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# CLASS ACTIONS IN AUSTRALIA: 2014 IN REVIEW

During 2014, Australian class action suits in numerous areas—including shareholder matters, financial products and advice, cartel, product liability, and environment and government—were initiated, pursued and sometimes settled.

It remains clear that shareholder claims are very strong, with new entrants and established plaintiffs' law firms and funders attempting to build class actions against a number of corporations. The bank fee class action based on the law of penalties is awaiting decision from the Full Federal Court of Australia, but related proceedings have already been launched in the Supreme Court of New South Wales.

Claims against government were highly visible, due to class actions involving Victorian bushfires from 2009, the Queensland flood from 2011 and a newly commenced proceeding based on the suspension of live cattle exports to Indonesia in 2011.

Developments in the law were also prominent in 2014, with the Full Federal Court clarifying the requirements for commencing class actions in *Cash Converters International Limited v Gray* [2014] FCAFC 111. The operation of the proportionate liability regime was thrown into disarray by conflicting decisions of the Full Federal Court in May and June 2014. The High Court has granted leave to appeal in *Selig v Wealthsure Pty Ltd* A25/2014, which will resolve the conflict.

Two important cases in the Supreme Court of Victoria considered the roles that lawyers could take in funding class action litigation. In one, a solicitor was prevented from acting for the representative party due to concerns about conflicts of interest and the action was permanently stayed as an abuse of process. In the other case, where a solicitor and senior counsel held a pecuniary interest in the outcome of the case beyond their legal fees, the Court found that the arrangement impinged—or had the appearance of impinging—on the integrity of the judicial process. The debate over the funding of litigation, by both lawyers and third parties, will continue in 2015.

## Settlements

2014 witnessed the largest class action settlement in Australia history: the Kilmore East-Kinglake bushfire class action. The year also saw the end of the Great Southern class action, which resulted in many disgruntled investor/group members after a small settlement was accepted but large legal fees charged. In addition, there was an assortment of other types of claims that resulted in settlements.

| Class Action | Claim | Settlement (including fees) | Lawyers' Fees and Disbursements | Funder's Fee |
|---|---|---|---|---|
| Kilmore East-Kinglake bushfire | Bushfires | A$494 million | A$60 million | Unfunded |
| Great Southern | Financial product | A$23 million | A$20 million | Unfunded |
| NAB Bank fees | Bank fees | Not finalised - A$38 million (estimated in media reports) | Undisclosed | Funded, fee undisclosed |
| AirCargo | Cartel | A$38 million | A$19 million | Funded, fee undisclosed |
| Bonsoy | Product liability | A$25 million | Undisclosed | Unfunded |
| Storm- Bank of Queensland | Financial product | A$19.6 million | A$2.68 million | Unfunded |
| MFS Premium Income Fund | Financial product | Not finalised - A$20 million (estimated in media reports) | Undisclosed | Funded, fee undisclosed |
| Westpac - Remittance Provider Class Action | Consumer / Contract | Reinstatement of accounts and provision of foreign exchange portal | Undisclosed | Unfunded |
| Wepar Nominees | Prospectus | A$1.13 million | A$1.03 million | A$1.08 million |
| Schulburg/Hepatitis C | Professional negligence | A$13.75 million | A$3 million | Unfunded |

The lessons or novel aspects of the 2014 settlements are discussed below.

Kilmore East-Kinglake Bushfire Class Action Settles for Record A$500 Million. The Kilmore East-Kinglake bushfire was one of the Black Saturday fires in Victoria during 2009. As a result of the fire, 119 people died, more than 1,000 suffered serious injury and approximately 1,800 homes and properties were destroyed or damaged.

The plaintiff brought proceedings on her own behalf and on behalf of people who were either injured or suffered from the death of persons upon whom they were dependent, or suffered property damage or economic loss in consequence of the fire.

The claim was brought against the owner and operator of the power line (AusNet Electricity Services Pty Ltd, formerly SPI Electricity Pty Ltd), a maintenance contractor charged with carrying out a periodic inspection of the power line (referred to as "UAM") and various entities of the State of Victoria charged with the management of forest lands, the fighting of fires and the policing of emergencies (the "State parties").

After a 208-day trial, the matter settled for about A$500 million. The award comprised contributions from AusNet/SPI of A$378.6 million, UAM of A$12.5 million and the State parties of A$103.6 million, but only for compensation in respect of personal injury and dependency claims. This is the largest class action resolution in Australia, easily eclipsing the prior record of A$200 million in the Centro shareholder settlement.

The settlement also resulted in A$60 million in legal fees and disbursements, with the proceeding having been funded on a no win–no fee basis but with a 25 percent uplift.

The class action settlement approval judgment also sheds light on the scale of large class action proceedings, noting that in addition to the 208 days of trial, there were:

- 26 pretrial directions hearings;
- 34 pretrial applications;
- 60 major evidentiary and procedural rulings;
- evidence from 40 expert and 60 lay witnesses;
- some 22,466 documents loaded onto the electronic court book;
- some 10,364 documents tendered in evidence; and
- in excess of 20,300 pages of transcript generated in the course of the trial.

**Great Southern Financial Product Class Action.** The Great Southern class action arose from the collapse of a number of agricultural managed investment schemes promoted and operated by Great Southern Managers Australia Limited. The principal claim was based on alleged defects in product disclosure statements.

The Great Southern Class action settled for A$3.55 million and with alterations to loan terms for some group members. The settlement equates to receiving about A$17 for every A$10,000 invested. The settlement also included the reimbursement of group members who had already paid A$20 million in legal fees to the law firm that brought the class action.

The settlement was ultimately approved by Justice Croft of the Supreme Court of Victoria, but the settlement involved some novel aspects.

The class action, which was really 16 proceedings of which about half were class actions, went to trial before Croft J and lasted 90 days. The judgment was written and listed for delivery on 25 July 2014, with the parties being advised of the listing on 23 July 2014. Upon being informed of the listing, the parties advised the court that the matter had settled. The completed judgment was locked away pending approval of the settlement by another judge, Judd J.

The status of the judgment was important because one of the criteria for approving a class action settlement is the plaintiffs' prospects of success. As Judd J observed: "An unusual feature of this case is that a judge of this court has heard all of the evidence and submissions and reached a considered decision about the very matters that would ordinarily be considered by the judge hearing the approval application. Thus, there is a fully informed and definitive statement of the parties' prospects to be found in the reasons for judgment". Consequently assessing whether the settlement was fair and reasonable without resort to the judgment was thought to expose the court to criticism. Consequently, the approval of the settlement was transferred to Croft J.

Croft J published his reasons for approving the settlement with the judgment that he had not delivered attached as an annexure. Croft J pointed out that as a result of the trial, "the plaintiffs' claims completely and comprehensively failed". Even a small financial settlement was then fair and reasonable considering that if it were rejected, the group members would have recovered nothing and the plaintiffs would have faced serious adverse costs consequences.

The legal fees charged for the class action are also of interest because a novel method for a class action was employed: a fixed-fee arrangement. Each group member who retained the lawyers for the plaintiff paid a flat fee to cover the costs of various stages of the litigation. The fee was not based on time worked, it was not conditional on success and it included no uplift. Consequently, the lawyers were not at risk of not being paid if the case failed. The settlement is also of interest because the legal fees were not subject to court approval as is the usual case in class actions. As the fees had already been paid, the court found that there was nothing for it to approve. This approach to legal fees is a concern because it creates an incentive for class actions with low prospects of success to be created by lawyers who can be certain of their recovery even if the claim fails.

**Shareholder Class Action Against Leighton Holdings Limited.** The shareholder class action against Leighton Holdings Ltd settled for A$69.45 million, including A$3.9 million for the applicant's legal costs. The claim was a follow-on lawsuit from regulatory action taken by the Australian Securities and Investment Commission which resulted in A$300,000 in fines and an enforceable undertaking to improve continuous disclosure policies and procedures. The Leighton class action provides yet another example of regulatory action acting as a class action compass for plaintiffs law firms and litigation funders.

The settlement is notable for a number of reasons. First is the speed of the settlement. The class action was subject to a mediation within five months of commencement, and a settlement was reached within seven months of commencement. The settlement occurred prior to the mandatory right to opt out, necessitating contemporaneous opt-out and settlement notices. Second, a number of methods were employed to communicate the notices to group members, including Leighton's share register being provided to a mailing house. Third, to protect Leighton against large claimants opting out and pursuing a separate claim, 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. Lastly, to determine the fairness of an early settlement, the court found that sufficient information was provided through discovery of agreed categories of documents, exchange of expert loss reports and position papers prior to the mediation.

Another class action brought by Melbourne City Investments Pty Ltd against Leighton Holdings Limited is continuing.

**Air Cargo Cartel Class Action.** De Brett Seafood Pty Limited and J Wisbey & Associates Pty Limited brought proceedings against a number of airlines in 2007 in relation to an alleged cartel to fix the price of international air freight services, and specifically the level of fuel and security surcharges imposed, between 1 January 2000 and 11 January 2007.

A A$38 million (including legal costs) settlement of the class action received court approval on 6 June 2014. The court's reasons have not yet been published. The Air Cargo class action is only the fourth cartel class action to be commenced. The settlement highlights the risk of cartel conduct attracting both regulator and class action lawyers' interest, and it illustrates the significant time and resources that this type of complex proceeding utilises.

## New Proceedings

**Shareholder/Securities Class Action.** The first half of 2014 saw a spike in shareholder class actions, with a number of new entrants threatening or commencing proceedings, mainly around alleged continuous disclosure breaches. In total, nine actions were threatened and four actions commenced.

Treasury Wine Estates was subject to a claim filed by Maurice Blackburn and funded by Bentham IMF. This was the second class action against the company, with the first proceeding being initiated by class action newcomer Mark Elliot in November 2013. Mark Elliott also commenced proceedings against Downer EDI Limited.

A class action has also been commenced against Newcrest Mining Limited in the wake of the civil penalty settlement achieved by the Australian Securities and Investments Commission. The

proceeding was filed by Slater & Gordon and funded by Comprehensive Legal Funding LLC. Slater & Gordon has also threatened proceedings against two other corporations.

ACA Lawyers, with funding from Harbour Litigation Funding, commenced proceedings against Oz Minerals Limited. The pair have also threatened proceedings against MacMahon Holdings, Iluka Resources Limited, WorleyParsons Limited and Padbury Mining Limited.

Two proceedings have also been threatened against Vocation Limited, one by Maurice Blackburn and one by Slater & Gordon. A class action was threatened by Slater & Gordon against QBE Insurance Group Limited but subsequently dropped, only for Maurice Blackburn to then advise that it was looking at commencing a class action.

**Bank Fees.** The bank fee class actions are again assuming prominence in the media. The Full Federal Court (Allsop CJ, Besanko and Middleton JJ) heard the appeal from Justice Gordon's decision in the bank fee class action against ANZ on 18, 19 and 20 August 2014. Judgment was then reserved.

The National Australia Bank has decided not to wait for the Full Court's judgment and decided to settle the class action against it. Preliminary steps such as identifying group members started at the end of 2014.

Further bank fee class actions have been filed in the Supreme Court of New South Wales, but the first directions hearing has been postponed until after the Full Federal Court's decision is handed down. The class actions will be for late payment fees charged on credit cards, the same as the Federal Court action. However, the group will be open to all bank customers who were charged late payment fees with no time period specified. Maurice Blackburn has stated that class actions will be brought against Westpac, St. George, Citibank, BankSA and ANZ. Further class actions are planned against CBA, NAB, BankWest and American Express.

At the time of the successful first instance claim against ANZ, questions were raised as to whether the substantive law might be used to bring class actions in relation to other industries. In August 2014, ACA Lawyers announced that it was investigating the commencement of late fee class actions against Telstra, Optus and Vodafone.

**Queensland Floods—Supreme Court of New South Wales Takes Control.** A class action has been filed in the Supreme Court of New South Wales seeking compensation for financial losses caused by the negligent operation of Wivenhoe and Somerset dams during the January 2011 flood in South East Queensland. The claim is brought against Seqwater, Sunwater and the State of Queensland. A strikeout motion brought by the defendants was successful, and the pleadings are due to be amended and served in February 2015. Of note, Garling J made orders setting out a timetable for pretrial steps such as witness statements and discovery, but also fixed the matter for trial commencing on 18 July 2016. While the trial date is more than a year away, it demonstrates that the Supreme Court of NSW intends to closely case manage class actions and bring them to trial expeditiously, even though they can be one of the most complex and cumbersome forms of litigation, as illustrated by the Kilmore East-Kinglake bushfire class action discussed above.

Incidentally, in 2014 Queensland issued a consultation draft of a new Part 13A which would be added to the *Civil Proceedings Act 2011* (Qld) to introduce a class actions regime into Queensland law. The regime is similar to the regimes that exist in the Federal Court, Victoria and New South Wales.

**Financial Advice and Financial Product Class Actions.** The area of financial advice and products was a fertile area for class actions after the global financial crisis, with claims filed in relation to Storm Financial, Timbercorp, Great Southern, Brisconnections airport link toll road and RiverCity's Clem7 tunnel in Brisbane. More recently, claims of inappropriate financial advice by various banks or related businesses have been addressed through alternative dispute resolution schemes. However, class actions are still being explored by the main class action firms in relation to failed financial products.

**Claims Against Government.** A range of industries involved in the live cattle trade have launched a class action against the federal government in relation to its suspension of live cattle exports to Indonesia in 2011. The claim for compensation is based on allegations of misfeasance in public office and that the suspension was invalid. The claims echo those brought in the Pan Pharmaceuticals class action and are another example of the recent trend of class actions against government depicted by the equine influenza, bushfire and Queensland dam cases.

## Class Action Commencement Requirements Relaxed

To commence a class action in the *Federal Court, s 33C(1)(a) of the Federal Court of Australia Act 1976* (Cth) (FCA) provides that "7 or more persons" must "have claims against the same person". This provision had been subject to competing interpretations for more than 10 years, especially where the class action was brought against multiple respondents. The interpretation that had been favoured was that every applicant and group member had to have a claim against the respondent or, if there is more than one, against all respondents.

The Full Federal Court in *Cash Converters International Limited v Gray* [2014] FCAFC 111 posed the question: "does s 33C(1) of the FCA require that *each* group member have a claim against each respondent to the proceedings?" The Full Court's answer was no.

The decision proceeded on the basis that to satisfy the standing requirements, a class representative must have a claim against each respondent. Further, seven group members must have a claim against one respondent for the proceedings to be commenced. However, the addition of other group members and other respondents is not prohibited. Consequently, multi-respondent class actions are now easier to commence in the Federal Court of Australia.

This interpretation of s 33C(1)(a) follows on from the low thresholds in the other two commencement requirements in s 33C(1):

> 33C(1) (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
>
> 33C(1) (c) the claims of all those persons give rise to a substantial common issue of law or fact.

"Similar or related circumstances" allows for quite a degree of variety between claims. The "substantial common issue of law or fact" requirement is not an onerous one, as "substantial" does not indicate a large or significant issue but instead is "directed to issues which are 'real or of substance'": *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 267.

It is to be expected that larger, less cohesive class actions are now able to be brought. If this occurs, then the resulting class action may require greater case management to ensure that helpful common issues are put forward for resolution. Alternatively, it may be necessary to employ s 33N to discontinue the proceedings where they "will not provide an efficient and effective means of dealing with the claims of group members".

## Lawyers Restrained From Funding Class Actions

Lawyers as litigation funders was a topic that was due to be addressed in the Federal Court in the Equine Influenza class action in 2014, as the lawyers in the class action had filed applications seeking approval for a related entity, the Claims Funding Australia Trust, which had as its trustee Claims Funding Australia Pty Limited, to be able to co-fund the class action. However, on 29 January 2014, the application was withdrawn.

Instead, the focus of lawyers as litigation funders switched to the Supreme Court of Victoria where three decisions addressed the issue: *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* (No 3) [2014] VSC 340, which was appealed, *Treasure Wine Estates Ltd v Melbourne City Investments PTY Ltd* [2014] VSCA 351 and *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582.

**Melbourne City Investments Pty Ltd (MCI) Class Actions Against Treasury Wines and Leighton Holdings.** MCI was incorporated on 1 November 2012. On the day of its incorporation, MCI purchased 39 shares in Leighton Holdings Limited for A$684 and 140 shares in Treasury Wine Estates Limited for A$693. Between October and December 2013, MCI as representative party commenced shareholder class actions against both companies based on allegations of defective disclosure to the securities market. The solicitor acting for MCI was in all cases Mr Mark Elliott. Mr Elliott was also the sole director and shareholder of MCI.

An Australian court has inherent jurisdiction to make orders to ensure the due administration of justice and to protect the integrity of the judicial process, including restraining a legal practitioner from acting in proceedings. The principles for restraining a legal practitioner are as follows:

- The test to be applied is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a lawyer should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.
- The jurisdiction is exceptional and is to be exercised with caution.
- Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause.
- The timing of the application may be relevant, in that the cost, inconvenience and impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief.

*See Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 3)* [2014] VSC 340 at [39] citing *Kallinicos v Hunt* (2005) 64 NSWLR 561.

Justice Ferguson on applying the law to the facts outlined above stated (at [50]):

> the [hypothetical fair-minded independent observer] would consider that Mr Elliott is compromised in his role as a solicitor such that there would be a real risk that he could not give detached, independent and impartial advice taking into account not only the interests of MCI (and its potential exposure to an adverse costs order), but also the interests of group members.

In short, Mr Elliott faced a possible conflict of interest. The court ordered that Mr Elliott be restrained from acting for MCI whilst it is the lead plaintiff and that the proceedings not be permitted to continue as a class action whilst MCI and Mr Elliott act in tandem as plaintiff and solicitor. The solicitor for MCI was subsequently changed. Justice Ferguson also considered whether the proceeding should be stayed as an abuse of process but declined to do so.

Treasury Wine appealed the finding that there was no abuse of process. Central to the appeal was the finding below that the reason for MCI's existence was to launch proceedings to allow Mr Elliott to earn legal fees and the inference that the current proceedings were launched for the purpose of Mr Elliott earning legal fees. The Victorian Court of Appeal, by majority (Maxwell P and Nettle JA), held that the commencement of litigation for the purpose of generating legal fees, rather than vindicating legal rights, was an abuse of process. The majority stated:

> The processes of the Court do not exist—and are not to be used—merely to enable income to be generated for solicitors. On the contrary, they exist to enable legal rights and immunities to be asserted and defended. In the common form of class action, that is the sole purpose of the proceedings. The members of the class wish to vindicate their rights. The fact that success will result in the solicitors' fees being paid does not affect the propriety of the proceeding.

**Banksia Securities Class Action.** The lead plaintiff in the Banksia securities class action, Mr Bolitho, was also represented by Mr Mark Elliott (as instructing solicitor) and by senior counsel Mr O'Bryan. The litigation funder was BSL Litigation Partners Limited ("BSL"), of which Mr Elliott was secretary and one of its three directors. The wife of senior counsel and Mr Elliott (through his superannuation fund and another company he controlled) were major shareholders in BSL (each holding about 45 percent of the shares).

Banksia Securities Limited made an application to the court to restrain Mr Bolitho from retaining both Mr Elliott and Mr O'Bryan in the class action. Mr Bolitho sought to oppose the application and continue his retainer with Mr Elliott and Mr O'Bryan. However, as explained above, the court's inherent jurisdiction allows for the restraining of the lawyers, not the restraining of litigants, and so the application was dealt with on that footing.

On 26 November 2014, Ferguson JA, relying on the same inherent jurisdiction of the court as in the MCI case above, found that a solicitor and senior counsel with a pecuniary interest in the outcome of the case, beyond their legal fees, should be restrained from acting for the lead plaintiff. The concern here was that the substantial (direct and indirect) shareholding of the two legal practitioners in the litigation funder funding the class action may impinge, or have the appearance of impinging, on the integrity of the judicial process. In particular, "the practitioner may not fulfil or may not be seen as fulfilling their obligations to the court": *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582, [19]. Here, the court was

concerned more with the conflict between the duty to the client and the duty to the court, while in the MCI decision, the concern was about conflicts faced by the lawyer in relation to the representative party and the group members.

In neither case did the court find that the lawyers had actually contravened a law or professional duty. Rather, the risk or appearance of a conflict was sufficient to require the lawyers to be restrained to protect the integrity of the judicial process.

## Litigation Funders and the Common Fund

In the Allco shareholder class action, an application has been filed seeking court orders for the appointment of International Litigation Funding Partners Pte Ltd as the funder of the class action on the terms usually included in a litigation funding agreement. This 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). 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. 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

The application was heard on 15 and 17 December 2014 with judgment reserved.

## Causation in Shareholder Class Actions Still Uncertain

The provisions that allow shareholders to seek compensation for contravention of the continuous disclosure regime and prohibitions on misleading conduct, *Corporations Act 2001* (Cth) ss 1041I, 1317HA and 1325, require proof of causation, even in class actions. However, the manner of proving causation is uncertain. In *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2014] VSC 357, the plaintiffs pleaded that reliance was not necessary or that causation may be satisfied by indirect reliance or through the fraud on the market theory. The Supreme Court of Victoria ruled that, in the context of an interlocutory application to strike out the statement of claim, the plaintiffs' approach should be allowed to go forward.

In *Caason Investments Pty Limited v Cao* [2014] FCA 1410, the applicant sought to amend its pleadings to delete reliance from causes of action based on misleading conduct in relation to financial products, financial services and disclosure documents so as to employ "market based causation". The Federal Court, in determining whether to grant leave, revisited the law on causation. The court explained that causes of action based on misleading conduct in relation to financial products or financial services 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. Moreover, provided the pleading set out how causation was alleged to have occurred, leave to amend would be granted as the state of the law was not settled. However, in relation to the claims based on a misleading prospectus, the deletion of reliance was rejected as the court found that the current pleading did not set out any other causal connection, and the weight of authority was against the viability of such a claim.

The requirements for causation will remain unsettled until subject to a trial and judgment.

## Proportionate Liability Uncertain–High Court to the Rescue?

In 2014, the Full Federal Court had occasion to consider the operation of the proportionate liability regimes in the *Corporations Act 2001* (Cth) and the Australian Securities and *Investments Commission Act 2001* (Cth) twice, but with differing outcomes.

The proportionate liability regimes replaced joint and several liability with proportionate liability for the causes of action to which the regime applied. The policy behind the proportionate liability regime was to limit the targeting of deep pockets, such as professional service providers, because they are insured. The regime clearly applied to claims based on misleading or deceptive conduct (s 1041H of the Corporations Act and s12DA of the ASIC Act).

In *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, the court was asked to determine if a claim under s 1041E (false or misleading statements), although not apportionable itself, should be apportioned when the claim arose

from the same facts and gave rise to the same loss as that for a claim under s 1041H, which was apportionable. The Full Court said no. Rather, the applicant having succeeded on both claims was required to elect the remedy that he or she wanted. Due to the nature of the appeal, it was clear that the applicant chose s 1041E and as a result the respondents were liable on a joint and several basis, i.e., the applicant could recover 100 percent of its losses from any of the applicants.

The Full Court noted that the same statutory construction applied to the *Competition and Consumer Act 2011* (Cth) but not to the state equivalents of the proportionate liability regimes.

In *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64, a majority of the Full Court (Mansfield and Besanko JJ, White J dissenting on this issue) adopted the opposite construction. Wealthsure included claims based on s 1041H of the Corporations Act and s12DA of the ASIC Act. It also included claims based on s 728 (misleading or deceptive conduct in a prospectus) and ss 945A and 945B (defects in a disclosure document but now repealed), s 1041E of the Corporations Act, ss 12ED (implied statutory warranty of due care and skill), 12DB (false representations) of the ASIC Act, contract and the tort of negligence. Each of these claims was not apportionable if standing alone. The applicants succeeded on all claims. The majority overturned the trial judge and found that all of the above claims were subject to the proportionate liability regime because the regime applied when the loss or damage caused by those claims was the same as the loss or damage caused by contravention of s1041H or s12DA.

The approach in *ABN AMRO* limits the proportionate liability regime to claims under ss 1041H and 12DA, while the approach in Wealthsure applies the proportionate liability regime to all claims, provided there is a claim under ss 1041H and 12DA and they result in the same loss or damage.

The conflict looks set to be resolved by the High Court, which granted special leave to appeal in the Wealthsure case on 14 November 2014. If the High Court sides with the approach in *ABN AMRO*, then proportionate liability will have a more limited scope of operation, and claims aimed at deep pockets are likely to resurface. This is because an applicant can bring a number of claims in relation to the same alleged loss, and if successful on one that is not ss 1041H or 12DA, avoid proportionate liability.

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