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Navigating the Australian Securities Class Action Landscape

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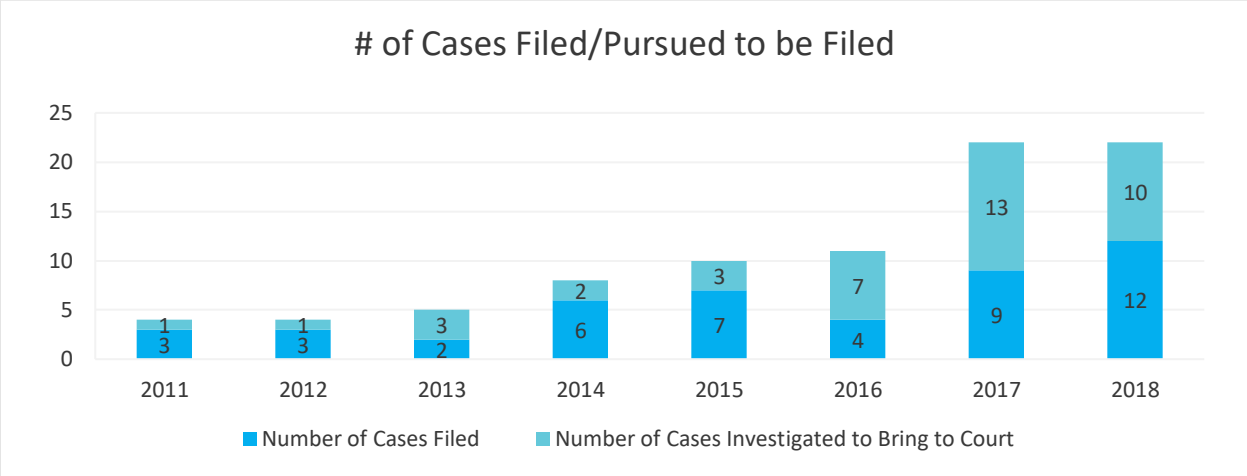
INTRODUCTION

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.

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.

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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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