CLASS ACTIONS IN AUSTRALIA
THE YEAR IN REVIEW 2011
Class actions are now an established part of Australia’s litigation landscape, providing an attractive alternative for plaintiffs to pursuing individual claims.

From the perspective of defendants - usually companies but sometimes directors and increasingly advisors also - class actions are significant not only because of the possibility of liability, but also due to the reputational consequences and the costs of defending the action. They also make the task of resolving regulatory action more complex. For group members, the class action regime enables them to take advantage of the cost and other pressures that class actions place on defendants to settle, without exposure to costs orders.

The growth of share market investment coupled with the rise of litigation funding and the increased sophistication of the plaintiff firms has seen a significant rise in claims within the financial services and securities sectors and competition law claims. We have also seen a resurgence in the more traditional consumer protection and product liability claims.

This report provides a snapshot of the key class action decisions in 2011, to see how the Courts’ management of class actions is affecting outcomes for plaintiffs and defendants.

The report looks at hot topics such as the size of recent settlements and the role of litigation funders, but also looks at the broader class action framework to explore who is running, defending and participating in class actions and the types of claims that are being pursued.

We hope that you find it informative.
KEY THEMES

BIG SETTLEMENTS AND BIG FAILURES RAISE THE STAKES

INCREASING ROLE OF INSTITUTIONAL INVESTORS AS GROUP MEMBERS

Larger investments, more to gain

Underwriting the book-build process

EXPANSION OF CLAIMS AGAINST PROFESSIONAL ADVISORS

First claim against a ratings agency

Financial advisors

Auditors

Stockbrokers

Larger investments, more to gain
THE ROLE OF CLASS ACTIONS

AN ESTABLISHED PART OF THE LITIGATION LANDSCAPE

Class actions, by which a representative applicant commences proceedings for the benefit of a defined group of persons (as opposed to pursuing claims on an individual basis), have been available in the Federal Court since 4 March 1992, in Victoria since January 2000 and in NSW since 4 March 2011. The statutory class action mechanisms provide a number of incentives to pursue damages or other relief as a group. Most significantly, they promote the prosecution of claims that any one class member would find too costly to pursue on their own. The consolidation of claims also encourages third parties - including solicitors and litigation funders - to sponsor claims. This is significant as only the representative plaintiff is, as a general rule, liable for costs (and not group members). The participation of a funder reduces risk by defraying the plaintiffs' own costs, funding any costs awarded to the defendants, as well as providing security against adverse costs orders. Solicitors act on a "no win no fee" basis (also known as conditional fee arrangements) so as to reduce the upfront costs of commencing litigation.

Second, as the Australian regimes are “opt out” systems, under which a person who falls within the group definition must take a positive step to avoid being bound by the proceedings, it is possible for class members to sit silently behind the representative applicant, rather than having a visible role in litigation. This makes class actions an attractive alternative to pursuing claims on an individual basis:

• for large institutional investors, or group members who maintain a commercial relationship with the defendant companies and don’t want to be seen to be leading the action
• for representative plaintiffs, who do not have to secure the consent of potential group members, making it easier and quicker to commence and run the litigation

The introduction of class action regimes has not yet led to the flood of litigation that some commentators had predicted. Rather, an average of only 14 class actions are currently filed every year in the Federal Court, representing less than 1% of all Federal Court proceedings. Despite this, class actions remain a significant concern for both directors and in-house counsel alike due to the scale of many of these claims. The bank fees class action commenced against ANZ in 2011 has 34,000 members signed up with an estimated value of $50 million. There are an estimated 160,000 group members across all of the bank fees class actions.

While there was no single standout settlement, 2011 saw the total value of settlements in shareholder class actions surpass $500 million.

In addition, 2011 saw the settlement of other significant class actions, including the Visy/Amcor cardboard fibre packaging cartel class action in March for $95 million (plus $25 million in costs) and $67.5 million in relation to class action proceedings commenced against the Commonwealth in respect of the closure of Pan Pharmaceuticals.

2011 also saw:

• the commencement of a number of significant new shareholder class actions, including shareholder class actions against Nufarm, Gunns and ABC Learning
• a resurgence in product liability class actions, with new proceedings filed concerning hip implants and thalidomide and possible proceedings mooted in relation to breast implants
• judgments in a number of ground-breaking class actions, including the bank fees class action test case, proceedings in relation to the 2009 Victorian bushfires, and an appeal decision in the VIOXX class action

This report analyses the key court decisions in 2011 to see how the Courts’ management of class actions is affecting outcomes for plaintiffs and defendants.

THEMES FROM THE GLOBAL VILLAGE

A number of countries have well-established class action systems that can provide indicators of future developments in Australia. While the United States is often considered to be the most plaintiff-friendly jurisdiction (for reasons including that costs do not generally follow the event and the availability in some cases of treble damages), Canada and the Netherlands each have similar class action regimes and both the United Kingdom and the European Union are considering whether to introduce a system for collective redress.

1 However, as discussed below, the emergence of the funded “closed class action” has eroded this advantage.
In 2010 the most significant international development in class action practice was the Morrison decision in the United States. In that judgment, the Supreme Court ruled that only trades on US markets were covered by the US Exchange Act, with the effect that “F-cubed” actions (concerning foreign investors in foreign stocks on foreign exchanges) are much more difficult to bring.

While many commentators predicted that multinational securities class actions would fade away as a result, reviews of activity during 2011 show that the pace of class action filings has generally remained steady. This is despite the number of proceedings relating to the global financial crisis now slowing. With the significant increase in the number of Chinese entities listing in the United States or undergoing a reverse merger, there has been a related leap in the number of cases commenced against Chinese entities (whether domiciled in, or with their principal offices in, China) as they come to terms with the market’s disclosure regime.

Equally, we have not yet seen a marked increase in the prevalence of Australian shareholder class actions. Other jurisdictions are, however, paying attention to what is happening in Australia, with a number of other class actions based on bank fees being investigated and commenced in other jurisdictions with some settlements already being made.

The biggest class action decision in the US for 2011 was the Wal-Mart decision, essentially an employee discrimination claim. While this may not be a subject matter appreciated in Australian class action practice, recent research shows that unions have played an important role in pursuing employees’ entitlements through class actions in Australia. With the possibility that the Australian economy may slow with the drag of crises in the European and US economies, this may be a resurgent theme.

The Wal-Mart case fell at the certification stage - a preliminary hearing at which the Court has to determine whether there is a common issue that is “capable of classwide resolution” such that the proceedings can continue as a class action. The case is evidence of the gate-keeping role played by American Courts in early stages of class action litigation. While no equivalent procedure exists in Australia, there is room for Australian Courts to take a more active role in considering the suitability of representative proceedings as a vehicle for resolving large-scale disputes. As we note below, we have seen some signs that the Courts were willing to be more proactive in class action management during 2011, and we expect this trend to continue.

<table>
<thead>
<tr>
<th>Company</th>
<th>Nature of allegations</th>
<th>Settlement Date</th>
<th>Settlement Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>GIO</td>
<td>Misleading representations in takeover</td>
<td>2003</td>
<td>$112m (including costs $15m)</td>
</tr>
<tr>
<td>Tracknet</td>
<td>Misleading statements in prospectus</td>
<td>2004</td>
<td>$4.3m (including costs $2.6m)</td>
</tr>
<tr>
<td>Concept Sports</td>
<td>Misleading statements in prospectus</td>
<td>2006</td>
<td>$3m (reported, terms confidential)</td>
</tr>
<tr>
<td>Harris Scarfe</td>
<td>Misleading or deceptive conduct</td>
<td>2006</td>
<td>$3m (including $2m costs)</td>
</tr>
<tr>
<td>Telstra</td>
<td>Continuous disclosure</td>
<td>2007</td>
<td>$5m (including costs $1.25m)</td>
</tr>
<tr>
<td>Aristocrat</td>
<td>Continuous disclosure</td>
<td>2008</td>
<td>$144.5m (including costs $8.5m)</td>
</tr>
<tr>
<td>Downer EDI</td>
<td>Continuous disclosure</td>
<td>2008</td>
<td>Approx $20m (confidential)</td>
</tr>
<tr>
<td>Village Life</td>
<td>Continuous disclosure</td>
<td>2009</td>
<td>$3m</td>
</tr>
<tr>
<td>AWB</td>
<td>Continuous disclosure</td>
<td>2010</td>
<td>$39.5m</td>
</tr>
<tr>
<td>Multiplex</td>
<td>Continuous disclosure</td>
<td>2010</td>
<td>$110m (including costs $11m)</td>
</tr>
<tr>
<td>OZ Minerals</td>
<td>Continuous disclosure</td>
<td>2011</td>
<td>$60m (including costs $4.9m)</td>
</tr>
</tbody>
</table>

4 This table does not include settlements reached as part of administrations, such as in relation to Sons of Gwalia, in which shareholders claims to the value of $125 million were recognised by the administrator, or Ion Limited.
6 In a reverse merger transaction, an existing public shell company with few or no operations acquires a private operating company, usually one that is seeking access to funding in the US capital markets.
8 For example, in November 2011 the Bank of America settled class action relating to an overdraft fees for US$410 million: see http://www. bocahoverdraftsettlement.com/.
GROUP DEFINITION

CLOSED CLASSES CREATE CERTAINTY FOR FUNDERS AND RESPONDENTS

Each of the Australian class action regimes is an opt out system. This means that unless class members take positive steps to remove themselves, they will be bound by whatever judgment is made or settlement is reached.

As such, central to class action practice is the scope of the group the named plaintiff seeks to represent. Key to this is the group definition, or definition of the “class” to be bound, which requires careful consideration before commencing proceedings.

In Australia, there has been a move towards the use of “closed classes”, particularly in funded class actions. Closed classes limit the group members to people who retain the firm of solicitors conducting the proceedings and/or enter into an agreement with the litigation funder. While restrictions of this nature have been challenged, they have been sanctioned by the Court, even though the effect is to convert the statutory opt out regime into an opt in regime and so exclude potential claimants.11

Research indicates that between 1992 and March 2009, 14 of the 18 Federal Court class actions that were funded used closed classes requiring group members to enter into an agreement with the funder and/or a retainer with the solicitor.12 For example, the Multiplex and Credit Corp class actions required agreements to be signed with the litigation funder, while the ongoing proceedings against Progen Pharmaceuticals required group members to have signed a retainer with the class solicitors.

Another trend has been the role that institutional investors play in class actions. This mirrors the increased participation of institutional lead plaintiffs in the United States, where more than 62% of lead plaintiffs in securities class actions filed in 2011 were institutions, including pension plans. Superannuation and managed investment funds typically hold large investments and therefore stand to benefit more significantly from a successful class action, as well as being easier to corral from the perspective of a law firm or funder promoting the claim.

Indeed from the perspective of a funder, a claim may not be viable without the support of key institutional investors, as they underwrite the “book-build” for a potential class action by providing economies of scale, as well as being repeat clients for a funder.14

In Australia, this trend has been reflected in the way groups have been defined.

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14 While the concept of “book building” in a class actions context has typically been used in relation to shareholder class actions, the term (which has its origins in institutional share offers) is entering more general class action parlance and was recently used in relation to a possible class action arising from the 2011 South East Queensland flood: Hedley Thomas “Absence of Somerset Dam operator raises critical queries”, The Australian, 9 February 2012.
For example, in the Visy/Amcor class action,\(^{15}\) the group was defined as persons who had spent more than $50,000 on corrugated fibreboard packaging in a 5 year period.

Finally, there has been much debate before the Courts (and beyond) as to the most fair and efficient way to finalise the identity of the group members who will be bound by the settlement or judgment. The Courts lack a specific power under the class action regimes to close the class, and so have relied on a general power to make such orders “appropriate or necessary to ensure that justice is done in the proceeding”. The Court has frequently directed that group members who want to claim must file a notice or proof of claim, following which the Court formally recognises the claims of those persons and excludes others.

However, in a number of decisions this year the Courts have expressed uncertainty as to the justice of this mechanism:

- in the Powercor class action relating to the 2009 bushfire near Horsham in Victoria, the Court was concerned that group members who failed to register would be forfeiting their claims without having had the opportunity to opt out, but was persuaded to make an order of the nature described above\(^{16}\)

- in the Visy/Amcor class action the Court was willing to admit latecomers to the March 2011 settlement after the registration deadline, following authority from the Aristocrat and GIO class actions that a group member who did not comply with the deadline should not be permitted to participate in the settlement unless the Court is affirmatively satisfied that it would be unjust to exclude the group member. In this instance, the Court accepted the reasons for delay in registering, being persuaded in part by the minimal effect that the inclusion of the group members would have on individual recoveries.\(^{17}\)

The increased use of closed classes clearly reflects a desire by funders and solicitors to have certainty of returns. However, it may also have benefits for defendants as well, enabling them to better ascertain their potential liability and thereby promote settlement.

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\(^{15}\) Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd [2006] NSWSC 702 of 2006; Amcor then cross-claimed against a number of Visy entities.

\(^{16}\) Thomas v Powercor Australia Limited [2011] VSC 614 at [31]-[35].

\(^{17}\) Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited [2011] FCA 1115.
GETTING TO THE SUBSTANCE OF THE MATTER

PLEADINGS AND ATTEMPTS TO AVOID INTERLOCUTORY SKIRMISHES

The year 2011 saw the introduction of significant pre-litigation requirements in the Federal Court, their abolition in Victoria and a decision by NSW to defer their introduction indefinitely. The federal regime requires parties to file statements setting out the “genuine steps” they have taken to resolve a dispute or to clarify or narrow the issues in dispute between them.

While we are yet to see whether the new requirements will have an effect on the conduct of class actions, plaintiff representatives have stated that they consider the regime a powerful tool to obtain information on liability from defendants sooner, thereby pushing class actions to early resolution.

In 2011 there were, however, a number of decisions which suggest that the Court is prepared to embrace an approach that would see class actions progress more quickly.

LESS PATIENCE WITH PLEADING DISPUTES

All plaintiffs are required to state the factual bases of their claim in pleadings. Pleadings must, to the satisfaction of the Court, set out the material facts on which the plaintiffs intend to rely to establish their cause of action. In addition to the requirement to state facts capable of supporting the underlying claim, representative plaintiffs in class actions must satisfy a number of procedural requirements particular to class actions. Most significant is the commonality requirement: to commence a class action there must be 7 or more persons all of whom have claims:

• against the same person
• arising out of the same, similar or related circumstances
• which give rise to a substantial common issue of law or fact

The Court may order that a case not continue as a class action if it is satisfied that it is in the interests of justice to do so. The Court might conclude that it would result in higher costs than the pursuit of separate proceedings or that a class action would not provide an efficient and effective means of dealing with the claims of group members.

2010 was marked by a series of decisions on the strike out of pleadings, resulting in further delays in already long-running proceedings while plaintiffs were required to replead to adequately set out their cause of action. Such interlocutory applications have long been criticised by the Court, described by one judge as a “disturbing trend,” with parties encouraged to bring their actions on for speedy determination.19

18 Civil Dispute Resolution Act 2011 [Cth], which came into effect on 1 August 2011.

19 Bright v Femcare Ltd (2002) 195 ALR 574 at [160] per Finkelstein J, cited with approval in Giles v Commonwealth (2011) NSWSC 582 (a class action brought on behalf of children who were...
2011 seemed to start in the same way with pleadings disputes in the Broncos class action (brought by rugby league clubs against financing companies), the first of which dealt with issues of class action practice. As a misleading or deceptive conduct claim, liability depends on the individual circumstances of each class member: the nature of statements or representations made to them (if any) and the extent to which they relied on those statements. The respondents had sought to have the matter discontinued as a representative proceeding on the basis that the allegations were based on facts specific to each group member, and did not show any substantial common issue of law or fact. However, the Court confirmed earlier decisions that there only need be one common issue, and it need not be large or of major impact on the litigation, noting that proceedings could pass the threshold test but later be discontinued as a class action (reverting to individual proceedings). In this instance, the Court concluded there was a real benefit in determining the common issues together.20

Similarly, a decision in one of the two class actions relating to the Storm collapse confirmed that representative plaintiffs are able to pursue “idiosyncratic individual claims” as part of a class action. The Court noted that the regime does not require that all claims of all persons in a class have to meet those criteria,21 only that claims of all persons in the class must meet the criteria. The dispute in those proceedings reflects ongoing concern as to the effect of the Full Federal Court’s decision in Phillip Morris v Nixon,22 which held that class actions before that Court required all members of the class to have claims against each of the defendants.23 In NSW any effect has been reversed, with express provision that proceedings can be commenced against multiple defendants when not all group members have a claim against each defendant. We are yet to see what effect this provision will have on the flow of class actions.

Representative plaintiffs have also been criticised for the length and complexity of their pleadings. In the Octaviar class action, the presiding judge refused leave to file an amended claim that was over 600 pages long, instead restricting the plaintiff to a 50 page limit.24

**USING THE FAST TRACK TO DETERMINE ISSUES QUICKLY**

In an effort to cut straight to the determinative steps of the proceedings, some parties have sought to take advantage of the relatively new Fast Track procedure in the Federal Court. This process is intended to address the escalating costs of getting a case to trial and the time it takes to complete a case by setting an abbreviated and strictly enforced timetable for the steps to hearing and judgment.25 A class action against Steggles had previously sought to use the Fast Track process, but was transferred out of the list when it was apparent that the proceeding required a longer time for preparation than permitted under the relevant practice notes.26

More recently, in the Bank Fees class action the claim was filed in September 2010 and, after some negotiation on the scope of the claim, a number of separate questions were listed for hearing in October 2011 and judgment was delivered in December 2011. En route to that judgment, the Federal Court ruled that Fast Track statements and responses are “pleadings” for the purpose of the Federal Court of Australia Act 1976 (Cth) and so are subject to the same scrutiny for adequacy.27

**PRESSURE FROM DEFENDANTS**

Instead of attempting to strike out a claim, defendants may seek further and better particulars of the claim. In the Progen Pharmaceuticals class action, which related to the respondent’s dealings as a stockbroker in relation to the company’s shares, the respondent sought particulars of those persons alleged to be group members. This information can assist defendants in calculating likely damages and to make decisions about whether to defend or settle, as well as to develop their defences to the underlying claims. The Court found that where a representative plaintiff has chosen to use a closed class, so that the members of the class are known to the plaintiff, the statutory regime permits such a request for particulars, as all group members have effectively opted in.28

**REPRESENTATIVE PLAINTIFFS ARE ABLE TO PURSUE “IDIOSYNCRATIC INDIVIDUAL CLAIMS” AS PART OF A CLASS ACTION**

**LOOKING AHEAD**

With pre-litigation rules now in place in the Federal Court, we expect the Court to take a much more active approach to managing class actions in its jurisdiction. This will include pressing parties to prosecute their claims, and making greater use of preliminary questions or the summary judgment procedure to determine issues at an early stage. We will be watching carefully to see whether the absence of a pre-litigation regime in NSW and Victoria has an effect on the flow of class actions to their Courts.

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21 Richards v Macquarie Bank Ltd [2011] FCA 1085 at [7]-[9].
23 See section 159(2) of the Civil Procedure Act 2005 (NSW), introduced with effect from 4 March 2011.
24 Mercedes Holdings Pty Ltd v Waters (No 3) [2011] FCA 236.
26 Yarrabee Chicken Co Pty Ltd v Steggles [2010] FCA 394.
THE RACE TO SEIZE JURISDICTION

COMPETING CLASS ACTIONS ARE ON THE RISE

Recent years have seen the involvement of law firms not traditionally identified with class action practice. Some are serious contenders, and are beginning to challenge the position of established firms.29 Other firms entered the area in class actions against Equititrust (Piper Alderman) and in relation to Pan Pharmaceuticals (MacLachlan Thorpe), while it has also been reported that Minter Ellison discussed a possible class action on behalf of business owners in the Northern Territory affected by the Federal Government’s ban on live cattle exports to Indonesia. Piper Alderman’s mooted class action against Vodafone seems to have fallen away for want of funding.

The second case related to the 2003 Alpine bushfires, which was also commenced without the authorisation of the named plaintiff. Upon application by the respondents to have the proceedings struck out as an abuse of process, the Victorian Supreme Court was extremely critical of this conduct, with serious consequences for:

- the firm - the Court recommended the solicitors be referred to the Legal Services Commissioner
- the proceedings - the Court emphasised that dismissing a claim, particularly a group proceeding, as an abuse of process is an extreme step and one that should only be taken after careful consideration of the evidence, and even then, cautiously. In the present case, dismissing the claim meant that the individual claims of any group members would now be statute-barred.

The Court recognised the reality that class actions were frequently driven by lawyers or funders (rather than claimants), but that this was a necessity given the size, cost and complexity of such claims. As the Court observed:

absent a litigation funder or a deep-pocketed lawyer who will carry the costs of the group, there is little or no prospect of finding a willing plaintiff – this is particularly so given the potential individual costs liability of the representative plaintiff.31

These decisions show that class action practice remains technical, and any party embarking on class action litigation – whether as a named plaintiff, group member or defendant – must remain mindful of the additional requirements imposed concerning the conduct of such proceedings.

On the other hand, recent settlements also show that acting in class actions, either as the plaintiff’s lawyers or the litigation funders, may be a good investment. In the Amcor/Visy cartel class action, where no funder was involved, the Court approved the payment of legal fees to the plaintiffs’ lawyers of $25 million. While there was independent evidence of the fairness and reasonableness of the costs incurred, the Court expressed some concern at the quantum.

In comparison, the two OZ Minerals class actions, which involved two plaintiff law firms, saw a total of just under $5 million in legal fees awarded with funder

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29 Professor Morabito’s study found that Maurice Blackburn and Slater & Gordon were involved in 34% of class actions filed between 1992 and 2009: An empirical study of Australia’s class action regimes: First report, December 2009, page 58.

30 Matthews v SPI Electricity Pty Ltd (Ruling No.1) [2011] VSC 167.

31 Cohen v State of Victoria & Ors (No 2) [2011] VSC 165.

“LAWYERS IN BUSHFIRE CLASS-ACTION EXPERIENCE BRAIN FREEZE?”

LAWYERS WEEKLY 21 MARCH 2011

However, this is a complex and technical area of practice and close court supervision means that practitioners must comply with the relevant legislation, regulation and practice notes. In 2011, two cases have fallen foul of key requirements of the class action regime.

The first was a claim against SPI Electricity in relation to the 2009 Victorian bushfires. The firm in question was criticised for bringing the proceedings within 10 days of the bushfires and prior to any Royal Commission findings. It was later brought to the Court’s attention that the proceedings had been commenced without the authority of the named plaintiff. However, as the solicitors identified another group member to act as plaintiff, the Court decided to regularise the proceedings. As a penalty for their conduct, the Court ordered that the solicitors be liable for any costs order made prior to the substitution. The group members also had their entitlement to seek interest restricted.30

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IMF reporting a net gain of $12.8M from its investment in the proceedings.\(^\text{32}\)

**OZ Minerals** is one of several examples where one factual scenario or dispute has resulted in multiple class actions being commenced - whether against different entities or representing different groups of plaintiffs. Others are:

- the ongoing Centro litigation, which includes a web of three class actions and numerous cross-claims, involving two plaintiff law firms and two separate litigation funders
- litigation surrounding the collapse of Storm Financial, in which two class actions have been commenced against different banks as well as ASIC proceedings against all of the banks
- two class actions relating to the collapse of Great Southern
- two class actions regarding continuous disclosure allegations against NuFarm
- the series of class actions commenced after Westpoint collapsed, including actions brought by ASIC against the group's auditors and a number of directors, and separate class actions against financial advisors
- two class actions brought by local councils alleging negligence and misleading and deceptive conduct against Local Government Financial Services, ABN AMRO and Standard & Poors as well as a separate action by State Cover Mutual
- two product liability class actions involving each of hip implants and the use of thalidomide during pregnancy

In the United States, a large number of class actions are often filed in quick succession in respect of the same class of plaintiffs and the same facts in the race to win the role of lead counsel once the proceedings are consolidated. This generally involves an assessment by the Court of which firm’s clients have the largest financial interest in the case, in some senses trumping a plaintiff’s individual choice of lawyers.

In Australia, this has not been so much of an issue. While multiple class actions have been filed with different legal representatives in respect of the same dispute, they often seek to represent different plaintiff groups - often by use of closed classes, as described above.\(^\text{33}\) Where it does occur, however, courts are taking different approaches to competing class actions, sometimes listing them to be heard together, or with the different plaintiff firms ordered to cooperate and represent the plaintiffs jointly (such as NuFarm). In others, the cases proceed in tandem, often listed before the same judge with joint directions hearings where efficient. However, once it is evident that the issues do not overlap and joint management is no longer justified, the Courts have been willing to separate proceedings and allow them to follow their own path (as in Storm). This approach allows the solution best suited to the particular proceedings to be adopted.

In addition to class actions commenced by individual plaintiffs, both the ACCC and ASIC have the power to bring representative proceedings on behalf of injured parties, whether consumers or investors, and have done so.\(^\text{34}\)

During 2011, the ACCC's action against Allphones on behalf of franchisees (alleging breach of contract and unconscionable conduct) was settled, and the Court emphasised that while the enabling legislation did not specifically require judicial approval, the Court must be satisfied that any orders it makes are appropriate. In that case, the Court required evidence to be led as to how the settlement sum was to be distributed and how calculations were to be made.

Similarly, in litigation commenced by ASIC against financial advisors associated with the Westpoint collapse, the Court had regard to the same factors as for a class action and sought counsel’s opinion before approving settlement in the sum of $1 million, representing 8.8% of the capital invested by the beneficiaries with those advisors.

We expect that 2012 will continue to see multiple class actions being filed in respect of particular disputes, involving both private parties and the regulators. What will be interesting is whether the introduction of the new NSW class action regime creates any incentives to file in that jurisdiction.


WHO’S BEING SUED

MORE CLAIMS AGAINST ADVISORS

In reviewing the class action landscape in 2011, it has been interesting to note who has been targeted by claimants.

The majority of class actions are brought against the primary target - the company that allegedly engaged in the misleading conduct, breached the continuous disclosure requirements or allegedly engaged in the cartel conduct. Multiplex, OZ Minerals, Amcor/Visy are examples.

However, 2011 has seen an increased willingness on the part of claimants to include advisors as respondents to class actions. In some cases, this is a pragmatic decision given the insolvency of the true target of the litigation, and reflects a recognition by plaintiff lawyers that advisors, covered as they may be by professional indemnity insurance and with professional reputations to protect, could alter the settlement dynamic. The trade-off for class action promoters is that joining multiple defendants usually results in greater costs (including risk of adverse cost orders if the claim fails), complexity and delay.

Examples include:

- Progen Pharmaceutical, in which the stockbroker was sued35
- Fincorp and Westpoint, which saw financial advisors targeted36
- Octaviar/MFS, where the former auditors were added as respondents in addition to the responsible entity and a number of company officers37

In addition, 2011 saw the first class action brought against a ratings agency, with Standard & Poors named as a respondent to proceedings brought against Local Government Financial Services and ABN AMRO. An attempt by Standard & Poors to have the case against it determined by summary judgment in advance of the trial was rejected.38

There is no certainty that not being named when the proceeding is commenced means advisors are in the clear. They can be dragged in at a subsequent point. In the Centro litigation, the auditors were first joined as respondents to existing class actions against Centro, before separate class actions were also commenced against them. The proceedings, which go to trial in March 2012, are significant because the applicants seek to get around the common law position that shareholders cannot sue auditors for negligence (as they owe any duty of care to the company) by pleading causes of action in misleading or deceptive conduct.

Cross-claims – by which other alleged wrongdoers may be joined to the proceeding by an existing defendant – are not an unusual occurrence in class actions, where there is the possibility of large damages claims. In the air cargo cartel class action, the Court had to consider numerous applications by the respondent airlines to bring additional carriers into the proceedings almost four years after the proceedings were commenced and outside the time permitted by the Court rules. In two separate judgments, leave was granted for cross-claims seeking contribution or indemnity. One reason given for the delay was that the additional airlines had since settled regulatory proceedings with the ACCC, thereby reducing the risk involved in joinder.

One development that was predicted but has not been common, is the inclusion of company directors as individual defendants to class actions. This reflects the belief that it is the company that has the deeper pockets and reputation to protect, and it is generally the more lucrative target. The exceptions - proceedings brought against Timbercorp and Octaviar – show however that where a company is insolvent or in administration, directors and professional advisors remain attractive defendants.

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35 Meaden v Bell Potter Securities Limited NoSD 1310/2010.
36 Harrison v Sandhurst Trustees Ltd VDI 616/2009 (Fincorp) and Markov v Duke VDI 2011/2008 (Westpoint).
37 Mercedes Holdings Pty Ltd v Waters NoSD 324/2009. Research by the Securities Class Action Clearing House and Cornerstone Research in the United States shows that the incidence of shareholder class actions being filed with complaints against auditors was at 3% for 2011, falling from 4% in 2010: Securities Class Action Filings: 2011 Year in Review, 19 January 2012, page 27
38 Bathurst Regional Council v Local Government Financial Services Pty Ltd (No.2) [2011] FCA 309.
In 2006, the High Court confirmed that the funding of litigation, by seeking out class members and exercising a degree of control over the litigation in return for a share of any settlement sum or damages, is not an abuse of process or contrary to public policy.\(^39\)

At that time, IMF was the only active litigation funder in Australia. By 2009 it was joined by International Litigation Funding Partners (Singapore), Comprehensive Legal Funding LLC (US), Litigation Lending Services and 2117980 Ontario (Canada), and new operators continue to enter the market, such as Hillcrest Litigation Services and Omni Bridgeway (The Netherlands).

Until recently litigation funding has largely been controlled through the general supervision of the Court, employing common law protections against abuse of process, and Federal, State and Territory consumer protection legislation. In addition, the appropriateness of funding arrangements is regularly considered by the Court in deciding whether to approve the settlement of a class action. In 2011, the Court emphasised its power to impose conditions on the approval of a proposed settlement if it considers a litigation funder is getting more that their due recompense.\(^40\)

Recently, however, a number of funding arrangements have been challenged in satellite litigation to class action proceedings:

- first, in proceedings commenced by Multiplex (the defendant) against the funder, funding arrangements were found to constitute a managed investment scheme which was not registered (as required by the Corporations Act) and lacked a qualified responsible entity\(^41\);
- second, in Chameleon the funding recipient challenged the legality of its own funding arrangements so as to avoid paying a fee to the funder, and the NSW Court of Appeal held the

arrangements involved the promotion of “financial products”, allowing Chameleon to rescind the agreement and avoid the fee\(^42\)

Since the Multiplex decision in 2009, litigation funding arrangements have remained governed by class orders issued by ASIC which exempt them from the Corporations Act. In mid-2011, however, the Federal Government issued draft regulations that impose a requirement that all litigation funders have adequate policies and procedures in place to manage any conflicts of interest.

Importantly, the regulations currently stop short of requiring funders to be licensed, which would subject them to minimum financial resourcing requirements and ensure their financial standing. While this approach appears to be premised on a belief that differential treatment of litigation funders compared to other financial services providers is justified because of their perceived contribution to access to justice, major funder IMF wants the regulations to go further so as to ensure that all clients have the protection of the licencing and regulatory regime under the Corporations Act.\(^43\)

There should be no misunderstanding: litigation funding in Australia is an increasingly sophisticated business. Funders use detailed funding criteria and conduct extensive due diligence before taking on a claim. They undertake a book-build exercise before committing to the commencement of proceedings. This is reflected in their financial performance. IMF, which is publicly listed, reports that it has lost only 5 out of 123 cases and that its seven settlements for 2011 generated more than $37 million in net income, of which $12.8 million or 35% was attributable to class actions.\(^44\)

This financial imperative, driving selectivity in taking on cases to ensure returns, will continue to impose some degree of discipline on the funding industry.

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40 Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 6) [2011] FCA 277.
In litigation, a lot can turn on having access to the right documents at the right time. For that reason, bitter fights can be waged during the early stages of class actions to get access to documents.

While in years past respondents have sought to push past the veil of the representative plaintiff to discover more information about the class being represented (and in particular the quantum of their potential exposure) the past year has been characterised by attempts by plaintiffs to obtain information from third parties to establish liability.

Plaintiffs have focussed their sights on regulators such as ASIC and the ACCC, which have used their statutory powers to gather evidence relating to potential civil and criminal prosecutions, as a short cut to proving their case.

In 2011, class action plaintiffs:

- Used sections of the Royal Commission report into the 2009 Victorian bushfires to assist in setting the scope of discovery, saving time and cost in preparing new evidence45
- Subpoenaed the ACCC to get access to documents relied on by the regulator in its prosecution of the alleged air cargo cartel. The Court permitted inspection of the documents over objections from airline respondents, emphasising that among the Trade Practices Act’s strong public interest objectives is allowing private parties to rely on the output of regulatory investigations, which are undertaken by regulators at least in part on their behalf46
- Subpoenaed ASIC for documents referred to in its regulatory proceedings, despite attempts by the respondents to have the subpoena set aside47

In neither case did the regulator object to the subpoena.

45 Matthews v SPI Electricity Pty Ltd (Ruling No. 3) (2011) VSC 399. The Court refused to admit the report as evidence, but granted leave to the report being used solely to assist in establishing the scope of discovery on the basis there was no admission as to the relevance of the information.
47 Mercedes Holdings Pty Ltd v Waters (No. 4) [2011] FCA 666 (the Octaviar class action). This is a common tactic used by plaintiff lawyers.
Courts are obviously keen to see litigation - and especially lengthy and costly class actions - settled to avoid the associated risks, costs, business disruption and delays. Like other cases, class actions are often marked by complex issues of law and evidence, with no certainty as to result. As such, Courts will encourage parties to engage in mediation and other mechanisms to settle disputes where possible.

Under the federal, NSW and Victorian regimes, any settlement or discontinuance of a class action is subject to Court approval. The legislation does not set out the factors the Court will consider in reviewing a proposed settlement. However, the Courts have developed criteria which involve consideration of whether the terms of the proposed settlement are fair and reasonable, having regard to the claims made by the group members who will be bound.48

The Court will typically require evidence and submissions regarding the proposed distribution scheme for any settlement sum, and often require an opinion from counsel. With that information before them, the Court will take a “practical judicial approach” in considering settlements, described by the presiding judge in the Fincorp class action as an assessment as to whether any feature of the proposed settlement is objectively unfair, unreasonable or inadequate.

During 2011, Courts noted on a number of occasions that apparent support by a litigation funder is relevant to the Court’s consideration of a proposed settlement, given the payments that are made to the funder out of any proposed settlement sum. The existence of funding was considered in the context of both the OZ Minerals and Pan Pharmaceutical settlements, although in neither case did the Court intervene to alter the terms of the distribution schemes proposed. However, the Courts took note of both the amount proposed to be paid to the litigation funder and the percentage that that amount bore to the overall settlement, and in particular that:

• the percentage was accepted by the parties to be below that which has been recovered in other class actions49
• reasonable notice had been given to all group members of the proposed payments

48 In the case of the Federal Court, in 2010 these principles were embodied in a practice note: Practice Note CM 17 “Representative Proceedings commenced under Part IVA of the Federal Court of Australia Act 1976”.

49 Professor Morabito reports that of funded class actions settled between 1992 and 2009, 29% of settlement funds went to the relevant litigation funder: An empirical study of Australia’s class action regimes: Second Report, September 2010 page 41.
The Court has also found reason to comment on the amount of legal fees payable under a number of proposed settlements. This has ranged from expressions of judicial concern at the payment of $25 million in fees and costs in the case of the Visy/Amcor class action, to reflections in the bushfire class action that a “no win no fee” with a 25% uplift on solicitors’ fees represented a “paradigm example of a case where an uplift fee on the conditional component of professional fees is appropriate”. 50

50 An uplift on solicitors’ fees is prohibited in relation to a claim for damages New South Wales: section 324 of the Legal Profession Act 2004 (NSW).
51 Across both the Federal Court and NSW Supreme Court proceedings.
52 The $3 million sum was paid in the ACCC’s representative action. In the class action commenced after the ACCC proceedings a settlement was reached following mediation, which dealt only with the terms on which Alphones would renew existing franchises.
53 Costs awarded but quantum not specified in judgment.
54 Across the two class actions.
55 Costs awarded but question not specified in judgment.
56 Settlement remains conditional on Court approval: Clime Capital Ltd v Credit Corp Group Ltd, NSW 1994/2008.

### “CLASS ACTIONS BY SHAREHOLDERS COST OZ MINERALS $60M”
THE AUSTRALIAN 11 MAY 2011

<table>
<thead>
<tr>
<th>Class action</th>
<th>Respondents</th>
<th>Allegations</th>
<th>Mediation?</th>
<th>Settlement sum (damages)</th>
<th>Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pan Pharmaceuticals</td>
<td>Commonwealth</td>
<td>Misfeasance in public office</td>
<td>Yes</td>
<td>67.5 million (March 2011)</td>
<td>$5 million</td>
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<tr>
<td>Fincorp</td>
<td>Financial advisors</td>
<td>Negligence</td>
<td>Yes (successful)</td>
<td>$29 million (May 2011)</td>
<td>$2 million</td>
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<tr>
<td>Alphones</td>
<td>Company</td>
<td>Breach of contract and unconscionable conduct</td>
<td>No</td>
<td>$3 million (May 2011)</td>
<td>N/A</td>
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<tr>
<td>Landfill gas leak</td>
<td>Council</td>
<td>Negligence</td>
<td>Yes (unsuccessful)</td>
<td>$17.5 million (May 2011)</td>
<td>$6 million</td>
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<tr>
<td>Amcor/Visy</td>
<td>Companies</td>
<td>Cartel conduct</td>
<td>Yes (unsuccessful, settled on first day of hearing)</td>
<td>$95 million (June 2011)</td>
<td>$25 million</td>
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<tr>
<td>OZ Minerals</td>
<td>Company</td>
<td>Misleading or deceptive conduct; failure to comply with continuous disclosure obligations</td>
<td>Yes (unsuccessful but led to subsequent negotiations)</td>
<td>$60 million (July 2011)</td>
<td>$5 million</td>
</tr>
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<td>Rubber chemicals</td>
<td>Companies</td>
<td>Cartel conduct</td>
<td>No</td>
<td>$400,000 (September 2011)</td>
<td>$1.1 million</td>
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<tr>
<td>Powercor (2009 bushfire)</td>
<td>Company</td>
<td>Negligence</td>
<td>No (settled after 5 weeks of hearing)</td>
<td>Quantification to be determined based on 55% of losses and penalty interest (December 2011)</td>
<td>N/A</td>
</tr>
<tr>
<td>Credit Corp</td>
<td>Company</td>
<td>Misleading or deceptive conduct; failure to comply with continuous disclosure obligations</td>
<td>No</td>
<td>$6.5 million (December 2011)</td>
<td>N/A</td>
</tr>
</tbody>
</table>
SUCCESS STORIES...

UNRESOLVED ISSUES OF CAUSATION AND LOSS

Putting settlements aside, only four class actions have reached some form of finality in 2011…none to the plaintiffs’ gain.

First, as noted above, the Victorian Supreme Court dismissed a class action commenced without the authority of the named plaintiff, with the solicitors in question being referred to the professional conduct authority.57

Second, in a class action commenced against the Timbercorp group, investors owing more than $450 million to a group company alleged there had been misleading or deceptive conduct (failures to disclose certain risks and adverse matters) and claimed that they ought not be required to repay their loans.58

This case is only the third securities class action to go to judgment in Australia.59 In a biting judgment, the Court:

• criticised the difference between the way the case had been pleaded and the way it was prepared and run at trial
• found that there was no liability, and that the investors had to repay the loans in question
• ordered the representative plaintiffs to pay Timbercorp’s costs (estimated at $10 million) in circumstances where the litigation was not supported by a commercial funder

The Court concluded that group members must demonstrate actual reliance on the alleged misleading or deceptive conduct, or that they would have acted differently if the material omission had been disclosed, as an essential element of establishing the cause of their losses. Importantly, the judge found that the plaintiff had not read the relevant documents in any detail, but relied on the advice of a financial advisor to obtain a tax deduction. The decision has since been appealed, with issues of reliance and causation to be scrutinised.

Third, in the VIOXX class action against Merck, the Full Federal Court overturned a previous award of $330,000 in damages to the representative plaintiff based on tortious liability and claims under the Trade Practices Act.60 The Court’s finding that the representative plaintiff failed to establish causation also has consequences for the class action more generally. This decision has been appealed to the High Court.

These two cases provide judicial confirmation that issues of causation are no less difficult to prove in large-scale class actions than individual proceedings. By focussing on the particular circumstances of each claimant and their history or conduct, these decisions suggest that the class action vehicle may not always provide the low-cost route to damages that access to justice proponents had hoped and that, where causation is key, the ability to establish the lead plaintiff’s case will be crucial in promoting settlement on behalf of the broader class.

Finally, in a decision on preliminary questions in the bank fees class action against ANZ, the plaintiffs lost on critical issues in respect of the majority of the fees under examination, and have since been ordered to pay 50% of ANZ’s costs. However, on the basis that the 5 December 2011 judgment determined that certain late payment fees are capable of comprising penalties, we have now seen other class actions commenced against Westpac, CBA, NAB, Citibank, St George and BankSA. Proceedings are still being considered in relation to Bank of Queensland, BankWest, Bendigo Bank, HSBC and Suncorp. At the same time, the plaintiffs are appealing aspects of the Federal Court’s decision and have issued proceedings in the original jurisdiction of the High Court.

59 In each of the other two class actions, Spangaro v Corporate Investment Australia Funds Management Ltd V03019/2001 and Refell v ACN 075 839 226 Ltd [2000] NSWSC 66; judgment was given on liability and the matters were then settled in respect of quantum.
In addition to the new bank fees class actions, we expect 2012 to follow last year’s trend with class action proponents investigating non-traditional areas. These are as diverse as claims brought by asylum seekers for their wrongful removal from Nauru, a possible class action for breaches of privacy against Sony (class actions filed in the US), against Orica for chemical leaks, possible proceedings arising from the South-East Queensland floods and an action against the Church of Scientology to recover unpaid wages and entitlements. Prospective shareholder claims are also mooted in relation to Downer EDI, Leighton, AECOM and Equititrust.

While some of these claims are being promoted by “traditional” class action participants (whether law firm or funder), we expect new entrants to also feature prominently, including overseas sources of funding.

Use of the class action mechanism to avoid individual questions of reliance and causation has not been wholly successful to date. Importantly, the question of whether shareholders can rely on an indirect theory of causation remains unresolved. In 2012 however, there may be some decisions that provide further guidance. Most significant among these is the Centro class action, the hearing of which commences in March 2012, where indirect causation is front and centre.

Other key events we will be watching are:

- Judgment in the proceedings commenced by 72 councils, charities and churches against Lehman Brothers Australia (the hearing of which finished in June 2011) – in this misleading or deceptive conduct claim, the Court’s decision will consider the extent to which actual reliance will be required
- the completion of the hearing against Local Government Financial Services, ABN AMRO and Standard & Poor’s (March 2012) – significant as being the first of any sort against a ratings agency
- the ongoing Octaviar/MFS class action – which received the go-ahead in respect of allegations against the company’s auditors just prior to Christmas
- the interlocutory wranglings in other class actions, with mediations being held in the GU and Nufarm class actions

Finally, while it was expected that the Federal Government’s approach to the regulation of litigation funding would be resolved by late 2011, the submissions received on the draft regulations, combined with the appeal of the Chameleon licencing decision, mean that this is likely to remain a live issue well into 2012.

61 Questions about the availability of market-based theories of causation were raised by Justice Finkelstein in approving the settlement of the Multiplex class action: P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No. 4) [2010] FCA 1029; referring to the NSW Court of Appeal decision in Ingot Capital Investments Pty Ltd v Macquarie Equity Markets Ltd (2008) 73 NSWLR 653.
Moira Saville specialises in dispute resolution in the areas of class actions, professional liability, insurance and special commissions of inquiry.

Roger Forbes is the leader of our Dispute Resolution team and has many years’ experience advising on contractual, commercial and corporate disputes, competition and infrastructure access disputes and public law.

Peta Stevenson is a senior associate specialising in competition law, advising on regulatory investigations and prosecutions through to follow-on damages actions including class actions.

Moira Saville
Partner
Sydney
T +61 2 9296 2311
moira.saville@au.kwm.com

ROGER FORBES
Partner & Practice Team Leader
Perth
T +61 8 9269 7250
roger.forbes@au.kwm.com

PETA STEVENSON
Senior Associate
Sydney
T +61 2 9296 2492
peta.stevenson@au.kwm.com

Sydney

Moira Saville
Partner
Sydney
T +61 2 9296 2311
moira.saville@au.kwm.com

KATE MILLS
Partner
Sydney
T +61 2 9296 2162
kate.mills@au.kwm.com

ALEX MORRIS
Partner
Sydney
T +61 2 9296 2495
alexander.morris@au.kwm.com

KAREN COLEMAN
Partner
Sydney
T +61 2 9296 2110
karen.coleman@au.kwm.com

Melbourne

DOMENIC GATTO
Partner
Melbourne
T +61 3 9643 4460
domenic.gatto@au.kwm.com

JOANNE CAMERON
Partner
Melbourne
T +61 3 9643 4083
joanne.cameron@au.kwm.com

CHRIS FOX
Partner
Melbourne
T +61 3 9643 4116
chris.fox@au.kwm.com

Perth

ROGER FORBES
Partner
Perth
T +61 8 9269 7250
roger.forbes@au.kwm.com

Hong Kong

DENIS BROCK
Partner
Hong Kong
T +852 3443 1020
denis.brock@au.kwm.com
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The team that worked on this report included Moira Saville, Roger Forbes, Greg Golding, Peta Stevenson, Armen Varvachtian, Stephanie Puris, Klone Johnson, Tatjana Cupac and Elle Quinn.

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FOR PUBLICATION ENQUIRIES PLEASE CONTACT

SUE ASHE
Head of Communications
T +61 2 9296 3716
E sue.ashe@au.kwm.com

ELLE QUINN
Communications Manager
T +61 2 9296 3730
E elle.quinn@au.kwm.com

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