

# CLASS ACTION FUNDAMENTALS

Date: **Thursday 3<sup>rd</sup> November 2011**

Presenter: **Kathleen Harris, Executive Counsel, DRI**

# Outline of Presentation

---

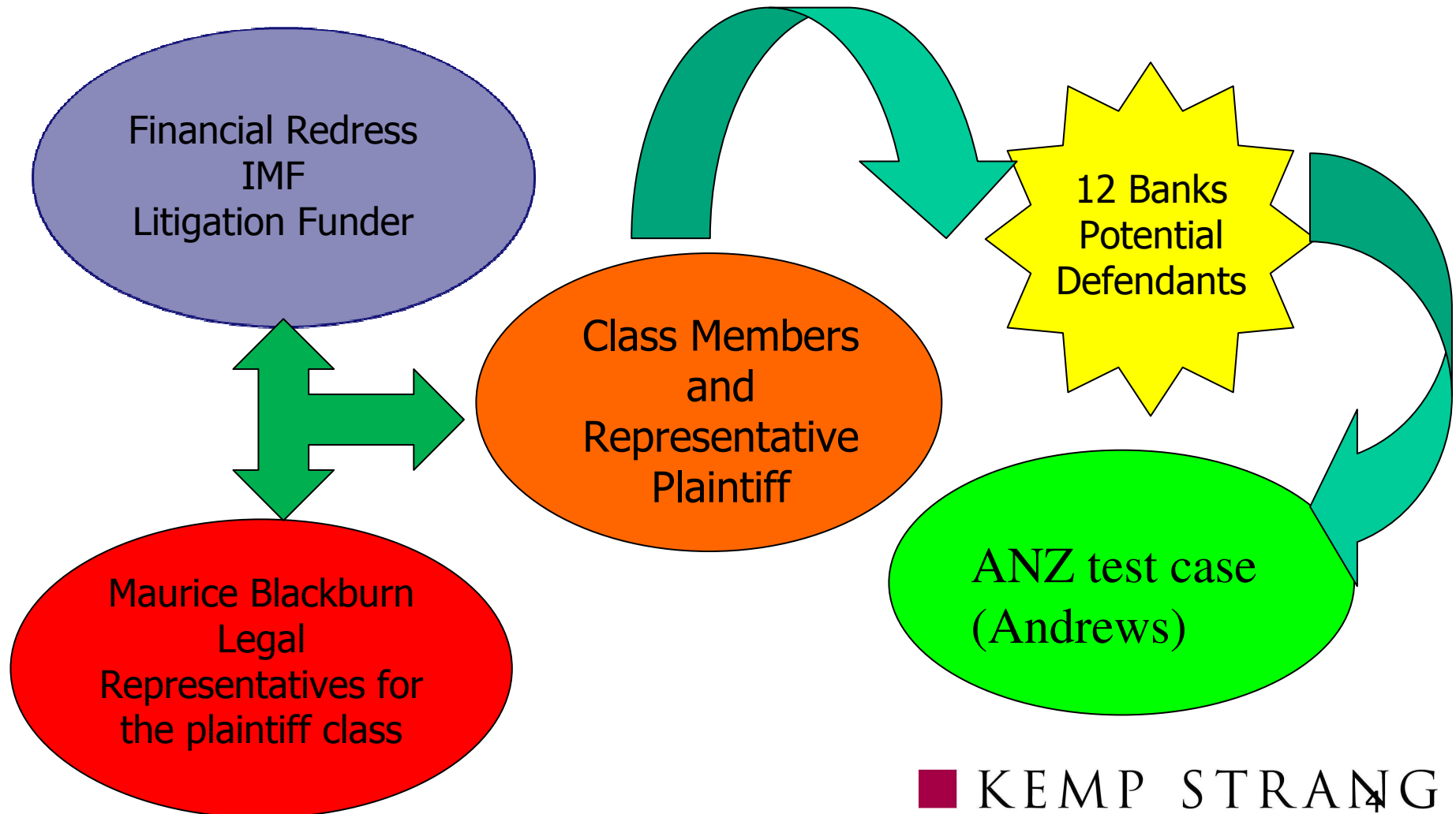
- What are class actions?
- Overview of exception fees class action
- Recent developments
- Impact on clients

# What is a class action?

---

- Part of the legal landscape since 1992
  - Allows small claims to be aggregated
  - Aim is access to justice and efficiency
  - Federal Court (1992), Victoria (2000), NSW (2011)
- Uptake increased in last 5-6 years
  - Coat-tails economic actions (shareholder, antitrust, financial services)
  - 14 per year average
- US trends used as guide
  - Australia more plaintiff friendly

# Exception Fees Class Action

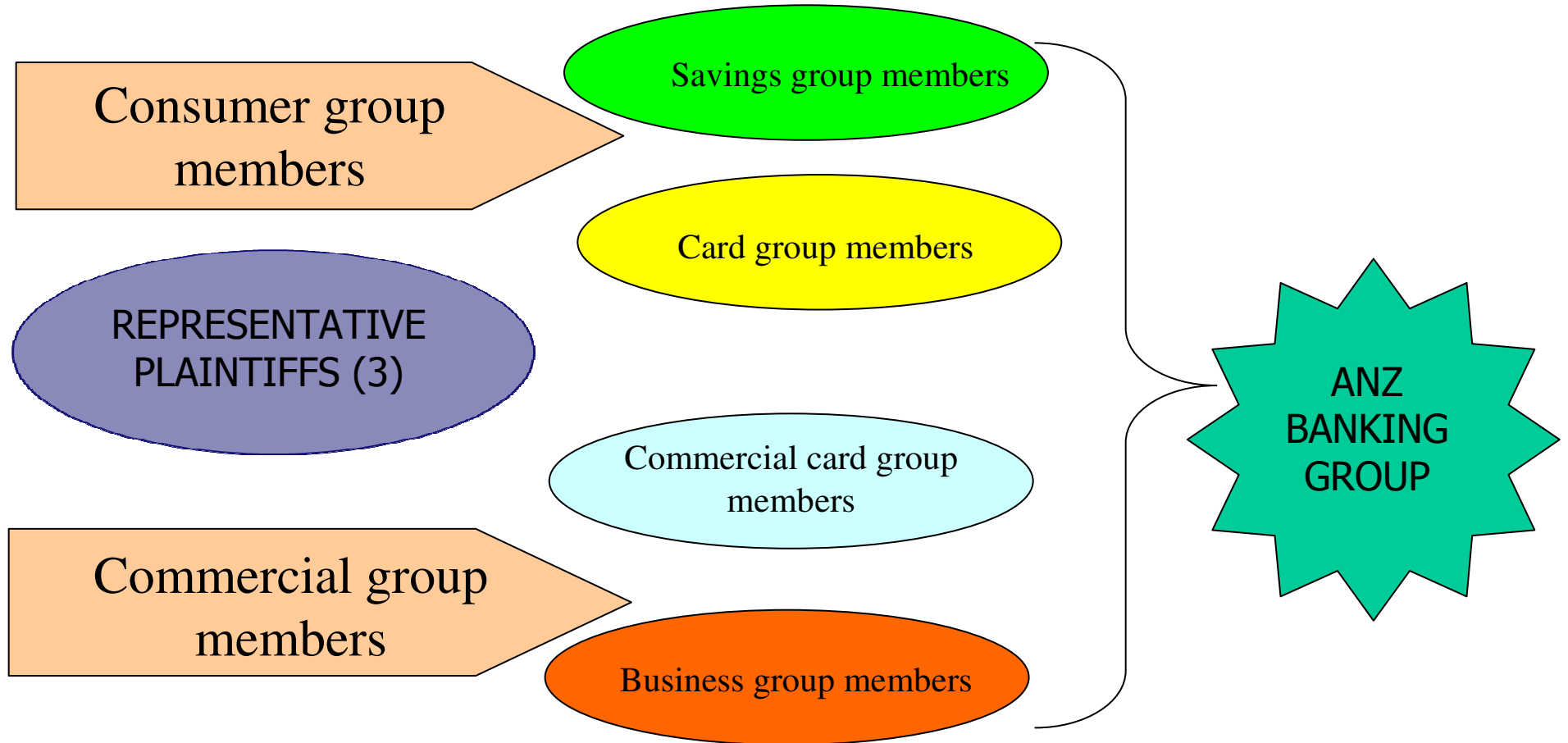


# Requirements for a class action

- At least 7 persons have claims against the same person or persons
  - 24/8/10: 200,000 account holders have signed funding agreements
- Must describe or identify group members to the degree a person can determine if they are a member of the group
  - Sometime in or after May 2004
    - was a customer of ANZ and
    - held and operated banking facilities with ANZ and
    - were charged an exception fee and
    - signed up with IMF
- All class members must have claims against at least one defendant (separate actions)

- Note change in NSW: (sec. 158(2) CPA (NSW))

# ANZ – CLASS MEMBERSHIP



# Requirements for a class action

---

- Claims of class must arise out of the **same, similar or related circumstances** and give rise to at least **one substantial common issue of law and fact**
- Primary claims are based on prohibition on charging of a penalty if a contract is breached
  - Exception fees include honour and dishonour fees, over limit fees, fees for late payment on bank accounts and credit cards
  - IMF say \$7 billion in exception fees charged over last 6 years by all potential defendants.

# Primary allegation - Penalty

---

Contract

- Bank and Customer have contract for bank account or credit card

Breach

- Customer breaches contract by overdrawing or exceeding limit

Penalty

- Bank changes fee which is a penalty not a genuine pre estimate of damage



# Legal basis for fee challenges

<b>Concept</b>	<b>Source</b>	<b>Basis</b>
<b>Doctrine of penalties</b>	<b>Common law</b>	<b>Contract breach + fee out of all proportion = penalty</b>
<b>Unconscionable conduct</b>	<b>ASIC Act, common law</b>	<b>Consider bargaining position of parties, legitimate interests of credit provider</b>
<b>Unfair contract terms</b>	<b>ASIC Act, Fair Trading Act (Vic)</b>	<b>Significant imbalance + not reasonably necessary to protect legitimate interests + would cause detriment = unfair</b>
<b>Unjust transactions Unconscionable establishment or early termination fees</b>	<b>National Credit Code Consumer Credit Code (Vic)</b>	<b>Must not exceed – • reasonable costs (establishment) • reasonable estimate of loss (early termination)</b>

# Open classes

- Open classes include everyone meeting the description.  
Example:
  - All persons resident in Australia who had a cheque account with the ANZ during the period 1 September 2004 to 1 September 2010 and whose account was debited for an honour or dishonour fee and/or a fee for late payment and/or an over limit fee
- Notice will be given to class members and those not wishing to participate can opt out
- Important because judgment on or settlement of claims will extinguish all class members' rights

# Closed Classes

- Limits the class to those who have signed a retainer agreement with the litigation funder prior to the class action commencing.
- Prevents “free riding”
- *Multiplex* allowed + new sec 166(2) CPA (NSW)
- Unlikely to see open classes
- Only extinguishes claims of claimants who have signed a retainer agreement - leaves way open for additional claims
  - Sec 166(2) subject to Court’s discretion on utility and efficiency

# Representative Plaintiff

---

- Commences the class action on behalf of the group
- Is liable to pay costs if unsuccessful
  - This has been mitigated by litigation funding
  - Timbercorp
- Will usually receive an extra payment from the settlement or judgement to compensate for extra effort

# How does litigation funding work?

- Class members enter into funding agreement. Common terms:
  - Litigation funder pays lawyer's fees and provides an indemnity for adverse costs order
  - Provides security for costs if necessary
  - Out of any favourable settlement or judgment, litigation funder has all costs and disbursements paid and a fee of between 20% to 40% of the recovery (Exception fees = 25%)
  - Fee normally reduces the earlier the litigation is resolved
  - Usually selects the lawyers to act for the class
  - If plaintiff unsuccessful, litigation funder pays adverse costs order and doesn't receive fee.

# Role of Maurice Blackburn

---

- Appointed as lawyers to the plaintiff class
- Paid by litigation funder
- IMF gives day to day instructions to lawyers
- Sometimes a committee of funded persons, usually selected by the litigation funder, have authority to make binding decision concerning the conduct of the litigation

# Options for resolution of a class action

---

- Class actions now on case management
  - Parties will be asked about mediation at the first case conference
- Usually defendants will move to strike out pleadings or that the action not continue as a class action
- Settlement of class actions
  - Notice must be given to all group members
  - Group members can object to the settlement
  - Court must approve the settlement

# Current status

---

- Use of Fast Track to run “test” cases quickly
- Hearing has been split into two:
  - Question of classification of fees as penalties
  - Second stage hearing on quantum of fee and proportionality to damages
- Penalty hearing ended on 5 October 2011 – waiting final submissions
- Judgment expected before Christmas or early Feb
  - Fast track = decision within 6 weeks of final submissions
- No public indication of any settlement discussions
- Likely loser will appeal



# Recent developments

---

- Federal Court
  - Use of fast track
  - “genuine steps” applies to class actions
  - Practice note (CM 17) 1 August 2011
    - Case management
    - Confer on interlocutory disputes
    - Preliminary motions dealt with early
    - Sample opt out notices
    - Approval of settlements

# Recent Developments

---

- NSW Part 10 and practice note SC Gen 17
  - No cy pres remedy introduced
- Missteps
  - Timbercorp
  - Centro
- Settlements:
  - Oz Minerals – \$55 million/ \$5 million fees
  - Amcor - \$95 million/ \$26 million fees

# Impact for clients

---

- Survey shows class action major worry for corporate counsel
- Penalty fee cases could have broad implications
  - 11 other defendants, other financial institutions
  - Telcos and other businesses charging late fees
- New ACCC powers
  - ASIC largest user of class actions
- Corporates as plaintiffs
  - Vitamins, local government, Amcor
- How we can help

---

© 2011 Kemp Strang. All rights reserved.

**This presentation is not to be used or relied upon as a substitute for professional advice. Before acting on any matter, readers should consult with their advisers.**