CLASS ACTION SERIES

Part 1 - Class actions damages: The big picture

Not only are the legal and quantum issues in shareholder class actions complex, but there are yet to be any definitive judgements in Australia on many of the key issues that continue to rapidly evolve. Every new matter raises a new set of challenges.

You're probably wondering why this is so hard given it's a well-trodden path elsewhere.

Australians may be surprised to hear that, while shareholder class actions have been common in the United States for many years, there still remains a dearth of judgments dealing with the details of damages. Although the high-level principles of assessing loss seem at first glance to be straight-forward, the devil is in the detail. And most securities class actions filed in the United States settle long before judges turn their minds to the details of assessing the loss suffered by each shareholder.

You're probably wondering why this is so hard given it's a well-trodden path elsewhere. Australians may be surprised to hear that, while shareholder class actions have been common in the United States for many years, there still remains a dearth of judgments dealing with the details of damages. Although the high-level principles of assessing loss seem at first glance to be straight-forward, the devil is in the detail. And most securities class actions filed in the United States settle long before judges turn their minds to the details of assessing the loss suffered by each shareholder.

Furthermore, the deeper we go in comparing notes with FTI Consulting's American experts, the more we realise that the "rules" applied in the United States don't necessarily apply here in Australia. For example, in Part 2 of this series we explore the "Dura Principles" (as we will refer to them), and how (and why) they changed the earlier methodologies in the Unites States. We uncovered some fundamental differences in the evolution of shareholder damages methodologies in Australia compared with elsewhere. That deeper understanding leads us to consider whether the Dura Principles would apply in Australia and whether other options might be available - or even required.

Why do damages methodologies cause so much debate?

It's partly because we don't yet have a precedent setting out a common language with which to communicate. The discussion typically relies on terms that are not precise, undefined or commonly misunderstood by both lawyers and experts. For example, terms such as "true value" and "fundamental value" are commonly used by lawyers instructing experts but are not explicitly defined in the law or in valuation standards. What is an event study and importantly what is it not? What are LIFO and FIFO, and why does it matter? We'll explore that further in Part 3 of our series on 'demystifying damages'.

Even if we could adopt the same methodologies as those employed in the United States, and have a common understanding of the damages principles, there are still additional issues unique to the Australian landscape that don't seem to have.

been dealt with elsewhere. Adding the effect of litigation funding arrangements and multiple competing class actions to the mix significantly increases the degree of difficulty. We understand that it's tempting for lawyers to leave these issues to be dealt with by their experts behind the scenes, down in the depths of complex financial modelling scenarios. Part 4 of our series tackles what lawyers need to know about the impact of those uniquely Australian challenges on damages calculations.

Involvement in many shareholder class action matters over the last few years has also confirmed what we already knew… it takes a diverse set of skills to truly surround the issues. Whilst there are some issues that can be equally dealt with by either forensic accountants, business valuers or economists, as soon as the degree of difficulty increases, a greater depth - and a combination - of specialised expertise is required. Do you need so many experts, and who does what? Stay tuned for Part 5, our expert Q&A.

Dawna Wright
Senior Managing Director
+61 3 9604 0604
dawna.wright@fticonsulting.com