The Australian Securities Class Action Landscape and Potential Changes Ahead

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Australia is the second most active jurisdiction for largescale securities class actions, although far fewer cases are filed there each year than in the United States. Some recent cases have produced eight to nine figure settlements for class members.

Australian lawmakers are considering a slate of reforms that could upend current practices, particularly with respect to the litigation funding industry and how courts manage competing cases.

The key proposals discussed below could do much to simplify participation for American investors.[1]

Background

Australia enacted class action procedures more than 25 years ago. These procedures permit both "opt-in" and "opt-out" class actions, and there is no certification requirement.

American pension funds may be missing out on compensation from Australian class action settlements. Outside securities counsel should assist with these claims as part of their non-U.S. litigation services.

In an opt-in or "closed" class action, investors must take affirmative steps to register, often prior to or during the early stages of litigation. An opt-in class usually includes all investors who purchased a specific security during the relevant period and signed a written agreement with a particular third-party litigation funder.[2] This strategy is used by funders to ensure that all class members are contractually obligated to pay a funding fee and a pro rata share of legal costs from any recovery. In some but certainly not all cases, the class is "re-opened" prior to mediation, giving investors another chance to register, and sometimes to do so without signing a funding agreement.

In an opt-out or "open" class action, investors are not required to sign a funding agreement at any stage. In those cases, just like in U.S. cases, all investors who purchased a specific security during the relevant period are class members, and are bound by any judgment or class settlement unless they request exclusion.

All class members must submit a registration form setting forth their eligible transactions, in order to receive a payment from a class settlement. These registration forms resemble proof of claim forms filed in connection with class action settlements in the United States and Canada. Under Australian procedure, however, courts frequently set claim registration deadlines in advance of mediation; putative class members must submit a form before any settlement is announced, rather than after.

As a condition of accepting any compensation, "unfunded" class members (those who have not signed an agreement) may be required to consent to a reduction of their compensation in an amount equal to the funding fees and legal costs owed by "funded" class members (those who have signed an agreement). Courts can also award fees and costs out of class settlement funds.

Litigation Funding

One common concern is that Australia is a cost-shifting or "loser pays" jurisdiction; if a plaintiff is unsuccessful, then the court usually issues an "adverse costs order" requiring the plaintiff to cover the defendant's reasonable costs. But, in a class action, that only applies to the representative plaintiff. An investor who does not take an active role in a litigation is not liable for adverse costs simply by remaining as a class member or by submitting a registration form to indicate an interest in future compensation.

Class actions generally allow investors to participate in legal actions and obtain recoveries that would be too costly to pursue on an individual basis. While American class action lawyers are able to increase access to justice—by taking on the costs and financial risk of litigation, in exchange for contingency fees paid by all who benefit—Australian law bars lawyers from entering into percentage-based contingency fee arrangements. Accordingly, Australian class action lawyers often need to team up with third-party litigation funders.

In nearly all Australian securities class actions, a commercial funder agrees to advance the legal costs incurred by the representative plaintiff, and take on the risk of having to pay adverse costs, in exchange for fees payable out of any recovery.[4]

Lawyers and funders often "book build" before litigation, soliciting potential class members to register pursuant to a written funding agreement.[5] In some cases, investors are allowed to register an interest, and may submit their trading data for loss analysis, without signing an agreement upfront. This process is used to gauge whether enough interest exists to make a case profitable.

Funding fees usually range from 20% to 45% of a class settlement; additional charges may apply if, for example, there is more than one defendant or there is an appeal.[6] On top of these fees, funders are reimbursed for all legal costs, and some

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also charge project management fees for investigating the claims, conducting a book build, monitoring the litigation, etc.

The Australian funding market has matured over the last two decades, from just a few providers to at least two dozen, including several that are based overseas. At present, commercial funders are not subject to regulation or capital requirements, like other financial services providers, and they are not bound by professional ethical obligations to courts or class members, like lawyers.

If adopted, these reforms could put an end to closed class actions and bring the Australian regime into line with the familiar opt-out model that investors see in the United States and Canada.

Recently, in a few securities class actions, courts have assumed the power to scrutinize or even reject contractual funding terms, and to impose "reasonable" fees on all class members—including those who never signed an agreement—pursuant to "common fund" orders. This trend has created uncertainty about the extent to which a particular court might vary funding terms and the range of fees that it might ultimately award.

Key Proposals:

- Regulating the litigation funding industry by imposing, for example, mandatory licensing (qualified on both character and organizational competence), minimum capital requirements, financial reporting and auditing, general obligations to class members, and/or standard contract terms.
- Clarifying the power of courts to issue common fund orders, and to review and vary all legal costs and funding fees to be deducted from class settlement funds, to ensure they are fair and reasonable, and possibly imposing statutory caps.[7]

Competing Class Actions

It has become common for defendants to face multiple class actions that assert similar claims. Because Australia does not have a process for selecting a lead case, courts have had to manage competing class actions on a case-by-case basis.

Some courts have found that, where there are two sets of lawyers and funders, different strategies and funding models might offer true alternatives, and class members should be allowed to choose.[8]

In the recent *GetSwift* litigation, the court found that three class actions were substantially the same and assumed the power to pick a winner; it stayed two cases and allowed only one to proceed.[9]

It is notable that the *GetSwift* court selected a common fund proposal; the winning funder had not conducted a book build and its client had not yet filed a statement of claim. In contrast, the losing funders had written agreements with 208 and 103 putative class members, respectively.

Key Proposals:

- Requiring all class actions to be filed as open class actions, and possibly conferring exclusive jurisdiction on federal courts.[10]
- Clarifying the power of courts to decide which of several competing class actions will proceed, and possibly introducing formal carriage motions and criteria.[11]

Takeaways

These reforms could protect class members against unfair or disproportionate cost burdens and ensure consistency and predictability in court rulings with respect to both fees and competing class actions.

Forcing lawyers and funders to compete for cases could also drive down fees and, thus, increase the recoveries flowing to class members.

Moreover, reforms that reduce, or even eliminate, the prospect of closed class actions, and the risk of overlapping or competing class actions being allowed to proceed, could bring to an end the practice of book building. It is possible that under a new regime, investors would no longer need to spend time comparing sets of lawyers and funders, and might never again sign a funding agreement! (At least for an *Australian* securities litigation.)

Of course, some of the potential reforms might not be favorable to investors.[12] Lawmakers could, for example, restrict the types of claims asserted in securities class actions, namely those based on breaches of the continuous disclosure obligations of entities listed on public exchanges and those relating to misleading or deceptive conduct.[13]

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The Australian Law Reform Commission (ALRC) is reviewing public comments on the proposals and is expected to issue its final report and recommendations by December 21, 2018. Then it will be up to the Parliament to act.

American investors should continue to watch this space for recovery opportunities in the meantime.

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ENDNOTES:

[1]See Australian Law Reform Commission ("ALRC"), Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Discussion Paper, June 2018; Victorian Law Reform Commission ("VLRC"), Access to Justice—Litigation Funding and Group Proceedings: Report, Mar. 2018.

[2]Closed class actions are not expressly contemplated by the relevant Commonwealth statute, but generally are permitted by the courts. Many commentators have noted that this practice appears contrary to legislative intent and the goal of enhancing both access to justice and judicial efficiency through class litigation.

[3]Plaintiffs can be ordered to post security to ensure that they have sufficient assets to cover any adverse costs. Adverse costs are set according to a standard scale, and typically are less than what a defendant actually paid.

[4]Historically, such arrangements were proscribed as both maintenance (providing financial assistance to a litigant) and champerty (sharing proceeds of litigation).

[5]Securities class actions are promoted through various channels, including direct outreach to large investors and announcements distributed by intermediaries, such as custodian banks and claims filing vendors.

[6]Funding agreements often include fee grids; lower rates may apply if the action is resolved quickly and/or if the settlement amount exceeds a certain threshold. In addition, a discount may be offered to investors who held a large number of shares. Some agreements also set floors, to ensure a minimum return on investment for the funder.

[7]Lawmakers could lift the ban on contingency fees for lawyers, subject to some restrictions, such as fee caps for unsophisticated class members or court approval. That said, this type of reform might be relevant to just a handful of law firms with the capital and risk appetite to prosecute a complex securities class action without outside funding or insurance.

The ALRC's Discussion Paper asks whether, instead of statutory caps, there should be a rebuttable presumption that the maximum portion of fees and commission paid from any one settlement or judgment sum is 49.9%.

[8]*See* McKay Super Solutions Pty. Ltd. v. Bellamy's Australia Ltd. [2017] FCA 947 (Aug. 18, 2017).

[9]*See* Perera v. GetSwift Ltd. [2018] FCA 732 (May 23, 2018). This decision is subject to appeal.

In another recent litigation, the federal court transferred four competing class actions to the state court, where a fifth class action was pending. *See* Wileypark Pty. Ltd. v. AMP Ltd. [2018] FCAFC 143 (Aug. 29, 2018).

[10]The VLRC's Report proposes establishing a national judicial panel to facilitate coordination of related class actions that are filed in different jurisdictions, similar to the U.S. Judicial Panel on Multidistrict Litigation.

[11]The ALRC's Discussion Paper suggests that the Canadian carriage motion, and its various selection criteria, may provide a useful model.

[12]The ALRC's Discussion Paper proposes that the government review the legal and economic impact of investor claims. It notes concerns, for example, about the availability and cost of directors and officers insurance, and the possibility that companies will relocate offshore for more favorable conditions.

[13]Once an entity is, or becomes, aware of information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell the Australian Securities Exchange that information.

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