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# Corporate Class Actions - A Primer

## **Abstract**

A class action, also known in Australia as ‘representative proceedings’ or a ‘representative action’, ‘provides a means by which, where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class.’ Class actions usually entail an aggregation of claims arising out of common circumstances, based on a common legal theory or theories, asserted by numerous plaintiffs against one or more defendants in a single action. In other words, instead of hundreds or potentially thousands of plaintiffs bringing separate claims against a defendant for a similar wrong (or perhaps not bringing claims, if the individual loss to each plaintiff is too small to merit the bother and expense of filing suit), in a class action those claims are all brought in a single suit.

## **Keywords**

Class actions, corporate class actions, class actions in Australia, representative actions

## **Disciplines**

Law

# CORPORATE CLASS ACTIONS – A PRIMER

Victoria Schnure Baumfield\*

Class actions are a method of redressing corporate wrongs. They are becoming more common, as the differences between the Australian and United States class action regimes fall away. Understanding the dynamics behind class actions in Australia will help companies avoid being the next target.

## WHAT IS A 'CLASS ACTION'?

A class action, also known in Australia as 'representative proceedings' or a 'representative action',<sup>1</sup> 'provides a means by which, where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class.'<sup>2</sup> Class actions usually entail an aggregation of claims arising out of common circumstances, based on a common legal theory or theories, asserted by numerous plaintiffs against one or more defendants in a single action. In other words, instead of hundreds or potentially thousands of plaintiffs bringing separate claims against a defendant for a similar wrong (or perhaps *not* bringing claims, if the individual loss to each plaintiff is too small to merit the bother and expense of filing suit), in a class action those claims are all brought in a single suit.

A key feature of class actions is that not only the named plaintiffs are bound by the action. The suit is brought by 'representative' plaintiffs';<sup>3</sup> however, the

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<sup>1</sup> See Peter Cashman, *Class Action Law and Practice* (The Federation Press, 2007) 4-7 for a discussion of the precise distinctions between these competing terms. Following Cashman at 4, when discussing Australian actions I will refer to the sort of proceedings authorized by Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ('*Federal Court Act*') and Part 4A of the *Supreme Court Act 1986* (Vic) ('*Victorian Act*') as 'class actions', as opposed to the representative actions allowed by the procedural rules of various Australian State, Territory and federal courts. With respect to the United States, 'class action' refers to the procedures referred to by that name in the federal and various state rules of civil procedure.

<sup>2</sup> *Black's Law Dictionary* (West, Abridged 6<sup>th</sup> ed, 1991) 171 (definition of 'class or representative action').

<sup>3</sup> See *Federal Court Act* s 33C; *FRCP* 23(a); see also Cashman, above n 2, 7.

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legislation provides that all persons holding similar claims are bound by the outcome of the action except to the extent that they opt out of the case.<sup>4</sup> This group constitutes the 'class'. The class often encompasses thousands of people, although in Australia the number could be as few as 7.<sup>5</sup> While the Australian class action rules were modeled on the American opt-out model, in practice, the rise of commercial litigation funders as a means of funding Australian class actions (see 'Funding of Class Actions', below) has led to a growing number of cases proceeding on an opt-in basis where the class is limited to members who have agreed to pay the litigation funder.

In both Australia and the United States, a class action will not stand unless there is a common issue of law or fact.<sup>6</sup> Do not underestimate this requirement. Because of it, not every case that might appear at first blush to merit class action treatment will in fact be so eligible. For example, it appears that the cases arising out of the recent Storm Financial collapse will be brought as separate cases, not as a class action, even though the plaintiffs' lawyers state that they anticipate the separate cases being tried in one hearing, because of the different circumstances surrounding each plaintiff's claim.<sup>7</sup>

### WHY BRING CLASS ACTIONS?

There are several reasons why the law allows and plaintiffs pursue class actions, including: economies of scale, profit-seeking plaintiffs' lawyers, and efficiency.

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<sup>4</sup> *Federal Court Act* ss 33H (application commencing representative proceedings must describe the group members to whom the proceeding relates but need not name or specify the number of group members); 33J (right of group members to opt out); and 33ZB (a judgment in a representative proceeding binds all group members who have not opted out); *FRCP* 23(a) (case may only proceed as class action where class is so numerous that joinder of all class members is impracticable) and 23(c)(2)(B) (the court will exclude from the class any member who requests exclusion; a class judgment will be binding on all other class members).

<sup>5</sup> *Federal Court Act* s 33C.

<sup>6</sup> See *Federal Court Act* s 33C(1)(c) (requiring that the claims of the class 'give rise to a substantial common issue of law or fact'); *Federal Rule of Civil Procedure* ('*FRCP*') 23(a)(2) (US) (requiring that 'there are questions of law or fact common to the class').

<sup>7</sup> See, eg, John Wilkinson, 'Storm Financial legal action takes shape' (21 May 2009) *Money Management* <<http://www.moneymanagement.com.au/article/Storm-Financial-legal-action-takes-shape/482213.aspx>> at 25 July 25 2009; Anthony Marx, 'Lawyers Slater & Gordon seek damages from Storm Financial' (14 January 2009) *The Courier-Mail* <<http://www.news.com.au/couriermail/story/0,23739,24908814-3122,00.html>> at 25 July 25 2009.

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### *Economies of scale*

First, a lawsuit that would not be worth the time and expense to either the plaintiff or the plaintiff's lawyer if brought on behalf of a single plaintiff may be worthwhile if brought on behalf of a large number of plaintiffs. For example, imagine a case where a credit card company was accused of improperly charging late fees to any customer who paid his or her bill after 10 am on the due date.<sup>8</sup> An individual cardholder's loss might be fairly small, say \$29 for one improperly charged late fee or perhaps a few hundred dollars if the cardholder often paid at the last minute. Few individual cardholders would bother suing over such a small sum – indeed, it is hard to imagine any lawyer agreeing to take this suit – but, when multiplied over the tens of thousands (if not more) of consumers who would have a valid claim, the potential damages become large enough for the case to make sense, at least from the lawyers' perspective.<sup>9</sup>

### *Profit-seeking plaintiffs' lawyers*

This leads to the second reason why people bring class actions: class action lawyers. Most class actions tend to be brought by a fairly small number of lawyers and law firms that specialize in class actions. In the United States, these lawyers are known as the 'plaintiffs' bar' or 'plaintiffs' lawyers'. Well-known plaintiffs' firms in Australia include Slater & Gordon and Maurice Blackburn Lawyers.

Class action cases can attract huge fees. Representing the extreme, in the massive class action arising out of the Enron fraud that was uncovered in late 2001, the plaintiffs' lawyers received attorneys' fees of 9.52%, totaling US\$688 million, from a combined settlement fund of US\$7,227,000,000 (comprising settlement amounts contributed by a number of bank, law firm, and other defendants).<sup>10</sup> These are fees just with respect to the defendants who settled. More fees could be forthcoming if the plaintiffs were to win at trial against non-settling defendants! The Enron settlement was the largest recovery ever in a class action,<sup>11</sup> and the

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<sup>8</sup> This was the basis of a lawsuit brought against a US credit card company several years ago. See *Schwartz v Citibank (South Dakota) NA*, 50 Fed 2 Appx 832, 836 (9<sup>th</sup> Cir 2002).

<sup>9</sup> Illustrating one of the largest criticisms of class actions, after Citibank paid \$18 million into a compensation fund to settle the claims against it in the *Schwartz* case, cardholders began complaining that they had received payments of less than \$1 from the fund, while the plaintiffs' lawyers received more than \$7 million in legal fees. See, eg, <<http://overlawyered.com/letters/archives/000607.html>> at 25 July 25 2009.

<sup>10</sup> *In Re Enron Corp Securities, Derivative & 'ERISA' Litigation*, 586 F Supp 2d 732, 741 (SD Tex 8 Sept 2008).

<sup>11</sup> *Ibid* 741, n 3.

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attorneys' fee award, though on the lower end in percentage terms,<sup>12</sup> likely is one of the largest ever granted in dollar terms. While the massive size of the attorneys' fee award should not be viewed as typical, even keeping in mind that it compensated a huge team of plaintiffs' lawyers for seven years of unpaid work, the basis for the fee award – ie, a fee agreement that provided for payment based on a settlement of the case, not just a win at trial – is typical in class actions, even in Australia, which does not provide for the sort of contingency fee typically charged in American class actions.<sup>13</sup>

Accordingly, entrepreneurial plaintiffs' lawyers are constantly on the lookout for potential cases. While this might entail aggrieved individuals contacting the lawyer, in other cases class action lawyers themselves come up with the idea for a lawsuit based on items in the news or through their own research and then seek out plaintiffs to appear in the already-conceived case.<sup>14</sup> Lawyers even advertise for plaintiffs in newspapers and elsewhere. Advertisements requesting plaintiffs for contemplated class actions are increasingly posted on the internet. For example, the Maurice Blackburn website as at 8 August 2009 was advertising for plaintiffs for potential shareholder class actions against National Australia Bank and OZ Minerals.<sup>15</sup>

In determining whether to pursue a class action, lawyers also, of course, consider the ease of proving the potential case. In Australia we have seen that class actions often follow from regulatory investigations by entities such as the Australian Securities and Investments Commission ('ASIC') and Australian Competition & Consumer Commission ('ACCC') that have uncovered evidence of wrongdoing. Such cases are attractive because the plaintiffs' lawyers can piggyback off the regulators' work by demanding the transcripts of interviews and other documents received and generated during the regulatory investigation.<sup>16</sup> For

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<sup>12</sup> Ibid 746, n 12.

<sup>13</sup> See 'How Are Class Actions Paid For?', and the Aristocrat Leisure case study, below.

<sup>14</sup> See *Kirby v Centro Properties Ltd* [2008] FCA 1505, [4] (Finkelstein J) (discussing the 'relatively new phenomenon in Australia' of 'lawyer-driven litigation' where 'the lawyer investigates the potential for a claim and recruits the plaintiff and often the group on whose behalf a class action is initiated').

<sup>15</sup> See <[http://mauriceblackburn.com.au/areas/class\\_actions/index.aspx](http://mauriceblackburn.com.au/areas/class_actions/index.aspx)> at 8 August 2009; see also District of Columbia Bar, Ethics Opinion 302 <[http://www.dcbbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion302.cfm](http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion302.cfm)> at 25 July 2009 (opining that Washington, DC lawyers may use internet-based web pages to seek plaintiffs for class action lawsuits provided that they comply with all applicable DC Rules of Professional Conduct).

<sup>16</sup> See, eg, *ASIC Act* s 25; Alex Cuthbertson, 'Storm clouds gather for listed companies' (31 March 2009) *Lawyers Weekly*

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example, in the Amcor/Visy cartel class action, the plaintiffs' lawyers, Maurice Blackburn, received document discovery from both the defendants and the ACCC.<sup>17</sup> Maurice Blackburn's discussion of the case on its website makes clear the crucial role in the ongoing class action of information developed by the ACCC in its investigation and prosecution of the participants in the corrugated fibreboard packaging cartel.<sup>18</sup>

All in all, interest by the plaintiffs' lawyers is the crucial factor that results in a person with a \$29 claim ending up as a plaintiff in a lawsuit. The putative plaintiff does not necessarily have much to gain from bringing the case, but the class action lawyer does: the chance to receive fees in the seven figures or more. And these fees, as illustrated in the discussion of the Enron class action settlement above, are not dependent on a case being litigated all the way to a successful jury verdict. Attorneys' fees are normally payable upon settlement of the matter (which is common in class actions), not just upon a win at trial.<sup>19</sup> So the class action lawyer who believes that he or she has identified a potentially lucrative case will be the driving force in rounding up plaintiffs and getting it filed.

### *Efficiency*

Class actions also have the virtue of being efficient, since the central core of common facts need only be proved once, not over and over again in multiple lawsuits. On the other hand, where efficiency suggests that it would be appropriate, even separate cases that are not class actions can be tried simultaneously (as appears to be contemplated in the Storm Financial cases). And it is likely that most lawyers and clients feel no personal obligation to ensure the overall efficiency of the system in any event. The courts and, more diffusely, society do have an interest in ensuring the efficiency of the system where appropriate, though, which helps explain why class actions are allowed at all.

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<<http://www.lawyersweekly.com.au/blogs/opinion/archive/2009/03/31/storm-clouds-gather-for-listed-companies.aspx>> at 8 August 2009.

<sup>17</sup> 'Pratt prosecution could help Visy/Amcor class action' (18 August 2008) *Smart Company* <<http://www.smartcompany.com.au/information-technology/pratt-prosecution-could-help-visy-amcor-class-action.html>> at 8 August 2009.

<sup>18</sup> See 'Amcor/Visy Class Action' *Maurice Blackburn Lawyers* <[http://www.mauriceblackburn.com.au/areas/class\\_actions/current/amcor.asp](http://www.mauriceblackburn.com.au/areas/class_actions/current/amcor.asp)> at 8 August 2009.

<sup>19</sup> See, eg, *In Re Enron Corp Securities, Derivative & 'ERISA' Litigation*, 586 F Supp 2d 732 (SD Tex 8 Sept 2008) (awarding attorneys' fees upon settlement of class action); see also case studies of Australian class actions below.

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### HOW ARE CLASS ACTIONS PAID FOR?

#### *United States*

In the United States, class action lawsuits are typically paid for on a contingency fee basis. A typical arrangement sees the lawyers taking an agreed percentage (eg, 30%) of the judgment or settlement amount, subject to court approval, if the plaintiffs win at trial or come to a settlement with the defendants, and earning nothing if the case fails. In a large case, therefore, the lawyers may earn tens of millions of dollars or more, creating obvious incentives for plaintiffs' lawyers to discover and pursue class actions where there is a feasible chance of success.

Detractors would say that plaintiffs' lawyers have incentives to pursue even unmeritorious class actions, since the mere risk of a large adverse judgment can be enough to induce (the cynical would say 'shake down') a risk-averse corporation to pay a few million dollars – less than the cost of defending a major class action – in settlement to make the suit go away. On the other hand, properly structured contingency fee arrangements can give class action lawyers the incentive to reach the best deal possible for the plaintiff class. For example, in the Enron class action, Judge Melinda Harmon approved a carefully structured fee agreement negotiated by the in-house lawyers of the lead plaintiff, the Regents of the University of California, and its class action counsel. The agreement gave the plaintiffs' lawyers motivation to seek the largest recovery possible since the lawyers' percentage take went *up* the more the lawyers received, not *down*, as is apparently typical in cases with such a large potential recovery.<sup>20</sup>

From the perspective of the named plaintiffs, there is usually little incentive against filing suit. Under the contingency fee arrangements, the 'client' (who in class actions often has little to do the lawyers' management of the case, unlike in the traditional lawyer-client relationship) pays no legal fees unless there is some sort of recovery. Furthermore, there is no general 'loser pays' rule in the United States, unlike in Australia, further removing any disincentive on the part of the class action plaintiff to bring suit. A typical class action plaintiff has nothing to lose except for the time devoted to giving a deposition during the discovery phase of the case and perhaps testifying at trial, if the case makes it that far.

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<sup>20</sup> *In Re Enron Corp Securities, Derivative & 'ERISA' Litigation*, 586 F Supp 2d 732, 741, n 4 (SD Tex 8 Sept 2008).



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### *Australia*

Australia, in contrast, forbids contingency fees.<sup>21</sup> This means that Australian class action lawyers cannot charge fees based on a percentage of the recovery, although Australian lawyers can and do charge on a 'no win-no fee' basis.<sup>22</sup> Australia also follows the 'loser pays' rule. The convergence of these factors effectively discouraged the common use of class actions until recently, when mechanisms were developed to transfer the risk of a losing action from the plaintiffs to other parties better able to bear the risk of loss.

A number of companies providing litigation funding services have entered the Australian market, including IMF (Australia) Ltd, International Litigation Funding Partners, Inc, and Commonwealth Legal Funding LLC. The typical arrangement involves the litigation funder agreeing with the potential litigants to bear the cost if the class action fails, in exchange for a share of the proceeds if the action is successful.<sup>23</sup> The emergence of litigation funders, along with no win-no fee arrangements, removed the risk of loss that had provided a disincentive to Australian plaintiffs. Class actions became more common, despite uncertainty over whether the use of litigation funders violated old prohibitions on champerty and maintenance, which rules were designed to prevent a party with no legitimate interest in a lawsuit from encouraging and profiting out of litigation. In 2006, even that uncertainty was effectively removed when the High Court held in the *Fostif* decision that litigation funding was neither an abuse of process nor contrary to public policy, at least in the jurisdictions that had abolished the crimes and torts of champerty and maintenance (the ACT, New South Wales, and Victoria had done so).<sup>24</sup> Accordingly, we can anticipate class actions becoming even more common in Australia in the years to come.

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<sup>21</sup> For now. See Alex Boxsell and James Eysers, 'Class-action fees spur spirited debate' (17 July 2009) *The Australian Financial Review* 42. Australia might eventually follow the UK in moving to allow contingency fees in certain circumstances.

<sup>22</sup> Slater and Gordon has apparently trademarked the 'No Win-No Fee' slogan. See <[http://www.slatergordon.com.au/pages/no\\_win\\_no\\_fee.aspx](http://www.slatergordon.com.au/pages/no_win_no_fee.aspx)> at 26 July 2009.

<sup>23</sup> See Standing Committee of Attorneys-General, *Litigation Funding in Australia*, Discussion Paper (May 2006) 4 <[http://www.lawlink.nsw.gov.au/lawlink/legislation\\_policy/ll\\_lpd.nsf/pages/lp\\_dp](http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/pages/lp_dp)> at 26 July 2009.

<sup>24</sup> *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* [2006] HCA 41. For a useful discussion, see S Clark and M Legg, 'Fostif Case – The continued rise of litigation funding' (2006) *Company Director* <<http://www.companydirectors.com.au/Media/Company+Director/2006/October/Fostif+Case.htm>> at 26 July 2009.

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### THE GROWING SIGNIFICANCE OF CLASS ACTIONS IN AUSTRALIA

Class actions have been a significant part of the legal landscape in the United States for several decades now.<sup>25</sup> In Australia, they have been appearing more frequently over the past decade, particularly since the 2006 *Fostif* decision, in which the High Court upheld the legality of the mechanisms by which these lawsuits are being funded.<sup>26</sup> Other jurisdictions are also starting to open up to class actions. For example, in recent years France has been investigating the adoption of rules allowing class actions.<sup>27</sup>

#### *Grounds for class actions in the United States*

In the United States, class actions in recent years have been filed against corporations and, in certain instances, their senior management (who may be named as individual defendants) based on allegations as varied as: violations of various laws in connection with financial institutions' subprime lending practices (resulting in both consumer and shareholder class actions);

- violations of federal securities laws in the offering of securities to the public (shareholder class actions);
- violations of state corporate laws (shareholder class actions);
- federal antitrust (competition) law violations, eg, price-fixing (consumer class actions);
- mass torts;
- product liability;
- other consumer complaints, eg, for inflated fees in connection with mobile phone contracts; and
- others.<sup>28</sup>

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<sup>25</sup> Ibid 654 (noting that changes to the US *Federal Rules of Civil Procedure* in 1966 that made it easier to claim for damages in class actions rather than simply declaratory relief led to the increased popularity of class actions in the United States).

<sup>26</sup> (2006) 229 CLR 386. See 'How are class actions paid for?', above.

<sup>27</sup> See, eg, Siobhan Morrissey, 'Vive les Class Actions' (September 2005) *ABA Journal* <[http://www.abajournal.com/magazine/vive\\_les\\_class\\_actions/](http://www.abajournal.com/magazine/vive_les_class_actions/)> at 25 July 2009.

<sup>28</sup> See, eg, Stanford Law School Securities Class Action Clearinghouse website <<http://securities.stanford.edu>> at 5 August 2009; Davis Polk and Wardwell description of recent class action litigation matters <<http://www.davispolk.com/practices/litigation/securities-class-actions-and-enforcement/>> at 22 June 2009 (illustrating here and in the related links that the US law firm of Davis Polk and Wardwell LLP is or has recently taken part in class actions in all of these practice areas);

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### *Grounds for class actions in Australia*

In Australia, typical bases for corporate class actions other than product liability class actions include:

- the prohibition against misleading and deceptive conduct in trade or commerce found in s 52 of the *Trade Practices Act 1974* (Cth) ('*Trade Practices Act*');
- the prohibition against misleading and deceptive conduct in relation to financial services found in s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*');
- the prohibition against misleading and deceptive conduct in relation to a financial product (including securities) or a financial service that is found in s 1041H of the *Corporations Act 2001* (Cth) ('*Corporations Act*');
- the prohibition against misleading and deceptive information in prospectuses (including omissions) found in s 728 of the *Corporations Act*; and
- the continuous disclosure regime applicable to listed companies under ASX Listing Rule 3.1, which has been codified into law applicable to listed companies by *Corporations Act* s 674.<sup>29</sup>

These bases particularly reflect the increasing significance of shareholder class actions in Australia in recent years, although they also can form the basis for consumer class actions in some instances (particularly s 52 of the *Trade Practices Act*). In addition, class actions have been brought alleging price fixing and market rigging cartels, as well as mass torts such as widescale food poisoning episodes.<sup>30</sup>

The following case study illustrates how recent class actions have proceeded in Australia:

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Skadden, Arps website

<<http://www.skadden.com/Index.cfm?contentID=47&practiceID=103&focusID=1>> at 22 June 22, 2009 (same, with regard to the US law firm of Skadden, Arps, Slate, Meagher & Flom LLP).

<sup>29</sup> See Ashley Black and Kathleen Harris, 'Corporate Class Actions in Australia', *Mallesons Stephen Jaques* <<http://www.mallesons.com/publications/2006/Jun/8472865W.htm>> at 26 July 2009.

<sup>30</sup> 'Class Actions & Major Projects', *Maurice Blackburn* <[http://www.mauriceblackburn.com.au/areas/class\\_actions/index.aspx](http://www.mauriceblackburn.com.au/areas/class_actions/index.aspx)> at 6 August 2009.

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### *Aristocrat Leisure shareholder class action*

In 2008 Aristocrat Leisure Ltd ('Aristocrat') settled a shareholder class action based on the claim that it had breached its continuous disclosure obligations.<sup>31</sup> Aristocrat had engaged in aggressive accounting tactics, specifically, the premature booking of revenue relating to the sale of gaming machines in South America. Improper revenue recognition is a common cause of earnings misstatements leading to class actions.<sup>32</sup> In Aristocrat's case, the premature booking of the sales contracts – already a breach of Australian accounting standards – became problematic when the customers claimed problems with the machines and the contracts fell through. The prematurely booked profit numbers did not come to fruition, rendering Aristocrat's 2001 and 2002 profit forecasts incorrect. In 2003, when Aristocrat issued two profit downgrades and the correct information came to light, Aristocrat's share price lost 75% of its value.<sup>33</sup>

In November 2003, a shareholder class action, *Dorajay Pty Ltd v Aristocrat Leisure Ltd*, was filed in the New South Wales Federal Court under Part IVA of the *Federal Court Act*. The suit claimed that Aristocrat had breached its continuous disclosure obligations under the ASX listing rules and s 674 of the *Corporations Act*, or its obligations not to engage in misleading and deceptive conduct under s 52 of the *Trade Practices Act* and the equivalent provisions of the *Corporations Act* and *ASIC Act*.<sup>34</sup> The case went to trial in October 2007, but the judge reserved her decision, and it became clear that the decision would not be released unless settlement negotiations that had started between the parties broke down.<sup>35</sup>

As Aristocrat had admitted that it had overstated its financial results,<sup>36</sup> the key issue was damages. The United States allows a legal principle in shareholder

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<sup>31</sup> Vincent Morello, 'Aristocrat pays \$144.5 million in class action' (1 September 2008) *CCH Australia* <<http://www.cch.com.au/au/ContactUs/Print.aspx?ID=27207>> at 1 September 2008; Matthew Drummond, 'Aristocrat to settle class action' (7 May 2008) *The Australian Financial Review* 1; Matthew Drummond, 'Aristocrat to cough up jackpot' (8 May 2008) *The Australian Financial Review* 20.

<sup>32</sup> See Stanford Securities Class Action Clearinghouse website, above n 51, at 5 August 2009 (indicating on its home page that, since the passage of the *Private Securities Litigation Reform Act of 1995*, 'a larger percentage of litigation activity centers on allegations of accounting fraud, with revenue recognition issues emerging as particularly significant causes of litigation').

<sup>33</sup> Matthew Drummond, 'Aristocrat to settle class action' (7 May 2008) *The Australian Financial Review* 1, 64.

<sup>34</sup> *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2008] FCA 1311, [1].

<sup>35</sup> Drummond, above n 33.

<sup>36</sup> *Ibid.*

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class actions called the ‘fraud on the market’ theory, which posits that the market as a whole relied on the incorrect information and that, accordingly, shareholders who bought during the time period when the information available to the market was incorrect were automatically damaged by buying the shares at an inflated price. The fraud on the market theory therefore eliminates the need to prove individual reliance on the misleading information in securities class actions. The fraud on the market theory has never been accepted by an Australian court,<sup>37</sup> but some courts have hinted that it does not conflict with Australian legal principles,<sup>38</sup> and the plaintiffs were raising it here. Otherwise, each class member would have to individually prove reliance on Aristocrat’s incorrect information. Rather than find out whether the Court would be the first to accept the fraud on the market theory in lieu of requiring proof of individual reliance on the misleading data by the plaintiffs, the parties settled the *Dorajay* matter in May 2008 for \$144 million, apparently the largest class action settlement in Australia to date.<sup>39</sup>

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<sup>37</sup> *Johnston v McGrath* [2007] NSWCA 231, [37] – [38].

<sup>38</sup> *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061, [11] (noting that ‘[i]t may also be argued that there is a rebuttable presumption of reliance (if it necessary to establish reliance) on the existence of an open and efficient market for Multiplex securities. In the United States this is referred to as the fraud-on-the-market theory. In *Basic Inc v Levinson*, 483 US 224 (1988) the Supreme Court of the United States held that securities class action plaintiffs are entitled to a presumption of reliance that the market for the securities in question was efficient and that the plaintiffs traded in reliance on the integrity of the market price for those securities. The fraud-on-the-market presumption is rebuttable. The defendant bears the burden of establishing that the presumption should not apply . . .’).

<sup>39</sup> Morello, above n 31; ‘Aristocrat Leisure Limited Class Action’ (2008) *Maurice Blackburn* <[http://www.mauriceblackburn.com.au/areas/class\\_actions/current/aristocrat.asp](http://www.mauriceblackburn.com.au/areas/class_actions/current/aristocrat.asp)> at 6 August 2009.