



CLASS ACTIONS

Practical Examples from Australia

Odette McDonald and Ben Phi
Phi Finney McDonald



Collective Redress / Class Action

#LegalProtectionInsurance

7 & 8 November 2019 | Hotel Palace Berlin

Overview

- Introduction to Australian class action procedure
- ATE insurance
- Shareholder class actions

Australian class action procedure

- No certification – can commence a class action as of right provided:
 - 7 or more persons,
 - same or similar circumstance,
 - giving rise to common issues of fact or law
(*Federal Court of Australia Act 1976 (FA), s33C*)
- Proceeding brought by Representative Party on behalf of a class defined by a “group member definition”
- Opt-out regime - although courts often impose a registration process to allow the claimant group to be defined and allow for loss to be quantified

Australian class action procedure cont.

- The initial trial resolves the individual claim of the Representative, plus the common issues of fact and law that were identified
 - The judgment is binding on any person that falls within the group definition who did not opt out
- Court approval of settlements and plaintiff legal costs
- Broad discretionary powers – Court can make any order ‘necessary to do justice in a proceeding’ (FA s 33ZF)



ATE Insurance – Context and Developments

- Contingency fees prohibited (Legal Profession Uniform Law, s183)
- Adverse costs – in most jurisdictions, ‘costs follow the event’
- Security for costs
 - Adequacy
 - ATE policies and Deeds of Indemnity as security in class actions



Shareholder Class Actions

- Claims alleging that listed companies breached market disclosure obligations
- Misleading conduct (*Corporations Act 2001* (Cth) (**CA**), s1041H)
 - strict liability – prohibition on ‘engaging in conduct that is misleading or deceptive, or likely to mislead or deceive’
 - ‘but for’ causation to claim loss (CA ss1041I and 1317HA)
 - ‘market-based causation’ – different to fraud on the market
- Continuous disclosure (CA s674(2)(b); ASX Listing Rule 3.1)
 - requirement to immediately disclose information that is not generally available, which a reasonable person expects would have a material impact on price or value

Key Issue - Multiplicity

- Competing class actions brought against same defendant relating to same underlying subject matter
 - Partially overlapping 'open' class actions (claim periods, additional defendants, causes of action)
 - Open and closed (opt out) class action
- Either carriage motion or case management (including consolidation) to reduce duplication of legal costs
- Possibility of early adverse costs orders (create risk for ATE insurers)