eligibility faces the dilemma of having to choose between competing class actions and on what criteria should that choice be made.

In the recent Bellamy's action, there were two competing cases, both being pursued on an open class basis. During the litigation and to manage the competing classes by allowing both to proceed, the court ordered that the Basil action being pursued by Maurice Blackburn would be converted into a closed class action and that the McKay action being pursued by Slater & Gordon would remain an open action. This meant in reality that the group members of the Basil action were effectively group members of both actions. A notice was sent out that the group members of the Basil action would have to choose to remain either a group member in the closed class action or to opt out of that action and become only a member of the McKay action. The request that either action be stayed was denied and both cases were allowed to continue. In contrast, in the recent GetSwift Limited action, three separate law firms were pursuing three competing class actions as of May 2018. Squire Patton Boggs, one of the law firms pursuing a case against GetSwift wrote "On 23 May 2018, the Honourable Justice Lee ordered that the proceedings filed by Squire Patton Boggs on behalf of Mr Perera (and another class action filed by Corrs Chambers Westgarth) were to be permanently stayed; and that a subsequent proceeding (commenced without a statement of claim) by lawyers Phi Finney McDonald on behalf of Raffaele Webb (Webb Proceedings) would be the only class action permitted to go forward."

Some law firms have wisely made arrangements among themselves when competing actions arise, so they have more control over the outcome than submitting the issue to the judge, which can lead to different results given the two examples above. In the Spotless Group action, three firms were pursuing

¹² Federal Court Rules 2011, Rule 30.11

competing actions against Spotless Group Holdings Limited, William Roberts, ACA Lawyers and Slater and Gordon. William Roberts discontinued its action and the two other firms sent out a notice (via the funder ICP). They advised that to avoid the hundreds of thousands of dollars spent defending an action to stay one of the proceedings, as had occurred in Bellamy's, they opted to combine forces and consolidate their actions. Therefore, the funders ICP Capital and Therium co-funded the litigation and Slater & Gordon was chosen to lead the litigation.



THE TAKEAWAY

Given the multiple differences between the two regimes: certification vs. no certification, the ability to hear individual issues vs. disposing of all common issues simultaneously, open class vs. closed class actions (opt-out vs. opt-in), competing class actions vs consolidated cases, litigation funder and downstream effects of common fund orders vs. contingency fee - how does an institutional investor navigate these issues to determine when to register their claims and with which law firm and/or funder and on what criteria? From following these cases and registering claims on behalf of clients for the last four (4) years, and from establishing strong relationships with particular law firms, such as Maurice Blackburn, Slater & Gordon, and Phi Finney McDonald, we have some insight into this arena. An important consideration when choosing with whom to register claims is to select a law firm with a long history of experience and expertise in litigating securities class actions. If the law firm has a history of success and a depth of experience, they will have more knowledge to craft their pleadings in such a way as to convince the judges that the class action should proceed until trial or settlement, whichever comes first. Also, by registering claims before the pleadings are filed, a claimant is guaranteed to be a funded group member. In other words, they cannot be barred from joining later if the law firm decides to pursue the action as a closed class action or the court, sua sponte (on its own volition), decides to make one or another proceeding a closed class action.

Brooke Dellavedova explains that it is of key importance to register claims by the scheduled mediation date as group members who try to register claims after this date can be barred from participating but still be subject to the settlement, i.e. they can no longer opt-out and file an individual litigation against the defendant. Hence, for practical purposes, the deadline imposed by the court for opting-out should be used as the equivalent “claim deadline” in U.S. practice.

Although “open” class actions look set to once again become the norm, parties are likely to continue to seek orders “closing the class” for settlement purposes. Under this approach, the court makes orders (usually in advance of a scheduled mediation) requiring group members to register their claims by a certain date in order to participate in any settlement. This approach is intended to give the parties greater certainty regarding the total value of claims made, and so enhance the likelihood of settlement. Group members are given notice of class closure, and if they do not register by the deadline, and the action settles, they will not be permitted to participate in the settlement (nor will they be able to bring a separate claim, as assuming they have not opted out, they remain group members, with their rights determined by the class action). Given the importance of class closure for estimating quantum and settling actions, courts have generally declined to let in late registrants unless they make a very compelling case. Accordingly, it is critical that group members carefully review and act on class closure notices – or they could be prevented from receiving compensation. (B. Dellavedova, personal communication, July 19, 2018).

Also significant in this approach is that the court has deemed any group member that retained the litigating law firm prior to the imposed opt-out deadline as a “funded group member” for all intents and purposes, even if the claimant had not provided full and complete claims or signed a funding agreement at that point. Another advantage claimants have that register earlier on is that the law firms can prepare and litigate individual issues after the common issues are determined and possibly expand a claimant’s recovery more than if they remained an unfunded group member.

Finally, one last consideration to registering early with a specific law firm and funder may be the perceived disadvantage of being subject to the funders’ commissions and possibly uplift fees for the law firm involved. However, this is a perceived disadvantage but not necessarily a true disadvantage. If the claimant remains unfunded, they will most likely still be subject to some type of common fund order or funding equalization order such that the advantage of not being subject to paying commissions is lost and the claimant pays whatever percentage the court decides is fair or equitable, without having had the opportunity to negotiate those terms. If the claimant chooses from the outset, they have the power to compare and negotiate these factors across the offered law firms and funders pursuing the action. Therefore, the path with the most power to negotiate terms with a funder, select a law firm with a history of experience and expertise that has a more probable chance of success in moving the litigation forward to settlement, to make sure that no opt-out deadlines are missed and that one is automatically deemed a “funded group member” is to register claims with a specific law firm/funder early on in the investigation of the cause of action.

“Therefore, the path with the most power to negotiate terms with a funder, select a law firm with a history of experience and expertise that has a more probable chance of success in moving the litigation forward to settlement, to make sure that no opt-out deadlines are missed and that one is automatically deemed a “funded group member” is to register claims with a specific law firm/funder early on in the investigation of the cause of action.”

There are many calls for reform for the class action regime in Australia as it is, given the many instances described above of uncertainty and discretion held by the judges with no legislative codification of how these cases should be handled. Perhaps as more time goes by, and the courts and participating entities grow more experienced with the present obstacles that beset the Australian class action regime, then they can develop more benchmarks or precedents to help guide a claimant in these murky waters. Our aim is to keep the affected investor apprised of any such developments and to best guide that potential claimant within the uncertain terrain as it is now.



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