Securities Litigation

In 13 jurisdictions worldwide

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GETTING THE DEAL THROUGH

Australia

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1 Describe the nature and extent of securities litigation in your jurisdiction.

At the heart of most securities litigation in Australia is a claim by an investor for compensation for a loss allegedly suffered as a result of a misrepresentation or non-disclosure.

In recent years, representative proceedings (or class actions) have become the dominant vehicle through which investors seek to recover compensation. In the 18 months to June 2014, 27 representative proceedings were filed in Australia. Of those, seven were shareholder class actions and seven were related to financial products or investments.

Various factors have influenced the growth of representative proceedings in Australia, but the 2006 ruling of the High Court that third-party litigation funding is permissible has been the most important. In Australia, an unsuccessful litigant is usually ordered to pay the successful party's legal costs. That rule presented a significant hurdle to would-be representatives, who stood exposed to substantial costs orders in the event of the unsuccessful prosecution of class actions. Nowadays, most securities class actions in Australia are funded by third-party funders, who agree to bear the prosecution costs and the risk of adverse costs orders in exchange for a percentage of the recovery.

The corporations regulator in Australia, the Australian Securities and Investments Commission (ASIC), has the power to bring proceedings on behalf of investors for breach of disclosure obligations and misleading or deceptive conduct (section 50 of the Australian Securities and Investments Commission Act 2001 (Cth) (ASICA)), but such actions are uncommon.

2 What are the types of securities claim available to investors?

Most claims are for breach of statutory obligations imposed by federal corporations legislation; principally the Corporations Act 2001 (Cth) (CA). These claims, described in more detail below, differ depending on whether the company is listed and whether the investor took up an offer of securities from the company or made a secondary market acquisition. Fundamentally, the legislation proscribes misleading or deceptive conduct, and imposes various disclosure obligations, including a requirement that listed entities continuously disclose information to the market that a reasonable person would expect to have a material impact on the price or value of the entity's securities.

Common law claims for negligent misstatement or fraudulent misrepresentation may also be available to investors who take up offerings or make secondary-market purchases. However, such claims are far less common than statutory claims.

3 How do claims arising out of securities offerings differ from those based on secondary-market purchases of securities?

Subject to a number of exceptions, a person must not make an offer of securities unless a disclosure document is prepared. Securities offerings have a specific disclosure framework under the CA.

A person commits an offence if they offer securities under a disclosure document that contains a misleading or deceptive statement or omission that is materially adverse from the point of view of an investor (section 728(3)). Investors who suffer loss as a result of a misleading or deceptive statement or omission in a disclosure document can commence proceedings under section 729(1) to recover that loss from a variety of persons, including anyone involved in the contravention.

Offers of financial products, such as units in a trust or managed investment scheme, are subject to a separate, but similar, disclosure regime under the CA. A person commits an offence if they offer a financial product under a disclosure document that contains a misleading or deceptive statement that is materially adverse from the point of view of a reasonable person considering whether to proceed to acquire the financial product (see sections 1021B – 1021P). Investors who suffer loss as a result of a misleading or deceptive statement or omission in a disclosure document can commence proceedings under section 1022B to recover that loss from the issuer or anyone involved in the preparation of the disclosure document who, directly or indirectly, caused or contributed to it being defective.

On the other hand, claims arising out of secondary-market purchases of securities are usually based on breaches of the general misleading and deceptive conduct provisions of the CA and the continuous disclosure obligations of companies listed on a financial market.

The general misleading and deceptive conduct provisions of the CA are found in section 1041E (making false or misleading statements in relation to financial products) and section 1041H (misleading or deceptive conduct in relation to financial products or services). Section 1041H provides that a person must not, in this jurisdiction, engage in conduct in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive. By contrast, section 1041E, which is an offence provision, proscribes the making of a statement or the dissemination of information that is false in a material particular or materially misleading. That provision only operates if, among other things, the statement maker did not care whether the information was true or false, or the statement maker knew or ought to have known that the information was false in a material particular or was materially misleading. Investors who suffer loss as a result of a contravention of sections 1041E and 1041H can commence proceedings under section 1041I to recover that loss.

If a company contravenes its continuous disclosure obligations (see question 4), both it and any person involved in the contravention commits an offence (sections 674(2) and 674(2A)). Investors who suffer loss as a result of a contravention can commence proceedings under section 1317HA to recover that loss.

4 Are there differences in the claims available for publicly traded securities and for privately issued securities?

The most significant difference relates to the continuous disclosure obligations that apply to publicly traded securities. In Australia, ASX Limited (the operator of the Australian Securities Exchange (ASX)), is the primary market operator. The ASX Listing Rules set out certain continuous disclosure obligations, which are given force by the CA. Listing Rule 3.1 provides that once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately report that information to ASX. This obligation is subject to a number of exceptions, including where the information concerns an incomplete proposal or negotiation.

5 What are the elements of the main types of securities claim?

Securities claims arising out of either securities offerings or secondary-market purchases of securities typically have two main elements: engagement in conduct proscribed by the relevant securities legislation (for example, the making of a statement (or an omission) that is misleading or

deceptive); and proof that the investor suffered loss as a result of the proscribed conduct.

6 What is the standard for determining whether the offering documents or other statements by defendants are actionable?

Offering documents and other statements are actionable if they contain a misleading or deceptive statement or fail to contain prescribed information. The relevant standard for each cause of action typically available to investors is discussed in questions 3 and 4.

7 What is the standard for determining whether a defendant has a culpable state of mind?

The general misleading and deceptive conduct provision in section 1041H of the CA is a strict liability provision. By contrast, section 1041E (false or misleading statements) requires deliberate, negligent or reckless conduct.

The disclosure document liability regimes and continuous disclosure civil liability regimes are also strict liability provisions. However, there are a number of statutory defences available (see question 12). For example, it is a complete defence for a person who is involved in a breach of the continuous disclosure provision if they took all steps (if any) that were reasonable in the circumstances to ensure that the disclosing entity complied with its obligations and, after doing so, believed on reasonable grounds that the disclosing entity was complying with its obligations (section 675(2B) of the CA).

8 Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

The terms of the legislation do not require proof of reliance. The legislation requires the claimants to demonstrate that they suffered the loss for which they seek compensation by or as a result of the proscribed conduct; that is, they must establish causation.

It is unclear whether it is necessary to establish individual reliance in securities litigation to prove causation. Plaintiffs have argued that such proof is not required. Borrowing from concepts underlying the fraud on the market theory, they contend that, in an open and efficient market for securities, any misrepresentation will be reflected in the price of the relevant securities, such that the misrepresentation will have caused their loss regardless of whether it influenced their investment decision. The argument has not yet been the subject of a judicial determination in securities litigation in Australia.

9 Is proof of causation required? How is causation established?

See question 8.

10 What elements present special issues in the securities litigation context?

Forward-looking statements or representations in relation to securities are the subject of specific rules in Australia. A person or entity must have reasonable grounds for forecasts or other forward-looking statements in a disclosure document (see section 728 of the CA) or representations relating to future matters generally (section 12BB of the ASICA). ASIC and ASX both regulate, and provide guidance in relation to, forward-looking statements. ASX Guidance Note 8, which provides guidance on the operation of Listing Rule 3.1, includes recommendations from ASIC and ASX that any material assumptions or qualifications that underpin forward-looking statements in an announcement should be stated in the announcement. The use of cautionary language will not, in and of itself, cure the absence of reasonable grounds.

11 What is the relevant limitation period? When does it begin to run? Can it be extended or shortened?

The limitation period for a claim arising from breach of the disclosure document provisions or the general misleading or deceptive provisions of the CA is six years after the day on which the cause of action arose (sections 729(3), 1022B(6) and 1041I(2) of the CA). The limitation period for a claim for a compensation order for breach of continuous disclosure obligations is six years after the contravention (section 1317K).

When representative proceedings are commenced, the running of any limitation period that applies to the claims of group members is suspended until a group member opts out of the proceeding (for example, section 33J of the Federal Court of Australia Act (FCA)) or there is a final determination made in relation to the representative's claim (that does not finally dispose of the group member's claim) (for example, section 33ZE).

12 What defences present special issues in the securities litigation context?

The disclosure regime for issues of securities under the CA includes a number of defences against liability. In the context of prospectus liability, the defences fall under the following categories: 'due diligence', 'no knowledge', 'reasonable reliance' and 'withdrawal of consent' (sections 731–733 of the CA). The outer limits of these defences are not well defined. One area of particular uncertainty is the extent to which (assuming competence is established) a person can rely on the work product of another without further inquiry.

In the context of product disclosure statement liability, it is a defence if the person took reasonable steps to ensure that the information would not be misleading or deceptive.

It is a defence against continuous disclosure liability if a person involved in the contravention: took all steps (if any) that were reasonable in the circumstances to ensure that the company complied with its disclosure obligations; and after doing so, believed on reasonable grounds that the company was complying with those obligations (674(2B)).

The general misleading or deceptive conduct provision (section 1041H) is not subject to express defences, however, it may be that liability can be apportioned if it can be established that the acts or omissions of concurrent wrongdoers caused, independently or jointly, the damage or loss that is the subject of the claim.

13 What remedies are available? What is the measure of damages?

Damages are the primary remedy.

The starting point for the measure of damages is the 'rule' in *Potts v Miller*. This measure compares the difference between the actual purchase price and the hypothetical 'real value' of the security at the time of purchase. 'Real value' may be ascertained by reference to a variety of factors, including subsequent events only where those events show, for instance, that what the shares might have sold for was not their true value and noting where 'independent,' 'extrinsic,' 'supervening' or 'accidental' factors affected the price.

An alternative measure of damages, which has been used in two recent high-profile cases involving complex financial products, is the difference between the price paid for the shares and whatever is 'left in hand' upon sale. This approach may be adopted where, for example, the effect of the misrepresentation is such that the purchaser is 'locked in' and unable to mitigate their loss.

Another potential measure of damages is the difference between the price paid for the security and the market price that would have prevailed but for the misrepresentation.

14 What is required to plead the claim adequately and proceed past the initial pleading?

The basic requirement is that a pleading must comprise of a statement, in summary form, of the material facts on which the party relies, but not the evidence by which those facts are to be proved. 'Material facts' are facts that are relied on as establishing the essential elements of the cause of action.

Certain contentions carry heightened pleading requirements. For example, Federal Court Rules (FCR) require the particularisation of contentions of fraud or as to any 'condition of mind' (eg, deliberate act, malice or recklessness).

Further, solicitors and barristers are obliged under professional conduct rules not to make allegations of criminality, fraud or other serious wrongdoing in court documents without an adequate factual foundation.

15 What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pre-trial resolution?

Parties may apply for summary judgment in a number of circumstances, including where the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding, or no reasonable cause of action is disclosed (for example, FCR 26.01). The jurisdiction to summarily terminate an action is sparingly employed and is not used

except in a clear case where the court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion. The test has been variously expressed, including 'so obviously untenable that it cannot possibly succeed' (see *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125).

The court rules also make provision for a defendant to seek to strike out all or part of a plaintiff's claim at an early stage in the proceedings in various circumstances, including where the pleading is ambiguous, fails to disclose a reasonable cause of action or constitutes an abuse of the process of the Court (for example, FCR 16.21). It is very rare for a court to strike out a party's pleading without granting leave to re-plead.

A party may apply to the court for an order that a question arising in the proceeding be heard separately from any other questions. Such an application is usually made only if the determination of the preliminary question will substantially dispose of the proceeding or render any further trial of the proceeding unnecessary (for example, FCR 30.01 – 30.02).

In a representative proceeding, a defendant may also seek to strike out a claim on the basis that the specific requirements for establishing a representative proceeding have not been met (see question 20).

16 Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

For claims involving financial services and markets (including misleading or deceptive conduct relating to financial products and services, and misleading or deceptive statements in product disclosure statements and prospectuses), the CA has expanded the Australian common law principles relating to vicarious liability. Section 769B of the CA provides that any conduct engaged in by an employee, agent, director or any 'other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent' is deemed to be engaged in by the body corporate. Similarly, conduct engaged in by a person in relation to an employee, agent, director or other person in the circumstances stated above is also deemed to have been engaged in in relation to the body corporate.

17 What are the special issues in your jurisdiction with respect to securities claims against directors?

A director in Australia includes persons appointed to the position of director, persons acting in that capacity under another name and persons with whose instructions the directors are accustomed to complying. Both executive and non-executive directors are subject to statutory duties of care and diligence and good faith, and are prohibited from misusing their position or information obtained by virtue of it (sections 180 – 183 of the CA).

A director may delegate certain powers under the CA (section 198D) but will remain responsible for the exercise of the powers (section 190(1)). However, if the director believed, on reasonable grounds, that the delegate would act properly, and that the delegate was competent and reliable, he or she may avoid liability for the delegate's actions (section 190(2)). Similar requirements apply where directors purport to rely on information or advice from others. In such circumstances, directors must exercise independent judgement before reliance on advice or information will be taken as reasonable (section 189).

In recent years there have been a number of high-profile cases brought by ASIC against directors alleging breach of directors duties associated with disclosures to the market. While the regulator has had mixed success, the cases have reinforced the obligations of directors to be aware of what are often highly technical and complex financial matters relating to the company. Although directors have a statutory power of delegation, it is clear that directors cannot substitute reliance on management's advice for their own attention and examination.

18 What are the special issues in your jurisdiction with respect to securities claims against underwriters?

Express provision is made in the CA for the liability of underwriters (but not sub-underwriters) named in a disclosure document with their consent for a contravention of the prospectus disclosure requirements for an issue of securities (section 729(1) of the CA).

An underwriter may also be liable for a defective product disclosure statement if it is involved in the preparation of the disclosure document and, directly or indirectly, caused the disclosure document to be defective or contributed to it being defective (section 1022B(3)(b)(ii)).

19 What are the special issues in your jurisdiction with respect to securities claims against auditors?

The auditor's potential liability in securities claims is generally for alleged misleading conduct (under state and federal fair trading legislation and the CA and ASICA), and for breach of contract and negligence if the claim is brought by the audit client. The claim will generally arise out of the year-end audit or half-year review, or both, and possibly due diligence or expert engagements undertaken by the audit firm where knowledge acquired by the audit firm in those engagements is then sought to be imputed to the auditor.

20 In what circumstances does your jurisdiction allow collective proceedings?

In order to commence a representative proceeding, the following threshold criteria must be satisfied:

- there must be seven or more persons who have a claim against the same person;
- the claims must be in respect of, or arise out of, the same or similar circumstances; and
- the claims must give rise to substantial common issues of law or fact (for example, section 33C of the FCA).

21 In collective proceedings, are claims opt-in or opt-out?

We have opt-out class action regimes in Australia. Class members can opt out by completing and lodging with the court the requisite opt-out notice before the date set by the court (for example, section 33J of the FCA). If a class member does not opt out by the relevant date, he or she will be bound by any judgment of the court.

While we have opt-out regimes in this country, courts permit classes to be defined so as to exclude persons who have not entered funding agreements with third-party funders, thereby effectively allowing 'closed' classes in representative proceedings.

22 Can damages be determined on a class-wide basis, or must damages be assessed individually?

Court rules give the judiciary broad discretion in relation to damages. The court may:

- make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the court specifies;
- award damages in an aggregate amount or 'class-wide basis', only when satisfied that reasonably accurate assessment can be made of the total amount to which group members will be entitled; or
- make such other order as it thinks just.

23 What is the involvement of the court in collective proceedings?

Unlike the position in the United States, it is not necessary for the court to certify the class, as there is no formal certification requirement. The court does, however, have an active role to play.

The court may, on application of the defendant or of its own motion, order that a proceeding no longer continue as a representative action where it is satisfied that it is in the interests of justice to do so because of a number of specified matters, including where the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members (section 33N of the FCA).

If a court is satisfied that a representative party is not able adequately to represent the interests of the group members, the court may substitute another group member as representative party (section 33T of the FCA).

Once a representative proceeding has been commenced, the parties must obtain approval from the court for any settlement of the proceeding or any discontinuance of the proceeding (section 33V of the FCA). When applying for court approval of a settlement, the parties will usually need to persuade the court that: 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 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 defendant(s).

Update and trends

Contingency fees
The rapid growth of the litigation funding industry and a number of recent significant securities class action settlements has placed the spotlight on the funding of securities class actions in Australia. In particular, the typically significant amounts paid to litigation funders, the funding premiums charged by lawyers and whether lawyers should be allowed to charge contingency fees, have been the subject of much judicial, academic and political debate.

In December 2014, the Productivity Commission (which is established under the Productivity Commission Act), released a report on Access to Justice Arrangements, which recommended the relaxation of legal billing rules to encourage more litigation. One of the key recommendations is to remove the ban on contingency fees (fees calculated by reference to the amount recovered).

Not necessary for all group members to have a claim against all defendants
In a recent Federal Court appeal decision (*Cash Converters International Ltd v Gray* [2014] FCAFC 111), the Court ruled that, while it was necessary that the named plaintiff have a cause of action against each defendant, it was not necessary that every group member must also have a claim against all of the defendants. The decision is significant as it is likely to expand the scope of cases that may be pursued as representative actions. It is also likely to complicate settlement discussions.

Proportionate liability laws to be considered by the High Court
Two conflicting decisions by the Full Court of the Federal Court have created significant uncertainty with respect to the operation of proportionate liability laws at a federal level. The proportionate liability regime was introduced to prevent claimants from targeting 'deep pockets' (usually professional service providers and public authorities) by commencing litigation against the defendants most able to meet an order to pay damages. Under the principles of joint and several liability, a defendant was liable for all of the loss suffered by a claimant, even if that defendant's share of the responsibility for causing that loss was comparatively small. Put simply, the proportionate liability regime restricts a defendant's liability to its share of responsibility for the loss.

The recent decision of the Full Court in *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 held that liability only applies to specific causes of action based on misleading or deceptive conduct, and that other statutory causes of action (such as those relating to misleading product disclosure statements under section 1022B of the CA) for the same loss or damage give rise to joint and several liability. If upheld, this means that a successful claimant is able to recover its entire loss from a respondent. The other Full Court decision (*Wealthsure Pty Ltd v Selig* [2014] FCAFC 64) held that the proportionate liability regime applies to all claims arising from the same loss or damage, provided that at least one of those claims falls within the regime.

Insurers and professional service providers will be awaiting the High Court's decision on this issue with interest. Should the High Court uphold a restrictive interpretation of the proportionate liability regime that allows claimants to elect to recover under joint and several liability principles, damages exposure for common claims (such as those under section 1041H of the CA, which is apportionable) could be significantly increased.

Causation continues to be controversial
Causation continues to be a live issue in securities litigation. The absence of authoritative judicial authority on this issue means that the risk exposure faced by companies defending securities class actions will remain uncertain. Practitioners continue to monitor developments in this area with interest.

24 What role do regulators, professional bodies, and other third parties play in collective proceedings?

Third-party litigation funders play a significant role. Securities class actions are rarely pursued without funding. This means that the defence of representative proceedings often involves strategic considerations that do not arise in conventional litigation.

While ASIC has no formal role in representative proceedings, it has the power to intervene in the proceedings (section 1330 of the CA), though it rarely does so. ASIC can also apply to the court for leave to appear as amicus curiae.

25 What options are available for plaintiffs to obtain funding for their claims?

As noted above, third-party litigation funding is permitted in Australia. The regulations under the CA exempt funders from the licensing, conduct and disclosure requirements in Chapter 7 of the CA, provided a funder maintains adequate arrangements and follows certain procedures for managing any conflicts of interest that may arise between the funder, lawyers and the funded parties.

Lawyers are currently prohibited from entering into agreements where the lawyer receives an agreed percentage of the amount recovered by the client due to concerns that it creates perverse incentives. They may, however, enter into agreements that enable them to charge an uplift of up to 25 per cent of their fees in the event of success.

26 Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

The usual rule is that costs 'follow the event', that is, the losing party pays the successful party's costs. Costs are usually awarded on a 'party-party' basis, being costs that are reasonably and properly incurred by a party in connection with the litigation. As a rule of thumb, this equates to approximately 60 to 70 per cent of the costs incurred.

The court may also award costs to the successful party on an 'indemnity' or 'solicitor client' basis. This means that the successful party is entitled to its full costs incurred in respect of the litigation. An example where a successful party may receive an award of indemnity costs is where it makes a settlement offer that is rejected and it subsequently achieves an outcome that is no less favourable than the proposed settlement offer. In that case, the successful party will usually receive party-party costs up to the date of the settlement offer and indemnity costs after the date of the settlement offer.

In representative proceedings, the court may not award costs against group members (section 43(1A) of the FCA). The exception is where a group member becomes a representative of a sub-group or has its own individual issues resolved by the court.

Where an award of damages has been made in a representative proceeding, the representative party may apply to the court for an order that its costs reasonably incurred in bringing the action may be recovered out of damages awarded in the proceedings, where the representative party's costs are likely to exceed costs recoverable from the defendant.

Plaintiffs may be required to provide security for the cost of defending claims, for example, where the plaintiff does not have sufficient assets in Australia to satisfy an adverse costs order or judgment. Nothing in Part IVA of the FCA relating to representative proceedings affects the operation of any law relating to security for costs (section 33ZG(c)(v)). Whenever the litigation is supported by a commercial litigation funder, it is typical for the funder to provide security for costs.

27 Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

One of the most common investment funds subject to securities litigation in Australia are managed investment schemes. Examples are unit trusts, which may be property trusts holding land, equity trusts holding shares or fixed income trusts. While a number of managed investment schemes are listed on the ASX, the majority are not. Typically, a managed investment scheme must be registered under Chapter 5C of the CA if it has more than 20 members or was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes, or ASIC determines that certain managed investment schemes are related and the total number of members exceeds 20 (section 601ED of the CA). Chapter 5C of the CA establishes a regulatory framework for managed investment schemes, including statutory duties of officers and employees of the managed investment scheme's responsible entity.

Section 601MA of the CA provides that a member of a registered managed investment scheme who suffers loss or damage because of conduct of the scheme's responsible entity that contravenes Chapter 5C of the CA may recover the amount of the loss or damage by action against the responsible entity. The liability of officers, employees and members of the compliance committee of the responsible entity for contravention of statutory duties (under sections 601FD, 601FE and 601JD respectively) is assessed under the civil penalty provisions of Part 9.4B of the CA.

If a product disclosure statement is required, the liability provisions in relation to defective disclosure documents will apply (see question 3).

28 Are there special issues in your country in the structured finance context?

There have been number of recent high-profile securities claims in Australia relating to structured finance products. In addition to targeting the issuer of the products, claims have also been brought against those involved in the marketing or sale of such products. Australia has seen the first successful case in the world by investors against a ratings agency for misleading and deceptive conduct. Importantly, the case confirmed that ratings agencies can owe a duty of care to investors. The Australian arm of failed Wall Street Bank Lehman Brothers was also successfully sued for misleading conduct and breach of its fiduciary duty in advising a group of 72 local councils and charities to purchase synthetic collateralised debt obligations.

29 What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

The operation of the CA outside Australia is based on the legislative power of the Commonwealth under the external affairs power in section 51(xxix) of the Australian Constitution (section 3(3) of the CA). Each provision of the CA applies, according to its tenor, in relation to acts and omissions outside Australia (section 5(4) of the CA). However, the extraterritorial application of the CA is limited in practice by the use of terms that are defined in a way that requires a nexus with Australia (for example, 'company' is defined to be any company registered under the CA (section 9 of the CA)).

The definition of these terms sets the scope of the causes of action and may necessarily exclude some claims by foreign residents. Conversely, some aspects of securities legislation specifically protect foreign shareholders (such as the Cross-Border Insolvency Act 2008 (Cth)).

30 What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

Investors must seek the leave of the court to commence proceedings against foreign defendants (unless the foreign defendant submits to the jurisdiction of the Court). For example, under the FCR, leave will only be granted to commence certain types of proceedings, including proceedings:

- based on a cause of action arising in Australia;
- based on a breach of contract in Australia;
- based on a contravention of an Act that is committed in Australia;
- based on a contravention of an Act (wherever occurring) seeking relief in relation to damage suffered wholly or partly in Australia; or
- affecting the person against whom the proceedings are commenced in relation to that person's membership of, or office in, a corporation incorporated or carrying on business in Australia.

As evidenced by this (not exhaustive) list, a successful claim against a foreign defendant must have some connection to Australia. The circumstances in which leave to commence proceedings will be granted depends on the facts.

The provisions relating to unconscionable conduct and consumer protection in section 12AC of the ASICA apply to conduct outside of Australia by bodies corporate incorporated or carrying on business in Australia.

31 How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

If multiple securities claims are commenced in different international jurisdictions, including in Australia, an Australian court would consider it had power to hear the matter if all standing and jurisdiction requirements are met. However, a party to an action could make an application to permanently stay the proceedings in the Australian Court; provided that it is established that the proceedings are oppressive and vexatious, the order sought will not effectively be enforced in the country where enforcement must be obtained or the parties have agreed to submit their dispute to the exclusive jurisdiction of another forum.

If multiple securities claims are commenced by different plaintiffs in different Australian jurisdictions, each court would have jurisdiction to hear the respective claims provided standing requirements are met. However, if the claims arise out of the same facts and give rise to similar issues, one or more parties may seek to have the proceedings heard together in a single jurisdiction pursuant to cross-vesting legislation.

32 What are the requirements in your jurisdiction to enforce foreign-court judgments relating to securities transactions?

The enforcement of foreign judgments in Australia is governed by both statutory regimes and common law principles.

The Foreign Judgments Act 1991 (FJA) and the Foreign Judgments Regulations 1992 (FJR) provide for the procedure and scope of the judgments that can be enforceable under the statutory regime. The FJR include a schedule of countries with which Australia has reciprocal arrangements for enforcement. The FJA applies to enforceable money judgments, which

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include judgments for an amount of money other than taxes or similar charges, or other penalty (except in relation to a New Zealand tax debt or a Papua New Guinea income tax payment) (section 3). A judgment is not enforceable under the FJA unless it is final and conclusive, although it may be subject to appeal, and was given in a court to which the enforcement provisions extend (sections 5(4) and 5(5)).

In instances when there is no statutory agreement, the foreign judgment must be enforced under common law principles. Foreign judgments may not be enforceable unless they are for the payment of a sum that is fixed or can be calculated (for judgments *in personam*). In some instances, equity might permit the enforcement of non-monetary judgments.

33 What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

The FCR provide that the parties must consider options for alternative dispute resolution (ADR), including mediation, as early as is reasonably practicable (FCR 28.1).

If the parties consider that ADR is appropriate, they may apply to the court for an order that the proceeding or relevant part of the proceeding be referred to an arbitrator, mediator, or suitable person and that the proceedings be adjourned or stayed until that process concludes or is terminated. The court may also order the parties to attend ADR if it considers it appropriate.

Adjudication is typically not used in securities litigation in Australia.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment
Foreign Investment Review
Franchise
Gas Regulation
Government Investigations
Insurance & Reinsurance
Insurance Litigation
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