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BRIEF : COLLECTIVE REDRESS IN AUSTRALIA

Background

Representative procedures have been available under English law for a long time. For example, Order 16 rule 9 of the *Rules of the Supreme Court 1883* (UK) provided that '*... where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued ... on behalf or for the benefit of all persons so interested*'.

These rules were replicated in Australia.[1] However, interpretation of these provisions by the Courts led to procedural difficulties, and the representative procedures facilitated by such provisions fell into disuse.

The modern Australian class action procedure was introduced in response to the deficiencies of the former representative scheme. It is an attempt to deal with the problems of mass claims arising from very large civil wrongs.

In 1977, the Federal Attorney-General instructed the Australian Law Reform Commission ('ALRC') to examine the adequacy of the existing law in relation to class actions.[2] The ALRC reported in 1988 the recommendation that a class actions procedure be introduced in the Federal Court of Australia. It did so for the expressly stated aim of enhancing access to justice by reducing the cost of court proceedings to the individual and improving the individual's ability to access legal remedies. It also aimed to promote efficiency in the use of Court resources, increase consistency in the determination of common issues, and make the substantive law more enforceable and effective.[3]

Legislation

In Australia, there are class action regimes in both the Federal Court and in the State Supreme Courts.

As a result of concerns related to a flood of U.S.-style litigation, Australia's regimes were established with a number of limitations. These include a focus on compensating identifiable claimholders rather than on broader regulatory deterrence, as well as an absence of any incentives for private enforcement that are present in other regimes, such as attorney contingency fees and respite from cost-shifting rules. Also, cy-près remedies are explicitly absent from all Australian class action regimes.[4]

Class actions were introduced into Australia through the enactment of the *Federal Court of Australia Amendment Act 1991* (Cth) which provided for 'representative proceedings' through inserting Part IVA into the *Federal Court of Australia Act 1976* (Cth) ('FCA Act'). Part IVA commenced on in March 1992.

Federal Court of Australia Act 1976 (Cth) : Selected Tables of Contents

[1] For example, *Supreme Court Rules 1957* (Vic) O 16 r 9; *Federal Court Rules 1979* (Cth) O 6 r 13.
[2] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), pp. 1.
[3] Ibid, p 8-9.
[4] Legg, Michael. 'Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?' *Macquarie Law Journal*, vol. 16, 2016, pp. 89-104.

Division 3—Notices

Division 4—Judgment etc.

Division 5—Appeals

Division 6—Miscellaneous

Several States have enacted their own Part IVA equivalent regimes that mimic that of the Federal Court, while some of the other States have a different model. However, although several jurisdictions in Australia specifically provide for class action proceedings, they are mainly brought in the Federal Court, Victorian, New South Wales and Queensland Supreme Courts in accordance with the separate legislation constituting those courts. Western Australia is in the process of adopting its own class action regime that is substantially based on the Federal Court Regime.

Threshold Requirements

Part IVA of the *FCA Act* sets out a prescriptive regime containing detailed provisions for the commencement and conduct of class actions. Section 33C of the *FCA Act* sets out the threshold requirements for the commencement of a class action under the regime, namely that (emphasis added):

(a) there must be claims **by seven or more persons** against the same person;

(b) the claims must arise out of the **same, similar or related circumstances**; and

(c) the claims of **all** those persons must give rise to a **substantial common issue of law or fact**.

These threshold requirements have been liberally interpreted by the Courts and as a result are generally not difficult to satisfy. For example, the Full Court of the Federal Court confirmed that when commencing class actions against multiple respondents, there is no requirement for every class member to have a claim against every respondent.[5] All that is required is that seven or more persons (including the class representative) have a claim against the same respondent.

The Australian representative proceedings regime requires the claims of at least seven persons, but generally have tens of thousands. Where one incident results in damage to a quantity of people less than seven, those aggrieved may sue via traditional joinder under Rule 9.02 of the *FCA Act*, or via the same interests representative proceedings rule under Order 18 of the relevant jurisdictional State Supreme Court Act.

Who can bring a class action?

A single class representative, who becomes the applicant in the proceedings, is usually the one who brings a class action. The representative is the one who initiates the procedures on behalf of the entire class, and they must establish standing under Section 33D of the *FCA Act*.

There can be more than one class representative, in which case each becomes an applicant in the same class action. This is common where the threshold criteria are met but there are other differences between groups of class members, which make it appropriate to distinguish between sub-groups (Section 33Q of the *FCA Act*).

Class members are not listed by name in the pleadings and play a largely ‘passive’ role. However, in certain class actions, particularly in shareholder or investor class actions, respondents often seek to obtain discovery of documents or particulars from sample class members, to assist in assessing issues of liability and quantum.

[5] *Cash Converters International Limited v Gray* [2014] FCAFC 111.

'Opt-out' Model

The Australian class action regime employs an 'opt-out' model (Section 33E of the *FCA Act*). The 'opt-out' model works as follows:

- All potential claimants who fall within the definition of the class become members of the class on the filing of the claim whether they are aware of it or not.
- They will all be bound by the judgment of the Court or any approved settlement unless they opt-out of the proceedings before a date which is fixed by the Court. The Court will require that all class members are notified of the action, their right to opt-out, and the process for doing so, pursuant to Section 33J of the *FCA Act*.
- If a class member chooses to opt-out of a representative proceeding, they will no longer be bound by the outcome of the proceedings and will be able to pursue whatever claim they may have in separate proceedings.

The 'opt-out' model can be distinguished from the 'opt-in' approach which requires potential class members to indicate positively that they want to be part of the class. If they do not opt-in, they will not become members of the class and will not be bound by the final judgment or approved settlement.

'Closed Classes'

In an effort to ensure access to justice, Australian Courts have fashioned a unique hybrid opt-in—opt-out process known as 'closed classes'. The rationale is to prevent free riding that may undercut the position of funders and class action law firms reliant upon entering into agreements with a critical mass of class members.

However, multiple closed classes also pose problems for respondents seeking the comfort of finality. To secure settlement and thus ultimately benefit participating class members, Australian courts have formulated a procedure whereby the closed class is opened and non-participating class members are invited to either register their claims or opt-out so that thereafter those who do not register and those who opt-out are effectively precluded by res judicata from making further related claims.

Australian courts' support of closed classes, while driven by practicality, has produced unintended consequences. Many relate to the ethical dilemmas faced by class action law firms and litigation funders seeking to advance the interests of participating class members over and above those of non-participating class members.[6] It has been said that closed classes ignore the public policy behind the opt-out regime and ignore the benefit of allowing those who are poor, less educated or located in remote locations to access justice.

Costs and Funding Schemes

The 'loser pays' rule generally does apply, where the losing side pays for the prevailing party's legal expenses. However, successful respondents can only obtain costs orders against the class representative. The Court is not permitted to make an adverse costs order against the remaining class members.

In 2006, the High Court of Australia effectively gave its stamp of approval to litigation funding in *Fostif*[7]. Following this decision, the Australian litigation funding market has continued to grow, with an increasing proportion of class

[6] Waye, Vicki, and Morabito, Vince. 'When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime.' *Theoretical Inquiries in Law*, vol. 19, no. 1, 2018, pp. 303-332.
[7] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 ('*Fostif*').

actions backed by funders. Litigation funders often receive a percentage of the amount paid by the respondents to the class members if the class action is successful.

It is common for litigation funders to meet costs orders made against class representatives and to provide security for costs where sought by respondents. In other words, independently funded class actions enable class representatives to avoid exposure to costs orders.

Australian lawyers generally cannot have agreements with clients that provide for contingency fees. Although On 18 June 2020, Victoria became the first State jurisdiction in Australia to allow claimant lawyers to charge contingency fees. In most Australian States, lawyers can charge 'conditional fees' which involve acting on a 'no win, no fee', often with an uplift based on the amount of fees charged (rather than size of settlement or judgment).

No financial support is available from public sources for class or representative actions. However, some regulators can commence proceedings in their own names on behalf of affected private parties, such as the Australian Competition and Consumer Commission ('ACCC'). Few such actions have been commenced in Australia.

Damages

Damages in Australia are calculated in accordance with the principles of causation, remoteness and contributory liability, with regard to specific statutory recovery regimes. While rare, exemplary damages can be awarded, but only when the respondent has shown a conscious and scornful disregard for the claimant's rights.

Complex questions of loss and causation frequently arise in many class actions. The market-based causation theory was accepted by Australian courts for the first time in the context of alleged shareholder losses in *Myer*[8].

Can the Court stop a class action?

The Court has the power to order that a proceeding no longer continue as a class action where it is satisfied that it is in the interests of justice to do so, for any one of the following reasons:

- the costs incurred if the proceedings were to continue as a group are likely to exceed the costs incurred if there were separate proceedings;
- the relief sought could be obtained by other proceedings;
- the proceedings will not provide an efficient and effective means of dealing with the claims; or
- it is otherwise inappropriate to bring the claims as a class action.

Settlement

Whilst most class actions settle through using alternative dispute resolution methods, in Australia a class action may not be settled or discontinued without the approval of the Court.[9] The criteria for approving settlements has been frequently discussed by the Court. It is now consolidated in the Federal Court Practice Note CM17.[10] The Court will consider whether the proposed settlement is a fair and reasonable compromise of the claims of the class members.

[8] *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited [2019] FCA 1747* ('*Myer*').
[9] *Federal Court of Australia Act 1976* (Cth) s 33V. See also *Supreme Court Act 1986* (Vic) s 33V and *Civil Procedure Act 2005* (NSW) s 173.
[10] Federal Court of Australia, Practice Note CM17, *Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, 9 October 2013, paras. 11.1-11.2.

The Courts are increasingly scrutinising settlements (including with respect to legal fees and funding commissions) and settlement distribution schemes.[11] Courts have demonstrated a willingness to disallow or amend proposed settlements, for instance where:

- not all class members have been provided with the opportunity to share in a premium for contribution to the funding of the proceedings;
- the proposed settlement fails to adequately differentiate between class members' claims;
- the proposed settlement provides for commissions to a litigation funder greater than the funder is contractually entitled to; and
- the legal fees and funding commission are disproportionate to what could reasonably be expected to be achieved in the litigation.

A settlement between respondents and an individual group member does not require court approval, unless the individual group member is a representative party, or the settlement has the legal effect of resolving the entire representative proceeding. Representative parties can only settle their individual claims with leave of the court, and must first seek leave to withdraw as the representative party. Before the court approves a representative party's withdrawal, notice must be given to other group members, and any application to have another person substituted as the representative party must be determined.

Proposals For Reform

On December 11th, 2017, the Australian Federal Government provided Terms of Reference to the ALRC for an inquiry into class action proceedings and third-party litigation funders. The final report was published in January 2019.[12] The ALRC Report made 24 recommendations for reform of Federal class action law and procedure in Australia, but the recommendations are yet to be implemented by the Australian Federal Government. They include:

- provide mechanisms in statute and legal frameworks for the Federal Court to deal effectively with competing class actions;
- provide mechanisms by which the Federal Court can appoint an independent costs referee to establish the reasonableness of legal costs in class action matters, and by which the Court can tender for settlement administration services;
- increase transparency and open justice for class action settlements;
- decrease the risk of ligation funders' failing to meet their obligations or exercising improper influence through a statutory presumption in favour of securities for cost, and greater Court oversight of funding agreements which must indemnify the lead plaintiff against an adverse costs order;
- enhance access to justice and decrease costs to litigants through the introduction of a limited percentage-based fee model for solicitors; and
- introduce a voluntary accreditation scheme for solicitors acting in class action proceedings.

[11] Newbold, Beverley. 'Class/collective actions in Australia: overview', (updated October 1st, 2020), <https://uk.practicallaw.thomsonreuters.com/3-617-6440>

[12] Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Report No 134 (2019).