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WHITE PAPER

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Class Actions in Australia: 2015 in Review

2015 was an active year on Australia's class action front. High-profile class action suits were settled across a range of industries and areas, and Australia's courts ruled on matters relating to market-based causation, funder's fees, and Anshun estoppel as applied to class action group members and their rights to pursue further litigation. This White Paper reviews these developments and other issues relating to recent class actions in Australia.

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INTRODUCTION

2015 saw the commencement and settlement of class actions in a range of areas: shareholder, investor, consumer, product liability, environment, and government in the Supreme Courts of Victoria and New South Wales as well as the Federal Court of Australia. The Law Reform Commission of Western Australia also published its report on class actions and recommended the adoption of a class actions regime for that state.

2015 also saw judgments in relation to a number of very significant class actions issues. The High Court of Australia limited the reach of the proportionate liability regimes in federal statutes so that only claims based on misleading or deceptive conduct are subject to proportionate liability. Other claims based on the same facts will be determined on the basis that joint and several liability applies.

Indirect or market-based causation was found to be arguable by the Full Federal Court in the Arasor shareholder class action. This approach to causation creates a lower standard than the traditional direct reliance requirement and if accepted more widely would make shareholder class actions easier to prove. The Full Federal Court also found against bank customers in the bank fees class action but the matter will be finally determined by the High Court in 2016.

The Federal Court declined to make orders to allow litigation funders to employ a “common fund approach” to funders’ fees so that all group members are automatically liable to pay a share of any recovery to the funder.

The Supreme Court of Victoria was called to rule on the vexed issue of Anshun estoppel (whereby a party can be estopped from bringing a subsequent claim if it could reasonably have done so in prior proceedings) in the class action context. The class action legislation states that group members are bound by the outcome of a class action, even though they are not before the court. However, whether a group member can be prevented from litigating a claim that was not part of the class

action but related to the class action claim is less clear. The Supreme Court found that Anshun estoppel did not apply, but the matter has been appealed.

NEW CLASS ACTIONS

2015 saw the commencement of a number of previously mooted shareholder class actions. QBE, Vocation, Myer, UGL Ltd, WorleyParsons and MacMahon Holdings were all sued by their shareholders in 2015. Investigations into potential shareholder class actions were also advertised in relation to Slater & Gordon, IOOF, and Iluka. Slater & Gordon, the class actions law firm, is the subject of a potential shareholder class action because it is listed on the Australian Securities Exchange (“ASX”) and subject to the applicable securities laws. Investor class actions were also prominent, as claims commenced involving Provident Capital Ltd and Wickham Securities.

Product liability claims continued in 2015. A class action is being considered in relation to frozen berries that were subject to a product recall. Consumer claims have been raised concerning the painkiller Nurofen and whether misleading statements were made about how the active ingredient operated. A consumer claim against the airlines Jetstar and Virgin is also being investigated regarding “drip pricing” (surcharges added at the end point of sale which the consumer was not aware of in the advertised price). If pursued, both of the latter claims will follow on from successful actions by the Australian Competition and Consumer Commission.

A class action against the federal government has been commenced in relation to the Manus Island regional processing centre for asylum seekers. A class action is being investigated in respect of the Commonwealth’s Home Insulation program that was cancelled in 2010, and another in connection to chemical contamination around the Williamstown air force base. There have also been claims involving floods and bushfires such as the Callide Dam flood in Queensland and the Perth Hills/Parkerville bushfire in Western Australia.

JUDGMENTS AND SETTLEMENTS

Investor Claims. Long-running claims from the global financial crisis were resolved in 2015. The Storm Financial class action against the Commonwealth Bank of Australia settled for \$33,680,000, or 55 percent of the group members' claims. Costs of \$10,340,062 were deducted from the recovery. Similar class actions against Macquarie Bank and Bank of Queensland had previously settled.

The class action proceedings brought in 2009 on behalf of persons who purchased units in the MFS Premium Income Fund was settled along with proceedings brought in 2013 by the fund's present responsible entity, Wellington Capital. The claims were against the former auditors and the responsible entity. The class action was memorably described by Perram J as "a long and drawn out procedural Stalingrad in which no quarter will be given" and resulted in 16 interlocutory judgments. The quantum of the settlement was not disclosed.

The class action by persons holding debentures issued by Australian Capital Reserve when it collapsed settled for \$25 million plus interest (including legal costs of about \$5 million).

December 2015 also saw judgment given in the class action brought by Trilogy Funds Management Limited (as responsible entity for the Pacific First Mortgage Fund) regarding losses on fund loans during 2006 and 2007 to Atkinson Gore Agricultural Pty Ltd. It was alleged that lending decisions made by the defendants were unreasonable and, amongst other things, failed to follow the fund's lending criteria. Wigney J delivered judgment in favour of Trilogy Funds Management Limited. Wigney J made compensation orders against two of the respondents for \$37,214,088.28 plus interest, and against two other respondents for \$6,245,974.93 plus interest.

Consumer Claims. The Cash Converters cases dealing with pay day lending in New South Wales were settled through the establishment of a \$20 million fund to compensate borrowers and with the additional payment of \$3 million in legal costs. A further class action against Cash Converters dealing with Queensland borrowers was commenced in 2015.

Product Liability. The Vioxx class action settlement which was initially denied approval on 17 May 2013 was modified

and obtained approval in February 2015. The new settlement overcame the issues with the original settlement, which it was said gave insufficient attention to the relative strength of group members' claims. The new settlement adopted a points system which recognised the differential impacts of certain personal circumstances presumptively predisposing group members to the occurrence of a heart attack. In another product liability claim Pfizer settled a class action based on the potential side effects of the Cabaser and Dostinex tablets that it manufactured and supplied.

The Bonsoy soy milk product class action involved allegations that the soy milk contained unsafe levels of iodine. The claim was settled for \$25 million, inclusive of costs and the administration of the settlement, which left about \$16.5 million to be distributed amongst the group members. The proceedings were brought on a conditional fee basis with a 25 percent uplift applying.

Environment / Government Claims. The abalone class action against the State of Victoria reached a settlement but in a situation where the claim had originally failed at trial and was being appealed. The State agreed to settle the claim on the basis that an amount of \$2,570,000.00 would be paid for its costs. The State's costs on a solicitor/client basis were said to be \$6,720,252.30.

The settlement of class actions arising out of the Black Saturday fires on 7 February 2009 continued in 2015. The Murrindindi fire class action settled for \$300 million with \$20 million being paid in costs and disbursements.

Personal Information Claims. Early in 2015 a class action settled, which had resulted from information being collected from potential employees for a joint venture entity to construct a desalination plant in Victoria. The novel claim saw the defendants agree to destroy any confidential, private or surveillance information held in relation to the potential employees.

Personal Injury Claims. The Fairbridge Farm class action was commenced in the Supreme Court of New South Wales on behalf of persons who as children suffered injury as a result of physical or sexual abuse at the Fairbridge Farm School. The class action settled in 2015 for \$24 million. The settlement was approved by the Supreme Court, but no judgment was published.

HIGH COURT OF AUSTRALIA LIMITS PROPORTIONATE LIABILITY LAWS TO MISLEADING AND DECEPTIVE CONDUCT

The High Court in *Selig v Wealthsure Pty Ltd* [2015] HCA 18 determined that the proportionate liability regime in Div 2A of Pt 7.10 of the *Corporations Act 2001* (Cth) and Pt 2, Div 2, subdiv GA of the *Australian Securities and Investments Commission Act 2001* (Cth) (“ASIC Act”) only applies to s 1041H and s 12DA respectively, namely, prohibitions on misleading or deceptive conduct.

The proportionate liability regime does not apply to other causes of action for the same loss or damage.

The reasoning will extend to the proportionate liability regime in Part VIA of the *Competition and Consumer Act 2010* (Cth) such that the regime is similarly limited to claims for loss or damage based on contravention of the prohibition on misleading or deceptive conduct in s 18 of the Australian Consumer Law, and does not apply to other causes of action under the Australian Consumer Law.

While the High Court has now provided certainty as to the operation of the proportionate liability regimes in key federal legislation it is also likely to fuel another round of debate on the proper limits of proportionate liability.

In 2004 all Australian governments sought to address the “deep pocket syndrome” whereby professional service providers and public authorities were targeted in litigation so as to gain access to their insurance cover. The joint and several liability that existed at the time meant that a successful plaintiff could recover their entire loss from any respondent regardless of the respondent’s share of responsibility. This was particularly attractive when the main entities that were liable were insolvent or had insufficient assets to meet the judgment. An auditor or local council may have been responsible for 10 percent of the harm but could be required to pay 100 percent of the damages claim. This led to a rise in insurance premiums.

To address the targeting of “deep pockets”, joint and several liability was replaced with proportionate liability for the causes of action to which the regime applied. This meant that each respondent was only liable to pay damages to the extent of their share of the responsibility for the harm.

In *Selig v Wealthsure* the High Court raised the counter-argument:¹

There is an obvious benefit to wrongdoers from this kind of proportionate liability regime. ... proportionate liability applies regardless of whether a concurrent wrongdoer is insolvent or is being wound up. The risk of a failure to recover from a particular wrongdoer shifts entirely to the plaintiff.

The High Court’s finding means that plaintiffs will endeavour to bring claims on multiple bases so that they are not subject to proportionate liability and the prospect of being out-of-pocket if a defendant is insolvent.

As predicted in Jones Day’s May 2015 *Commentary*, the prohibitions on misleading or deceptive conduct will still be used because they have advantages over other statutory and common law claims, such as there is no fault or intention required, and there is no need to show a duty of care, or breach of that duty, or foreseeability. However, to avoid proportionate liability other claims based on tort, contract, equity or statute where joint and several liability applies will be included. This means that litigation is likely to be longer and more costly as multiple claims are pleaded and brought to trial.

The prediction has been proved correct as illustrated by *Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm)* [2016] FCAFC 2 where the applicant sought to amend its pleadings to add a claim based on s 1041E of the *Corporations Act 2001* (Cth) because that provision was not subject to a proportionate liability regime, meaning that the respondent could not “reduce its liability by reference to its share of the blame”.²

MARKET-BASED CAUSATION ARGUABLE IN SHAREHOLDER CLASS ACTIONS

A key battleground in shareholder class actions in Australia is causation. Increasingly, plaintiffs have sought to argue that the proper causation standard for these claims should not be direct or individual reliance in shareholder claims (the most difficult causation hurdle to jump), but indirect or market-based causation (a lower hurdle). However, a lower hurdle for causation in shareholder claims comes with a significant commercial and social price. The *Harvard Law Review* described the development of “dispensing with proof of individualized reliance” in the

United States as “fuel[ing] a multibillion dollar shareholder class action industry”.³ Some recent cases in Australia suggest that indirect reliance may be gaining acceptance.

Babcock & Brown. The indirect reliance issue was contested in the Babcock & Brown shareholder litigation in the context of a final hearing.⁴ As events transpired, because of the grounds on which the plaintiffs failed, Perram J concluded it was unnecessary for the court to rule on which causation test should apply.

Nonetheless, the judge (in obiter) expressed the view that if it had been necessary to rule, it was likely the court would have accepted indirect reliance as the relevant causation standard. His Honour indicated that, with qualifications, he would accept that “a party who acquires shares on a stock exchange can recover compensation for price inflation arising from a failure to disclose material required by [the continuous disclosure regime] to be disclosed”.⁵ The qualifications included that the relevant statement or omission must be material or have a price effect (a precursor to disclosure being required) and that a plaintiff shareholder could not recover if it knew of the misleading nature of the alleged conduct.

Arasor International Limited. Shareholders in Arasor International Limited commenced proceedings against directors and the auditors of the company. The claims related to statements in or omissions from the following documents and related conduct:

- A prospectus dated 14 September 2006 in relation to the initial public offering of shares in Arasor in connection with its admission to the official list of the ASX and trading of Arasor shares on ASX’s market (September prospectus);
- A short form prospectus dated 23 March 2007 (March prospectus);
- Arasor’s 2006 financial statements and its 2007 financial statements; and
- The half-yearly financial statement dated 31 August 2007 released by Arasor to the ASX.

The applicants sought compensation on the following bases:

- Under s 729 of the Corporations Act, for loss or damage “because” an offer of securities under a disclosure document contravenes s 728(1) which prohibits misleading or deceptive statements and omissions of required material;

- Under s 1325 of the Corporations Act, for loss or damage “because” of conduct of another person in contravention of Ch 6D (including ss 728 and 729) and Pt 7.10 (including s 1041H which prohibits misleading or deceptive conduct in relation to a financial product or service);
- Under s 1041I of the Corporations Act and ss 12GF and 12GM of the ASIC Act, for loss or damage occasioned “by conduct of another person” that contravenes s 1041H of the Corporations Act and s 12DA of the ASIC Act – both prohibiting misleading or deceptive conduct; and
- Under s 159 of the FTA, for loss, injury or damage suffered “because of a contravention of a provision of this Act”, relevantly, s 9 which prohibits misleading or deceptive conduct.

The statutory wording of “because” and “by” has been interpreted as necessitating proof of causation.⁶

At first instance the applicant sought to amend its pleadings to delete direct reliance from two categories of causes of action: (i) those based on misleading statements or omissions in the September prospectus and in the March prospectus; and (ii) those based on misleading conduct in relation to financial products, financial services or in trade or commerce, so as to employ market-based causation. The Federal Court in determining whether to grant leave to amend revisited the law on causation.

Farrell J explained that causes of action in the second category were based on s 82 of the *Trade Practices Act 1974* (Cth) which had been subject to extensive judicial interpretation. The case law accepts that causation can be proved without direct reliance by the person who suffered loss, but there must be reliance in some form, usually by a third party. Her Honour went on to allow the amendment of the pleading:⁷

despite the strength of intermediate appellate court authority which requires reliance to be demonstrated as an element of causation where an investor has entered into a transaction to which the claim of misleading or deceptive conduct is relevant, recent High Court authority on s 82 of the TPA and the fact that market-based causation claims relying on ss 1041H and 1041I and their analogues in the ASIC Act in the context of Chapter 6CA have not been considered by the High Court suggest that the state of the law cannot be regarded as so settled that an appropriately pleaded claim would have no reasonable prospect of success.

However, in relation to the first category of claims based on a misleading prospectus, the deletion of reliance was rejected as the High Court found that the pleading did not set out any other causal connection and would, impermissibly, plead only a conclusion.⁸ Her Honour also expressed concern that if reliance was not pleaded, but was ultimately found to be necessary, then those group members who could prove reliance would be unable to recover.⁹

The applicants appealed Farrell J's decision to the Full Federal Court. The primary judge's decision was appealed due to confusion over whether the applicants had been denied the ability to plead market-based causation in relation to ss 728 and 729 of the *Corporations Act 2001* (Cth), the first category of claims.

The joint judgment of Gilmour and Foster JJ found that the orders "had the effect of shutting out the applicants from pleading market-based causation in relation to their ss 728 and 729 case".¹⁰ Edelman J disagreed.¹¹ Nonetheless, the Full Federal Court found such a pleading was arguable as it was neither futile nor likely to be struck out.¹²

The joint judgment relied on the Full Court of the Federal Court in *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1 which said that "[t]here is no bright-line principle that it is insufficient for a plaintiff to prove that some other person relied on the alleged misleading conduct and that that person's reliance led to the plaintiff suffering loss". The joint judgment also pointed to the text of s 729 which does not refer to reliance and considered that market-based causation may also be supported by the policy behind the provision.¹³

Edelman J found that it was at least arguable that market-based causation could be employed as a technique of causation without reliance. His Honour referred to cases that involve misleading conduct by one trader which leads to customers being diverted from another trader: *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526. Edelman J also stated that another factor in favour of market-based causation being arguable was that s 729 permits liability in the case of an omission. Reliance on an omission was described as "a strain of language".¹⁴

The Full Court also pointed to other recent decisions where pleadings of indirect reliance had been permitted to proceed or implicitly endorsed as being arguable, such as *Camping*

Warehouse Australia Pty Ltd v Downer EDI Ltd [2014] VSC 357; *Bolitho v Banksia Securities Ltd* [2014] VSC 8; *Earglow Pty Ltd v Newcrest Mining Ltd* [2015] FCA 328; *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2015] FCA 149.

The Full Court's decision in *Caason Investments Pty Limited v Cao* [2015] FCAFC 94 continues the line of cases that has endorsed the availability of indirect reliance for proving causation without actually finding causation proved. Like *Caason*, most of the decisions have been interlocutory judgments dealing with pleading issues where the defendants bore the usual higher burden of proof compared to the standard burden applicable at the trial stage. Alternatively they have been obiter statements in final judgments.

Despite indirect reliance being accepted as being available to prove causation in shareholder class actions it still remains unclear as to how that form of reliance will actually be proved. Edelman J highlighted the need to identify how the causal mechanism was said to operate—how did the relevant conduct affect the market price, or what were the links in the chain of causation?¹⁵

The Full Court's decision was analysed in a September 2015 Jones Day [Commentary](#).

BANK FEES CLASS ACTIONS RETURNS TO HIGH COURT

The high profile bank fees class actions ground to a halt in 2015 with the Full Federal Court overturning the first instance decision finding that late payment fees were a penalty. However, special leave to appeal to the High Court was obtained and the matter was set down for hearing on 4 and 5 February 2016.

The proceedings now before the High Court were originally heard by Gordon J, when she was a justice of the Federal Court, in 2014. Gordon J was appointed to the High Court in June 2015. The proceedings were brought as a class action by Mr Lucio Paciocco and a company controlled by him, Speedy Development Group Pty Ltd (SDG).

Mr Paciocco held a consumer deposit account and two consumer credit card accounts with Australia and New Zealand

Banking Group Limited (ANZ). SDG held a business deposit account. The Applicants sought to set aside bank fees charged by ANZ because the fees:

- Were penalties, either at common law or in equity; or
- Were the products of unconscionable conduct by ANZ within the meaning of the ASIC Act, ss 12CB and 12CC, or the *Fair Trading Act 1999* (Vic) (the FT Act), ss 8 and 8A; or
- Were unjust under the National Credit Code in Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth); or
- Were charged pursuant to contractual provisions that were unfair contract terms under the FT Act, s 32W and the ASIC Act, s 12BG.

ANZ denied the claims made by Mr Paciocco and SDG and contended that Mr Paciocco and SDG were statute barred from bringing claims in relation to two of the fees because they were debited from the account more than six years prior to the commencement of the proceedings.

Gordon J made the following findings:¹⁶

- The credit card late payment fees charged by the ANZ were penalties at common law and in equity;
- The bank customers were entitled to recover from ANZ the difference between the credit card late payment fees paid to ANZ and ANZ's actual loss;
- The non-payment fees, over limit fees, honour fees and dishonour fees were not penalties;
- None of the fees were charged in contravention of various statutory provisions in relation to unconscionable conduct, unjust transactions or unfair contract terms; and
- Mr Paciocco's claims were not statute barred.

Both parties appealed Gordon J's decision. ANZ submitted that Gordon J erred in finding that the late payment fee was a penalty and that s 27 of the *Limitation of Actions Act 1958* (Vic) applied to two fees (thereby bringing those claims within time).

Mr Paciocco and SDG contended that Gordon J erred because her Honour did not construe the fees (other than the credit card late payment fee) as penalties and her Honour did not find that there was statutory unconscionability, unjust transactions or unfair contract terms.

The Full Federal Court, which comprised of Allsop CJ, Middleton J and Besanko J, overturned Gordon J's finding that the late payment fee was a penalty but otherwise upheld her Honour's judgment.

The appeal to the High Court and the respondent's notice of contention address all three issues below, namely, the penalties doctrine, the statutory claims and the operation of the statute of limitations.

A May 2015 Jones Day [Commentary](#) provides a more detailed analysis.

FEDERAL COURT OF AUSTRALIA REJECTS "COMMON FUND" FOR LITIGATION FUNDERS

In the Allco shareholder class action, an application was filed by the two applicants/representative parties seeking orders for the appointment of International Litigation Funding Partners Pte Ltd (ILFP) as the funder of the class action on the terms of the litigation funding agreement (reimbursement of legal fees paid to the lawyers and payment of between 22.5 percent and 35 percent of any recovery) entered into by some group members.

The making of the orders would have the result that all group members would be liable to pay the funder's fees (costs incurred by the funder and a percentage of any recovery) without having entered into any agreement.

The orders, if made, would remove the need for a litigation funder to contract with a group member to be paid and therefore allow for an open rather than a closed class to be employed. An open class is a traditional opt out class action that includes all group members who meet the group definition, regardless of whether they have entered into a litigation funding agreement. A closed class is a subset of an open class that is achieved by adding an additional requirement to the group definition that limits the group to those persons who have entered into a litigation funding agreement with a specific funder. The closed class made entering into a funding agreement a pre-requisite to being included in the class action. The application would create a funding regime similar to the common fund approach employed in the United States for the payment of lawyers' fees in class actions.

Wigney J declined to make the orders. The Federal Court found that the orders, while advantageous to the litigation funder, were not “appropriate or necessary to ensure that justice is done in the proceeding” as required by section 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth).

The current decision demonstrates the growing and significant role that litigation funding plays in relation to class actions. This can be a positive development through providing the necessary financial resources to seek access to justice for those with small claims. However, the judgment recognised explicitly that funders structure class actions and their funding arrangements in their own self-interest. Litigation funders aim to make profits for their investors, they are not a benevolence fund looking to do good.

The law around class actions has been developed by funders seeking to advance their interests through favourable precedent development. The closed class that was approved in the Multiplex class action is a clear example. Wigney J examined the sought after orders from the perspective of their impact on group members as a whole and found that while the orders may assist the funder they were not in the interests of group members. It must not be forgotten that the function of class actions is to pursue remedies for those allegedly wronged—not to make profits for litigation funders.¹⁷

The Allco decision means that litigation funders will in the short term continue to either employ a closed class definition or seek orders as part of any settlement to address the existence of unfunded group members. The latter gives rise to a continuing debate as to how unfunded group members should be dealt with. Two broad approaches have been adopted to date. First is an equalisation order whereby unfunded group members have their recovery reduced by the amount the funded group members have paid to a litigation funder. This amount is redistributed across all group members. The second is the imposition of the funding agreement terms on unfunded group members so that they must pay the funder’s fee to the funder. The former ensures equality amongst group members but without a direct payment to the funder. The second ensures equality but with funder receiving a greater fee.

In the GPT shareholder class action, Gordon J rejected the second approach observing that “it is difficult to conceive of a circumstance in which it would be appropriate”¹⁸ and employed the first, in keeping with the approach adopted in

the Aristocrat and Multiplex class actions. However, the second approach has been employed in two class actions—a shareholder claim in the Supreme Court of Victoria, and a bank fees claim in the Federal Court.¹⁹

Jones Day’s September 2015 *Commentary* offers a more detailed analysis of the Federal Court’s decision.

FAILED CLASS ACTIONS: TO WHAT EXTENT ARE GROUP MEMBERS BOUND BY AN UNSUCCESSFUL OUTCOME?

The extent to which a group member is bound by the outcome in a class action is of great significance to group members, defendants, and the justice system generally. The group member will want to know whether their claims are completely subsumed by the class action, or are they only bound by the resolution of the common issues as this will be a central consideration as to whether they opt out of the class action, or take other steps to protect their interests. Equally, defendants will be concerned to know if the class action will resolve all claims against them, except for those group members that opt out, or whether they may face further litigation. More generally, the fairness of the class action regime hinges on all participants knowing the extent to which their rights are to be determined or not.

The answer to the question “To what extent are group members bound by an unsuccessful class action?” turns on the application of the legal doctrines or *res judicata*, issue estoppel, Anshun estoppel and abuse of process.

In *Timbercorp Finance Pty Ltd (In Liq) v Collins and Tomes* [2015] VSC 461 the Supreme Court of Victoria was called on to decide whether group members in a failed class action could raise individual defences in related litigation. The class action was based on non-compliance with the requirements for a product disclosure statement and allegations of misleading conduct in relation to investments in horticultural and forestry managed investment schemes. A component of the schemes was the provision of loans to investors. The related litigation involved claims to recover the loans plus interest and was defended by former group members who sought to challenge the validity and enforceability of the loan agreements through defences not raised in the class action.

The lender, Timbercorp Finance, argued that the defendants were precluded as a matter of law from raising their pleaded defences, by Anshun estoppel, and/or because raising the defences constitutes an abuse of process. Timbercorp Finance did not seek to rely on res judicata or issue estoppel. It was also accepted that if the borrowers had opted out of the group proceedings then they would not be denied the ability to plead their defences.

Timbercorp Finance raised an array of arguments. Central to the Court's consideration was s 33ZB which provides:

A judgment given in a group proceeding—

- (a) must describe or otherwise identify the group members who will be affected by it; and
- (b) subject to section 33KA, binds all persons who are such group members at the time the judgment is given.

Robson J found that Anshun estoppel and abuse of process did not apply. Robson J found that s33ZB did not create common law privies, but rather s 33ZB privies, which has an application similar to issue estoppel but not Anshun estoppel.²⁰ Put another way—estoppel on the common issues only. Robson J's finding was contrary to High Court obiter in *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 and statements by Croft J in *Clarke v Great Southern* [2014] VSC 516. Unsurprisingly, the decision has been appealed to the Victorian Court of Appeal.

Jones Day's November 2015 [Commentary](#) on the Supreme Court of Victoria's decision provides further analysis.

SETTLEMENT OF CLASS ACTIONS INVOLVING TRUSTS

In *Hodges v Waters (No 7)* [2015] FCA 264 the Federal Court was required to determine whether to approve a settlement where beneficiaries or unit holders of a trust alleged claims against an auditor in a situation where the trustee also had a claim for the same loss against the auditor. The auditor raised as a defence the reflective loss principle that means that even though a unit holder might have a personal loss, he or she may not recover it if it was reflected in a loss by the trust.

The application of the reflective loss principle, while settled in company law, is unresolved in Australia in relation to a trust.

Further, as the trustee, some years later, also commenced proceedings which it sought to settle, the Federal Court was also asked to deal with a judicial advice application pursuant to s 63 of the *Trustee Act 1925* (NSW). The Federal Court was required to determine whether it had jurisdiction to deal with the application and, if it did, whether the trustee would be justified in settling the proceedings.

Perram J considered the settlement from the perspective of the prospects of each claimants' success and opined:

the most likely outcome to this litigation was that it would be lost. There was a high risk that the applicants had no standing to proceed and a good chance the bulk of the trustee's claim was statute barred.²¹

The Federal Court did not disclose the quantum of the settlement as confidentiality was a condition precedent to the settlement of the class action proceedings under the settlement deed. Based on the judge's view that the claim was worth \$80 million and the probable, although not certain, outcome that the case would be lost the payment was considered to be "a good settlement" and was approved.²²

The Federal Court also found that it had jurisdiction to provide judicial advice and gave the advice that the trustee would be justified in settling the proceedings.

Jones Day's April 2015 [Commentary](#) offers additional analysis.

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ENDNOTES

- 1 *Selig v Wealthsure Pty Ltd* [2015] HCA 18 at [21].
- 2 *Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm)* [2016] FCAFC 2 at [63].
- 3 “Class Actions—Presumption of Reliance Under SEC Rule 10B-5 - *Halliburton Co v Erica P John Fund Inc*” (2014) 128 *Harvard Law Review* 291.
- 4 *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2015] FCA 149.
- 5 *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2015] FCA 149 at [220].
- 6 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525.
- 7 *Caason Investments Pty Limited v Cao* [2014] FCA 1410 at [106].
- 8 *Caason Investments Pty Limited v Cao* [2014] FCA 1410 at [111], [120]-[125].
- 9 *Caason Investments Pty Limited v Cao* [2014] FCA 1410 at [116].
- 10 *Caason Investments Pty Limited v Cao* [2015] FCAFC 94 at [9].
- 11 *Caason Investments Pty Limited v Cao* [2015] FCAFC 94 at [92].
- 12 *Caason Investments Pty Limited v Cao* [2015] FCAFC 94 at [65], [187].
- 13 *Caason Investments Pty Limited v Cao* [2015] FCAFC 94 at [68]-[71].
- 14 *Caason Investments Pty Limited v Cao* [2015] FCAFC 94 at [154]-[156].
- 15 *Caason Investments Pty Limited v Cao* [2015] FCAFC 94 at [112], [131]-[132], [184].
- 16 See Jones Day Commentary, “[Bank Fees Class Actions in Australia: Customers Recover Credit Card Late Payment Fees That Exceeded Bank’s Costs](#)” (February 2014).
- 17 See *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* [2014] VSCA 351 at [14].
- 18 *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626 at [60].
- 19 *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625; *Farey v National Australia Bank Ltd* [2014] FCA 1242.
- 20 *Timbercorp Finance Pty Ltd (In Liq) v Collins and Tomes* [2015] VSC 461 at [583]-[585].
- 21 *Hodges v Waters (No 7)* [2015] FCA 264 at [89].
- 22 *Hodges v Waters (No 7)* [2015] FCA 264 at [92].

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