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**Australian class action law** Print**19 November 2007**

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In Australia, class actions (or representative proceedings as they are formally known) can be commenced by a representative applicant in circumstances where seven or more people have claims which arise out of the same or related circumstances that give rise to a substantial issue of fact or law.

The person who commences a class action is required to describe the class of persons who are being represented. Once the class is described, every person in that class is assumed to be part of the class unless they decide to '*opt-out*' of the action by filing a notice with the court in a specified form. The representative applicant does not need the consent of the class members and does not even need to know who they are or where they live. (This in comparison to the US procedure which is '*opt-in*'.)

In many respects the Australian class action procedure is more 'plaintiff friendly' than in the US. This is because in Australia:

- there is no certification requirement (ie, a requirement to satisfy the court that the proceedings meet the requirements for a class action before it proceeds);
- there is no need to show that the common issues predominate over individual issues - it is enough that there be one common issue which is '*real or of substance*'; and
- the courts have the power to manage the litigation by splitting the class into sub-groups to deal with discrete issues. This gives the Australian courts a wide discretion to deal with a group of claims as a class action.

In 1992, the *Federal Court of Australia Act 1976* (Cth) (**the Act**) was amended to include Part IVA to allow class actions to be brought in the Federal Court. Victoria also introduced a class action scheme which is essentially identical to the Federal Court scheme and is under Part 4A of the *Supreme Court Act 1986* (Vic).

In other States and the Territories, there are representative procedures available but they are not, strictly speaking, '*class actions*'. They involve '*same interest*' procedures

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## About the author



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which traditionally have been narrowly interpreted but cases such as the High Court's decision in *Carnie v Esanda Finance* have broadened their scope.

Since the introduction of these provisions, class actions have become a regular feature of Australian litigation. For example:

- ◆ Longford Gas – interruptions to gas/power
- ◆ Sydney Water – contaminated water
- ◆ Wallis Lake Oysters – contaminated oysters
- ◆ Mobil avgas – contaminated fuel
- ◆ Phillip Morris – claims by cigarette smokers
- ◆ GIO – AMP -
- ◆ Concept Sports -
- ◆ Aristocrat -
- ◆ Track net - securities/shareholder actions
- ◆ Media World -
- ◆ Multiplex -
- ◆ Harris Scarfe -
- ◆ Village Life -

### Federal Court class actions

Class actions in Australia are governed by a comprehensive set of rules which determine how each step of the case will proceed.

Some key provisions of the Act are:

- ◆ **section 33C** - the commencement of proceedings. This section deals with when representative proceedings may be commenced including whether or not the relief sought includes claims for damages that would require individual assessment;
- ◆ **section 33J** - the court must fix a date before which a group member may **opt out** of a representative proceeding. Except with the leave of the Court, the hearing of a representative proceeding must not commence earlier than the date before which a group member may opt out of the proceedings;
- ◆ **section 33N** - the court may on application by the respondent or of its own motion, order that proceedings no longer continue under this Part where it is satisfied that it is in the interests of justice do to so. Grounds include:
  - (i) higher costs if the matter is heard as a representative proceeding;
  - (ii) if the relief sought can be obtained by other proceedings;
  - (iii) if the representative proceeding does not provide an efficient and effective means of dealing with the claim; or
  - (iv) that it is otherwise inappropriate that the claim be pursued as a representative proceeding;
- ◆ **section 33Q** - if it appears that determination of the **common issue/s** will not finally determine the claims of all group members, the court may give **directions** in relation to the determination of the remaining issues which may include appointing a **subgroup**;
- ◆ **section 33R** - the court may permit

- an **individual** group member to appear for the purpose of determining an **issue** that relates only to the claims of that member in which case only the individual is liable for the associated costs;
- ◆ **section 33S** - the court may give directions for the commencement and conduct of a **separate proceeding** by an individual group member if the issue cannot be conveniently dealt with under section 33Q or section 33R;
  - ◆ **section 33V** - a representative proceeding may not be **settled or discontinued** without approval of the Court. If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court;
  - ◆ **section 33W** - a **representative party may**, with leave of the court, **settle** his/her individual claim in whole or in part at any stage of the representative proceeding. With leave of the court, this person may **withdraw** as a representative party and on the application of a group member, the court may make an order for the substitution of another group member as the representative party;
  - ◆ **sections 33X and 33Y** - certain **notices** must be given to group members and must be approved by the court. These notices include notices with respect to the right to opt out before a specified date, settlement, and application by the respondent for dismissal for want of prosecution;
  - ◆ **section 33ZB** - a **judgment** given in a representative proceedings will bind all persons other than any person who has opted out of the proceedings under section 33J.

### Some matters to keep in mind

The definition of the class is obviously very important to both substantive (liability and quantum) and procedural (discovery, opt-out and other notices) issues. Also, there is currently uncertainty as to what is permissible. For example, Stone J in the *Aristocrat* litigation disallowed a definition which required class members to be a client of Maurice Blackburn because this made the procedure more 'opt-in' than 'opt-out' whereas Finklestein J in the *Multiplex* litigation took a different view. So, always consider whether the class can, and should, be challenged.

Check carefully the common issues: while the concept is fairly broad and can be liberally applied, the common issues need early identification to assist with confirming that a class action is appropriate and with managing the procedure, particularly discovery.

Discovery can be very expensive, especially in this day and age of email communication and other electronic documents. More importantly perhaps, pleadings are often amended following discovery – it can be used as a 'finishing exercise', so take care with discovery orders. (In the US, there are now limitations on a claimant's ability to use

the process as a 'fishing exercise'.)

Think about when to close the class – is it better sooner rather than later? Or vice-versa? You do not know who is a member of the class until this happens. The members may have very different experiences, interests and expectations which can shape the course the litigation takes and influence the outcome, especially settlement.

Sometimes, with the court's leave, persons can 'opt-in' again.

What protection is available for costs orders in your favour? Security for costs against an individual applicant may not be possible but the applicant could be a corporate entity or there may be a litigation funder involved. Litigation funders can be required to provide some form of security.

Check your insurance, particularly to make sure you have adequate defence costs cover.

### **Will Australia become like the US?**

Contingency fees, jury trials, punitive damages and no costs orders following the event are features of US litigation thought to contribute to the number of claims and the quantum of verdicts/settlements in the US. We do not have these in Australia.

National tort law reform (less litigation in other areas) and litigation funding (transferring the risk of costs orders) will probably have an impact. Also, as noted at the beginning of this article, our class action procedure is more 'plaintiff friendly' in a number of areas.

Securities/shareholder class actions are in their own class and involve difficult issues of reliance and causation. In the US, these are overcome to some extent by the 'fraud on the market' theory. It's a new area for Australian courts and litigants, and legislative reform has been raised as a possibility. That reform may make the actions easier to bring.

Class actions were introduced to assist with access to justice for those who may need assistance. While they are being used by individuals with claims who could not otherwise afford to pursue them, they are also being used by large corporate entities and funded by litigation funders. We can expect, therefore, to see more of them but because of the differences in our legal systems, you would think that the number of claims and the quantum of verdicts/settlements will be less.]

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