



JONES DAY
COMMENTARY

GUIDANCE ON THE INTERACTION BETWEEN THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION AND CLASS ACTIONS PROVIDED

The rise of private enforcement of the securities laws in Australia, usually through the class action, has major ramifications for the interaction between private litigants and the public regulator, the Australian Securities and Investments Commission (“ASIC”). ASIC has responded to this development with two new information sheets:

- Information Sheet 180, *ASIC’s Approach to Involvement in Private Court Proceedings* (June 2013) (“INFO 180”); and
- Information Sheet 181, *Providing Information and Documents to Private Litigants* (June 2013) (“INFO 181”).

The information sheets demonstrate that the advent of public and private enforcement means that these two forms of enforcement need to be considered together—private litigants may seek information from

ASIC, and ASIC may intervene in private court proceedings. Both have ramifications for potential class action defendants.

OBTAINING INFORMATION AND DOCUMENTS FROM ASIC

ASIC has significant coercive investigatory powers, including the power to conduct oral examinations (section 19 examinations), issue notices to produce books and documents and apply for a search warrant to seize books.

It may release transcripts of oral examinations conducted by it under section 19 and related books to a person’s lawyer if the lawyer satisfies ASIC that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related.

ASIC also has a general power to give any person a transcript of an oral examination and related books, but the power is subject to a confidentiality regime in the ASIC Act.

ASIC may obtain books under a notice or warrant which ASIC may then use, or permit to be used, for the purposes of a proceeding, including a civil proceeding.

ASIC may also be subject to a subpoena. In the shareholder class action area, this procedure is illustrated by *King v GIO* where a subpoena was issued for the production of “records of examination and related books in the investigation of the first respondent”, GIO.¹ Similarly, in the *Multiplex* class action, leave to issue a subpoena that sought documents provided by the respondents to ASIC in the course of an investigation, section 19 transcripts and signed or sworn statements from witnesses obtained by ASIC, was granted.²

The ability of private litigants to obtain this information means that ASIC may operate as a “class action compass” that points to potential claims or improves the prospects of success and reduces costs by making evidence available.

ASIC is able to resist the provision of information or documents. In INFO 181, ASIC observes that “in most cases, [it] will not provide information or documents where to do so could potentially compromise an ASIC investigation or enforcement action”. ASIC is able to resist the production of materials that are subject to public interest immunity, that is, some other aspect of the public interest, such as the workings of the enforcement and regulatory arms of the executive government are likely to be adversely affected if disclosure were required. In the *Multiplex* class action, the Full Federal Court held that the public interest in encouraging informers to come forward outweighed the applicant’s interest in obtaining the materials for its proceedings.³

For a person or entity that has provided documents or information to ASIC, a major concern is that the material may be used against it by private litigants. Restrictions on use are

provided by legal professional privilege, confidentiality obligations and operation of the Privacy Act. ASIC will also give a person an opportunity to be heard prior to the disclosure of information. Potential class action defendants need to be mindful of the scope and limitations of these restrictions when dealing with ASIC.

ASIC’S ROLE IN PRIVATE LITIGATION

While private litigants can commence litigation, including class actions, ASIC has a broad ability to intervene in that litigation. For example, the Corporations Act 2001 (Cth) provides that “ASIC may intervene in any proceeding relating to a matter arising under this Act”.⁴ ASIC may also apply to the court for leave to appear as *amicus curiae*.

ASIC’s INFO 180 explains that the decision to intervene will be guided by the following four general principles:

- Whether intervention is of strategic regulatory significance.
- Whether the benefits of intervention outweigh the costs of doing so.
- Whether issues specific to the case warrant intervention.
- Whether alternatives are available, including appearing as *amicus curiae* or taking action ourselves.

Further, ASIC explains that strategic regulatory significance means:

- A case raises matters that are clearly significant to our statutory objectives or exercise of our functions and powers.
- Important issues of interpretation of legislation, going to the heart of the legislative policy of the provision or to ASIC’s powers or ability to administer the legislation, arise.

As private litigants in the course of seeking their own remedies may require courts to decide novel points of law that

1 *King v GIO Australia Holdings Ltd* (2001) 116 FCR 509.
2 *P Dawson Nominees Pty Ltd v Multiplex Limited* (2007) 64 ACSR 53, [10].
3 *ASIC v P Dawson Nominees Pty Ltd* (2008) 66 ACSR 704, [48]–[61].

4 Corporations Act 2001 (Cth) s1330.

will then form precedents binding ASIC, it is in ASIC's interest to ensure it is heard on these issues. In particular, ASIC will want the court to be aware of the broader ramifications that particular outcomes may have.

In *Richards v Macquarie Bank Limited* [No 4] [2013] FCA 438, ASIC intervened in a class action settlement hearing where it was proposed that a 35 percent uplift be given to those group members who financed the cost of prosecuting their class action. Group members who contributed to the legal costs and disbursements involved in running the class action recovered 42 percent of their losses, while those who did not contribute recovered only 17.602 percent of their losses. ASIC raised concerns about the size of the uplift and whether adequate notice had been given to group members of the uplift. The settlement was still approved, and ASIC has lodged an appeal.

The intervention in *Richards* and the publication of INFO 180 may indicate that ASIC plans on taking a more active role in monitoring and, where necessary, making its voice heard on important issues of public interest.

ASIC has championed the useful role that class actions can play as part of a larger range of enforcement tools, but that does not mean ASIC has vacated the field. Private class actions are heavily lawyer- and litigation-funder driven, meaning monetary recovery is a top priority. This may at times be at odds with a larger public interest in the efficient and effective regulation of financial markets and protection of consumers.

For class action defendants, ASIC's new activism may mean that novel causes of action attract an additional set of submissions or that class action settlements are put under further scrutiny. While this may result in additional costs, proactively engaging with the regulator to understand their concerns and determining if they can be met will become part of dealing with the class action litigation.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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