Trends in Australian Securities Class Actions:
1 January 1993 – 31 December 2009

By Greg Houston, Svetlana Starykh, Astrid Dahl, and Shane Anderson
Following the high-profile collapse of a number of companies in the early 2000s, shareholders have demonstrated that they are increasingly willing to use class actions as a tool to protect themselves from harmful conduct—and to punish offenders.
Introduction

Securities class actions are a relatively recent development in Australia and now an increasingly common feature of the corporate and legal landscape. The foundations for this development were established by a series of legislative changes that occurred over the last two decades, although the incentive for securities class actions to be brought before the courts has only recently been strengthened through developments in case law.

The first class action regime in Australia was introduced in 1992 when the Federal Court of Australia Act 1976 (Cth) (“FCA Act”) was amended, through the inclusion of Part IVA, to provide for representative proceedings. Under this regime, proceedings can be commenced if three threshold requirements are met: (a) seven or more persons have claims against the same respondent; (b) the claims of all those persons are in respect of, or arise out of, the same, similar, or related circumstances; and (c) the claims of all those persons give rise to a substantial common issue of law or fact. A similar regime to Part IVA took effect from 1 January 2000 through the inclusion of Part 4A of the Supreme Court Act 1986 in Victoria.

Despite concerns that the introduction of Part IVA might lead to a rush of litigation, relatively few securities class actions were filed prior to 2004. Prevalence of common stock ownership in Australia is amongst the highest in the world, yet for the most part shareholders appeared unwilling to pursue the accountability of corporations through such means. Following the high-profile collapse of a number of companies in the early 2000s, however, including HiH and OneTel, shareholders have demonstrated that they are increasingly willing to use class actions as a tool to protect themselves from harmful conduct, and to punish offenders.

The ability to use class actions in this manner has been greatly assisted by a number of significant common law developments. These have helped clarify the rights of shareholders and have overcome some of the impediments associated with bringing an action.

For example, since the decision in Prudential Assurance v. Newman Industries Ltd. (No 2), a long-standing principle of Australian law has been that a shareholder cannot recover damages merely because the company has suffered loss. However, in Johnstone v. HIH Ltd. it was established that shareholders can seek remedies where their loss is distinct from any loss suffered by the company, and their entitlement to seek remedies arises under a separate basis in law from that of any entitlement of the company. For example, in circumstances of misleading or deceptive conduct by the company itself, the personal loss of shareholders is quite different from the loss, if any, suffered by the company.
Although these case law developments have helped clarify how and when securities class actions can be used, until recently a major impediment to filing an action existed in the form of the Court Rules that apply to costs. This impediment was ultimately circumvented by the emergence of commercial litigation funding and the High Court’s confirmation in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* of its validity in a non-insolvency context.

Prior to the advent of litigation funding, applicants had a strong disincentive to bring an action due to the risk of incurring significant costs. In contrast to the US and Canadian legal systems, lawyers in Australia are prohibited from charging contingency fees. Although “no-win, no-fee” arrangements have been permitted for some time, the costly nature of class actions meant that it is rare for lawyers to conduct such cases on a wholly conditional basis. The difficulty associated with financing a class action is compounded by the risk that the representative applicant can be ordered to pay the costs of the respondent(s) if they are unsuccessful.

In addition to imposing a financial burden on the lead applicant, the inability of lawyers to set fees based on a percentage of the settlement has the potential to create perverse economic incentives. Unless fees are capped at an absolute level, the open ended nature of the fee agreements creates a financial incentive for respondents to draw out proceedings through the excessive use of interlocutory applications and appeals. The intention of this strategy, as Finkelstein J noted in *Bright v. Femcare Ltd* is to cause the applicant to incur prohibitive costs and seek pre-trial resolution of the matter.

The availability of commercial litigation funding has improved the incentive and ability for investors to initiate class actions.
The availability of commercial litigation funding has therefore improved the incentive and ability for investors to initiate class actions. Typically under the terms of a litigation funding agreement, the funder will finance the representative’s legal costs and any other costs associated with running the class action, including adverse cost orders, in return for a set percentage of any net settlement or judgement and reimbursement of costs not otherwise recovered from the defendant if the case succeeds. This arrangement transfers much of the risk associated with bringing a class action from the applicant to the litigation funder.

Since the High Court approved commercial litigation funding, there have been two related legal developments, one positive for litigation funders, and the other negative:

– In 2007 the Full Federal Court ruled in Multiplex Funds Management Ltd v. P Dawson Nominees Pty Ltd that the class on whose behalf a case is brought can be restricted, which has the effect of preventing free riding by unsigned class members.

– In 2009 the Full Federal Court ruled in Brookfield Multiplex Ltd v. International Litigation Funding Partners Pty Ltd that a litigation funding agreement constituted a managed investment scheme and therefore must be registered. In the opinions of Sundberg and Dowsett JJ, the effect of this ruling is that a qualified entity must be appointed—which essentially means the litigation funder must hold an Australian Financial Services licence. The Commonwealth government has since indicated that it intends to exempt class action funders from this requirement, but details are still to be made available.

In light of these developments, we examine below trends in Australian securities class actions.

Trends in Filings

Filed in 1993, National Mutual Life Association of Australasia Ltd v. Reynolds was the first securities class action to be brought in Australia. Although it appeared that this filing would be the first of many securities class actions, since it was filed shortly after the introduction of Part IVA, it was six years before the next class action, King v. AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd), was brought before the courts in 1999. King would ultimately become the first successfully pursued securities class action in Australia.

Since King, securities class actions have been regularly filed in Australia, although until 2004 the pace was modest, with an average of one case being filed per annum. From 2004, securities class action filings have increased steadily, with a record six cases filed in 2009 (see Figure 1). Since 2004, securities class action filings have increased steadily, with a record six cases filed in 2009.
Despite strong growth over the past three years, the number of securities class actions filed in Australia does not begin to approach the number filed in the US. In 2009, for example, Australian securities class action filings represented 2.8% of the 215 cases filed in the US through November of that year. Although this difference can be largely attributed to the fact that the Australian economy is much smaller than that of the US, another important factor is that the legal frameworks governing securities class actions are quite different.

However, Australian class action filings are broadly similar to the level seen in Canada, once adjusted for the respective size of each economy. For instance, in 2008 Australian GDP was approximately two-thirds the size of Canadian GDP, and Australian class actions amounted to 55% of the nine cases filed in Canada.
Types of Allegations

The two primary causes of action in Australian securities class actions are contraventions of the continuous disclosure rules, which require listed companies to promptly disclose information material to the value of their securities, and laws prohibiting misleading and deceptive conduct. Both causes of action are incorporated in the Corporations Act 2001. Pre-dating this legislation, the first securities class actions filed in Australia alleged breaches of the Trade Practises Act 1974. In addition to these primary forms of contravention, a significant number of allegations in Australian securities class actions are made in relation to breaches of fiduciary trust.

The substance of allegations in Australian class actions primarily relate to inaccurate earnings guidance, accounting misstatements, and failures to disclose escalating debt levels or imminent insolvency. The distribution of allegations by type in 1999 through 2009 filings is illustrated in Figure 2. The two most common allegations—inaccurate earnings guidance and improper accounting—together accounted for 52% of allegations over the period.
Filings by Economic Sector

Securities class action filings in Australia have been brought against companies in seven sectors of the economy, as shown in Figure 3 below.²⁶

Actions brought against issuers in the diversified financial, insurance, and real estate industries (“Financials”) account for about half of all filings: 15 of the 29. Despite its importance to the Australian economy, the resource sector (“Materials”) accounts for only 14% of cases; two of the four resource sector filings are against mining companies (Oz Minerals and Sons of Gwalia), while the other cases concern the chemicals and forestry industries.

Figure 3. Number of Filings by Sector of Issuer (N=29) 1 January 1993 – 31 December 2009

Table 1. Cases with Multiple Respondents

<table>
<thead>
<tr>
<th>Primary Respondent</th>
<th>Co-Respondent(s)</th>
<th>Industry of Co-Respondent(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 GIO</td>
<td>Grant Samuel and Associates</td>
<td>Diversified Financials</td>
</tr>
<tr>
<td>2 Astor Goldsbrugh</td>
<td>Pannell Kerr Forster</td>
<td>Accounting</td>
</tr>
<tr>
<td>3 Concept Sports</td>
<td>Pitcher Partners</td>
<td>Accounting</td>
</tr>
<tr>
<td>4 Sons of Gwalia</td>
<td>ING; Ernst and Young</td>
<td>Diversified Financials; Accounting</td>
</tr>
<tr>
<td>5 HIH</td>
<td>Guy Carpenter; Goldman Sachs</td>
<td>Insurance; Diversified Financials</td>
</tr>
</tbody>
</table>

Despite its importance to the Australian economy, the resource sector accounts for only 14% of filings.
Developments in Litigation Funding Arrangements

Over the past six years there has been significant growth in the number of class actions financed by commercial litigation funders. Until 2004, all six securities class actions were financed by a named applicant and/or its law firm. Since then, 17 of the 22 new class actions have been financed by a commercial litigation funder (see Figure 4).

The growth in commercial litigation funding can be attributed to a series of legal developments that have gradually established that practice’s legitimate application in securities class actions.

Figure 4. Litigation Funding and Securities Class Actions Filings
1 January 1999 – 31 December 2009

Until 2004, all six securities class actions were financed by a named applicant and/or its law firm. Since then, 17 of the 22 new class actions have been financed by a commercial litigation funder.
Traditionally, the use of commercial litigation funding had been constrained by concerns about maintenance and champerty, which were once torts and crimes under common law. These laws were intended to prevent abuses of court process by banning a person from improperly encouraging litigation (maintenance) and funding another person’s litigation for profit (champerty). Although as of the mid-1990s maintenance and champerty had been decriminalised in New South Wales, Victoria, South Australia, and the Australian Capital Territory for some time, the preservation of liability still existed under certain contracts.

Despite the decriminalisation of maintenance and champerty, the courts therefore retained the authority to stay an action or set aside a funding agreement if it were found to be inconsistent with the public policy considerations upon which the prohibition was based.

In 1995, a statutory exception to maintenance and champerty was recognised if the applicant was the administrator of an insolvent company. This exception prompted the emergence of commercial litigation funding businesses, most prominent among them being the Insolvency Managed Fund (now known as "IMF"). Soon after, these businesses started providing funding to solvent applicants as well, prompting a spate of court challenges as to its legality.

Over 20 court challenges to litigation agreements were pleaded from 1998 through 2006. While none was successful in having the agreement struck down, some actions were stayed, causing the use of commercial litigation funding to remain fraught with uncertainty.

Opponents of the practice argued that it encouraged trafficking in litigation, whilst supporters asserted that it facilitated justice.

The legality of commercial litigation funding in a non-insolvency context was finally resolved in *Campbells Cash and Carry*. In this decision, the High Court ruled that a litigation funding agreement was not an abuse of process and that there was no reason in public policy why the proceedings should be stayed.

Once the legality of litigation funding was established, application of the practice in securities class actions became more frequent. Today, the litigation funding industry is dominated by IMF, the first publicly listed litigation funder in Australia. Established in 2001, IMF originally financed insolvency-related cases. In 2004, IMF financed its first securities class action, *Dorajay Pty Ltd v. Aristocrat Leisure Limited*. Since then, IMF has financed 13 other securities class actions and proposed financing an additional three that have not yet been filed.

Although IMF dominates the litigation funding industry, a number of new firms recently entered the market. These include US-based Commonwealth Legal Funding (CLF) LLC, which has financed actions against Opes Prime and Centro, and International Litigation Funding (ILF) Partners, which is financing the *Multiplex* case. In addition, one US-based consortium, consisting of Wasserman, Comden & Casselman LLP and Julian Hammond, has indicated its intention to fund a class action against Babcock and Brown Power.

Associated with this increase in funding activity, three interesting legal developments have recently taken place, specifically:

- the use of opt-in funding arrangements;
- the emergence of concurrent actions by different groups financed by different litigation funders; and
- the classification of litigation funding agreements as managed investment schemes.

We examine these developments below.

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- the classification of litigation funding agreements as managed investment schemes.

We examine these developments below.
When Part IVA of the FCA Act was designed in 1992, one of the most contentious decisions was the adoption of an opt-out model. Under this model, class actions are deemed to proceed on behalf of all persons claimed to be represented except those who affirmatively opt-out. Conversely, under an opt-in model, a person does not become part of the proceedings without affirmatively electing to join.

From the perspective of commercial litigation funders, an opt-in model is preferable because it eliminates free riding by unsigned class members. If class membership is not restricted, unsigned class members can enjoy the benefits of commercially funded litigation without having to pay for it by granting the funder a share of their own recovery. Restricting class membership further assists litigation funders by enabling better estimation of class size and thus the determination of whether it is likely to be profitable to fund an action.

The first seven securities class actions filed in Australia adopted the opt-out model. In 2004, the applicant in Dorajay attempted to restrict the class to persons who had signed a retainer agreement with the representative applicant’s law firm, Maurice Blackburn. This approach was ultimately rejected by Stone J, who argued that the criterion created an illegitimate opt-in procedure that was inconsistent with Part IVA and would dictate who should represent the group. A perverse outcome of the Dorajay decision from the perspective of the respondent was that the number of potential claimants increased from 600 to many thousands.

Following this, Maurice Blackburn adopted a different approach and sought to define the group by reference to applicants who had entered into a litigation funding agreement with ILF. This strategy proved successful, with Finkelstein J finding in P Dawson Nominees Pty Ltd v. Multiplex Ltd. that the funding agreement did not impose an opt-in requirement under Part IVA. Furthermore, his Honour stated that, regardless, there was no problem in imposing an opt-in regime provided that group members can opt-out of the proceedings.

The Full Court of the Federal Court upheld Justice Finkelstein’s primary judgement in Multiplex in December 2007. Since that time, at least six of the 11 new securities class actions filed have restricted the class to persons who sign a litigation funding agreement.

Following an application by Centro to have the CLF proceeding stayed (with the support of the IMF proceeding), Finkelstein J decided that, rather than stay, consolidate, or hold a joint trial, litigation committees should be established. These committees are intended to assist his Honour in identifying what is in the best interests of the group members and therefore, how the class actions should be managed.

On 14 November 2008, Finkelstein J directed that the Centro actions be allocated to another judge on account of the fact that his Honour had a financial interest in Centro. Since that time there have been no further developments in relation to Justice Finkelstein’s proposal to establish litigation committees.
Litigation Funding Agreements as Managed Investment Schemes?

On 20 October 2009, a potentially significant decision was handed down by the Full Federal Court in *Brookfield Multiplex* when it ruled that the litigation funding agreement and the solicitors’ retainers in the proceedings constituted a managed investment scheme. Until the effect of this decision is negated through legislative reform, it will continue to affect the litigation funding industry.

Under Australian law, an entity running a managed investment scheme must comply with a number of legal requirements. In particular, under Chapter 5 of the *Corporations Act*, certain managed investment schemes must be registered with the Australian Securities and Investments Commission (ASIC) and a responsible entity must be appointed to manage them. If these requirements are not met, group members are entitled to rescind their contractual agreements.

Under the terms announced by ASIC, relief has been provided from the requirements that would otherwise apply to funded class actions as ‘managed investment schemes’ under Chapter 5C and Chapter 7 of the *Corporations Act*. This relief was intended to “avoid any disruption that could adversely impact plaintiffs in those actions, or interfere with the timely and efficient conduct of the subject litigation.”

With the legal and regulatory relief only effective until 30 June 2010, the implications of *Brookfield Multiplex* beyond this period will only be resolved once the government and ASIC clarify how commercially funded class actions will be regulated.

The Commonwealth government has since indicated that it intends to make regulations that “carve out” funded class actions from the managed investment scheme provisions of the *Corporations Act*, negating the implications of *Brookfield Multiplex*. The government has also stated that it intends to establish a future role for ASIC in developing “guidance” to ensure that “potential conflicts of interest” arising when litigation funders or class action lawyers are assessing awards or settlements are “properly addressed”. Details giving effect to these intentions are still to be made available.

The implications of *Brookfield Multiplex* will only be resolved once the government and ASIC clarify how commercially funded class actions will be regulated.

In light of the problems associated with running an unregistered managed investment scheme, the Court indicated in *Brookfield Multiplex* that some form of declaratory relief would be inevitable. However, prior to the Court issuing its final orders, ASIC announced its intention to grant transitional relief to lawyers and litigation funders involved in legal proceedings structured as funded class actions.
Resolutions

Once a securities class action has been filed in Australia, it is generally resolved through a court approved settlement. Of the 12 securities class actions that had been resolved as of December 2009, eight were settled. Settlements have become more common in recent years. Only three of the seven resolved cases that were filed before 2004 settled; the others were concluded through a judgement, dismissal, or stay of proceedings. In contrast, all five resolved cases that were filed after 2003 concluded through a settlement.

Although the preference of parties to settle reflects a multitude of factors, some of which are case-specific, there are also important considerations common to many securities class actions. In particular, the increasingly prominent role played by commercial litigation funders is likely to promote the selection and subsequent filing of actions that are stronger and for which a greater proportion of potential class members have signed a funding agreement.

We have previously indicated that most applicants in a class action are dependent on financing by commercial litigation funders and, to a lesser extent, solicitors operating on a speculative basis. Given that these businesses will only earn a profit if the applicant wins the case, or at least extracts a favourable settlement, they have a powerful incentive to select only those cases for which there is a reasonable prospect of success. The cost of losing at trial is also potentially so high that, even if the risk is low, respondents are averse to taking a chance.

For this reason, it is not surprising that proceedings have been increasingly concluded through a settlement. All of the resolved actions known to have been financed by a litigation funder were resolved through settlement. These actions represent half of the eight settled actions, and four of the five resolved actions filed since 2004.

It remains unclear how the courts will rule on a number of critical issues, and for this reason both applicants and respondents may prefer the certainty of a settlement over the uncertainty associated with a judgment and potential liability for all legal costs.

The preference for parties to settle is also influenced by the fact that any judgment carries a number of risks. We discuss below that just two securities class actions have been resolved by proceeding to judgment. It therefore remains unclear how the courts will rule on a number of critical issues, and for this reason both applicants and respondents may prefer the certainty of a settlement over the uncertainty associated with a judgment and potential liability for all legal costs.
Judgments, Dismissals, and Stays of Proceedings

Since the introduction of the first class action regime in Australia in 1992, only two cases, to our knowledge, have been resolved through final judgment—see Table 2.

We are also aware of two proceedings that have been resolved through either a dismissal or stay of proceedings. Johnstone was struck out because of substantial and pervasive deficiencies in the claim. National Mutual was stayed on the grounds that the proceedings had not been prosecuted with due diligence.

The securities that were the subject of the actions in Table 2 were unlisted, so the judgments did not address as-yet unresolved questions such as the application of event studies or the relevance of US jurisprudence, such as the “fraud on the market” doctrine. However, the recent decision in Australian Securities & Investments Commission v. Fortescue Metals Group Ltd. [No 5], although an enforcement proceeding rather than a securities class action, does offer support for the use of event studies, which employ statistical analysis when assessing the materiality of corporate disclosures.

Table 2. Judgments

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Judgment Year</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spangaro v. Corporate Investment Australia Funds Management Ltd.</td>
<td>2003</td>
<td>Applicant awarded refund of investment application monies</td>
</tr>
<tr>
<td>Reiffel v. ACN 075 839 226 Ltd.</td>
<td>2003</td>
<td>Applicant awarded lost income and incidental expenses</td>
</tr>
</tbody>
</table>
Settlements

The first securities class action to be settled in Australia was *King*, which settled for AUD$112 million in 2003. As of December 2009, an additional seven securities class actions had since been settled—see Table 3.70

The largest Australian securities class action settlement was in relation to *Dorajay*, which settled for AUD$144.5 million. In this case, the respondent effectively admitted that its share price was inflated by its misconduct.71 The two principal issues that were contested in court were whether the class members relied on the alleged misconduct and the quantum of share price inflation. Ultimately neither issue was resolved, since the parties settled after trial but prior to the final judgment.72

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<table>
<thead>
<tr>
<th>Company</th>
<th>Date</th>
<th>Settlement Value (AUD $m)</th>
<th>Settlement Allocation (AUD $m)</th>
<th>Shareholders</th>
<th>Litigation Funder</th>
<th>Applicant Solicitors</th>
</tr>
</thead>
<tbody>
<tr>
<td>GIO Australia Holdings Ltd. (Australia)</td>
<td>Aug-03</td>
<td>112.0</td>
<td>97.00</td>
<td>-</td>
<td>15.00</td>
<td></td>
</tr>
<tr>
<td>TrackNet Australia Limited</td>
<td>Jun-04</td>
<td>4.30</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Concept Sports Ltd. (Australia)</td>
<td>Sep-06</td>
<td>Confidential</td>
<td>n/a</td>
<td>0.70</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Harris Scarfe Holdings Limited (Australia)</td>
<td>Oct-06</td>
<td>3.00</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Telstra Corp. Ltd. (Australia)</td>
<td>Dec-07</td>
<td>5.00</td>
<td>3.75</td>
<td>-</td>
<td>1.25</td>
<td></td>
</tr>
<tr>
<td>Aristocrat Leisure Ltd. (Australia)</td>
<td>Aug-08</td>
<td>144.50</td>
<td>99.50</td>
<td>36.50</td>
<td>8.50</td>
<td></td>
</tr>
<tr>
<td>Village Life Ltd. <a href="Australia">2050</a></td>
<td>Mar-09</td>
<td>Confidential</td>
<td>n/a</td>
<td>1.44</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Sons of Gwalia Ltd. (Australia)</td>
<td>Sep-09</td>
<td>Confidential</td>
<td>n/a</td>
<td>18.00</td>
<td>n/a</td>
<td></td>
</tr>
</tbody>
</table>
Financial Advisor Class Actions

In addition to the securities class actions identified above, all of which were filed against issuing entities or their officers/trustees, several class actions have been filed against financial advisors. These cases are distinct from standard securities class actions in that the allegation concerns the conduct of the financial advisors who recommended or managed the investment, rather than that of the entity issuing the underlying security itself. At least seven group proceedings have been initiated against financial advisors who recommended the purchase of financial products issued by Westpoint Corporation, and two against Opes Prime Stockbroking.

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In the Westpoint cases, the allegation is that the financial advisors should not have recommended such risky products to the investors. The proceedings have been initiated by both ASIC and Slater and Gordon, with IMF providing litigation funding in some cases. By December 2009, ASIC had reached settlements with three financial advisors. One settlement was confidential; the other two actions settled for a total of AUD$8.5 million, with investors receiving between 43% and 63% of the capital they invested.

The claims against Opes Prime allege negligence and breaches of the Corporations Act. ANZ Bank and Merrill Lynch are also named as respondents in these cases, and are alleged to have sold clients’ shares contrary to the clients’ margin lending agreements with Opes Prime. Rival litigation funders financed these cases, one on an opt-in basis and the other on an opt-out basis. In July 2009 the class actions against Opes Prime were both settled when the company’s creditors voted in support of a Scheme of Arrangement.

Unlike the Scheme of Arrangement that was ultimately agreed to, the Scheme that was originally considered proposed that legal costs, but not financing costs, be paid out of the settlement pool before any monies were distributed to class members. This would have disadvantaged class members who had signed with a commercial litigation funder because they would have had to bear all litigation funding costs, even though it was their action that made possible the settlement. The final agreement established a separate pool for the payment of litigation funding costs.

In addition to these cases, Slater and Gordon has indicated that it intends to file a class action against Bell Potter. The proposed claim is based on the allegation that Bell Potter engaged in false, misleading, and/or deceptive conduct when providing advice to investors who subsequently invested in Progen Pharmaceuticals.
Looking Forward

Securities class actions are an increasingly common feature of the Australian legal, corporate, and regulatory landscape. Compared to the US, however, the number of filings is relatively small, even when adjusted for the different sizes of the two economies. Nevertheless, with a number of recent common law developments having resolved many areas of uncertainty, it is likely that the rate of growth in filings evident since 2004 will continue into the future.

There remain several areas of uncertainty that the courts are yet to address, including the application of event studies to determine the extent of any price inflation in a security. When these issues are ultimately resolved, and depending on the position that the courts take, this may add further impetus to the growth in securities class actions.

Of perhaps more immediate relevance are the changes that are to be made in light of the Full Federal Court’s decision in *Brookfield Multiplex*. The government has indicated its intention to exempt class action funders from some requirements of the *Corporations Act* and to develop specific, new arrangements for conflict of interest management. Until these proposals for the regulation of commercially funded class actions are clarified and then put in place, the rate of filings could be significantly affected in the very near term. This scenario is supported by the fact that all cases expected to be filed in the short term would be financed by commercial litigation funders—see Table 4.

Until the government’s proposals for the regulation of commercially funded class actions are clarified and then put in place, the rate of filings could be significantly affected in the very near term.

Table 4. *Proposed Securities Class Actions*

<table>
<thead>
<tr>
<th>Company</th>
<th>Solicitor</th>
<th>Litigation Funder</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Babcock &amp; Brown Power</td>
<td>Slater &amp; Gordon</td>
<td>Wasserman, Comden &amp; Casselman LLP (USA) and Julian Hammond (New York Attorney)</td>
</tr>
<tr>
<td>2 GPT Group (Australia)</td>
<td>Slater &amp; Gordon</td>
<td>Comprehensive Legal Funding LLC</td>
</tr>
<tr>
<td>3 Transpacific Industries Group</td>
<td>Maurice Blackburn</td>
<td>IMF (Australia) Ltd.</td>
</tr>
</tbody>
</table>
NERA is widely recognised as a leading firm in the economics of securities, finance, and commerce. Our team draws on a global network of leading academics and industry experts to provide analysis, expert testimony, and practical insights in securities litigation. NERA experts have filed or given evidence in all three securities class actions for which trials at first instance have commenced in Australia since 2006. We have also been retained in many of those that have been filed during this same period. In addition, our experts have given evidence in many securities class actions in the US, Canada, and Japan. The scope of our work reflects the challenges faced by our diverse client base, which includes law firms, businesses, regulatory agencies, and governments.

Our experts assist clients in all stages of securities litigation, including pretrial discovery, fact analysis, development of economic and financial damage models, critique of damage reports by opposing experts, and preparation of well-documented reports, exhibits, and testimony. Our experts’ knowledge spans equity and commodity markets; government, corporate, and mortgage securities; bonds and currencies of global and emerging markets; and warrants, futures, forwards, swaps, options, and other derivatives.

NERA has been analysing trends in securities class actions for more than 15 years, and we continue to study litigation trends around the world. Two reports analysing US trends are published each year: one at mid-year and a second, annual review published at year end. In 2009, we released our first studies of class action trends in Japan and Canada. This is the first such study on securities class action trends in Australia.
Endnotes

1 The opinions expressed herein do not necessarily represent the views of NERA Economic Consulting or any other NERA consultant. Please do not cite without explicit permission from the authors.

2 Mr. Houston is a Director, Ms. Starykh is a Senior Consultant, and Ms. Dahl is an Analyst with NERA Economic Consulting, while Mr. Anderson is formerly of NERA Economic Consulting. The authors thank Dr. Marcia Kramer Mayer, Jennifer Fish, and Jake George for helpful contributions to earlier drafts of the paper. In addition, we thank Jordan Hauer, Victoria Mollard, Suzanne Pelley, Nicole Roman, Sarah Turner, and Carlos Soto. These individuals receive credit for improving this paper; all errors and omissions are ours.

3 Prior to the introduction of Part IVA, representative proceedings could only be undertaken based on rudimentary procedures existing in the court rules of most states. The introduction of Part IVA was intended to promote two objectives, specifically: (1) enhance access to justice; and (2) provide a mechanism through which groups of persons pursuing claims would be able to obtain redress more cheaply and efficiently than would otherwise be the case with individual actions. Dr. Vince Morabito, Corporate Accountability, Third Parties and Class Actions, Working Paper No. 3, 2006, pp. 3-10.

4 Both Part IVA of the FCA Act and Part 4A of the Supreme Court Act 1986 apply to all types of class actions and not just securities class actions.

5 For example, during the Second Reading of Part IVA, Peter Costello, then Shadow Attorney-General, stated that “this Bill is a step on the way to making Australia a more litigious society. It will encourage the proliferation of litigation in this country”. Commonwealth, Parliamentary Debates, House of Representatives, 26 November 1991, 3284-3285.

6 Within Australia, 6.7 million people—41% of the adult population—own shares either directly or indirectly. ASX, Australian Share Ownership Study, 2008 p. 34.


8 [1982] Ch 204.

9 [2004] FCA 190 (‘Johnstone’).

10 See Crosbie, in the matter of Media World Communications Ltd (Administrator Appointed) [2005] FCA 51.


13 In this case, the High Court upheld Justice Emmett’s decision that a shareholder’s claim for damages can be regarded as debt, within the meaning of s563A of the Corporations Act. Therefore, the shareholders claim is not based on any obligations incurred as a result of membership, which would be in contravention of s563A of the Corporations Act.


15 [2006] HCA 41 (‘Campbells Cash and Carry’).

16 In some jurisdictions lawyers are allowed to charge uplift fees for successful cases, although most states have introduced legislative caps that impose a maximum uplift of 25% of legal costs. Stuart Clarke and Christina Harris, “The push to reform class action procedure in Australia: evolution or revolution,” Melbourne University Law Review, Vol. 32 No. 3, December 2008.

17 Slater & Gordon, Shareholder Class Actions in Australia: Current state of play, p. 3.

18 [2002] FCAFC 243 at [160].


20 [2007] FCAFC 200 (‘Multiplex’).

21 Unsigned class members are those members who have not entered into an agreement with a commercial litigation funder. This is discussed in greater detail in Section 3.1.

22 [2009] FCAFC 147 (‘Brookfield Multiplex’).

23 Ibid at [104].

24 Commenced as National Mutual Life Association of Australia Ltd v. Reynolds, Federal Court of Australia, Matter QG 110 of 1993 (‘National Mutual’).

25 Commenced as King v. GIO Australia Holdings Ltd, Federal Court of Australia, Matter N 955 of 1999 (‘King’).

26 During this interval, class actions were still being filed under Part IVA, although these cases concerned toxic torts and product liability.

27 King was settled in August 2003 for A$112 million. Although National Mutual was filed before King, it was ultimately stayed in 2000 on the grounds that the proceedings had not been prosecuted with due diligence.
Data on filings come from multiple sources, including Risk Metrics Group/Securities Class Action Services (SCAS), Factiva, Bloomberg, ASIC, litigation funders, applicants' law firms, solicitors, and the press. In compiling our data, we seek information on all unique class actions alleging damages with regard to the purchase, ownership, or sale of securities. Until cases are consolidated, we report multiple filings if different cases are filed on behalf of investors in common stock and other securities. If cases are ultimately consolidated the data are adjusted—for example, in the Multiplex class action, the P Dawson Nominees Pty Limited action and Frederick Hart action were consolidated. We also report all class actions concerning listed and unlisted securities. However we do not report class actions in relation to financial advisors; these actions are detailed in Section 5.


Based on publicly available data from the International Monetary Fund, in 2008 Australian GDP was 7% of US GDP.

For example, the US litigation cost rules are more favourable to pursuing a securities class action because contingency fees are permitted and costs are not awarded against the loser.


In 1994, the ASX Listing Rules were given legislative backing when the statutory requirement for continuous disclosure was enacted. The continuous disclosure obligations are contained in Chapter 6CA of the Corporations Act 2001, including section 647(2); the requirement that listed disclosing entities are bound by the disclosure requirements in the market listing rules.

In 1998, new securities specific legislation was enacted prohibiting misleading and deceptive conduct. Misleading and deceptive conduct related to securities is prohibited under sections 670A, 728 and 1041H of the Corporations Act 2001, and section 12DA of the Australian Securities and Investments Commission Act 2001. These acts are framed in similar terms and prohibit persons from engaging in misleading or deceptive conduct in connection with a financial product or service. Any person who suffers loss or damages as a result of such conduct is entitled to recover the amount of loss or damages.

Most shareholder class action statements of claim have multiple allegations. We examine the distribution of all 55 allegations in the 29 cases filed in Australia from 1999 through 2009. To code allegations in cases for which we do not have a statement of claim, we reviewed judgements, media coverage, and related announcements by solicitors and litigation funders.

This analysis is based on the ‘Sector’ classification from the Global Industry Classification Standards. The Financials sector is comprised of the Diversified Financials, Insurance, and Real Estate industry groups, shown separately.


Civil Law (Wrongs) Act 2002 (ACT) s 221; Maintenance, Champerty and Barratry Abolition Act 1993 (NSW) 3, 4, 6; Criminal Law Consolidation Act 1935 (SA) Sch 11 ss1(3), 3; Wrongs Act 1958 (Vic) s32 and Crimes Act 1958 (Vic) s322A.


Ibid.

An insolvency practitioner’s power of sale permits it to contract for the funding of lawsuits if these are characterised as company property. Ibid.

Ibid.

Ibid.

Ibid.

Although the High Court’s decision confirmed the legality of commercial litigation funding, the arrangement had previously been used successfully in securities cases against Aristocrat, Sons of Gwalia, and Concept Sports Limited.


Commenced as Dorajay Pty Ltd v. Aristocrat Leisure Limited, Federal Court of Australia, Matter NSD 362 of 2004 (‘Dorajay’).


Unsigned class members are those who have not entered into an agreement with the commercial litigation funder.


[2007] FCA 1061.

Two representative proceedings were filed by Richard Kirby, one against Centro Retail Ltd and Centro MSC Manager Ltd and the other against Centro Properties Ltd and CPT Manager. These proceedings are being funded by IMF. The other proceeding was filed by Nicholas Vlachos against all four Centro companies and is being funded by CLF.

We understand that IMF was charging up to 40% of the net amount recovered, whilst CLF was charging between 15 and 30%. Slater & Gordon, the US Funder for Centro Class Action, April 2008.

Kirby v. Centro Properties Limited [2008] FCA 1505. The litigation committees were proposed to be formed for all actions, with the members being drawn from the respective class actions.

Michelle Mulder and Katherine Czoch, Australia: Class Action Hero?, February 2009.

Those schemes that do not require registration are detailed in Section 9 and Chapter 5 of the Corporations Act 2001.

Although this is not a particularly onerous requirement, in order to register with ASIC, entities running the managed investment schemes must be registered Australian public companies and hold an Australian Financial Services Licence, a requirement that IMF alone among the litigation funders currently satisfies. ASIC, www.asic.gov.au.

Brookfield Multiplex Limited v. International Litigation Funding Partners Pte Ltd [2009] FCAFC 147 at [108]. In asserting this position, the Court noted that the respondent is entitled to have confidence that the applicant’s solicitors are appropriately authorised and that the proceedings will not be disrupted or delayed in the future by ASIC or disgruntled group members.

ASIC grants transitional relief from regulation for funded class actions, November 2009.

Ibid.


Under the terms of Part IVA of the FCA Act, a case can only be settled or discontinued with the court’s approval. This provision is designed to ensure that the settlement or discontinuance is in the interests of the class and not just the representative applicant. A similar requirement is imposed in relation to Part 4A of the Supreme Court Act 1986 (VIC).

Although the same incentive applies to individuals, because commercial litigation funders and solicitors have significantly greater experience, they are more likely to be able to identify stronger or more profitable cases.


We are aware of one additional settlement post December 2009. Watson v. AWB Ltd., a high-profile case concerning payments by AWB to Iraqi entities in breach of UN sanctions, settled in February 2010 for AUD$39.5 million. Commenced as Watson v. AWB Ltd., Federal Court of Australia, Matter NSD 2020 of 2007.

Freehills, Class Action Update, August 2008.


ASIC, Steps taken by ASIC to recover funds for the benefit of Westpoint investors, January 2009.

Slater and Gordon have indicated that a series of claims could eventually be brought against the 75-100 financial planners that advised their clients to enter into the high risk investments. Slater & Gordon, www.slatergordon.com.au.


In April 2009 Slater and Gordon indicated that it intended to file a class action within the three weeks. However, since that time no further information has been available to indicate if the action was filed.

In the matter of Australian Securities & Investments Commission v. Fortescue Metals Group Ltd. [No 5], Gilmour J relied upon evidence in the form of event studies to determine the materiality of information, once disclosed, in interpreting the continuous disclosure obligations. However the courts have yet to rule on the role of event studies when determining the extent of any price inflation in a security.

**About NERA**

NERA Economic Consulting ([www.nera.com](http://www.nera.com)) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For half a century, NERA’s economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world’s leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

NERA’s clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world’s largest economic consultancies. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

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