

Class actions in Australia - Greg Williams & Colin Loveday, Clayton Utz (March 2004)

Fifteen years ago the concept of a class action was foreign to Australian law. However, in 1992 the Federal government introduced a modern class action procedure. Since then the class action has become a regular feature of the Australian litigation landscape. Perhaps more importantly, the procedure is increasingly being used for "blockbuster" litigation - that is high profile, publicity-driven actions which seek to advance the claims of hundreds or thousands of claimants.

In simple terms a "class action" is a procedure which allows an individual or a small group of claimants to commence litigation not only on their own account, but also on behalf of a group of people with similar claims. This capacity to mobilise the claims of tens, hundreds, thousands or even millions of claims in a single procedure has meant that, in jurisdictions where the procedure is available, class actions are a favourite area for speculative, lawyer-driven litigation.

Class actions are difficult beasts to manage and their defence is a specialist skill. On the one hand, being named as a defendant in a class action can be a daunting prospect. A defendant in a class action is usually facing an indeterminate, but potentially large liability. The class action may well attract media attention, particularly if its promoters are trying to recruit more claimants to their action.

On the other hand, class actions can sometime offer opportunities to alert and prepared defendants. There have been some examples of early attacks on class actions resulting in them backfiring spectacularly on their promoters. In other circumstances, where a defendant is interested in resolving a large number of potential claims, a class action may offer the prospect of efficiently settling a substantial liability in one fell swoop.

Class actions in Australia

In 1992, the Australian Federal Parliament introduced legislation to allow class actions to be brought in the Federal Court. While the legislation refers to "representative proceedings" the term "class actions", borrowed from the United States is commonly used to describe this sort of procedure.

These amendments formed part of a package of reforms aimed at improving "access to justice". They included changes to various state and territory laws which removed the long standing restrictions on lawyers' advertising for clients and introduced a limited form of contingency fee for lawyers.

Taken as a whole these changes have significantly increased the level of litigation in Australia. Advertisements by lawyers offering to act for plaintiffs on a no win no fee began appearing in newspapers and on radio. This, in turn, led to the emergence of a number of prominent law firms specialising in large scale litigation on behalf of plaintiffs. Australia quickly became the place outside the United States where a corporation was most likely to become embroiled in speculative, lawyer driven, litigation.

While the growth in the number of class actions since 1992 has been a steady rather than spectacular, what has been noticeable in the last 5 years is the number of actions commenced in which the class said to be represented is truly massive, running to tens, or even hundreds, of thousands. Some examples include:

- an estimated 60,000 class members in a smoking and health class action;
- an action concerning price fixing for vitamins, where the original class definition included all direct or indirect purchasers of price-fixed vitamins between 1992 and 1999, likely to be a substantial proportion of persons residing in Australia during this period;
- approximately 25,000 persons the subject of the recent settlement of a shareholders' claim; and

- a potential class of 1.4 million in litigation arising out of an interruption to gas supplies in Melbourne.

There are two more recent developments which seem likely to influence the direction of Australian class actions in the near future.

The first is the emergence of mass litigation concerning shares and other financial products. Australia's first shareholders' claim was commenced in August 1999 and was settled in August 2003. It was a class action which alleged misleading conduct on behalf of a large insurance company while defending a hostile takeover bid. That conduct was said to have caused loss to many shareholders. The terms of the settlement, which should see each class member recover about 60% of their claim, included a payment of \$15 million in costs to the lawyers representing the plaintiff.

This result is likely to lead to more of this type of such litigation. Indeed, no sooner was the first action settled than another was commenced in November 2003, this time alleging misleading conduct by a company leading to a profit downgrade. The prospect of mass litigation relating to corporate governance issues and financial forecasts is going to place more pressure on boards and management.

At the same time we are seeing the growth of a commercial litigation funding industry. There are a number of litigation funders who are prepared to underwrite the costs of litigation in exchange for the share of the proceeds if the litigation is successful. These are entirely commercial operations - indeed Australia even has a publicly listed litigation funder, IMF Limited, which claims that it is, as far as it knows, the only such company to be publicly listed in the world.

Lawyers are prohibited from entering into these sorts of funding arrangement. However, the funders are not lawyers and, as such, offer a means for plaintiffs to circumvent the restrictions imposed on lawyers and spread the risk of speculative litigation. However, the consequence is that the litigation looks increasingly like a commercial venture.

The litigation industry suffered some setbacks in 2003, with 2 Australian courts rejecting quasi-class actions supported by litigation funders, in part because of the courts' concerns that the litigation funders' involvement might corrupt the litigation process. However, the industry is unlikely to be dissuaded and will no doubt develop ways to address these concerns.

The three developments mentioned above are interrelated. The increase in the size of class actions reflects a realisation on the part of those who promote such actions that they must be run on a commercial basis - the larger the class the greater the potential for profit. Similarly, the growing interest of litigation funders in class actions reflects an awareness of the opportunity to profit from them. As the conduct of class actions becomes increasingly commercial we are seeing a shift in focus from the more traditional personal injury actions to litigation with a more commercial flavour.

The mechanics of a class action

The United States has the best known and most developed class action procedure of any jurisdiction. Tales of class action litigation in the United States are commonly related as examples of the excesses of the US culture of litigation.

However, it may surprise many people to know that the Australian class action procedure is in many respects more plaintiff-friendly than the US procedure.

All that is required to commence a class action in Australia is that:

- there are 7 or more persons who have claims against the same person (it is not necessary that one identify the 7 persons, merely that a court can be satisfied that there are at least 7);
- the claims are in respect of, or arise out of, the same, similar or related circumstances; and
- the claims give rise to a substantial common issue of law or fact.

This differs from the US in several respects.

First, and most importantly, Australia has no certification requirement. In the US procedure the plaintiff must obtain court certification for the class action before it proceeds. This involves convincing the court at an early stage that the proceedings meet the requirements for a class action and, in particular that the issues in the class action are such as to lend themselves to a grouped determination. This process is entirely absent from the Australian system.

Of course, a defendant to an Australian class action is entitled to challenge the constitution of the action and argue that it does not meet the 3 requirements set out above. However, it is the defendant and not the plaintiff who bears the onus on such an application.

Second, in satisfying the requirement that there be a "substantial common issue" there is no need to show that the common issues predominate over individual issues. Under the US system the certification process involves an examination of the degree of difference between the claims of the individual class members. There is no requirement for such an examination in Australia. It is enough that there be one common issue which is "real or of substance".

Third, the Australian courts have power to manage the litigation by splitting the class into sub-groups to deal with discrete issues. This gives Australian courts wide discretion to deal with a group of claims as a class action even in circumstances where there are numerous differences between the claims of the class members.

The liberal threshold requirements for class actions have been reflected in a liberal approach by the courts to the use of even their residual discretions to order that proceedings not continue as a class action. The consequence is that it is becoming increasingly difficult to achieve a quick and early defeat of a class action.

The opt out system and its consequences

Australia has an "opt out" system for class actions.

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.

This "opt out" system enables plaintiff's lawyers to create huge claims with a stroke of the pen. It was initially seen as one of the attractions of the Australian procedure for plaintiffs.

However, it has proved to be something of a double edged sword, for a number of reasons.

One difficulty which confronts plaintiff's lawyers is convincing class members to provide financial support for a class action, especially in the early stages. Since the rules provide that any class member who is in the class will obtain the benefit (or the burden) of any judgment in relation to common issues, many class members take the view that there is no need for them to be actively involved in supporting the class action.

There have been several instances of class actions being commenced within days of an event giving rise to claims because the lawyers perceive that being "first to file" will give them an advantage both in recruiting class members and in being entitled by the court to act as the representatives for the class.

Although a wide class definition has the advantage for a plaintiff of including more claims, there is also a risk too wide a class definition will render the action vulnerable to attack. Despite Australia's liberal class action laws there have been several examples of class actions failing or becoming bogged down in interlocutory steps because class definition was drawn too widely.

A third difficulty concerns notice. One consequence of having an "opt out" system is that there must be a procedure which allows the court to be satisfied that, as far as possible, the class members have been

notified of the existence of the class action and are broadly aware of the issues it raises. The court rules require that the court to order that a notice of the class action be issued and give the court broad powers to make orders as to its method of publication.

The form of the notice can often be a highly contentious issue. Even a relatively simple class action can be difficult to present and explain in summary form. The notification process can also be costly - it may involve direct mailings and advertisements in national newspapers. These costs are usually borne by the plaintiff, at least at first instance.

The final difficulty concerns settlement. While the "opt out" procedure enables one to easily create a large class at the beginning of an action, if one is to settle a claim it is ultimately necessary to determine the true breadth of the class and the value of their claims. Unless this is done it can be difficult for a defendant to properly assess its potential liability and therefore to engage in settlement discussions.

These difficulties have led to plaintiff's lawyers to step away from the "opt out" system. Class definitions are seldom drawn as widely as they were 5 years ago and plaintiffs are increasingly asking courts to make orders to "close the class" - that is to restrict the class to certain identified individuals.

A judgment in a class action binds all class members who have not opted out at the time of judgment. Similarly, a settlement of a class action, which must be approved by the court, may be made in such a way as to bind all members of a class.

As a consequence, class actions do offer opportunities to defendants who are interested in a final resolution of the whole of a potential liability. It may be possible, if the price is right, to obtain an order from the court which effectively puts an end to any further litigation.

Other systems

This article has focussed on the Federal class actions system. The Federal Court is just one of many jurisdictions available to plaintiffs in Australia. There are many types of claims which it cannot hear.

One Australian state, Victoria, introduced a class action scheme which is essentially identical to the Federal Court scheme. No other state has followed suit, although South Australia has its own (little used) rules dealing with class actions.

Nevertheless, with the growing expertise amongst lawyers in the conduct of mass plaintiff litigation there have been several attempts to bring such actions in the state courts. Each state court has an old procedure allowing for a limited form of class action. In 1995 many of the restrictions on the use of these procedures which were thought to prevent their use for class actions were removed by the High Court.

Conclusion

In recent times there has been a backlash against the level of litigation, particularly personal injury in Australia. That arose from the public liability crisis driven by increasing insurance premiums which came to a head in 2002 and resulted in reforms to personal injury litigation to make it more difficult for plaintiffs to succeed. Some states, including NSW, have reimposed restrictions on advertising by lawyers.

However, there has been no attempt to alter the rules in relation to class actions. As plaintiff's lawyers look for alternatives to their traditional areas of endeavour, class actions, particular class actions relating to financial products seem to be a fertile field for development. Such actions offer great opportunity for profit, especially if the risk can be shared with a litigation funder. As such, the trend towards such actions is likely to continue in the foreseeable future.

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