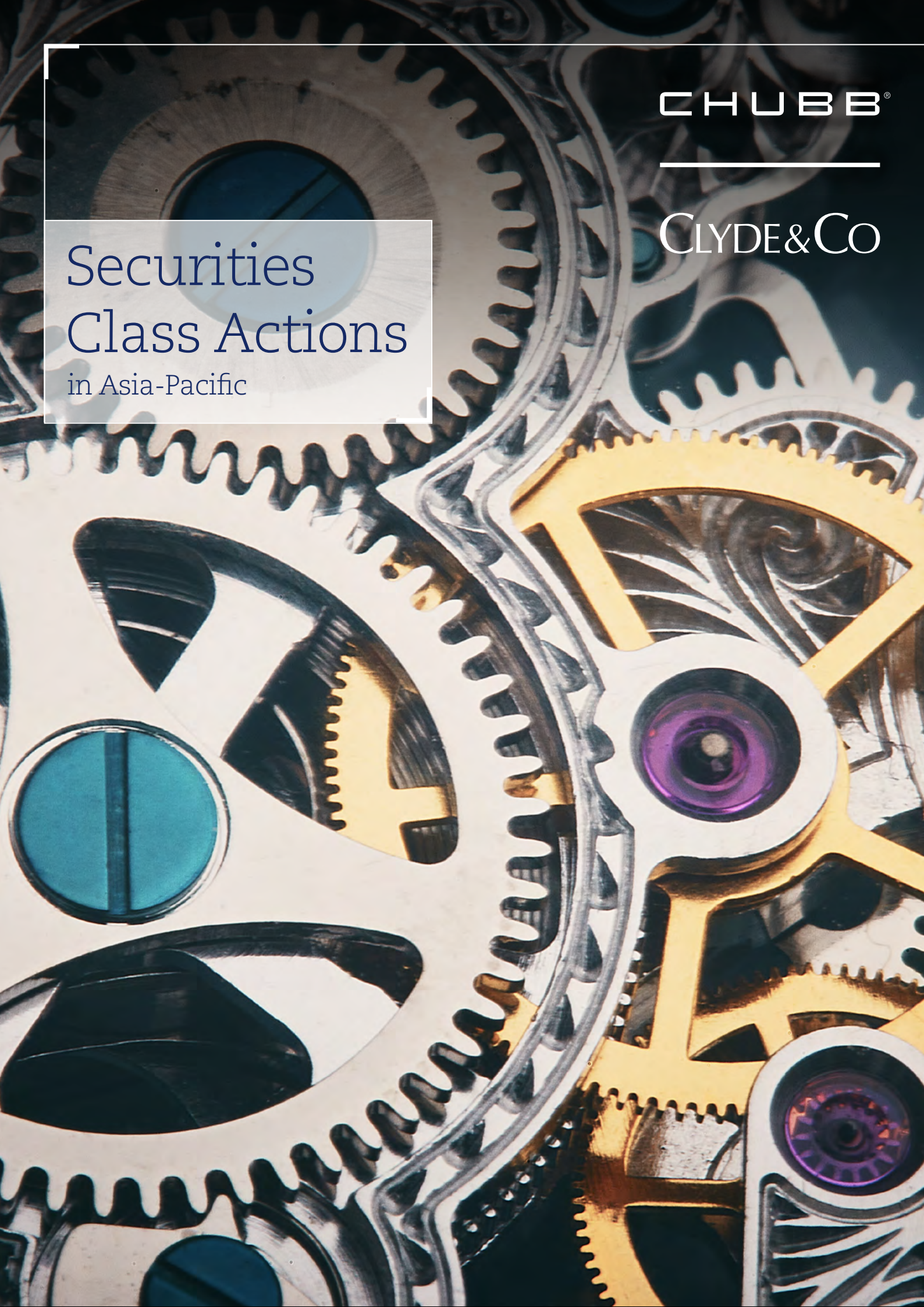

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Securities Class Actions

in Asia-Pacific

Introduction

The average securities class action can cost between AUD 50-70 million (including settlement value and legal costs).[1] The Australian Directors' and Officers' (**D&O**) insurance market premium pool is around AUD 280 million. By the end of 2017, 16 new securities class actions had been filed in the Federal Court of Australia and in 2018 at least 18 actions were filed.[2]

Against this backdrop, this White Paper explores the landscape for securities class actions against corporates across Asia-Pacific and the D&O insurance solutions that are available to companies and their D&Os.

Australia has one of the most developed (and plaintiff-friendly) class action regimes in the world and has seen the bulk of the class actions in the Asia-Pacific region. As such, the majority of this White Paper focuses on developments in Australia. However, securities class action litigation against entities and their D&Os is increasingly a global issue, and a number of jurisdictions across Asia are beginning to enhance their corporate governance regimes, and introduce procedures for collective actions.

As collective actions develop internationally, so too will exposures for companies and their directors. However, the likelihood of a collective action depends on a number of different factors, including appetite for litigation, the presence of litigation funders and the spread and make-up of the shareholders concerned. This White Paper therefore also examines the position in China, Taiwan, Thailand, Japan, India, South Korea, Hong Kong, Singapore, Malaysia and Indonesia.

1 Insurance Council of Australia's response to the request for submissions to the Victorian Law Reform Commission's consultation on "*Access to Justice – Litigation Funding and Group Proceedings*".
2 Ibid. Also see Active Shareholder Class Actions in Australia table on pages 14 to 15 in this White Paper.

Australia

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Australia's class action system is moving into its 27th year following its 25 year anniversary in 2017. During this time, the threat of being on the receiving end of mass proceedings has become a core risk factor for companies and directors based in, or listed in, Australia. The class action regime has grown and developed, aided by an entrepreneurial plaintiff bar, a burgeoning market for litigation funding and relatively low thresholds for bringing a claim under the class action procedure.

Class Actions – the main features

The class action regime was introduced in the Federal Court of Australia in 1992, followed by the Supreme Courts in New South Wales, Victoria, and, since 2016, in Queensland, with developments in Western Australia anticipated. All of those states have procedures closely modelled on the Federal Court system. In South Australia, there is a different system which provides for certification, but is rarely utilised. The focus of this White Paper will be on the system in the Federal Court, where the majority of securities claims are brought.

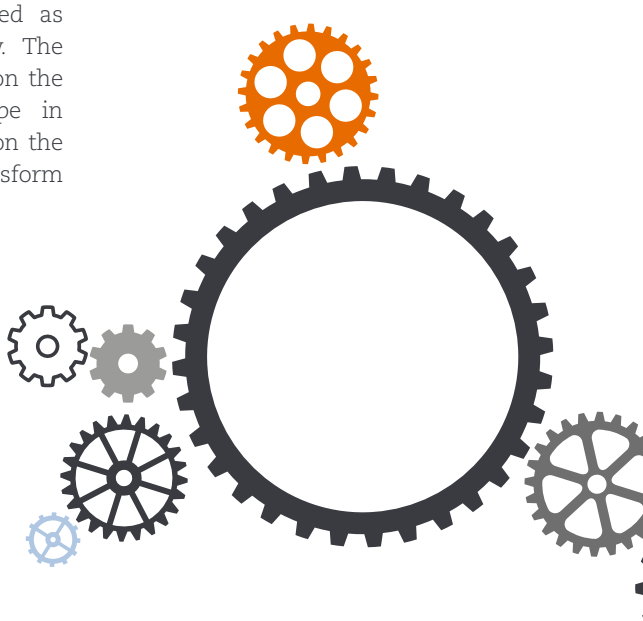
On 24 January 2019 the Australian Law Reform Commission (**ALRC**) released its final report in its "Inquiry into Class Action Proceedings and Third-Party Litigation Funders" (**Inquiry** or **ALRC Final Report**). The Inquiry focused on the impact that an increasing number of class actions and litigation funders has had on the class action regime. The ALRC has recommended several reforms that were the subject of public consultation, including a review of the legal and economic impact of the central causes of action in shareholder claims.[3] The conclusions reached by the ALRC include that:

- litigation funding should remain within the purview of the Courts rather than regulation by the corporate watchdog, the Australian Securities and Investments Commission (**ASIC**);[4]
- there should be a Parliamentary review of the continuous disclosure laws in Australia, an area where there has been significant claims activity with shareholder class actions;[5]
- certain mechanisms should be introduced to prevent competing class actions and exclusive jurisdiction should be conferred on the Federal Court for causes of action arising under specific Commonwealth legislation;[6] and
- there are certain mechanisms which should be introduced to permit the charging of contingency fees in class actions, subject to a range of limitations.[7]

Overall, the recommendations made by the ALRC might be described as extensive but not revolutionary. The extent of any impact they have on the class action litigation landscape in Australia will inevitably depend on the appetite of the government to transform recommendations into policy.

The key features of the Australian regime which currently remain are as follows:

- There must be seven or more persons with claims against the same defendant;
- The claims must be in respect of, or arise out of, the same, similar or related circumstances; and
- The claims must give rise to at least one substantial common issue of law and fact.



3 For more information see www.clydeco.com/insight/article/alrc-class-actions-article.
4 See Chapter 6 in the ALRC Final Report, Regulation of Litigation Funders.
5 See Chapter 9 in the ALRC Final Report, Review of Substantive Law?
6 See Chapter 4 in the ALRC Final Report, Case Management.
7 See Chapter 7 in the ALRC Final Report, Solicitors Fees' and Conflicts of Interest.

Once proceedings are commenced, any settlement must be approved by the Court. This requires the Court to be satisfied that the settlement is fair and reasonable and in the interests of class members.

The regime operates as an "opt-out" system, meaning that all potential plaintiffs will fall within the definition of the class upon filing unless they choose to opt out. The class can be defined by reference to a set of criteria (such as "all shareholders who bought shares in ABC between X and Y dates") and group members will often play a limited or non-existent role in the proceedings, with the named representatives being the only named plaintiffs in the proceedings.

At trial all common questions together with all non-common questions raised by the lead applicant's personal claim will be determined. The judgment will bind all group members who have not opted out.

Despite the "opt-out" model, Australian Courts have permitted narrower class actions to be brought with the class being restricted to those that have entered into an agreement with a particular litigation funder and/or law firm retainer. This has led to competing class actions with respondents having to defend multiple claims arising out of substantially the same facts, sometimes in different jurisdictions (for example, State Courts and the Federal Court). Where such competing claims are not promptly consolidated, the legal costs escalate.

The jurisprudence from Australian Courts is developing in this area. On

20 November 2018 the Full Federal Court upheld a first instance decision ordering a permanent stay in two of three competing class actions such that only one of those class actions can proceed.[8] Additionally, the ALRC has recommended that the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) and the Federal Court of Australia Class Actions Practice Note (**Class Actions Practice Note**) be amended to grant the Court specific powers such that all representative proceedings are initiated as an open class, with further case management procedures to deal with competing class actions. If the recommended changes are implemented by the Australian Parliament, this should address the current challenges faced by competing class actions and multiplicity of proceedings.

8 *Perera v Getswift Limited* [2018] FCAFC 202 (appeal); *Perera v GetSwift Ltd* [2018] FCA 732 (first instance decision) (GetSwift). At the time of writing this paper, an application has been filed in one of the stayed proceedings seeking special leave to appeal to the High Court of Australia. That application had not been determined, as far as Chubb is aware, as at the date of publication of this paper.

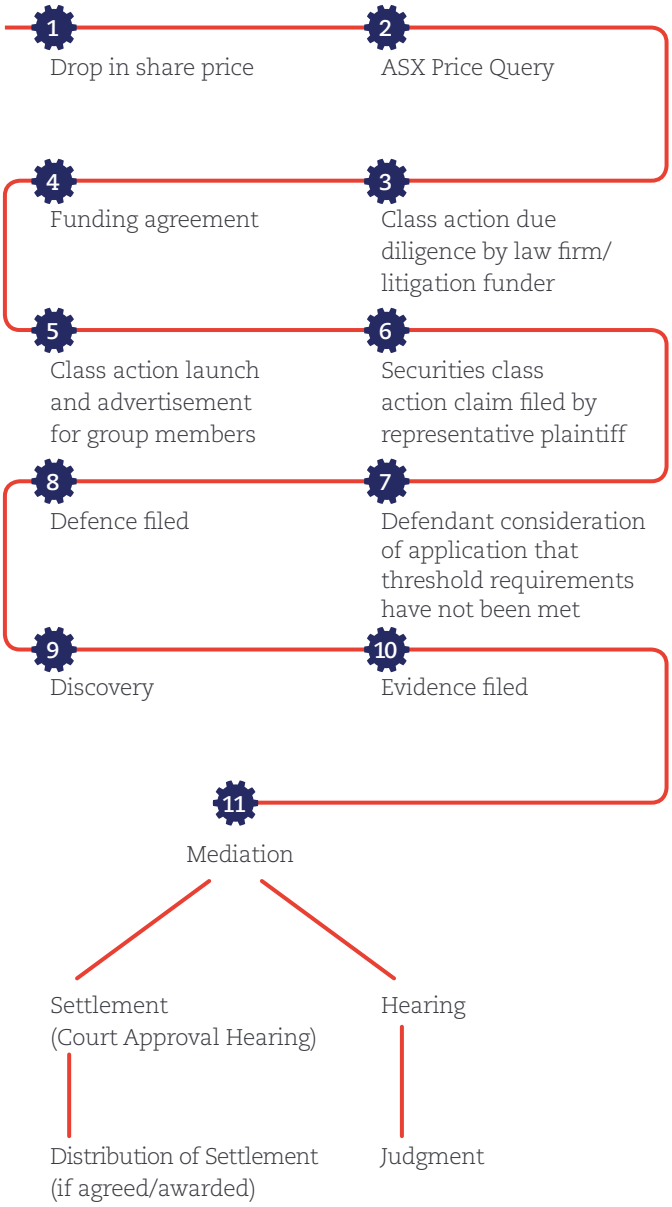
Test for Bringing a Securities Class Action

A securities class action is a claim brought by a group of shareholders most commonly against a company and/or its directors and officers claiming damages for financial losses suffered as a consequence of either the company's failure to disclose material facts or a misrepresentation of material facts to the financial market.

Typically, whilst shareholder claims involve large overall losses, the individual loss suffered by each shareholder can be small. Class actions therefore offer a route by which the claim can be brought on behalf of many individuals against the same defendants by a lead applicant, usually identified and managed by a plaintiff law firm.

Securities class actions will generally allege that the respondent company, listed on the Australian Securities Exchange (**ASX**), engaged in misleading or deceptive conduct by its statements to the market and/or failed to disclose relevant information to the market (s1041H of the Corporations Act 2001 (Cth)) (**Corporations Act**) and breached its continuous disclosure obligations in relation to material information under the ASX Listing Rules (s 674 of the Corporations Act). ASX Listing Rule 3.1 provides that "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 ASX that information." Importantly, it is not necessary to prove any intent to defraud or mislead investors, or negligence for either cause of action.

Main Stages in a Securities Class Action



Market disclosure and integrity is a matter of great interest to the corporate regulator, ASIC. It routinely investigates continuous disclosure breaches and, where contraventions are suspected or have occurred (resulting in an uninformed securities market), ASIC may conduct an investigation which can also lead to regulatory action. Whilst not always a precursor to a securities claim, where there has already been such an investigation this may give potential claimants access to a route-map by "piggybacking" their claims on the work of the regulator.

Free-Riders

Australia's "opt-out" model has traditionally had the potential to encourage "free-riding".

This is where unfunded group members wait until a successful outcome has been achieved before coming forward to collect a proportion of the proceeds without needing to reimburse the funder. In order to prevent free-riding, funders and plaintiff law firms have sought to restrict class actions to a "closed class", typically brought on behalf of a subset of group members who contractually enter into a funding agreement or law firm retainer. Litigation funders have recently sought to overcome the "free rider" problem and improve their financial recoveries by applying to Australian Courts for common fund orders in class actions. Common fund orders require all class members who seek to benefit from the proceeds of settlement or judgment to contribute equally to the cost of legal representation and litigation funding costs, regardless of whether or not they had entered into a funding agreement.

Despite the Courts' initial reluctance to make such orders, a litigation funder finally achieved success in the Full Federal Court decision of *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*[9] (**Money Max**) in late 2016, with the same funder also securing a common fund order in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)*.[10] Similarly, in *Earglow Pty Ltd v Newcrest Mining Limited*[11] and *Camping Warehouse Pty Ltd v Downer EDI Ltd*[12] the Court approved an "equalisation order" which operated as a redistribution recovery mechanism to all funded members.[13]

The ALRC has recommended that the Federal Court Act be amended so that there is an express statutory power for the making of common fund orders, either on application by the plaintiff or on the Court's own motion.[14]

This follows decisions which demonstrate the willingness of Australian Courts to modify and interfere with litigation funding arrangements, including adjusting the rate of commission due to the funder. It is important to note that whilst Money Max offers comfort to funders that proceedings are commercially worthwhile, in the absence of a requisite pool of signed up group members at the outset of a matter, there remains uncertainty as the Court (not the funder) will set the commission rate at the end of proceedings. Similarly, the uncertainty for funders will continue to exist if the ALRC recommendations on regulation of litigation funders become law. If implemented, through amendments to the Federal Court Act this would empower the Court to approve the terms of third party funding agreements, such that funders would be required to irrevocably submit to the jurisdiction of the Court. This would result in private agreements reached by the funder with group members only being enforceable with Court approval, and the Court being empowered to reject, vary, or amend the terms of those agreements.[15]

From a defendant's perspective, these decisions and potential reforms do not, of course, affect the respondent's liability or quantum; rather they go to how settlement monies are to be distributed as between funders and members of the group. However, the impact of these decisions on the likelihood of multiple actions is a key issue for defendants, explored further below in "Multiple Class Actions". In addition, with the developing jurisprudence on common fund orders it may now be possible for a funded class action to be commenced sooner as the focus on the initial "book build" and signing up participants to the class before commencement may no longer be as fundamental.

However, the impact of these decisions on the likelihood of multiple actions is a key issue for defendants, explored further below in "Multiple Class Actions".

These decisions in and of themselves may encourage more open class actions to be brought in Australia, and indeed the ALRC has recommended legislative amendments to ensure all class actions are initiated as open class actions. Anticipated reforms and/or judicial intervention mean that open class actions are therefore expected to dominate the class action regime moving forwards. However, these decisions and proposed reforms will not of themselves turn cases with limited prospects of success into an attractive funding proposition. There is of course a risk that if similar orders are made in other claims over time, this may cause funders to fund cases that previously would have been considered marginal and would not have secured funding.

9 [2016] FCAFC 148
10 [2017] FCA 330; (2017) 343 ALR 476
11 [2016] FCA 1433
12 [2016] VSC 784
13 An equalisation order is an alternative to a common fund order. It takes the amount that members of the class who did not sign funding agreements would have paid to the funder if they had signed the agreements, and distributes it pro-rata to all group members. It ensures that members who funded the litigation are not worse-off by deciding to help fund the litigation.
14 ALRC Recommendation 3.
15 See Chapter 6 of the ALRC's Final Report, and in particular, recommendation 14.

HIH Insurance Limited (in Liquidation) – a green light on INDIRECT causation

One of the key issues to determine in a securities class action is whether it is necessary for each group member to prove actual reliance on the contravening conduct which it is alleged has led to their loss (direct causation) or whether they must simply show that they purchased their shares from the company at an inflated price and the inflated price was caused by the company's contravening conduct (indirect or market based causation).

The "fraud on the market" theory of causation is well established in the US. Under this theory, all material information (including any misrepresentation) that is publicly disclosed is reflected in the share price. As a result, if an investor acquires shares at a certain price, he or she is presumed to rely on all of the information that is reflected in that price, including the misrepresentation. The theory was affirmed in relation to misrepresentative acts (as opposed to omissions) alleged in Rule 10 b-5 claims by the Supreme Court in *Halliburton v Erica John Fund.*[16]

There is presently no judicial authority from a superior Court in Australia as to whether causation needs to be demonstrated on a direct (individual reliance) or indirect causation basis.

This has been an unsettled area of law in Australia where, until very recently, the US style fraud on the market theory has not been embraced. However, there are some recent decisions of single judges which show the Courts (at least at first instance) are leaning towards market based reliance or indirect causation theory. In one such case, *Re HIH Insurance Limited (in liq) and Others*,[17] a small number of shareholders successfully claimed that:

a. The failure to disclose important information caused them to acquire the shares at an overvalue and that they were entitled to recover the difference between what they had paid for the shares and their so-called true value when acquired; and

b. They were entitled to pursue a case based on the theory of indirect causation and that they did not need to prove individual reliance.

However, the Court also observed that investors cannot succeed if they knew the truth about, or were indifferent to, the contravening conduct but proceeded to buy the shares anyway. Whilst this case was not constituted as a class action, some analogies can be drawn for group actions involving similar facts.

In *Re HIH*, the plaintiffs did not argue that they had read or directly relied on the financial information containing the allegedly misleading statements; rather, they had bought the shares at a time that the price for the shares was inflated due to the misleading financial information. The Court held that the failure to disclose accurate information led to the market thinking that the company was trading more profitably than in fact was the case. This led to the shares being traded at an inflated price.

Unlike the fraud on the market theory, there is no rebuttable presumption of reliance on public misstatements and plaintiffs will still have the onus of proving that the price of the shares was affected by the misstatements.

Although not binding in other Australian jurisdictions, the decision may provide an important contribution towards jurisprudence on the scope of the causation onus placed on plaintiffs in Australian securities class actions. However, it is important to emphasise that it is a single judge decision of a state Court and that the case should be given appropriate context: it arose following Australia's largest corporate collapse where the liquidator had refused to admit proofs of debts by the shareholders. If the reasoning in *Re HIH* were to be accepted by the Federal Court and appellate State Courts, it would provide strong domestic support for market-based causation. It would also permit plaintiffs in securities actions to prove causation by the mere purchase of a security on a well-developed exchange, where the value was artificially deflated or inflated by misleading and deceptive conduct, unless that plaintiff knew the truth about, or was indifferent to, the misleading and deceptive conduct.

Questions of onus in causation will continue to be passionately contested, including in securities class actions, until such time as this area is more fully considered by the appellate Courts in Australia.

Further, in such claims, if the lead applicant successfully establishes that the company engaged in misleading or deceptive conduct and/or breached its continuous disclosure obligations, the lead applicant will still need to establish that such conduct caused loss and damage. Expert evidence on both sides will be needed to show the impact of any share price inflation (see further under "The need for expert evidence").

16 563 US 804 (2011)
17 (2016) 335 ALR 32. There has been a subsequent related interlocutory decision in this proceeding including in relation to loss methodologies, being *In the Matter of HIH Insurance Limited (In Liquidation) (ACN 008 636 575) and Others* [2017] NSWSC 380

Shareholder activism

A key issue for every company is the powers distributed and held by shareholders, and shareholders' ability to influence a company and its management. A tension between the shareholders and company has the potential to arise in all organisations, from large listed companies to private companies with closely related shareholders. Whilst the balance of power between directors and shareholders will vary from jurisdiction to jurisdiction, the power to make binding decisions for the company and to choose the direction the company grows in is generally vested in the directors. Internationally, there is an increasing trend towards activism by shareholders to increase their influence on the company's conduct, and the decisions taken by directors and management.

As reported by Activist Insight and FTI Consulting in 2017,[18] shareholder activism is on the rise across Asia-Pacific, most notably in Australia, but also in China, Hong Kong and Japan. Whilst activism in Australia is not new, its shape and scale are changing; whereas activism was largely the preserve of high net worth individuals seeking to obtain board control, Australian and international activist funds (the latter spurred on in part by the saturation of the US market)[19] and asset managers are driving the activity in ever-increasing numbers. The "internationalisation" of activism in Australia is tipped to lead to a rise in public campaigns (in contrast to the preponderance of solutions reached behind closed doors), and the targeting of larger corporates than has previously been the case.

Australia's corporate legislative framework is regarded as having a number of "activist friendly" features. It has a growing number of proxy advisors who give advice to shareholders on how to exercise their voting rights. There are a number of routes which shareholders can use to force change such as the power to make resolutions, bring oppressive actions under the provisions of the Corporations Act (a route which is increasingly displacing derivative actions which can be costly and difficult to pursue), and collective action to change the constitution.

Whilst, broadly speaking, shareholder activism is focussed upon effecting corporate change rather than preparing for a dispute with the company and its directors, increased shareholder activism undoubtedly involves harder scrutiny of a company's performance and evidences a willingness to take corporates to task for perceived failings. Going forward, we expect directors and companies to have to grapple increasingly with shareholder activism.

18 Global Activism On The Rise: A 2017 Update, FTI Consulting, 28.7.2017, http://fticommunications.com/2017/07/global-activism-rise-2017-update/ : For example, the removal of CEO or other Board members rose from 27.8% in 2016 to 52.7% in the first half of 2017.

19 Shareholder Activism in Australia: Navigating the evolving landscape, JP Morgan, 2017, https://www.jpmorgan.com/jpmpdf/1320730885940.pdf

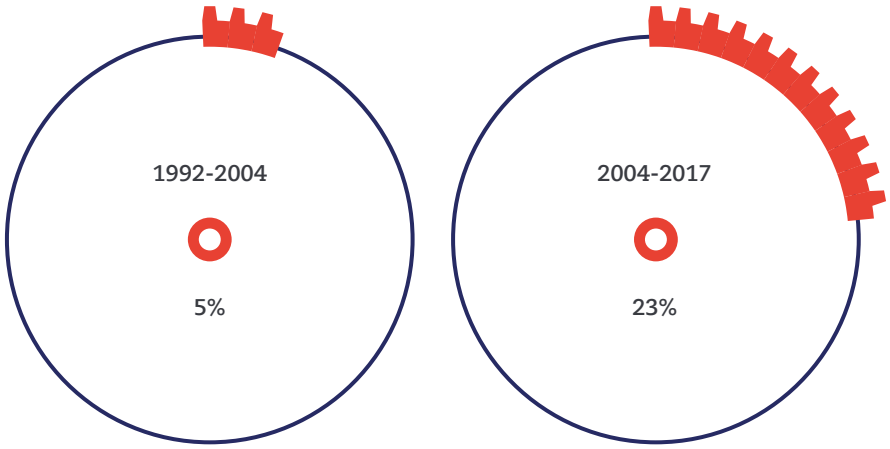
Growth in Securities Class Actions

The first securities class action was filed in Australia in 1999. Since then, there has been a rapid growth in securities class actions in Australia with at least 78 shareholder class actions filed in the Federal Court since 2002 (when misleading or deceptive conduct provisions were introduced into the Corporations Act).[20] Shareholder class actions are the most commonly filed class actions in the Federal Court; 34% of all class actions filed in the last 5 years have been shareholder claims.[21] Although one securities class action has run the full course at trial (but settlement was reached before judgment was delivered) and judgment is currently reserved in the Myer shareholder class action which was conducted in late 2018,[22] there have been numerous claims by shareholders constituted outside of the class action regime that have reached full judgment. The threat of facing a class action in Australia is a huge exposure for companies and their D&Os. Australia is now a country where corporates face the highest risk of being subject to a class action in the world (second only to the US). It is increasingly common for claims to arise out of a single event such as a corporate collapse (for example, Dick Smith, Tamaya, Allco and Forge), as well as those that arise from alleged accounting irregularities with allegations that accounts and profit forecasts have been over-stated (for example, TWE and QBE).

This growth can be explained by a number of factors, including the focus by plaintiff law firms and funders on this area, heightened scrutiny of corporate governance, and support by ASIC, for the role private litigation can play in the enforcement of those standards. Institutional investors and trustees of superannuation funds have increasingly begun to view joining group securities suits as a means of enforcing their private legal rights (for example the participation by UBS in the Centro class action). Although rarely acting as the representative plaintiff, their involvement heightens the overall exposures for the defendants. Going forward, securities class action litigation is expected to continue to develop for a number of reasons including:

- Indirect/market based causation (see further above under "HIH Insurance Limited (In Liquidation) – a green light on indirect causation") - if the Courts adopt a test of indirect/market based causation, the plaintiffs do not have to show individual reliance;
- Litigation funding given the relative ease of securing litigation funding for this type of claim and recent Court decisions granting common fund orders which favour funders; and
- Regulatory focus by ASIC on market disclosures and integrity. ASIC routinely investigates continuous disclosure breaches and where contraventions are suspected or have occurred (resulting in an uninformed securities market), there is the potential to piggyback upon the work of the regulator.

Class Actions established by shareholders[23]



20 ALRC Discussion Paper – *Inquiry into Class Action Proceedings* and *Third Party Litigation Funders*; June 2018 (**ALRC Discussion Paper**) at [1.12] citing V. Morabito, private correspondence (13 March 2018)
21 Ibid
22 TPT Patrol Pty Ltd atf the Amies Superannuation Fund v Myer Holdings Limited (VID1494 of 2016).
23 An Empirical Study of Australia's Class Action Regimes Fifth Report. The First Twenty-Five Years of Class Actions in Australia by Professor Vince Morabito, July 2017

Role of ASIC

ASIC has played a prominent part in the development of securities class actions in Australia. Regulatory action following a share price drop can on occasion be the starting point for actions (see above "Main stages in a securities class action" and note below). As part of its regulatory toolkit when investigating breaches of continuous disclosure obligations, ASIC has broad powers to interview directors under compulsion, and the interview records can be produced under a subpoena in a securities class action. ASIC can also seek compulsory provision of documents or information which may also be provided to litigants in certain circumstances. The investigation can therefore provide a valuable resource for plaintiffs seeking to build a case.

Although ASIC has the power to bring proceedings (under s 50 of the ASIC Act 2001 (Cth)) where to do so would be in the public interest, it is unlikely to do so where a private claim is already on foot and it encourages potential plaintiffs to seek alternative routes such as private litigation.[24] Additionally, ASIC can bring civil penalty proceedings and criminal proceedings (the latter of which is usually reserved for the most serious conduct) and will do so even where there are also civil proceedings in respect of the same breach and can also seek enforcement undertakings from the corporation in return for an agreement not to prosecute. Although these undertakings will not contain a formal admission of liability, they can provide valuable ammunition for plaintiffs.

Actions against the entity only

One of the current concerns for the Australian D&O market is the significant and increasing number of securities class actions being filed against insured entities, in some cases without any claims being brought against the insured directors or officers themselves. Cover for securities claims is typically extended to entities under D&O policies as "Side C" cover.

Under relevant Australian laws, a plaintiff does not need to allege that misleading or deceptive conduct was committed by directors, and under the ASX Listing Rules there is no requirement that a company's failure to disclose to the market was deliberate or negligent. This means there is a lower threshold for bringing securities claims against a company directly in Australia as compared to other jurisdictions, such as the US where scienter (intent) is required. Accordingly a company will often have fewer defences available to it than an insured director or officer who can rely on due diligence in order to defend a claim where they are pursued as being accessorily liable for the company's breach.

This rise in the number of Australian class actions being brought against entities alone has led to D&O insurers funding and settling large claims not involving any claims against the insured directors or officers – which is an unforeseen consequence of extending Side C cover to D&O policies. This has therefore created a risk of the limit of D&O cover being fully eroded by a single class action (or multiple actions) against the entity alone, leaving no or limited cover available for insured directors and officers for the same or other claims including, for instance, regulatory claims or other civil claims.

In order to address these concerns, D&O insurers are likely to adjust the ways in which Side C cover is offered to the Australian market in future, for example by increasing premiums, restricting cover or reducing limits of cover, introducing higher attachment points or excluding Side C entity only cover altogether.

Defendants' exposure

The exposure for defendants is potentially huge with settlements for shareholders and investors claims well exceeding AUD 1 billion.

The largest shareholder settlement to date is the Centro class action, where proceedings were brought on behalf of purchasers of an interest in Centro securities during a relevant period, alleging Centro breached its continuous disclosure obligations and engaged in misleading conduct by failing to disclose to the market its maturing debt obligations. The AUD 200 million settlement was approved on 19 June 2012 (estimated claim value AUD 1 billion). More recently, in December 2017, QBE Insurance agreed to pay AUD 132.5 million to settle a class action over its 2013 share plunge.

Although some prospective claims do not make it through the book building stage and fall away before filing, the publicity and scrutiny for defendants (strong media activity can accompany a class action launch, and can often precede a determination of whether there is a reasonable case) is often intense and capable of collapsing the share price in and of itself.

24 ASIC INFO 151 approach to enforcement.

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Key Shareholder Class Action settlements in Australia

Matter	Year commenced	Year settled	Settlement amount (AUD)	Reported Demand (AUD)	Plaintiff Law Firm	Litigation Funder
GIO	1999	2003	112 million	500 million	Maurice Blackburn	
Tracknet	2000	2004	4 million		Maurice Blackburn	
Aristocrat	2003	2008	145 million	240 - 396 million	Maurice Blackburn	IMF Bentham Limited
Concept Sports	2004	2006	3 million	Unknown	Maurice Blackburn	IMF Bentham Limited
Harris Scarfe	2002	2006	3 million	20 million	Duncan Basheer Hannon	
Multiplex	2006	2010	110 million	150 million	Maurice Blackburn	International Litigation Funding Partners
Telstra	2006	2007	5 million	300 million	Slater & Gordon	
Downer EDI	2007	2008	18.25 million	100 million	Slater & Gordon	IMF Bentham Limited
Village Life	2008	2009	3 million	30 million	Slater & Gordon	IMF Bentham Limited
Sons of Gwalia	2005	2009	70 million	260 million	Dennis & Co Jackson McDonald	IMF Bentham Limited
AWB	2007	2010	40 million	100 million	Maurice Blackburn	IMF Bentham Limited
Centro	2008	2012	150 million	700 million	Maurice Blackburn	IMF Bentham Limited
			50 million		Slater & Gordon	Comprehensive Legal Funding
Media World	2005	2010	0	40 million	Maurice Blackburn Slater & Gordon	
OZ Minerals	2009	2011	39 million	185 million	Maurice Blackburn	IMF Bentham Limited
		2011	21 million	185 million	Slater & Gordon	Litigation Lending Services
		2016	32.5 million	250 million	ACA Lawyer	IMF Bentham Limited
Credit Corp Group	2010	2012	6.5 million	Unknown	William Roberts	IMF Bentham Limited
National Australia Bank	2010	2012	115 million	200 million	Maurice Blackburn	International Litigation Funding Partners
Sigma Pharmaceuticals	2010	2012	58 million	200 million	Slater & Gordon	Comprehensive Legal Funding
Transpacific Industries Group	Settled before filing	2012	35 million	Unknown	Maurice Blackburn	IMF Bentham Limited
Nufarm	2011	2012	47 million	Unknown	Slater & Gordon	Comprehensive Legal Funding
					Maurice Blackburn	International Litigation Funding Partners

Matter	Year commenced	Year settled	Settlement amount (AUD)	Reported Demand (AUD)	Plaintiff Law Firm	Litigation Funder
GPT	2011	2013	75 million	100 million	Slater & Gordon	Comprehensive Legal Funding
White Sands Petroleum	2012	2014	3 million	Unknown	Piper Alderman	LCM Litigation Pty Ltd
Allco Finance Group	2013	2017	40 million	Unknown	Maurice Blackburn	International Litigation Funding Partners
Great Southern	2013	2014	23 million	240 million	Macpherson & Kelley Lawyers	IMF Bentham Limited
Leighton Holdings	2013	2014	70 million	400 million	Maurice Blackburn	International Litigation Funding Partners
Rivercity	2014	2016	121 million	150 million	Maurice Blackburn	IMF Bentham
Newcrest	2014	2014	36 million	200 million	Slater & Gordon	Comprehensive Legal Funding
Downer EDI	2011	2014	28 million	38 million	Slater & Gordon	IMF Bentham Limited
Downer EDI	2014	2016	11 million	Unknown	Mark Elliott	BSL Litigation Partners
Billabong	2015	2016	45 million	Unknown	Slater & Gordon	Comprehensive Legal Funding
Brisconnections	2014	2015	Confidential	Unknown	Whittens Lawyers	IMF Bentham Limited
Gunns (directors)	2011	2016	16 million	75 million	Maurice Blackburn	IMF Bentham Limited
Treasury Wines	2014	2017	49 million	100 million	Maurice Blackburn	IMF Bentham Limited
QBE	2015	2017 (in principle)	132.5 million	200 million	Maurice Blackburn	International Litigation Partners
Slater & Gordon	2016	2017	36.5 million	250 million	Maurice Blackburn	International Litigation Partners
Tamaya Resources	2014	2017	6.75 million	30 million	Maurice Blackburn	International Litigation Partners
Arasor	2012	2018	19.25 million	Unknown	Squire Patton Boggs	International Litigation Partners
Kagara	2016	2018	3 million	Unknown	Piper Alderman	IMF Bentham Limited
Macmahon Holdings	2015	2018	6.7 million (awaiting Court approval)	Unknown	ACA Lawyers	Harbour Fund II

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Active Shareholder Class Actions in Australia

Matter	Year commenced	Reported Demand (AUD)	Plaintiff Law Firm	Litigation Funder
Forge	2014	Up to 100 million plus interest and costs	Phi Finney McDonald Lawyers	IMF Bentham
Worley Parsons	2014/2015	300 million	ACA Lawyers	JustKapital Litigation Pty Ltd
Myer Holdings	2015 – on appeal	300 million	Portfolio Law	Australian Funding Partners Limited
QRxPharma	2015	Unknown	Arnold Bloch Leibler	JustKapital
Ashley Services Group Limited	2016	Unknown but 103.5 million market capitalisation drop reported	William Roberts	IMF Bentham
Vocation Limited	2016	Unknown but 350 million market capitalisation drop reported	Phi Finney McDonald Lawyers	IMF Bentham
			Maurice Blackburn	International Litigation Funding Partners
Murray Goulburn	2016	Unknown but 183.5 million market capitalisation drop reported	Elliott Legal	Melbourne City Investments
UGL	2017	Unknown	Phi Finney McDonald Lawyers	IMF Bentham
Sirtex	2017	Unknown	Portfolio Law	BSL Litigation Partners Limited
			Maurice Blackburn	IMF Bentham
Bellamy's	2017	Unknown but 259.7 million market capitalisation drop reported	Slater & Gordon	IMF Bentham
			Maurice Blackburn	Investor Claim Partner
Commonwealth Bank of Australia	2017	Unknown but 5.6 billion market capitalisation loss reported	Maurice Blackburn	IMF Bentham
Spotless Group Holdings	2017	Unknown	Slater & Gordon	Therium
Surfstitch	2017	100 million	Gadens	International Litigation Funding Partners
Crown Resorts	2017	Unknown but 1.3 billion market capitalisation loss reported	Maurice Blackburn	International Litigation Funding Partners
Shine	2017	250 million	Quinn Emanuel	Regency Funding Pty Ltd
Quintis	2017	122 million plus	Gadens	Unknown
			Piper Alderman	Litigation Capital Management
Dick Smith	2017		Corrs Chambers Westgarth	Vannin Capital
	2018	200 million	Johnson Winter & Slattery	Investor Claim Partner

Matter	Year commenced	Reported Demand (AUD)	Plaintiff Law Firm	Litigation Funder
AMP	2018	Unknown but 2 billion market capitalisation drop reported	Phi Finney McDonald Lawyers	IMF Bentham
			Quinn Emmanuel	Burford Capital
			Shine	Augusta Ventures
			Slater & Gordon	Therium
			Maurice Blackburn	International Litigation Funding Partners
GetSwift	2018	75 million to 100 million	Squire Patton Boggs	International Litigation Partners
		120 million to 140 million	Corrs Chambers Westgarth	Vannin Capital
		Unknown	Phi Finney McDonald Lawyers	Therium
Iluka	2018	Unknown	ACA Lawyers	Harbour Fund II
BHP Billiton	2018	Unknown but 25 billion market capitalisation loss reported	Phi Finney McDonald Lawyers	G&E RTMC Funding
Commonwealth Bank of Australia	2018	Unknown	Phi Finney McDonald Lawyers	Therium
			Slater & Gordon	IMF Bentham
Brambles	2018	Unknown	Maurice Blackburn	Harbour Fund II
CIMIC	2016	Unknown	Maurice Blackburn	International Litigation Funding Partners
Woolworths Group	2018	Unknown	Maurice Blackburn	IMF Bentham

What steps can a defendant take when a Class Action is brought?

In the submissions in response to the Victorian Law Reform Commission (**VLRC**) paper,[25] a debate has raged on whether certification requirements should be introduced. The debate has not been split evenly between plaintiffs arguing against and defendants for certification, although the Insurance Council of Australia has called for a robust certification process, including a determination pre-commencement as to which of several competing actions should proceed. In contrast, the ALRC was unpersuaded that a class certification procedure, like that which operates in the United States and Canada, would enhance the practice and procedure of the class action regime in Australia.

In the absence of a certification regime, the onus is upon the defendant to argue that the action is an abuse of process or should not otherwise proceed through an interlocutory application. For example, defendants can argue that the action should be struck out, or declassified or defendants can challenge the plaintiff and group representation. The Court can also make any of these orders on its own motion.[26] However, in practice, as the threshold to constitute a class is relatively low in Australia, the Courts are wary of intervening on class composition issues in securities claims at an early stage in the proceedings.

Defendants will also typically seek security for their costs of the litigation at an early stage of class action proceedings (this is referred to further below).

Defence costs

The costs of defending a securities claim are substantial, typically in the region of many millions of dollars. Recent empirical studies suggest that the average duration for shareholder claims to settle and obtain Federal Court approval is 848 days (2.5 years)[27] from commencement of the proceeding, although some actions take much longer than that to progress through the Courts with defence costs increasing the longer it takes to finalise a matter. The defence costs incurred are often commensurate with, or more than, the plaintiff's costs of pursuing such claims. Recent Court settlement approvals have disclosed plaintiffs' costs of AUD 12.6 million in the Oz Minerals class action, AUD 19.2 million in the AECOM/Rivercity class action, AUD 5.7 million in the Billabong class action, AUD 10.3 million in Newcrest Mining, and AUD 10.5 million in Allco Finance.[28]

Shareholders typically seek to establish liability in these claims based, in large part, on publicly available evidence (for example, documents filed with the ASX) against the company's internal records (with voluminous records often generated across several years) and, where a regulatory investigation has also occurred into the conduct of a company, the records obtained in the course of that investigation. If there has been a pre-action investigation, ASIC has broad powers of document compulsion and examination of individuals in connection with the alleged conduct which may later be produced under subpoena in a securities claim. Substantial costs are often incurred in the discovery process, the majority of which will fall upon the defendant. This is because the defendant corporation will usually have voluminous internal documents which need to be reviewed and considered for both relevance and client legal privilege before being produced to the class applicant for inspection.

Expert evidence (considered further below) also absorbs a significant portion of the costs incurred in bringing and defending these claims.

Other concurrent wrongdoers may also be joined: for example, auditors and legal advisors. This all has an impact on the complexity of the claim and the incurring of defence costs.

Costs orders are only available against the class representative. It is common for litigation funders to meet these costs. In addition to their own costs, settlements usually provide that defendants meet the plaintiff group members' legal costs.

25 *Access to Justice – Litigation Funding and Group Proceedings*, Consultation paper, July 2017 (**the VLRC paper**). http://lawreform.vic.gov.au/sites/default/files/VLRC_Litigation_Funding_and_Group_Proceedings_Consultation_Paper_for_web.pdf
26 Sections 33C and 33N of the Federal Court of Australia Act 1976 (Cth).
27 An Empirical Study of Australia's Class Action Regimes Fifth Report. The First Twenty-Five Years of Class Actions in Australia by Professor Vince Morabito, July 2017.
28 *Mitic v Oz Minerals Ltd (No 2)* [2017] FCA 409; *Hopkins v AECOM Australia Pty Ltd (No 8)* [2016] FCA 1096; *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194; *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433; *Blairgowie Trading Ltd v Allco Finance Group Ltd (Receivers and managers appointed) (in liq) (No 3)* [2017] FCA 330

The need for expert evidence

A key consideration for the defence team will be the opportunity to attack the quantum claimed in the proceedings. To show price inflation, expert evidence is typically needed to demonstrate the economic consequences of the alleged non-disclosure. The example below shows how loss methodology may work in an artificially simple scenario.

Simple Loss Methodology

One of the simplest ways of assessing the loss is to look at the market reaction to the information once it is disclosed:

1. Plaintiffs will argue that if the price drops, then at face value it suggests that the non-disclosed information was material to the price or value of the securities;
2. The failure to have informed the market earlier caused the market to trade securities at a higher price - this is known as the Inflation Period; and
3. The quantum of the loss can be estimated by reference to the inflation in price or value of the securities caused by the contravention and the number of securities purchased in the Inflation Period and still held by group members at the conclusion of the Inflation Period.

In practice, it will be much more complicated and there is a natural tension when investors seek to rely on inflation as the measurement of their loss, as it is also equally possible that some group members may have made a profit through selling shares in the same relevant period at the higher price. In addition, shareholder claims do not tend to be 'no transaction' cases as the shareholder would have made some other form of investment, if not in the company that is the subject of the claim, then some other company or investment opportunity. Economic evidence on share trades and the impact of other confounding information (being any other information unrelated to the specific disclosure that would be expected to have an effect on the stock price) on the market price is therefore an important tool to use in attempting to resolve these tensions.

Event studies, whilst not compulsory in Australia as compared with the US, are frequently used as a tool to demonstrate these economic consequences.

An "event study" is used by an expert economist or market analyst as a statistical tool to show evidence of the change in price to specific disclosures. Whilst it has been widely adopted as a standard methodology in the US for assessing market inflation, its use in Australia is not yet subject to any useful judicial guidance because the only securities action ever to run to a full trial was settled before judgment was delivered.[29]

There are also various quantum methodologies which are used to calculate potential claim value and/or the potential number of impacted shares in a shareholder class action:

- First In, First Out (**FIFO**), premised on the assumption that the shares purchased first (i.e. before the relevant claim period) are also sold first;
- Last In, First Out (**LIFO**), premised on the assumption that shares purchased last are sold first, and which does not off-set the shares sold in the claim period; and
- "Netting", which provides for any purchases and sales of shares by each group member to be netted off to account for any windfall gain that a group member may have made by selling the shares at the allegedly inflated price.

The appropriate method of loss assessment for quantum calculation purposes has not been decided by any appellate Australian Court to date and it can take some time for defendants to get access to information through interlocutory processes in order to undertake the analysis required above, with parties fiercely debating the appropriate loss methodology. Loss methodologies were considered by his Honour Justice Brereton in New South Wales Supreme Court Proceedings in 2017 where his Honour ruled in favour of the LIFO approach, although this action was not constituted as a class action.[30]

29 *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19.
30 *In the Matter of HIH Insurance Limited (In Liquidation) (ACN 008 636 575) and Others* [2017] NSWSC 380.

Strategic considerations for defendants

Whilst the prospect of facing high value, high stakes litigation will inevitably carry with it interruption to normal business activity, reputational risk and heightened media attention, there are a number of factors that are unique to class actions that raise particular issues for corporates and D&Os:

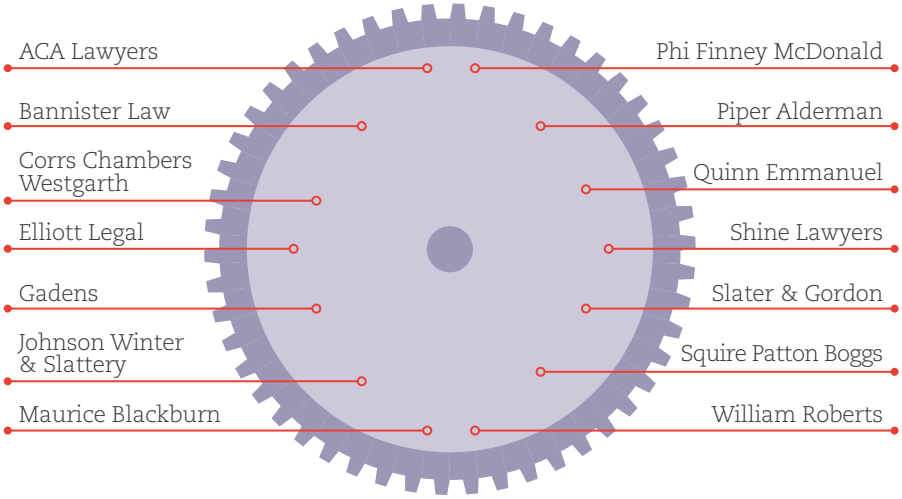
– The opt-out system makes it difficult for defendants to an action to ascertain their exposure early on. Whilst the Court requires class members to be notified of the action so that they have the choice to opt out and not be bound by the outcome, class closure can happen quite late in the proceedings, usually only shortly before a mediation or trial, and there is always the possibility of the class being re-opened if a matter does not resolve at mediation.

– Despite the opt-out model, Australian Courts have permitted closed class actions (restricting the class to those who have signed up to an agreement with a funder) increasing the prospect of competing actions and increased cost. (See further under "Multiple Class Actions"). This practice is expected to be eliminated if the ALRC's recommended reforms, which are aimed at ensuring that all class action proceedings proceed as open class actions, are implemented.

– There is little opportunity to challenge the strength/weaknesses of individual cases early on because the primary focus at the start is on the lead applicant and the common issues.

The defendant will have to consider its prospect of success at trial and assess whether this can be deemed an acceptable risk. This is a highly complex exercise, made more difficult by the current uncertainty around a firmly established approach to causation and appropriate loss methodology. Defendants will also have to consider the benefits of having a judgment on a certain set of allegations, particularly when facing multiple proceedings.

Plaintiff firms representing active shareholder class actions



Entrepreneurialism

The role of the Australian plaintiff bar

Plaintiff law firms in Australia have played a critical part in the growth of securities class actions in the jurisdiction. Firms such as Maurice Blackburn, and Slater & Gordon initially captured most of the market with specialist class action teams, usually working in tandem with litigation funders. The market has expanded to include more players such as ACA, Squire Patton Boggs, Shine Lawyers, Mark Elliott, Bannisters, Quinn Emmanuel, Gadens and Phi Finney McDonald (established as a boutique firm by former partners of Slater & Gordon). It is the law firms that will undertake due diligence on the claim, often following a drop in share price, and will advertise for group members and build the class. ASIC may also investigate the same matters for potential regulatory action against the company and its D&Os.

As the VLRC paper[31] identifies, there has been a trend towards smaller and newer law firms entering the class actions space, heightening the prospect of more speculative claims and the issues surrounding a "race to file" discussed elsewhere in this paper.[32] There has also been ongoing consideration over whether more regulation of lawyers is required, and whether contingency fee arrangements (also known as percentage-based fee billing) should be permitted. Whilst those arrangements are currently prohibited in Australia amidst concerns of fostering an environment of greed and conflicts of interest amongst the legal profession, the ALRC recommends allowing a limited contingency fee model for class action proceedings, which it believes will:

- enable greater access to justice for medium-sized class actions;
- promote competition amongst funders and encourage lower commission rates;
- provide a more straightforward method of billing for group members; and
- increase returns for group members by allowing for unfunded actions.

The ALRC recommends that in order to achieve a limited contingency fee model that addresses the concerns of stakeholders, statutes regulating the legal profession should permit solicitors to enter into contingency fee agreements subject to a range of limitations including that:

- an action that is funded through a contingency fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis;
- contingency fee agreements in representative proceedings are permitted only with leave of the Court; and
- the Court has an express statutory power to reject, vary, or amend the terms of such contingency fee agreements.

The role of litigation funding

Litigation funding, the provision of financing by a third party not otherwise involved in the litigation, has been critical to the development of class actions in Australia. Due to the prohibition on contingency fees in Australia, litigation funding first rose in prominence to assist company administrators and liquidators to pursue debts on behalf of creditors. Increasingly, litigation funders play a significant role in class actions where, absent funding, representative plaintiffs would bear the risk of huge financial outlay and adverse costs risk in return for comparatively small individual damages. Litigation funders supported 71% of all shareholder class actions filed by mid 2017.[33] Securities class actions in particular are regarded as fertile ground by funders as being simpler in terms of assessment of damages and the identification of a class than other mass consumer claims, such as products and cartel claims.

Essentially, litigation funding involves a party to a dispute receiving monies from a funder in exchange for the funder obtaining a return on its investment. Returns can take the form of an agreed amount or a share of the proceeds. In the event that the claim does not succeed, the costs are met by the funder or, if the relevant rules on costs allow, After The Event (**ATE**) insurance may be provided by the terms of the funding agreement to cover any adverse costs orders up to a specified limit. Commission paid to the funder is typically in the range of 22-45% (after costs).[34]

31 VLRC paper, supra.
32 The issues are detailed in the Insurance Council of Australia's response to the VLRC's consultation paper, and include (i) inadequate representation by the lead plaintiff (ii) poor pleading of claims (iii) competing class actions; and (iv) closed class actions.
33 Vince Morabito Empirical Study (p 30), supra at FN 14.
34 VLRC paper, supra.

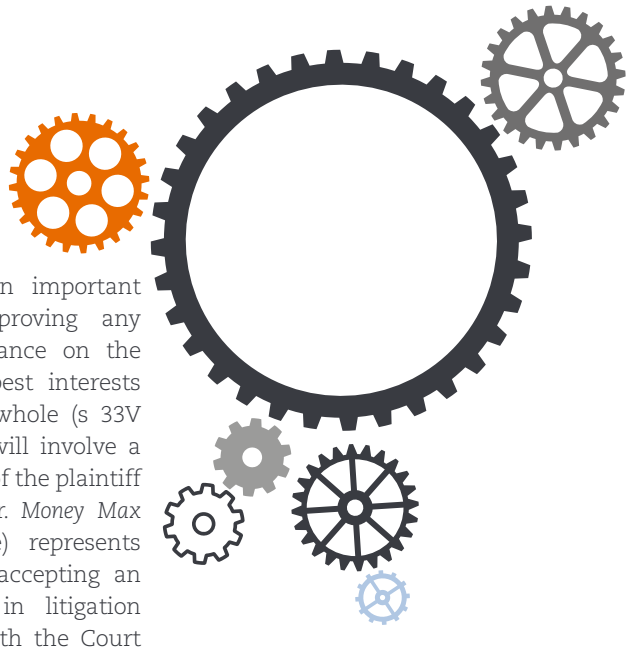
The largest funders in Australia include ASX listed IMF Bentham and Litigation Capital Management Finance, and a Singaporean hedge fund, International Litigation Partners. Offshore funders (such as Harbour Litigation Funding and Burford Capital, reportedly the world's largest funder, which recently announced expansion of its operations in Australia[35]) are also emerging players. The opportunities presented by Australia's class action regime have attracted a diverse range of funders - including those backed by institutional investors, hedge funds and even high net worth individuals. The VLRC paper states that there are approximately 19 Australian and international litigation funders active in Australia, but that number is frequently changing with the ALRC most recently reporting that there are approximately 25 active funders in the Australian market.[36] Offshore funders currently comprise just over a third of the funding market.

There is growing concern that the presence of less sophisticated players who may be prepared to take on risks that more established funders will not, has led to more speculative claims being announced (with resultant media focus on the corporate and the potential for an accompanying stock drop).

In addition, the funding market has become increasingly saturated, and this has led in part to the "race to file" discussed elsewhere in this paper. The involvement of the funder is usually heavily publicised, and it may be seen as a tactical advantage for the plaintiffs to show that the claim has survived the funder's due diligence process. Class actions proceeding in the Federal Court will be subject to a requirement to disclose any litigation funding agreement at/prior to the initial case management conference. The agreement will usually be heavily redacted on the grounds of privilege.

Whilst litigation funding is clearly a commercial venture that the funders would not engage in if the commercial returns were not there, the Courts have a supervisory function in ensuring that the extraction of a commercial return from the claims process does not offend public policy.[37] For example, in October 2016,

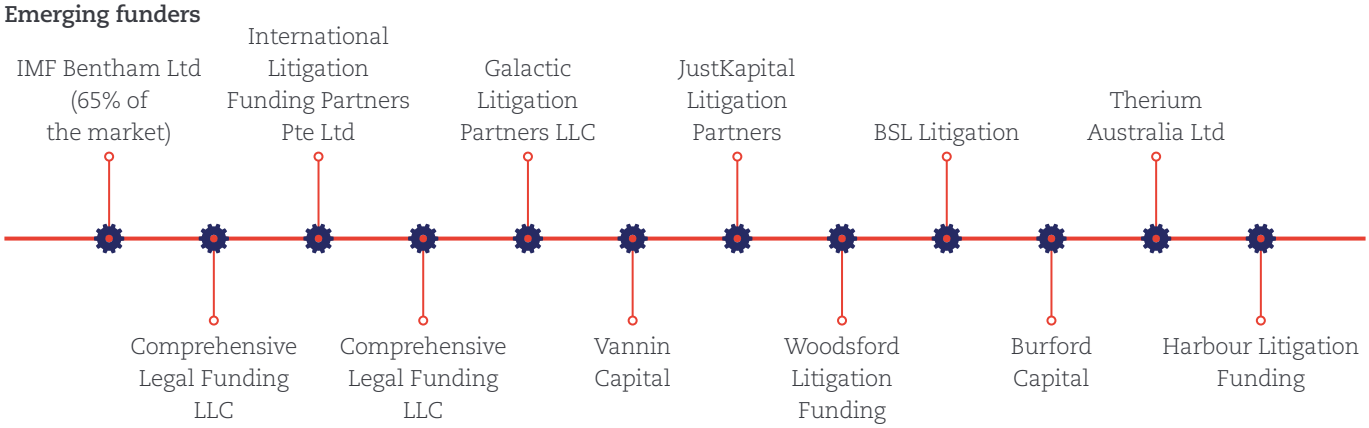
35 See www.abc.net.au/news/2019-01-28/litigation-funder-in-australia-to-profit-from-royal-commission/10755130 "The world's biggest litigation funder has set up shop in Australia to get a slice of the booming class action business, including some high profile cases stemming from the banking royal commission."
36 ALRC Final Report, para 2.66.
37 *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* [2006] 229 CLR 386



Australia's Federal Court stayed an action as an abuse of process where the funder, Melbourne City Investments (**MCI**), had purchased a small parcel of shares in a publicly listed company and then instituted group proceedings with the funder's sole director and shareholder retained as the solicitor in the litigation. The Court found that the sole purpose of the creation of MCI was to buy shares and bring class actions as lead plaintiff to enable legal fees to be earned.[38] However, the Courts have been mindful that the boundaries on Court interference are set by the legislature; in *Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm)*,[39] the Court refused permission to amend the pleadings where the funder was acting on both sides of the record in two actions arising from the same factual dispute but commented that *"the desirability of permitting such arrangements is something which warrants investigation by the legislature"*.

The Court also plays an important supervisory role in approving any settlement or discontinuance on the basis that it is in the best interests of group members as a whole (s 33V Federal Court Act). This will involve a balancing of the interests of the plaintiff law firms and the funder. *Money Max* (discussed further above) represents a step by the Court in accepting an active supervisory role in litigation funding arrangements, with the Court concluding that the funding commission would be determined by the Court at the end of the proceedings. The Court will intervene to ensure the commission rate is reasonable. In *Blairgownie Trading Ltd v Allco Finance Group Ltd*[40] the Court found that 30% of the net settlement sum (after deduction of legal costs) was reasonable, adjusting it where necessary.[41]

Emerging funders



38 *Melbourne City Investments Pty Ltd (MCI) v Treasury Wine Estates Limited* [2016] FCA 787
39 [2016] FCAFC 2
40 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330
41 *Earglow Pty Ltd v Newcrest Mining Limited and Camping Warehouse Pty Ltd v Downer EDI Ltd* [2016] VSC 784

Impact of litigation funding on settlement dynamics

There is no doubt that the presence of a litigation funder changes the dynamics of the litigation process. Some key issues for defendants to consider include:

- Applying for disclosure of the funding agreement: Parties to a class action proceeding in the Federal Court will be subject to a requirement to disclose any litigation funding agreement, which as recognised by the ALRC will be scrutinised by the Court in detail.[42]
- Early Tactics: Defendants may consider deploying strong defences at an early stage to prompt early settlement negotiations. Any result will need to not only be acceptable to the plaintiff (and the group members), but also ensure a commercial return for the funder.
- Costs pressures: Security for costs are often ordered against a funded party; the Court will consider the funders' ability to meet indemnity obligations in terms of adverse costs.
- Settlement dynamics: The funder is likely to be front and centre in settlement negotiations. Funder involvement will change the percentages of recovery, driving the strategy in any given case.
- Costs recovery: Australia has a loser pays system, and there have been cases in which a funder has been ordered to pay costs, such as in *Gore v Justice Corp Pty Ltd*[43] and *Ryan Carter and Esplanade Holdings Pty Ltd v Caason*.[44]

The presence of a funder is relevant to a defendant's assessment of the litigation costs risk. As mentioned above, security for costs is often ordered against a funded party. The funding agreement is often tendered in response to a security for costs application and there will be consideration of the funder's ability to meet indemnity obligations in terms of adverse costs. There are some recent decisions which have permitted litigation funders to provide security by way of an ATE insurance policy (specifically a deed of indemnity together with a bank guarantee for the costs of enforcement) as an alternative to paying money into Court.[45] The Australian Institute of Company Directors has argued for the prudential oversight of funders.[46] However, the ALRC has recommended against prudential oversight and in favour of strengthening the security for costs regime in funded actions in a number of respects.

There is no doubt that litigation funding has energised and fuelled the development of securities class action litigation in Australia with varying views on whether the effect has been positive or negative. There has been a debate for a number of years regarding whether litigation funding should be more tightly regulated, and whether it delivers access to justice. At present, there is no mandatory licensing of litigation funding, with regulatory oversight limited to monitoring by ASIC, which requires funders to have adequate arrangements for managing conflicts of interest.[47]

In January 2017 in Australia, the Victorian Government asked the VLRC to review litigation funding practices in Victoria following cases such as the Huon litigation (not a class action) in which an entire AUD 4.5 million settlement was split between the lawyers and the litigation funder. In December 2017 the ALRC was asked to consider whether, and to what extent, class actions and third party litigation funders should be subject to Commonwealth regulation relating to conflicts of interest, costs charged and settlement distribution, as well as looking at prudential regulation and capital adequacy. However, the ALRC has recommended against the establishment of formal regimes for regulating litigation funding such as a bespoke licencing regime administered by ASIC or imposing capital adequacy requirements. It has instead recommended the implementation of consumer protection measures through improving Court oversight of funding arrangements. As discussed earlier in this paper, the oversight enhancements recommended by the ALRC include a requirement for Court approval for creation of a binding litigation funding agreement, in which the Court would have the power to amend commission rates.[48] The ALRC's recommendations are likely to stymie any further suggestions that a licencing or prudential regulation regime should be established in the foreseeable future.

42 ALRC Final Report, para 2.60.
43 [2002] FCA 354
44 [2016] VSCA 236
45 *Australian Property Custodian Holdings Limited (in Liq) v Pitcher Partners* [2015] VSC 513 (first instance); *Australian Property Custodian Holdings Ltd (in liquidation) (receivers and managers appointed) v Pitcher Partners & Ors* [2016] VSC 399; *DIF III Global Investment Fund LP & Anor v BBLP & Ors* [2016] VSC 401 and *In the matter of Tiaro Coal Limited (in liq)* [2018] NSWSC 746
46 VLRC paper, supra.
47 See ASIC Regulatory Guide 248 Litigation schemes and proof of debt schemes: Managing conflicts of interest (https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-248-litigation-schemes-and-proof-of-debt-schemes-managing-conflicts-of-interest/)
48 ALRC Final Report, see recommendations 11-16.

The ALRC has also made a number of recommendations directed towards managing potential conflicts of interest in law firms' arrangements with funders. In relation to managing these conflicts, the ALRC recommends that:

- the Law Council of Australia should develop specialist accreditation for solicitors in class action law and practice;[49]
- the Australian Solicitors' Conduct Rules should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party funder that is funding the same matters in which the solicitor or law firm is acting;[50] and
- the Class Actions Practice Note is amended so that the first notices provided to potential class members by legal representatives are required to clearly describe the obligation of legal representatives and litigation funders to avoid and manage conflicts of interest, and to outline the details of any conflicts in that particular case.[51]

49 ALRC Final Report, see recommendation 20
50 ALRC Final Report, see recommendation 21
51 ALRC Final Report, see recommendation 22

Multiple Class Actions

In recent years, there has been an increase in the filing of multiple class actions against the same defendant(s). The prospect of facing multiple group claims arising from the same facts is clearly undesirable from a defendant's perspective; it can increase cost and complexity and create a difficulty in gauging the reasonableness of settlements. Defendants may be faced with: multiple open classes; one closed class and one open class; different claims; different claim periods; differing investor groups; different group definitions; different common issues; and actions which are competing, parallel or sequential.

Closed class actions are undesirable for defendants as they can increase the incidence of multiple class actions. For example, where a class action is successful, subsequent proceedings may be brought by those who did not originally register in the closed group. It is likely that the decision in *Money Max* (where common fund orders were granted) will result in more open classes, which, from a defendant's perspective, is preferable as this increases the prospect of achieving finality on settlement. However, an open class claim may not cover all potential plaintiffs, and there may be an increase in competing open classes. How the Courts deal with multiple class actions will therefore continue to be a key consideration.

Australian Courts have generally been reluctant to order a stay or consolidation where there are multiple proceedings, and have allowed multiple proceedings to continue in parallel, on the basis that this allows class members greater choice on representation and funding. In *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd*[52] there were two class actions filed on behalf of overlapping groups of people. The defendant sought a permanent stay of one of the competing proceedings. The Court made an order closing the class of one of the proceedings and ordering it to be tried jointly with the other set of proceedings on the basis that active case management would lessen the risk of the defendant facing costs duplication.

In the more recent decision of *Getswift*, the Full Federal Court[53] upheld orders staying two (2) of three (3) competing class actions.[54] In deciding which of the *Getswift* class actions should proceed, in the first instance decision his Honour Justice Lee undertook a "multifactorial assessment" of all of the factors of the competing filings, including the likely returns to group members, funding models and the proposals put forward by the legal advisers to manage legal costs and expert evidence. With an increased number of competing class actions being commenced, the Full Federal Court took the opportunity to provide general guidance on the range of factors to be considered and the possible options open to a docket judge in dealing with competing open class actions. Some of the key inquiries to be undertaken include:

- an assessment of the various funding and costs models to identify which model is likely to best motivate the class applicant's solicitor and funder to work assiduously to achieve the best outcome for the applicant and all group members; and
- identifying which legal team is likely to secure the best result for the class.[55]

At the time of this paper, an application seeking special leave to appeal from the Full Federal Court decision to the High Court of Australia was pending. It is not known if the High Court will grant special leave to hear the appeal and provide authoritative statements on these issues from Australia's most superior Court.

Additionally, as commented on earlier in this paper the ALRC has recommended reform which would eliminate the practice by which closed class actions have been permissible by reference to group members who have entered into an agreement with a particular litigation funder and amendments to the Federal Court Act to give the Court an express statutory power to resolve competing class actions.

52 [2017] FCA 947
53 *Perera v GetSwift Limited* [2018] FCAFC 202.
54 *Getswift*, supra.
55 See www.clydeco.com/insight/article/swiftness-does-not-mean-first-past-the-post.

The Future

Over the next 5 years, our predictions for shareholder class actions are:

The current trend of more than 10 new shareholder class actions being filed each year will continue, if not increase, unless and until such time as there is further law reform in connection with the central causes of action in shareholder claims.

Law reform will follow the issue of the ALRC's Final Report. If its recommendations are accepted by the Australian Parliament, this will have an impact on the class action claims environment including in relation to:

- A potential overhaul of the continuous disclosure regime (following Parliamentary review) which has driven shareholder claims. Although not going so far as watering down continuous disclosure obligations, we could see the introduction of a higher fault standard in respect of continuous disclosure and the laws relating to misleading or deceptive conduct. Additionally we may see changes to the laws around private enforcement of rights through the Courts with certain actions being reserved only to the corporate regulator, ASIC;
- Exclusive jurisdiction may be conferred on the Federal Court of Australia for causes of action arising under specific Commonwealth legislation that are central to shareholder claims;
- Explicit Court powers may be introduced to regulate and intervene in private contractual arrangements between litigation funders and group members in class action proceedings, rather than establishing a licencing regime administered by ASIC or otherwise imposing minimum capital adequacy requirements on funders;
- The Court's powers will likely be enhanced to manage and dispose of competing class actions, which will help ameliorate current issues with multiple actions and return to the original objective that class actions proceed on an open rather than closed basis. This, in tandem with a possible prohibition on closed classes, would result in a reduction in competing class action proceedings; and
- Changes may be introduced to the way costs are charged by solicitors in funded litigation, with the availability of contingency fee arrangements being permitted in class actions subject to a number of limitations.

As the six year limitation period has expired for claims emanating from losses in financial services sustained from the 2009 global financial crisis, shareholder actions will continue to be pursued in connection with large scale corporate collapses, in respect of earnings guidance/forecasts and subsequent profit downgrades and based on any adverse findings which may arise from the Financial Services Royal Commission (with the final report delivered to the Australian Treasurer on 1 February 2019 and released publicly on 4 February 2019).

We expect to see more jurisprudence, even before any recommendations from the ALRC are adopted by the Parliament, as to how Australian Courts are willing to intervene and case manage competing class actions irrespective of whatever private contractual arrangements have been entered into with group members and particular law firms/litigation funders.

There will be increased involvement of institutional investors and trustees of superannuation funds as plaintiffs in class actions.

We may see the first Australian shareholder class action based on data breaches, for example where a company's share price drops due to an undisclosed data breach or due to a company's inadequate cyber security protections.

A superior Court in Australia will rule on whether a class can rely on indirect or market based causation in establishing reliance in a shareholder class action. The outcome of such a decision may impact the willingness of parties to run class actions to judgment, rather than settling in the future.

We will see increased use of data analytics in class actions including by funders and law firms to identify potential class action claims, to narrow the scope and volume of discovery and to assess economic loss suffered by members of the class.

There will be an increase in claims relating to financial disclosures with respect to the effects of climate change. In 2017 shareholder claims were instituted against the Commonwealth Bank raising allegations of inadequate financial reporting on the impact of climate change, but these were subsequently dropped. Our oil/ energy sector may see claims similar to recent actions brought against major fossil fuel companies in the US, claiming they did not adequately or appropriately disclose risks posed to their businesses by climate change.

D&O insurers are likely to adjust ways in which Side C cover is offered to the Australian market in the future, in an attempt to avoid limits of cover being fully eroded by actions against entities alone, leaving no or limited remaining cover to D&Os.

Class action regimes – a comparison

Jurisdiction	Australia[56]	US	UK
Type of mechanism	Representative proceedings.	Class actions.	Group litigation orders (**GLO**) and representative claims under Part 19 of the Civil Procedure Rules.
Opt-in/out	Opt-out although closed class permitted. However, the ALRC has recommended reforms prohibiting closed classes.	Opt-out.	Opt-in.
Requirements	7 or more persons with claims against the same defendant in respect of or arising out of the same, similar or related circumstances.	Be so numerous (generally held to be more than 40 class members) that joining all members is impractical. Raise common questions of law or fact. Have representatives whose claims or defences are typical of the class. Have representatives who fairly and adequately protect the interests of the class.	GLO - claims issued by a number of different parties giving rise to "common or related issues of fact or law" – each party must have first brought their own claim. Representative - more than one party has the "same interest" in a claim.
Common issues	There must be at least one substantial common issue of law or fact. There is no requirement that common issues predominate.	Questions of law or fact common to the class members must predominate over any questions affecting only individual members.	GLO – lower standard of commonality required than representative proceedings. Representative – "same interest" is a common grievance and the relief sought must be beneficial to all.
Certification	Not required. Burden is on the defendant to show that the threshold requirements have not been met.	Certification is required.	Requires Court approval before can proceed – this is at the Court's discretion.
Main causes of action	Breaches of continuous disclosure obligations under s674(2) of the Corporations Act and Rule 3.1 of the ASX listing rules. Breach of rules relating to misleading or deceptive conduct under s1041H of the Corporations Act and/or s12DA of the ASIC Act 2001 for financial services claims.	Section 10(b) of the Securities and Exchange Act of 1934 (antifraud provision) and Rule 10b-5 promulgated thereunder (liability for any misstatement or omission of a material fact). Sections 11 (misstatements and/or omissions in a Registration Statement) and 12 (liabilities arising in connection with prospectuses and communications) of the Securities Act 1933.	Sections 90 and 90A of the Financial Services and Markets Act 2000 (**FSMA**). Section 90 relates to misstatements and omissions in listing particulars and prospectuses. Section 90A relates to misstatements and omissions in periodic and episodic disclosures in relation to securities traded on certain markets.

56 Pending the outcome of the implementation of reforms arising from the ALRC recommendations and following on from the Royal Commission Final Report.

Jurisdiction	Australia[56]	US	UK
Causation rules	Unclear, but indirect/market based theory likely to be approved.	Fraud on the market theory.	Unclear - the use of the words "as a result of" implies a causal link between the loss and the relevant misstatement or omission. However, general acceptance that there is no need to demonstrate reliance.
Costs rules	Costs follow the event so usually the losing party will be required to pay the winning party's costs.	Each party bears its own costs. Parties are not entitled to costs recovery unless statute or regulation provides otherwise.	Costs follow the event so usually the losing party will be required to pay the winning party's costs.
Litigation funding	Permitted and widely used to fund securities and financial services class actions.	Permitted in a number of states and its use in the financing of securities suits is growing.	Permitted and has been critical to the shareholders collective proceedings brought against financial and commercial institutions.
Contingency fees	Contingency fees are not permitted but risk sharing between funders and law firms is permitted on a conditional basis. However, the ALRC has recommended reform in this area to permit contingency fees in class actions (subject to conditions).	Permitted and widely used as a method of financing securities suits.	Damages Based Agreements (**DBAs**) are permitted whereby the lawyer does not charge the client as the matter progresses, but receives a percentage of damages (the "contingency fee") in the event of a win. Take up of such arrangements has, so far, been low. There is a cap of 50% for commercial cases.

Securities Class Actions in

Asia-Pacific

Contents

Developments in Asia

China

China has a civil law system. However, whilst the law itself is fairly sophisticated, the infrastructure is insufficient to support it and the inherent culture in China is unsupportive of securities litigation.

Whilst there is no specific class action mechanism, under the Civil Procedure Law (**CPL**) of the People's Republic of China, "joint" and "representative" actions have been permitted since 1991. Joint litigation is where there are two or more persons and the subject matter of the action is the same or of the same category. Representative litigation is joint litigation where the number of litigants on either side is 'large' (10 or more people) and representatives are then elected from the litigants to represent the class in the litigation.[57] Representative litigation can be brought on an opt-in basis where:

– it involves the same subject matter; or

– it involves subject matters of the same category and the Court considers that the action can be tried in consolidation with the consent of the concerned party or parties.

In theory, representative actions are allowed across all areas, such as competition, consumer claims arising from financial services, environmental law, pension claims and product liability. They can even be employed for civil claims connected with criminal proceedings. However, an important exception applies in the case of securities-related actions.

Historically, China has been unwilling to support securities claims brought in any form, whether individually or on a collective basis.[58] However, individual and joint securities actions have made more ground in recent times and there has been an increasing number of judgments on the issue of misrepresentation relating to securities (for example, fraudulent listing, fictitious profit etc). Further, after the "Provisions of the Supreme People's Court on the Trial of Cases of Civil Compensation Arising out of False Presentation in Securities Markets" (**Misrepresentation Provisions**) entered into force in 2003, more than 110 cases regarding securities misrepresentations have been filed before competent Courts in China, of which more than 40 have resulted in judgments.

However, it is a different matter in respect of securities representative actions. In 2001, over 350 investors filed an action against Yorkpoint Science & Technology Co. The next day the Supreme Court placed a temporary ban on the acceptance of securities suits which ultimately led to the dismissal of the claim. At the time, the Court commented that it had insufficient training and experience to handle such claims.

Representative actions were then effectively banned following the "The Notice of the Supreme People's Court on Relevant Issues of Filing of Civil Tort Dispute Cases Arising from Misrepresentation on the Securities Market" published in 2002, in which the lower Courts were directed that they should only accept a single or joint securities claim. This means that only group actions with 10 or fewer persons may be pursued in the Chinese Courts. This places a restriction on the pursuit of investor claims where the number is likely to far exceed this. Where individual claims are brought in different Courts at different times, there is the risk of inconsistent approaches and judgments.

There are also judicial barriers to securities actions proceeding in China. For example, smaller claims face a higher fee than larger claims, which encourages the Courts to split claims up and there is often socio-political pressure not to accept securities claims.

There are other barriers to the spread of securities claims in China:

– Contingency fee agreements between the plaintiffs and their lawyers in group actions are prohibited;

– There must be an administrative or criminal ruling as to liability before the filing of a misrepresentation claim.

There have been class actions outside of the securities field, relating to land acquisition, environment contamination, consumer protection and copyright protection. Recently, China has come under increased pressure to address its air and water pollution, leading to over 200 cases so far being brought for breaches of environmental law. This rise in the number of representative lawsuits indicates a trend towards increased use of representative litigation to resolve disputes in China. However, it is a developing picture and, for the time being, it does not look to extend to securities claims.

57 Article 54 of the CPL provides for representative action where the number of persons involved is not fixed at the date of filing.
58 For example, on September 21, 2001, the Supreme People's Court issued 'Notice of the Supreme People's Court on Refusing to Accept Civil Compensation Cases Involving Securities For the Time Being (No. 406 [2001])'

Taiwan

Taiwan has a civil law system and, therefore, group actions are governed by statutory laws. The Taiwanese Code of Civil Procedure (**CCP**) provides for four types of group actions:

1. Joinder of parties (Article 53) – two or more persons may be party to the same proceedings where:
   a. The rights or obligations that are the claims of the suit are common to them;
   b. The rights or obligations that are the claims of the suit are based on the same factual or legal grounds; or
   c. The rights or obligations that are the claims of the suit are of the same type and the factual or legal grounds on which the claims are based are also the same type; provided, however, that the domiciles of the defendants must be located in the jurisdiction area of the same Court or the suit must be subject to a common Court.
2. Appointee lawsuit (Article 41) – where multiple persons having a common interest appoint one or more of their number as the appointees to institute a lawsuit on behalf of the rest. The Court may also publish a notice requesting others possessing the same common interest to apply to opt in within a specified time.
3. A suit brought by a non-profit association (Article 44-1) – where members of the association may appoint the association to bring a claim on their behalf.
4. Representative lawsuit (Article 44-2) – where, upon approval of the competent authorities, an incorporated non-profit association or foundation may institute a lawsuit against a person who has infringed upon the rights of multiple persons to seek injunctive relief.

Group actions under these mechanisms are rare in Taiwan. The cases that have been brought have related to securities/shareholder claims, environmental protection and consumer protection.

The main activity in the region in relation to securities claims is as a result of the Securities Investors and Futures Traders Protection Act, pursuant to which the Securities and Futures Investors Protection Centre (**SFIPC**) may bring a claim or arbitration in its name following receipt of 20 or more complaints from investors who have suffered damage owing to the same cause. The SFIPC then issues a public notice notifying investors of the cases and inviting them to join. Recent examples of cases (all involving insider trading) include:

- TransAsia Airways Corporation (compensation sought: NTD 5,137,000; status: ongoing case at Taiwan Taipei District Court);
- Mega Financial Holding Company Ltd (compensation sought: NTD 111,594,000; status: ongoing case at Taiwan Taipei District Court);
- Taiwan Life: (compensation sought: NTD 289,237,000; status: ongoing case at Taiwan Taipei District Court);
- Phison Electronics: (compensation sought: NTD 8,036,000; status: ongoing case at Taiwan High Court); and
- OBI Pharma, Inc.: (compensation sought: NTD753,364,000; status: ongoing case at Taiwan Shilin District Court).

SFIPC actions are typically run concurrently with criminal prosecutions into insider trading. A downside for investors is that if the criminal action fails, then the SFIPC action also fails, a potential costs risk for the class of investors. Nonetheless, the procedure provides an effective mechanism for aggrieved investors and its popularity continues.

Thailand

The Civil Procedure Code in Thailand was significantly amended in 2015. These amendments included the insertion of class action provisions into the Code, which took effect in December 2015. The procedure is a broad based regime covering all types of actions, including securities class actions.

To bring a class action, the plaintiff files a petition and a complaint which states the grounds and factual basis for the suit. The basis and methods for calculation of individual damages is also necessary in order to obtain Court approval. The Court must be satisfied that the following conditions are met in order to grant the application:

- That the claims have common grounds, factual basis and relief sought, which must be sufficiently specified;
- That a significant number of members are involved to make the procedure convenient;
- That a class action would be more equitable and efficient; and
- That the plaintiff (and its lawyer) is sufficiently qualified to represent the class.

Japan

Given that the procedure it still in its infancy, there have not yet been any securities-related actions. To date, the procedure has only been utilised in a claim against the operator of a goldmine in relation to breaches of environmental legislation.

The procedure is intended to be similar in scope to the US class action system and its certification and opt-out features have much in common. However, there are a few critical differences which may mean that Thailand does not see the same level of interest from plaintiff lawyers:

– 'Success fees' or contingency based fee arrangements are prohibited by the Courts. As lawyers are responsible for gathering evidence in order to justify class certification, plaintiff lawyers may not be incentivised to pursue class actions;

– Costs awards ordered by the Thai Courts are typically low; and

– Lack of binding precedent presents a difficulty when attempting to undertake an assessment of the case and its likely outcome.

Whilst Japan does a have class action procedure[59] it is limited to consumer actions. The only securities actions that can utilise the procedure are those claims which are based upon tort liability under the Civil Code. Claims under the Financial Instruments and Exchange Act of Japan (**FIEA**) cannot be brought under the procedure.

Instead, investors in securities would need to make use of the collective action mechanism contained in Article 38, Code of Civil Procedure 1996 (**CCP**) which permits collective actions where the actions are:

– Common to two or more persons or based on the same factual or legal cause; or

– Of the same kind and based on the same kind of factual or legal cause.

Investors still need to file a claim on their own behalf and whilst the claims are consolidated and managed together, a decision in one does not bind another.

Another avenue is pursuant to Article 30 of the CCP, under which a group of investors can appoint a representative to bring the suit on behalf of the group where issues of law and fact are common to all of their claims.

Alternatively, the Court can of its own volition consolidate claims that have been filed separately, but this is not guaranteed.

However, the lack of a class actions procedure is not to say that Japanese investors are left without a remedy. Japan has, within the FIEA, a framework of laws for investor protection. Investors have rights of action under Articles 17-22 for false statements or omissions in the prospectus or registration statement or in public documents, such as an annual report.

Under Article 21-2, the plaintiff need only to prove that there was a material misrepresentation in a public document, which is required to be disclosed under FIEA, and that the plaintiff acquired securities after it had been disclosed. The Article does not require the plaintiff to prove reliance on the doctrine, thereby having the effect of introducing the "fraud-on-the-market" theory from the US.[60] Furthermore, under Article 21-2 the defendant bears the burden to prove it was not negligent. In the case of misstatements and omissions in offering documents, there is strict liability. There is also a rebuttable statutory presumption regarding damages for investors who held shares for one year prior to and on the day of the announcement of the misrepresentation: the damage is presumed to be the difference between the average market price of the shares for one month prior to and after the announcement.

This legislative framework, coupled with the ability for lawyers to operate on a contingency fee basis and relatively low litigation costs (with each side bearing its own costs), means that there is an incentive for investors to pursue securities claims despite the lack of a class actions procedure.

An example of an investor action in Japan relates to the Olympus accounting fraud, which was exposed in late 2011 by its British CEO. Olympus admitted to a

59 Act on Special Provisions of Civil Procedure for Collective Recovery of Property Damage of Consumers ("ASPCP")
60 Applied to civil enforcement of SEC Rule 10b-5

USD 1.7 billion accounting fraud that had concealed investment losses for over a decade. The news led to a massive share price drop. Claims were filed in the Tokyo District Court on behalf of nearly 90 investors, including foreign institutional investors and pension funds, seeking to recoup JPY 37.7 billion (USD 316 million) in damages. The case eventually settled in 2015 following successful mediation. Shares had also been traded in the US and, following a claim there, settled for USD 2.6 million.

Nonetheless, it is unlikely that Japan will see the volume of actions seen in the US. As the collective procedure requires individual claims to be filed, this requires a significant amount of time, energy and coordination. In addition, the lack of discovery presents an evidentiary challenge and the lack of binding precedent creates uncertainty. A further hindrance to the spread of securities collective actions in the region is that third party funding is not common in Japan and there is still an ongoing debate as to its lawfulness. Whilst there is no express law against litigation funding and claims and causes of actions can be assigned, any claim assigned primarily for the pursuit of litigation is expressly prohibited. In addition, non-lawyer third parties are prohibited from acting as intermediaries between lawyers and clients and sharing in the proceeds from any suit. To do so may lead to criminal sanctions.

The spread of the US plaintiff bar

In addition to the vulnerability of Asia-Pacific companies listed on US exchanges to securities class actions addressed elsewhere in this White Paper, companies in the region are not immune to the attentions of an ever-entrepreneurial US plaintiff bar. Similarly to, and often in tandem with litigation funders, the US plaintiff Bar is extending its territorial reach.

A prime example is the Olympus litigation in Japan, where US lawyers, DRRT, brought together non-Japanese institutional investors, directing strategy and acting as an intermediary between the investors and Japanese Counsel. DRRT had been involved in the smaller US case involving Olympus' American depository receipts (which were not captured by the *Morrison*[61] decision – see the "Multiple Class Actions" section) but, as a result of *Morrison* could not pursue the larger case on behalf of their clients in the US. It highlights the vulnerability of corporates to claims brought by global investors in their local jurisdiction.

India

Securities class actions can be pursued under s 245 of the Companies Act 2013, introduced in the wake of the "Satyam fraud" (though only in force from June 2016). Briefly, in 2009 Satyam Computer Services' chairman, admitted to manipulating the company's earnings (approximately USD 1 billion on the books was fictitious) leading to a significant share price drop and the company's removal from the main stock exchanges.

The case brought corporate governance and investor protection in the developing corporate sphere in India into the spotlight. Class actions were pursued in the US by purchasers of Satyam's American Depository Receipts, which were eventually settled for USD 125 million. However, notably, investors in India were left without recourse due to the lack of a class actions procedure. This in part led to the legislature introducing s 245, which prescribes that shareholders or depositors can file a suit with the Tribunal if "they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors."

To proceed, the class needs to have at least 100 members or at least 10% of the shares, whichever is less (if no share capital, the class must equate to at least a fifth of the total members of the company) and the following must be satisfied:

- The class action suit is preferable to many individual cases;
- Common issues of law; and
- The representative parties will protect the interest of the class.

The class can seek injunctive relief, declarations that resolutions are void where they are based on misrepresented facts, damages, or any other remedy.

In addition, securities class actions can be brought under s 37 of the Companies Act 2013 for a misleading statement or the inclusion/omission of any matter

61 *Morrison v. National Australia Bank* 561 US 247 (2010)

South Korea

in a company prospectus. These class actions can be commenced by any person, group/association of persons affected by the statement/inclusion/omission.

Such claims are filed before the National Company Law Tribunal (**NCLT**), which then considers, amongst other things, whether the depositor/member has acted in good faith, any evidence showing the involvement of people beyond the company's directors and officers and whether the claim could be brought as an individual action instead.

After an application is admitted, the NCLT has to give notice to all the members of the class, by means of both a vernacular and English newspaper, as well as websites including the company's and the NCLT's own. Once a class action has begun, a member can opt out at any time with the NCLT's permission. Subject to any conditions it imposes, the member cannot be prevented from bringing an individual claim against the company under another law.

Section 245 has only been in force since June 2016 so the procedure is still very much in its infancy. However, there are concerns that the framework is not conducive to a viable class action procedure. For example:

- Contingency fees are banned in India and litigation funding is prohibited, discouraging the emergence of a plaintiff bar;
- There is a lack of knowledge regarding the securities market and awareness of rights by investors;
- Banks are excluded under the Act and actions may not be filed against them;
- The rules hold plaintiffs to a high burden of proof, making it difficult for plaintiffs to prove their case; and
- The length of the proceedings – it can take over a decade to full conclusion, if appealed.

There is currently no procedure for claimant class actions available for general claims in South Korea. Class actions are only available for certain securities actions[62] under the Securities Related Class Action Act, in force since 2005.

The class requires certification before it can proceed. In order to be granted certification, the class must number at least 50 members holding, in the aggregate, at least 0.01% of the total number of the outstanding securities of the defendant company. In addition they must have common legal or factual issues against the defendant and a class action is an "efficient and appropriate" means of protecting the rights of the class. Thereafter, a notice is published by the Court inviting those who wish to join a representative party to apply within 30 days of the notice. The procedure is opt-out.

Contingency fees are permitted and there are no express rules against third party funding. However, Article 6 of the Trusts Act prohibits the assignment of claims purely for the purpose of pursuing litigation. As such, funding agreements need to be structured in such a way so as not to breach these rules.

Ten cases have been brought to date, including two against foreign financial institutions (Royal Bank of Canada and Deutsche Bank). The first and only case to reach judgment is the case brought by the investors of equity linked securities against Deutsche Bank in May 2016, which reached judgment on 20 January 2017. Deutsche Bank was ordered to pay damages of KRW 8.58 billion (approximately GBP 6 million). Two other cases involving defendants Jinsung T.E.C. and Royal Bank of Canada have settled and judgments in other ongoing cases are expected over the next year.

In the Jinsung T.E.C. case which settled in 2010 (a year after commencement), the entity agreed to pay KRW 2.7 billion (USD 2.5 million) with each party to bear its own costs. The Court granted the plaintiff's counsel fees amounting to 20% of the settlement. The settlement amount was administered under a distribution plan through which KRW 1.9 million (USD 1.7 million) was claimed by class members with the balance returned to the defendant.

Despite the relatively low number of cases brought, there is judicial support for such actions within the region; the Supreme Court has granted certification, reversing decisions of the lower Courts on two of the cases brought to date. Such support may add weight to a decision to pursue a class action under the Act and it is expected that more may be forthcoming in years to come, especially given that the volume of securities-related cases has been increasing in the region. However, this is tempered with the following difficulties faced by potential plaintiffs:

- Limitations on discovery within South Korea mean that proving a case can be difficult for a class, potentially preventing them from being brought;
- The length of time it takes to certify a class, with the average case taking over 4 years to obtain certification;
- Costs risks, as costs are usually borne by the losing party (though the availability of contingency fees may reduce this risk); and
- Limitation period; the class action must be brought within 3 years from the date of the unlawful act or within 1 year of the claimant becoming aware, whichever is earlier.

62 Damages for false disclosure, unfair securities practices or claims against auditors in relation to financial records

Hong Kong

Hong Kong does not have any specific class action procedures, rather the sole mechanism for dealing with multi-party proceedings is the rule on representative proceedings, based on the English law representative proceedings.

Order 15, rule 12 of the Rules of the High Court sets out the basis for representative proceedings. It provides that where numerous persons have the same interest in any proceedings, one or more of them can represent all such persons in the proceedings. Representatives can bring proceedings or act as a defendant in proceedings. A judgment or order given in representative proceedings will be binding on all persons so represented, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

Representative proceedings in Hong Kong are rare and, to date, there have been no securities actions brought using the procedure despite there being no limitation within the rules to such actions using the procedure. Historically, a primary reason for this was the requirement for the potential class to have the "same interest". The English case of *Markt & Co Ltd v Knight Steamship Co Ltd*[63] held that this requirement translates to all class members having to show the same issues of fact and law: "*The implication is that they have to prove (a) the same contract between all plaintiff class members and the defendant, (b) the same defence (if any) pleaded by the defendant against all the plaintiff class members, and (c) the same relief claimed by the plaintiff class members.*"[64] This was a stringent test that was difficult to overcome, resulting in few actions being brought using the procedure.

The later case of *Prudential Assurance Co Ltd v Newman Industries*[65] relaxed this test, instead requiring that "*there must be a common ingredient in the cause of action of each member of the class*" or "*some element common to the claims of all members of the class*". Once this was established, any following judgment would be binding and plaintiffs could then prove the remainder of their action in separate proceedings. Further cases also held that separate contracts and separate defences should no longer prevent an action from proceeding and that damages can be awarded.

Despite these developments to make the procedure more flexible, the procedure is still rarely used and the Chief Justice's Working Party on Civil Justice Reform has commented that representative proceedings are inadequate as a framework for dealing with large-scale multi-party situations. In relation to securities actions, there is either a more appropriate remedy already available[66] or, for example in relation to claims involving mis-selling, unsuitable recommendations or negligent investment advice, the "same interest" requirement presents a hurdle that is difficult to overcome due to liability turning on the individual circumstances of the members of the class. In other situations, such as claims pursuant to investor protection provisions in the Securities and Futures Ordinance (Cap 571), representative actions in theory may be brought but, to date, none have done so.

Recognising the limitations inherent in the system, the Law Reform Commission produced a report in May 2012 which looked at the current system and recommended the introduction of a comprehensive class action regime starting incrementally with consumer cases. The mechanism would adopt an "opt-out" approach and potential classes would need to overcome a certification stage. However, despite several meetings between 2012 and 2017, the matter has not progressed and the Administration is still considering the recommendations of the working group.

If the recommendations get through, and coupled with the increased scrutiny of the Securities and Futures Commission and the possibility of litigation funding in the region, Hong Kong can likely in time expect claims being brought against financial institutions in the jurisdiction, in line with other jurisdictions that have class action procedures. However, there are several limitations which mean that any future system is unlikely to mirror US-style class actions. For example:

- The Law Reform Commission's report does not specify whether punitive damages could be awarded (currently Hong Kong only permits them in certain prescribed circumstances[67]) – if compensatory only, the attraction to plaintiff lawyers is reduced;
- It is still the case that contingency fees are prohibited and it is not recommended that this position change; and
- The losing party generally has to pay the costs meaning that plaintiffs run a significant costs risk.

63 [1910] 2 KB 1021 (CA)
64 The Law Reform Commission of Hong Kong, Report On Class Actions: Executive Summary, 28 May 2012, at paragraph 5
65 [1981] Ch 229
66 For example, the compensation scheme in Part XII of the Securities and Futures Ordinance (Cap 571) for cases involving misappropriation or theft of clients' assets by officers of licensed corporations
67 The two specific categories of cases in which the CFI may award exemplary damages are: i) Cases of oppressive, arbitrary or unconstitutional action by servants of the government and ii) Cases in which the defendant's conduct was calculated to make a personal profit which may exceed the compensation payable to the plaintiff.

Singapore

As in Hong Kong, multi-party actions in Singapore are currently confined to representative proceedings under Order 15, rule 12 of the Rules of Court (Cap. 322, R5), based on the English law representative proceedings. Many of the issues discussed in the Hong Kong section regarding the requirement for the potential class to have the "same interest" apply in the Singapore system.

As in Hong Kong, representative actions are rare. This may, in part, be due to the culture of the region which is not by nature litigious. Nonetheless, such cases have been brought, the most noteworthy being the Raffles Town Club case,[68] in which members sued the club's shareholders for misrepresentation and breach of contract and the *Koh Chong Chiah v Treasure Resort*[69] case, in which ex-members of the club sued the club's owner, Treasure Resort, claiming they had been denied membership privileges.

These cases demonstrated a move away from the English case of *Markt*[70] which required the application of a strict "same interest" test. In *Koh Chong Chiah v Treasure Resort* the Court of Appeal underlined that the procedure is to be applied in a broad and flexible manner so as to preserve the principle of access to justice, describing it as a flexible tool of convenience in the administration of justice.

The Court established that:

- The class of represented persons must be capable of clear definition. This is critical because it identifies the individuals who are entitled to relief and who will be bound by the judgment;
- The proposed representative(s) must adequately represent the interests of the entire class, and must capably prosecute the interests of the class;
- There must be significant issues of fact or law common to all the plaintiffs. The Court must compare the significance of the common issues between the plaintiffs with the significance of the issues which differ between them; and
- All the plaintiffs must have the same interest in the relief granted.

However, despite the Court's willingness to make the procedure flexible and accessible, such cases are still rare and there have been no securities actions using the procedure.

There are no current plans to introduce a class action regime in the country. It has been reported in the press that Securities Investors Association (Singapore) (**SIAS**), an investor lobby group, would readily represent minority investors in group actions, despite the fact that no shareholder representative action has been brought in Singapore to date. SIAS also said it was considering establishing a litigation fund, to which members and minority investors could contribute.

However, SIAS also stated that litigation was the last resort, with its President saying: "*I sincerely hope we do not see the day when we launch a class action suit against a company. I believe in resolving things in the boardroom, not the courtroom, in the interest of all parties… Because when you have acrimony in the capital markets, people will think twice about investing in our country.*"

As with Hong Kong, contingency fees are prohibited and the general rule is that the losing party must pay the reasonable costs of the successful party. In Singapore, third party funding of dispute resolution proceedings is generally prohibited. However, recent legislation has permitted third party funding of international arbitration proceedings.[71] Third party funding contracts for court litigation still remain in general unenforceable, except in certain insolvency-related proceedings. In addition, the Law Society of Singapore is currently reviewing the ban on conditional/contingency fees and, if lifted, this could result in more securities representative claims in the future in Singapore.

68 *Tan Chin Seng and Others v Raffles Town Club Pte Ltd (No 2)* [2003] SGCA 27
69 *Koh Chong Chiah and others v Treasure Resort Pte Ltd and another* [2013] 4 SLR 1204
70 See note 1
71 Amendments to the Civil Law Act

Malaysia

As in Singapore and Hong Kong, the only form of group litigation in Malaysia is representative actions, pursuant to Order 15, Rule 12 of the Rule of Court 2012, based on the English law representative proceedings. Similarly, Malaysia has adopted the English decision of *Duke of Beford v Ellis*[72] and *Markt & Co Ltd v Knight Steamship Co Ltd*[73] and issues regarding the "same interest" requirement feature in Malaysia.

Two Malaysian cases of note that consider these cases are *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors*[74] and *Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd & Ors* (**Palmco**).[75] *Palmco* confirmed that the criteria to be met were:

1. The plaintiffs are members of a class;
2. They have a common grievance or interest; and
3. the relief sought is in its nature beneficial to all whom the plaintiffs represented.

The decision of *Tang Kwor Ham* looked back at previous decisions and held that Order 15 Rule 12 should not be applied rigidly; it should be as flexible as possible. However, despite this, the procedure has its limitations when used in Malaysia for reasons including:

- Lack of pre-trial case management in group litigation;
- Funding mechanisms;
- The payment and allocation of costs (the Courts typically order the losing party to pay costs); and
- Contingency fees are prohibited.

72 [1900-3] All ER Rep 694
73 Supra note 37
74 [2006] 1 CLJ 927
75 [1988] 2 MLJ 624

Indonesia

Indonesia introduced a broad class action procedure in 2002 via Supreme Court Regulation No. 1 of 2002 which defines a class action as: "*where one or more persons representing a class of people lodge a lawsuit for himself or themselves, and simultaneously represent a class of people in great number representing similar facts or legal bases between class representatives and said class members.*"

Supreme Court Regulation No. 1 of 2002 does not specify any limitations on use of the procedure in relation to certain claims. In theory, therefore, it could be utilised in securities actions. However, only the following Laws expressly permit the filing of "representative" suits:

- Law No. 5 of 1983 - Indonesian Exclusive Economic Zone;
- Law No. 10 of 1997 - Nuclear Power;
- Law No. 8 of 1999 - Consumer Protection (consumers having similar interests and suffering from actual damages);
- Law No. 18 of 1999 - Construction Services (representative suit by way of power of attorney);
- Law No. 41 of 1999 – Forestry (representatives claiming in relation to forest destruction that causes damages to society); and
- Law No. 32 of 2009 – Environmental Management (similarity of facts and legal basis).

Class actions have been brought outside of these restrictions. In 2007, 600 customers of Bank Perkreditan Rakyat Bungbulang claimed against the bank and the Government for [RP 478 million of savings to be returned and in the form of deposits of RP 3.5 billion]. The customers were successful in 2015.[76] However, the law is silent in relation to actions related to financial services issues and of the 20-30 class actions (largely public interest cases) brought to date, none have related to securities.

76 Other examples include Case No.262/Pdt.G/2016 PN.JKT.PST, dated 10 May 2016 in relation to the Government's relocation of the people Bukit Duri

Is securities litigation prevalent in the jurisdiction?

Vulnerability to Action in the US

Whilst *Morrison* may have curbed the ability for claims against foreign corporates without the necessary US nexus to be brought in the US, companies in the Asia-Pacific region that are listed on US exchanges, remain vulnerable to US securities suits due in part at least to the more stringent financial disclosure rules and heightened regulatory scrutiny accompanying a US listing. Identification of accounting irregularities may be particularly acute for companies with dual listings in the US and China, due to the different ways the accounts will be presented and structured.

Many in the region will be familiar with the spate of lawsuits filed against US listed Chinese companies in 2011, largely relating to Chinese reverse mergers, which enabled private companies to obtain a US listing through a reverse merger with a US listed public shell company without having to go through the IPO process. The emergence of these US suits resulted in part from the actions of short sellers who highlighted accounting irregularities in pursuit of profits.

Reverse merger lawsuits are now a legacy issue, and as reported by Cornerstone,[77] filings against non-US listed companies generally declined in the few years after 2011 as the spate of these suits subsided. At the beginning of 2017, NERA reported[78] that the drop coincided with, and is partially explained by, a decline in the percentage of overall US listings represented by foreign-domiciled companies. The drop in Chinese domiciled companies was particularly pronounced, with many de-listing in the US and re-listing in China.

However the picture is beginning to change, and 2014 onwards has seen an upswing in securities class actions against US listed Chinese companies. In mid-2017, Cornerstone reported that there was one more action against a Chinese company in the first half of 2017 than in the whole of 2016. The D&O Diary[79] reports that 59 securities suits were filed against non-US companies in 2017, representing 14.2% of all securities suits during that year, of which 10 were against Chinese companies (an additional 2 were brought against Hong Kong based companies). These companies face a higher frequency of action than their representation amongst US listed companies would suggest,[80] indicating that the risks are not confined to the period of Chinese reverse merger activity in 2011. This may in part be due to the type of industries predominating in the region; many of the claims against Chinese entities relate to the activities of technology companies.

Whilst the burden of proof for bringing a successful action remains relatively high, an example of this being the PetroChina decision[81] in which the Court dismissed the action for lack of a causal nexus (the acts of corruption complained of were not proved to relate to the actions of the listed entity), the spectre of US proceedings is a crucial risk factor for all companies considering listing in a US exchange.

77 Securities Class Action Filings, 2017 midyear assessment, Cornerstone Research, www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2017-Midyear-Assessment
78 Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review, NERA, 23.1.2017, (page 7), www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf
79 Securities Suit Filings at Historically High Levels During 2017, D&O Diary, 1.1.2018
80 ibid
81 *In re PetroChina Company Ltd. Securities Litigation* [2015] 13-CV-06180-ER, US District Court, Southern District of New York

Multiple actions

Securities class action litigation against entities and their D&Os is a global issue, with developments in one part of the world significantly impacting upon the development and spread of actions in other jurisdictions. For example, the US Supreme Court decision in *Morrison v. National Australia Bank*,[82] which (broadly) held that the US Courts do not have jurisdiction over claims by non-US investors who purchased their shares in a non-US company outside of the US has meant that foreign investors who purchased shares in a foreign company on a foreign exchange, cannot pursue claims in the US Courts and must look elsewhere for redress. Whilst the exact boundaries of the *Morrison* decision continues to be a source of litigation in the US Courts, there is no doubt that investors denied access to the US Courts as a result of the decision (the plaintiffs in the *Morrison* case were Australian residents who had purchased shares in the Bank on the ASX), are increasingly seeking to pursue their claims in other jurisdictions. The Court in *Morrison* itself expressed the view that the action "had Australia written all over it".

The decision in *Morrison*, which has the potential to exclude certain classes of shareholder but not others from the jurisdiction of the US Courts also brings into the spotlight the prospect of multiple competing procedures in different jurisdictions arising out of the same fact pattern, a situation which will be complicated where those jurisdictions' laws have the potential for extra-territorial effect. For example, provisions of Australian law dealing with market manipulation or making materially false or misleading statements that are likely to impact the prices on the financial market, have the potential for broad extra territorial reach. Broadly, the rules apply to conduct, meaning acts or omissions regardless of where they occur, but the conduct must have an effect on the Australian financial market. In relation to the making of false or misleading information, the conduct can occur anywhere and the investment can be in a foreign incorporated company as long as the person affected is in Australia.

82 Supra note 42

Litigation Funding in Asia

Litigation funding has been pivotal to the development of class actions in jurisdictions where contingency fees are not permitted, such as Australia. However, the doctrines of maintenance and champerty (maintenance is the act of a third party encouraging or maintaining litigation, usually by providing financial assistance. Champerty is a type of maintenance where a third party funds litigation in return for a share of any judgment proceeds) have acted as a barrier to the spread of litigation funding in certain jurisdictions. Even where legal principles do not operate as a barrier and the costs rules are favourable, a litigation culture is required to fuel demand, and the litigation risk must be palatable to the funder. Litigation funding is gradually spreading across Asia, with funders such as IMF Bentham expecting growth in the region.

People's Republic of China

No laws expressly prohibit litigation funding in mainland China, so long as it is not by plaintiff lawyers. That said, given the unpredictability of legal action and the difficulty of enforcement in mainland China, at present, few professional funders are active in the market for either litigation or arbitration.

Taiwan

In Taiwan, contingency and conditional fees are allowed, with the exception of criminal, family and juvenile offenders' cases. Third party funding is not prohibited, but it is a relatively underdeveloped market in this regard. ATE insurance is rare, though not prohibited.

Thailand

The general position in Thailand seems to be that contingency agreements are prohibited between plaintiffs and their lawyers. With regards to third party funding, the Supreme Court of Thailand has ruled several times that litigation funding is in conflict with public policy and ethics, meaning any agreement would be rendered void.

Japan

The present position in Japan is that contingency and conditional fee arrangements are not prohibited outright. 'No win, no fee' arrangements are relatively rare in practice. Third party funding is uncommon in Japan due to the uncertain position on its lawfulness, as it is neither authorised nor prohibited.

India

At present in India, lawyers funding their clients' legal proceedings and charging contingency fees is prohibited, being opposed to public policy. Tentative steps have been taken towards, amongst other things, enabling foreign law firms and foreign lawyers to practice foreign law; diverse international legal issues in non-litigious matters and international arbitration cases in India, albeit in a phased manner. At present, foreign law firms are not allowed to operate in India. Unless the fees system is reformed, we do not anticipate a plaintiff lawyers' market. Third party funding is prohibited.

South Korea

Contingency fee arrangements are permissible for civil cases under Korean law, but have been ruled by the Korean Supreme Court as impermissible for criminal cases. At present, there are no rules to allow, regulate or prohibit third party litigation funding in Korea. We are not aware of any trend that would indicate that a third party funding regime will be formulated in Korea.

Hong Kong

In general, the third party funding of commercial disputes is not allowed in Hong Kong. However, limited exceptions exist, including insolvency proceedings to enable liquidators to pursue various claims. Recently, steps were taken to allow litigation funding in relation to arbitration and mediation. Hong Kong is seen as presenting an opportunity for funders, with Harbour Litigation Funding being set up in 2015.

Singapore

In Singapore, third party funding is generally prohibited in litigation to the extent that it falls foul of the rule against champerty, but third party funding of international arbitration is allowed by legislation. Singapore has also introduced the Insolvency, Restructuring and Dissolution Act 2018 which, when it comes into force, will allow judicial managers and liquidators to assign proceeds from certain actions to a third-party, in exchange for funding of such actions. Contingency fee arrangements with lawyers are not permitted.

Malaysia

Contingency and conditional fees have been ruled as illegal by the Malaysian Bar Council. In *Mastika Jaya Timber v. Shankara*,[83] the Court stated that the doctrine of champerty invalidates any such contingency agreement which demands payment only in the event of success at trial. This means that third party funding is most likely prohibited, despite not being addressed directly in the law.

Indonesia

Contingency fees and conditional fees are allowed in Indonesia, on the condition that they are provided with a non-refundable deposit on instruction. Furthermore, there are no restrictions on how the claimant is financed, meaning third party funding is technically allowed. However, no specific process for third party funding has been recognised as of yet.

83 22-229-2009-I

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658
Offices

31,500
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54
Countries

190
Territories with policies issued

Clyde & Co

50+
Offices

3,800
Total staff

415
Partners

1,800
Lawyers

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