JONES DAY

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COMMENTARY

The Fast Australian Class Action Settlement

Key Points

- The shareholder class action against Leighton Holdings Ltd ("Leighton") was subject to a mediation within five months of commencement, and a settlement was reached within seven months of commencement. The settlement provided for Leighton to pay A$69.45 million, including A$3.9 million for the applicant's legal costs.
- The settlement occurred prior to the mandatory right to opt out, necessitating contemporaneous opt out and settlement notices.
- A number of methods were employed to communicate the notices to group members, including Leighton's share register being provided to a mailing house.
- To protect Leighton against large claimants opting out, Leighton had the option to withdraw from the settlement or require an amount in respect of such a group member to be held in escrow for a period of two years.
- The court made class closure orders, which means that group members face a "use it or lose it" situation in relation to their claims. If group members do not register their claim and the settlement is approved, then they receive no compensation and their right to claim is extinguished.
- The availability of information to determine the fairness of an early settlement was satisfactorily addressed through discovery of agreed categories of documents, exchange of expert loss reports and position papers prior to the mediation.

Background

Inabu Pty Ltd, as trustee for the Alida Superannuation Fund, commenced a class action in the Federal Court of Australia against Leighton in relation to two major construction projects, the Brisbane Airport Link project ("BAL Project") and the Victorian Desalination Plant project ("VDP Project"), and a Dubai-based property construction joint venture, the Al Habtoor Leighton LLC ("Habtoor Leighton").

The class action alleged that in the period 16 August 2010 to 11 April 2011, Leighton had breached its continuous disclosure obligations under s 674 of the *Corporations Act 2001* (Cth) and various prohibitions on misleading or deceptive conduct because it:

- Failed to disclose that there were material matters arising either individually or collectively from the BAL Project and VDP Project and likely

impairments on the Habtoor Leighton investment which made it likely that Leighton would not achieve its profit forecasts for the 2011 financial year; and

- Made statements that misled or deceived shareholders about the profit forecasts and performance for the 2011 financial year and performance.

Proceedings were commenced on 30 October 2013. By mid-May 2014, a settlement, subject to the approval of the court as required for class actions, had been reached. This was before any defence was filed. The settlement provided for Leighton to pay an amount of A$69.45 million, including A$3.9 million for the applicant's legal costs. The amount that each group member would actually receive depended on the number and quantum of claims that participated in the settlement.[1]

Leighton had previously settled an Australian Securities and Investments Commission investigation into the BAL Project, VDP Project and Habtoor Leighton. This settlement required Leighton to pay A$300,000 in fines and enter into an enforceable undertaking to improve continuous disclosure policies and procedures.[2]

Settlement Prior to Opt Out

The settlement reached in the Leighton class action occurred prior to the mandatory requirement that group members be given an opportunity to opt out, or exclude themselves, from the proceedings.[3] As a result, Jacobson J was asked to approve notices that combined the separate forms of notice that would ordinarily be sent in the case of a proposed settlement with those which give notice of group members' entitlement to opt out of the proceeding.

It was also determined that there needed to be two different forms of the relevant notices because of the different status of funded group members (who had entered into a funding agreement with International Litigation Funding Pte Ltd) and other unfunded group members. Funded group members as part of the obligations under the funding agreement had agreed to take part in the proceeding and provided the necessary information in relation to the purchase and sale of Leighton shares for the relevant period.

The steps in the settlement process were:

Date	Step
6 March 2014	Mediation
16 May 2014	Settlement agreement executed
6 June 2014	Hearing for approval of opt out and settlement notices by the court
Before 4pm on 10 June 2014	Notices to be displayed on the website of the applicant's solicitor
Before 4pm on 13 June 2014	Mailing of notices to funded and unfunded group members and publication of notices in newspapers
18 July 2014	Persons wishing to opt out must return form Unfunded group members must register to participate in settlement
1 August 2014	Group members wishing to oppose settlement must provide notice Unfunded group members must provide a statutory declaration verifying their shareholdings in Leighton
15 August 2014	Settlement approval hearing
25 August 2014	Orders made approving settlement

Leighton's Ability to Withdraw from the Settlement

The timing of the settlement meant that a group member who did not want to be bound by the settlement on offer could opt out of the class action. To guard against Leighton reaching a settlement that did not in fact settle the claims against it, the settlement agreement provided that Leighton may issue a withdrawal notice where a group member who held a sufficiently large number of shares in Leighton elects to opt out of the proceedings. Presumably this terminated the settlement agreement.

1 A loss assessment formula was devised to calculate payments to individual group members but was ordered to be treated as confidential by the court.
2 ASIC, "Leighton Holdings complies with three ASIC infringement notices for alleged continuous disclosure breaches and ASIC accepts compliance enforceable undertaking", Media Release 12-53MR, 18 March 2012.
3 *Federal Court of Australia Act 1976* (Cth) s 33J.

The settlement agreement also allowed for the issue of a large shareholder opting out of the settlement to be dealt with by Leighton being able to require an amount in respect of such a group member to be held in escrow for a period of two years. If the shareholder did not make a claim against Leighton in respect of the subject of this proceeding during the escrow period, then the escrow amount would be distributed to participating group members according to the terms of the settlement scheme. This approach allows for a settlement to go ahead but also protects a respondent against additional claims by shareholders who opt out of the class action.

The withdrawal and escrow conditions were not subsequently enlivened as only seven opt-out notices were received, and they did not cover a sufficient number of shares.

Identification of Group Members

To identify unfunded group members who had not previously come forward, a two-step procedure was adopted.

First, Leighton provided a mail house distribution service with the details of all shareholders recorded on the Leighton share register who purchased securities in Leighton between 16 August 2010 and 11 April 2011 (inclusive). The mail house then communicated the notices by email, or if no email address existed or the email failed to send, by prepaid ordinary post to the shareholder at the address recorded on the share register. The information from the share register was not to be disclosed to the applicant, applicant's solicitor or the litigation funder.

Second, the notices were also communicated through being displayed on the website of the applicant's solicitor and through publication in one weekday edition of the *Australian Financial Review* and one weekday edition of *The Australian*. The applicant's solicitor was also permitted to publish notices in any further newspaper or on any website that it considered appropriate to bring the notices to the attention of group members.

The court's orders also made provision for notices to be communicated to funded group members by email and prepaid ordinary post. Contacting funded group members would be more straightforward as they were known to have communicated with the lawyer and funder previously.

Class Closure

A common feature of Australian class actions that reach a settlement is that the court is asked to "close the class"[4] which entails establishing a process for group members to identify themselves so they can participate in the settlement. In the Aristocrat Leisure shareholder class action, Stone J observed that when an opt-out group definition is used, it will eventually be necessary to close the class because:[5]

> Until the class of participating group members is closed and the members of the closed class identified, there can be no final settlement and no distribution of settlement monies to members of the class.

However, in addition to requiring group members to come forward, courts have also made orders that group members who do not come forward lose their claims. In the Leighton class action, Jacobson J explained:[6]

> ... that if the group member does nothing and the settlement is approved, the group member will not receive compensation but will be bound by the settlement and will not be able to claim compensation from Leighton in the future in relation to the circumstances giving rise to the present proceeding.

Class closure means that group members face a "use it or lose it" situation in relation to their claims. Jacobson J was prepared to make orders closing the class here because it was necessary for an efficient and orderly distribution of funds, the class action had attracted extensive media coverage and there was sufficient time from when the notices were given for group members to come forward.

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4 The closing of the class is a step that occurs in an open or traditional opt-out class action. The process is to be compared with a closed class where the group is defined from the outset in a manner that limits the group to ascertainable persons. *See Matthews v SPI Electricity (Ruling No. 13)* [2013] VSC 17 at [18]-[24].

5 *Dorajay Pty Ltd v Aristocrat Leisure Limited* (2008) 67 ACSR 569 at [13].

6 *Inabu Pty Ltd v Leighton Holdings Ltd* [2014] FCA 622 at [17].

After the time for group members to register their participation in the class action had closed, the court recorded that 6,000 people had registered, 3,000 of whom were unfunded group members. Group members who registered after the deadline were not entitled to participate in the settlement. However, Jacobson J amended his earlier orders to include those group members in the settlement.

Approval of the Settlement

A class action may not be settled or discontinued without the approval of the court.[7] The criteria for approving settlements in the Federal Court has been discussed on a number of occasions[8] and are now consolidated in Federal Court of Australia, Practice Note CM17, *Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, 9 October 2013.

When applying for court approval of a settlement, the parties will usually need to persuade the court that: (i) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who will be bound by the settlement; and (ii) the proposed settlement has been undertaken in the interests of group members, as well as those of the plaintiff, and not just in the interests of the plaintiff and the defendants.[9]

In the Leighton class action, the main concerns discussed by Jacobson J were the availability of information to determine the fairness of an early settlement and the unknown numbers of unfunded group members.

However, the settlement was after a mediation before an experienced mediator in light of an extensive exchange of information between the parties, including discovery of agreed categories of documents, and the exchange of expert loss reports and position papers.

The affidavit supplied by the applicant's solicitor explained that usually where there were funded and unfunded group members, the funded group members are protected from dilution of their claims by a minimum amount being reserved for them. This had not happened in the current settlement. However, while the number of unfunded group members that registered was high, the quantum of their claims was relatively low compared to the claims of funded group members.

His Honour also noted a number of other issues, including the unsettled law on causation and calculation of damages, an independent costs consultant's report on legal costs and a claim for the applicant to be reimbursed.

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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7 *Federal Court of Australia Act 1976* (Cth) s 33V.
8 *See*, e.g., *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671; *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626.
9 Federal Court of Australia, Practice Note CM17, *Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, 9 October 2013 at [11.1].