AUSTRALIA

REMEDIES THAT CROSS BORDERS

Australia is now the number one location outside of North America where a corporation is most likely to find itself defending a class action. In 2012, Australia's securities class action settlements totaled more than one billion Australian dollars. In the first six months of 2014, a record 12 securities fraud class actions were proposed or filed. That rate of filing puts Australia on par with the United States in terms of number of securities class actions filed per year per capita.

The Legal System Generally

Australia is a common law based Federal system. Australian trials, much like trials in the U.S., are conducted in an adversarial manner. Originally trials were heard by a judge and a jury, but in recent years, the jury trial has eroded.

Discovery

Australian civil procedure allows for pretrial documentary discovery but does not allow for pretrial depositions. Most Australian courts favor a category-based approach to discovery in which the parties will exchange lists that set out the documents each party believes relevant to the legal case. The lists are filed in court and the opposing party is then allowed to inspect the other party. Discovery may be sought from the defendants and the representative plaintiff in a representative proceeding, but authorities disagree as to whether and when it is appropriate to order discovery against group members. Group members may be required to provide trade data and to respond to inquiries confirming the accuracy of the trade data, but they are not typically required to provide additional discovery or to attend hearings or review submissions.

Costs of litigation and attorney fees

Australia is a "loser pays" system, and the court may require the losing party to pay the prevailing party's costs and attorneys' fees. Absent class members are not responsible for paying any of the defendant's costs if the defendant prevails in a class action. Ultimately, the award of fees and costs is discretionary and the court may determine appropriate amounts and whether costs and fees should be awarded. Attorneys are prohibited from

representing clients on a contingent fee basis, but third party funding is available and widely used. As discussed in more detail below, the lack of contingent fees and the risk of being required to pay defendant's costs if litigation is unsuccessful, has had a unique impact on collective actions in Australia. Third party litigation funding is frequently used, and in the past, the use of third party litigation funding has influenced the way a class is defined so that only members who signed the litigation funding agreement are considered class members. Recent Australian jurisprudence may be changing the way the cases have heretofore operated. Overall, the risks of participating in Australian representative proceedings are still minimal because of the use of third party funding.

Overview of the Australia's Securities Laws

Securities regulations fall under the following laws: 1) the Corporations Act 2001; 2) the Australian Securities and Investments Commission Act 2001 ("ASIC Act"); 3) the Foreign Acquisitions and Takeovers Act 1975; and 4) the regulations that accompany all the three acts. Shareholder action in Australia typically alleges violations of either or both the Corporations Act or the ASIC Act. The Corporations Act regulates the incorporation and behavior of companies, and it is the main statute responsible for financial products (e.g. securities) and the provision of financial services. Civil actions can be brought by investors alleging that a corporation committed a breach of the Corporation Act. The ASIC Act primarily governs the operations of the Australian Securities and Investment Commission, although it also contains provisions that govern the Corporations Act and some consumer protection laws (concerning financial services). When a corporation provides materially misleading or deceptive statements in a disclosure document or it engages in conduct in relation to a financial product or service that is misleading or deceptive, it can be considered to have breached the Corporations Act and the ASIC Act, and the corporation can be liable for damages. The Corporations Act also contains prohibitions on insider trading and market manipulations. Civil actions alleging violations of the Corporations Act and/or the ASIC Act can be brought in federal court or in the courts of an Australian state or territory that has jurisdiction over the defendant.

Collective Securities Litigation in Australia

Representative proceedings, more commonly known as class actions, were introduced in Australia in 1992 through the enactment of Section IVA of the Federal Court of Australia Act 1976. A class action is commenced by a single representative where seven or more persons have a claim against the same person. A class action may be brought by an individual or a corporation who has sufficient interest to commence a proceeding. Australia allows class members to proceed anonymously, and neither the precise number of class members nor the identity of the members must be disclosed to the defendants or the public. To qualify as a class action, all group members must have claims against all respondents. Additionally, the claims must arise out of the same, similar, or related circumstances, and they must give rise to at least one substantial common issue of law or fact.

Unlike jurisdictions such as the Netherlands, representative proceedings in Australia are not limited to pursuing injunctive or declaratory relief, and the representative plaintiff may seek damages on behalf of the class. It is irrelevant to the courts if the damages might need to be determined on an individual basis – the claims can still be brought through representative proceedings as long as the tests described above are met.

In some respects, the Australian class action system is more accommodating to plaintiffs than the United States because:

- There is no initial certification procedure that requires the court to be satisfied that the proceedings are appropriately pursued as a class action. In fact, the burden is placed on the defendant to show that it is inappropriate for the claims to be pursued via class action.
- There is no requirement that common issues predominate over the individual issues.

Strictly speaking, all Australian representative proceedings are 'opt-out'. The critical question is whether the proceeding is limited to those who have executed a litigation funding agreement as of the date of commencement (a closed class) or, absent such a limiter, the proceeding is open to all that purchased during the relevant period (open class). Because Australian attorneys have historically been prohibited from both representing clients on a contingent fee basis and advancing any litigation costs, many Australian plaintiffs must rely on third party litigation funding. When third party litigation funding is utilized, the class definition is usually written in a way that requires those who wish to join in the litigation to register or opt-in in advance. This closed class mechanism developed as a way to guard against the "free rider problem" where absent class members did not contribute to the costs of prosecuting the litigation or share in the risk of any adverse costs.

Recently, there has been a shift in the way Australian representative proceedings are structured, and more cases are either being announced as open class cases or, if they begin as a closed class case, an application may be submitted or a judge may order that the case be opened up. In October of 2016, the Full Court of the Federal Court of Australia issued a landmark decision in Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Limited [2016] FCAFC 148 ("Money Max"). In Money Max, the court granted an application for a "common fund" order which allows a litigation funder to provide funding for a representative proceeding and obtain the contingent funders' fee from all class members if the litigation proves successful. If the courts continue to follow the common fund approach, the result could be that more and more representative proceedings proceed on an open class basis. It could also mean that class actions will now be announced and then commenced in a much more expeditious manner. Under the current system, it can take a couple years between when a potential action is announced and when a complaint is actually filed because litigation funders need to sign-up a critical mass of class members in order to make the action economically viable.

When a case proceeds on an open class basis, eligible shareholders will be bound to results of the action unless they choose to opt-out by a deadline set

by the court. To complicate matters further, in open class proceedings, the Australian Court typically imposes a requirement that group members "register" their claim in order to be eligible to share in any ultimate settlement or judgment. To that end, the court will usually issue a notice setting the deadline by which an eligible class member must "register" their claim. This differs from the U.S. approach (where class members submit their claims after a settlement is announced) in that the claims registration process usually takes place before any settlement or judgment is reached. Consequently, shareholders may end up registering for something that never leads to any recovery. It is also important to be mindful that the period of time between the court's announcement and the deadline to "register" is usually short. It is unclear whether those processes will be modified in light of the recent Money Max decision.