

# **FA9- Where are we going? Perspectives from ASIC and IMF Litigation Funding**

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**The Institute of  
Chartered Accountants  
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# Overview

1. Litigation Funding in Australia
2. Types of Action Funded
3. The Cost/Benefit of Funding
4. Investments
5. Markets
6. IMF's Class Actions
7. Shareholder Targets
8. Causally Connected Loss (Quick Material Drops on Large Volumes)
9. Four Different Loss Methods
10. Conclusion

# Litigation Funding in Australia

1. The Insolvency Market until 2001
2. IMF Public Profile from 2001:
  - Commercial Litigation
  - Group Actions
  - Insurable Risk Cases are excluded
3. Fostif

# Types of Action Funded

1. Commercial Claims
2. Insurable Risk Cases are excluded
3. Higher Value Claims
4. Multi Party Claims

# The Cost/Benefit of Funding

## **Benefits**

- Payment of claimants' legal costs and disbursements
- Provision of security for respondent's costs
- Payment of any adverse cost orders
- Assistance with investigations and project management

## **Costs**

- Nil if unsuccessful
- Reimbursement of investment from settlement or judgment
- Payment of between 20% and 35% of settlement or judgment

# Investments

| IMF Investment Portfolio Report as at 31 December 2008 (Budgeted IMF Fee >\$500,000) |                                     |  |                               |
|--|-------------------------------------|--|-------------------------------|
| Matter   | Latest Completion Date <sup>1</sup> | Maximum Claim Value <sup>1</sup> \$000's | Insolvency/ Group/ Commercial |
| ABC Learning Centres Ltd <sup>2</sup>  | March 2011                          | 100,000                                  | Group                         |
| Air Cargo  | June 2011                           | 80,000                                   | Group                         |
| Allco Finance Group Ltd <sup>3</sup>   | March 2011                          | <sup>3</sup>                             | Group                         |
| AM Corporation, Smith, Rich & Lifetrack  | December 2009                       | 20,000                                   | Group                         |
| AWB  | December 2009                       | 60,000                                   | Group                         |
| Beconwood  | June 2009                           | 6,000                                    | Commercial                    |
| Centaur Mining v Gutnick   | August 2009                         | 30,000                                   | Insolvency                    |
| Centro Retail Ltd & Centro MCS Manager Ltd <sup>2</sup>                              | March 2011                          | 100,000                                  | Group                         |
| Centro Properties Ltd & CPT Manager Ltd <sup>2</sup>                                 | March 2011                          | 100,000                                  | Group                         |
| Challenger ats Unit Holders  | December 2009                       | 5,000                                    | Group                         |
| Commonwealth of Australia (re Pan Pharmaceuticals)                                   | June 2011                           | 150,000                                  | Group                         |
| Concept Equity v Challenger <sup>4</sup>   | December 2009                       | 2,000                                    | Commercial                    |
| Credit Corp Group Ltd  | March 2011                          | 15,000                                   | Group                         |
| Finance Brokers Case (Partially settled, see ASX Announcement)                       | June 2009                           | 10,000                                   | Group                         |
| ION Limited <sup>5</sup>   | December 2009                       | 19,500                                   | Group                         |
| Kingstream Steel Creditors Trust   | December 2009                       | 17,000                                   | Insolvency                    |
| Miles West Group Pty Ltd v Transfield Services (Australia) Pty Ltd                   | December 2009                       | 6,000                                    | Commercial                    |
| NEIB v Minara Resources  | June 2010                           | 32,000                                   | Commercial                    |
| Octaviar Ltd (formerly MFS Ltd) <sup>3</sup>   | March 2011                          | <sup>3</sup>                             | Group                         |
| OPES Prime Clients v ANZ <sup>6</sup>  | March 2011                          | 150,000                                  | Group                         |
| Oz Minerals Limited <sup>2</sup>   | June 2011                           | 50,000                                   | Group                         |
| Pan Pharmaceuticals re Creditor's Claims <sup>5</sup>                                | July 2009                           | 6,000                                    | Group                         |
| Peninsula Shipping   | December 2009                       | 6,000                                    | Commercial                    |
| Sons of Gwalia (Administrators Appointed) <sup>7</sup>                               | June 2009                           | 57,000                                   | Group                         |
| Symonds <sup>8</sup>   | August 2009                         | 14,000                                   | Commercial                    |
| Totterdell v Pollock   | June 2010                           | 10,000                                   | Insolvency                    |
| Village Life   | June 2010                           | 25,000                                   | Group                         |
| Westpoint  | December 2009                       | 15,000                                   | Group                         |
| <b>TOTAL PORTFOLIO (BUDGET FEE TO IMF IS GREATER THAN \$500,000)</b>                 |                                     | <b>1,085,500</b>                         |                               |

# Markets

|                       | <b>Insolvency</b> | <b>Commercial</b> | <b>Group</b>  |
|-----------------------|-------------------|-------------------|---------------|
| <b>Number</b>         | <b>3</b>          | <b>6</b>          | <b>19</b>     |
| <b>Claim Value %</b>  | <b>5%</b>         | <b>6%</b>         | <b>89%</b>    |
| <b>Claim Value \$</b> | <b>\$57m</b>      | <b>\$66m</b>      | <b>\$962m</b> |

# IMF's Class Actions

## Shareholder Claims

- Aristocrat, Concept Sports, Sons of Gwalia, ION, Village Life, AWB, Downer, Allco, MFS, Centro, Opes, Credit Corp, ABC, OZ Minerals, Arasor

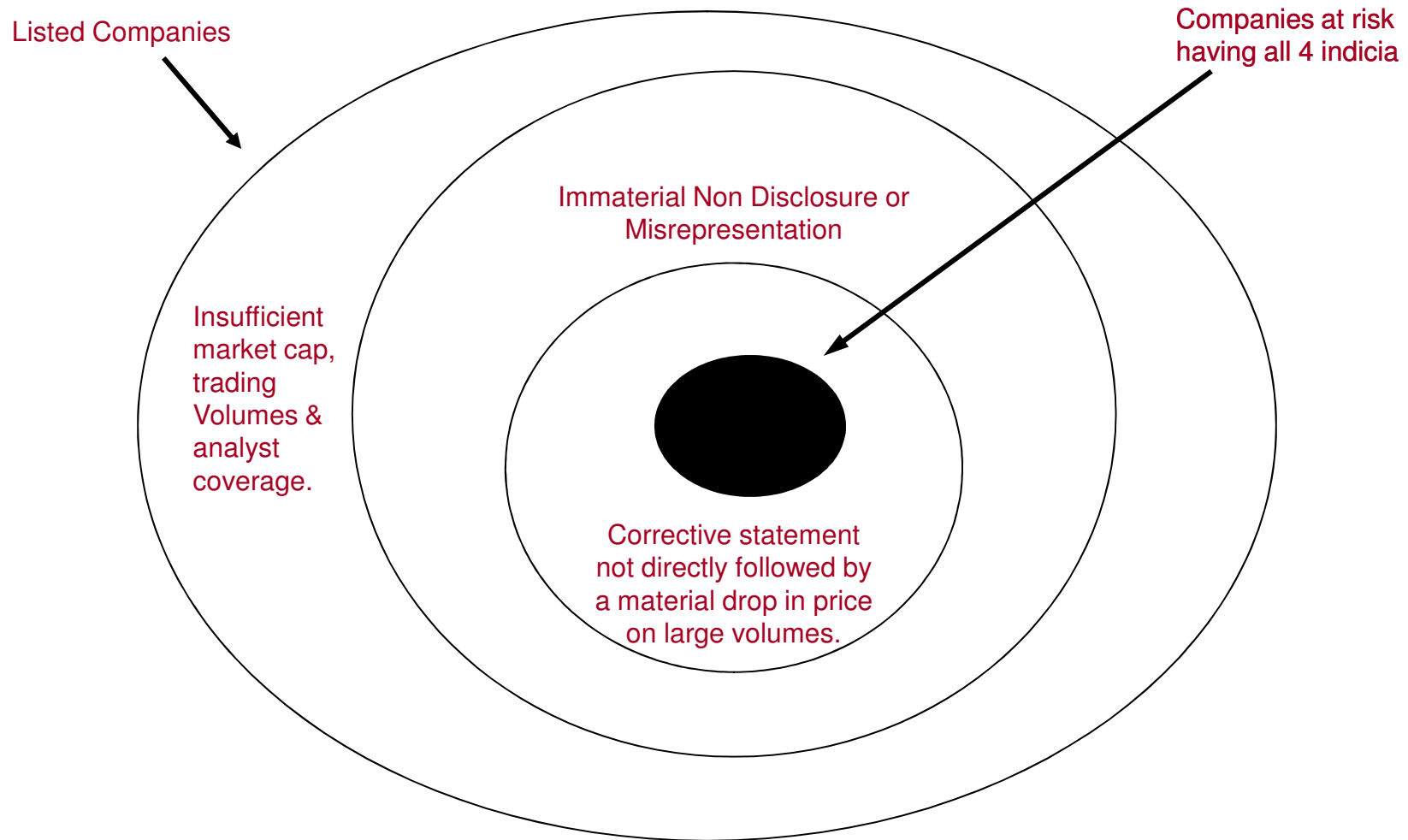
## Financial Services Claims

- Finance Brokers, AM Corporation, Sentinel, Mercury Rising, Challenger, Westpoint, Firepower, Great Southern, MFS Premium Income Fund, Lehmans

## Miscellaneous

- Patricks – The Wharfies
- BATA/Phillip Morris – Unconstitutional Tobacco Tax
- Whyalla Airlines – Passenger Death Claims in USA
- PAN Pharmaceuticals – Customer claims against PAN
- PAN Customers v Cth – Wrongful termination of licence
- Air Cargo – Airline Price Cartel

# Shareholder Targets



# A Quick Material Drop on Large Volume

Relevant to:

- Proving Causation
- Proving Loss and its quantification
- Shareholder Demand for Class Action

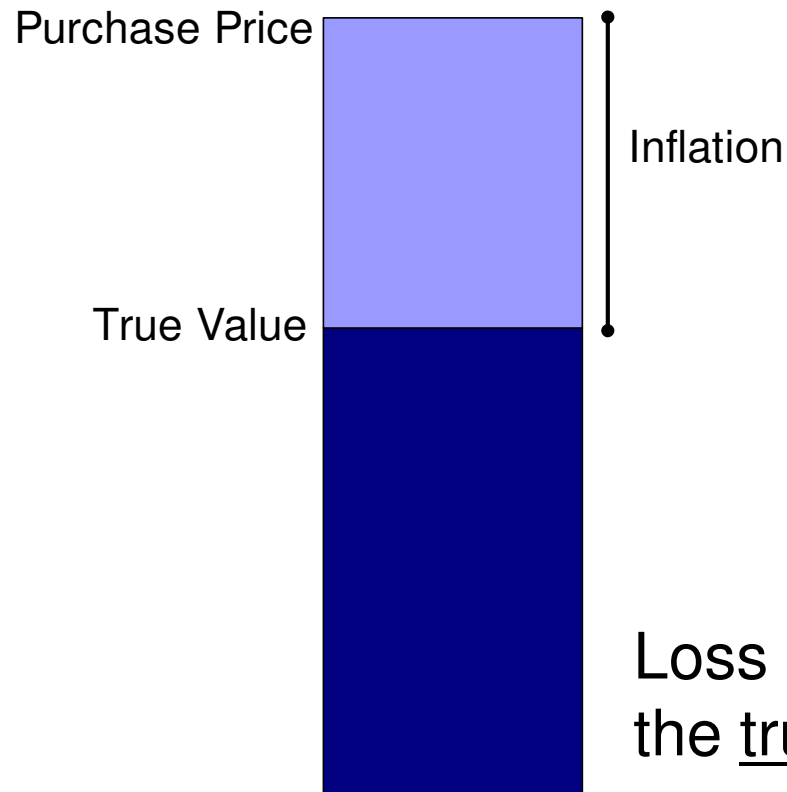
# Four Different Loss Methods

- Price Paid Less Benefit Left in the Hand
- Price Paid less True Value
- Price Paid less True Value and Subsequent declines in value
- Price Paid less True Value with Full Sale Offset

## **Price Paid less Benefit Left in Hand**

- **Loss = Purchase Price – Sale Price  
(Shares Sold)**
  
- **Loss = Purchase Price – Current Market  
Value (Shares Held)**

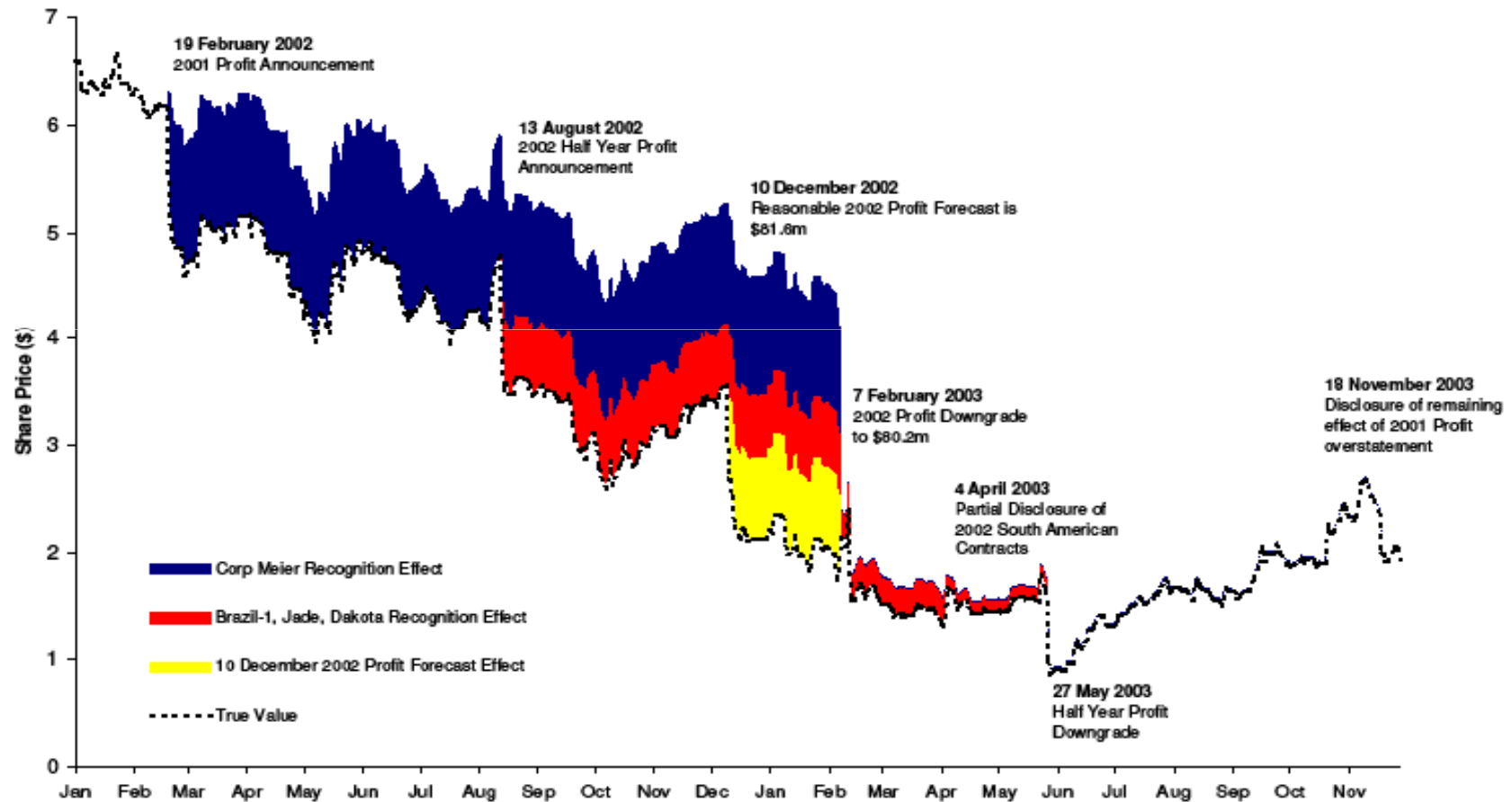
# Price Paid less True Value



Loss = Purchase price minus  
the true value (*Potts v Miller*)

# Event study in *Aristocrat*

Incremental inflation of Aristocrat's share price caused by each contravention, 2002 and 2003



# True Value and Offsetting Benefits

- Issue arises in relation to shares sold at inflated value in period for which loss is not claimed
- Full Offset says all such sale inflation should be offset against any loss Aristocrat contended for this

# Interaction Between ASIC & IMF

- Policy and Compensation Motivations
- Examples of interaction
  - Lehman Australia
  - Westpoint
  - Facilitating Licensee Settlements (Opes; ANZ/ING)
- Reliance Upon Penalty Proceeding Findings