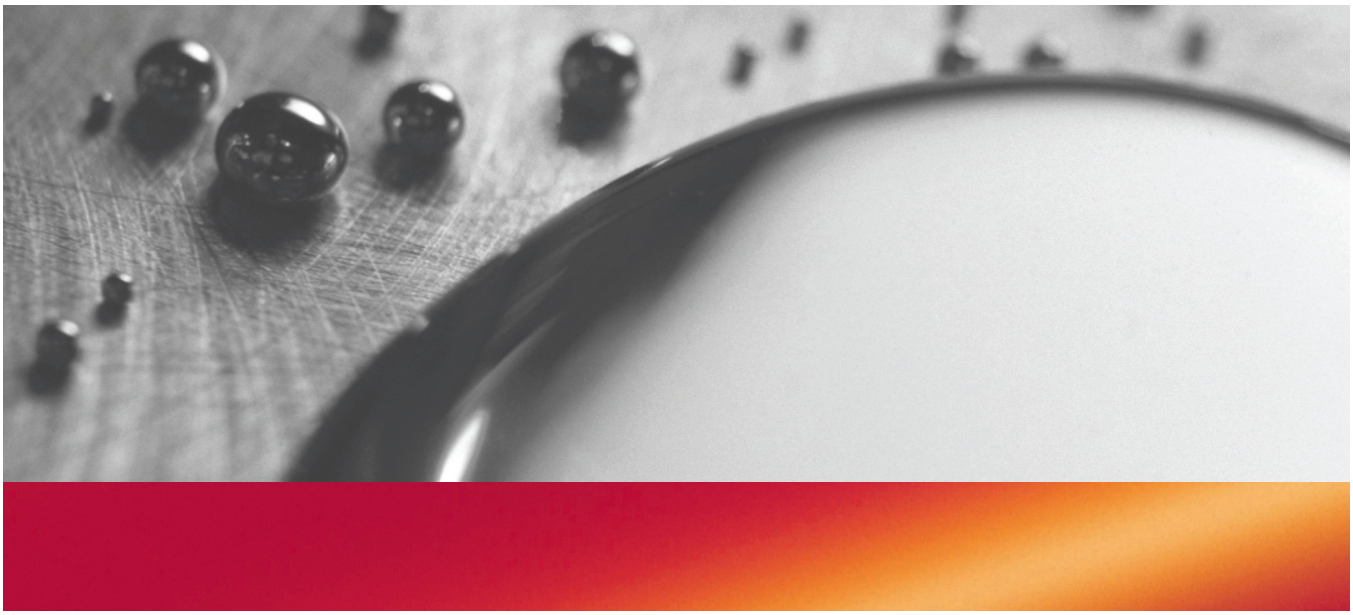
CLAYTON UTZ

Class Actions in Australia

An Overview



Introduction

Prior to 1992, class actions did not form part of the Australian legal landscape. While the rules of the various Australian courts made provision for what were known as 'representative actions' based on common law and the old English rules they were of comparatively limited application. Indeed, they were generally considered to have no useful application in modern society.

All of this changed in 1992, when the Federal Parliament amended the *Federal Court of Australia Act*[1] **("the FCAA")** to introduce what are referred to in that legislation as "representative proceedings". These are, in essence, analogous to what are referred to in the United States as "class actions".

The 1992 amendments to the FCAA formed part of a package of reforms which also included amendments to the *Trade Practices Act* that established a new product liability regime based on the concept of strict liability. At the same time as these changes were made by the Federal Parliament the various state and territory legislatures were persuaded to amend the rules governing the practice of law in Australia so as to remove the long standing restrictions on lawyers' advertising for clients and introduce a modified form of contingency fee agreements.

Taken as a whole these changes 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 a number of prominent law firms specialising in large scale litigation on behalf of plaintiffs. In many instances these firms simply attempted to advance claims in Australia which were identical with proceedings being run by their associates in the US. Australia quickly became the place outside the United States where a corporation was most likely to become embroiled in speculative, lawyer driven, litigation.

It is now generally accepted that the 'reforms' of the early 90s made a not insignificant contribution to the public liability crisis that came to prominence in 2002. This, in turn, led to the Federal Government establishing the Ipp Committee to review key areas of the law of negligence and the subsequent passage by all state and territory governments of civil liability reform legislation. In some jurisdictions, notably New South Wales, this has included attempts to reimpose restrictions on advertising by lawyers.

Unfortunately, much of this is simply too late - the genie is well and truly out of the bottle and Australian society has, perhaps irreversibly, adopted the culture of 'blame and claim' with a vengeance.

[1] Federal Court of Australia Amendment Act 1991 (No.181 of 1991).

Class actions in the Federal Court of Australia

In the Federal Court, class actions are more properly referred to as "representative proceedings". Similarly, the applicants (plaintiffs) represented in a representative proceeding are referred to in the FCAA as "group members" rather than class members. Nevertheless, the more popular terminology of class actions and class members has become common - even in the courts.

In simple terms a class action can be commenced by a representative applicant in circumstances where seven or more people have a claim which arises out of "the same similar or related circumstances" that gives rise to a "substantial common issue of fact or law". The representative plaintiff does not need the consent of the class members - indeed the representative plaintiff does not even need to know who they are or where they live.

Take, for example, a class action against an internet service provider or a superannuation fund. In either instance a representative plaintiff, who is a customer or member, can commence an action on behalf of, say, all other customers of that ISP or members of that fund.

Once the class action has been commenced all members of the class are bound by the outcome of the proceedings unless they "opt out". In order to take that step the class member must give written notice to the Court of their intention to opt out.

While the Australian class action procedure is often portrayed as similar to that of the United States, there are a number of significant differences between the two countries' procedural requirements, all of which tend to make the Australian class action procedure more 'plaintiff-friendly' than that in the US.

First, the Australian class action procedure has no certification procedure or requirement. That is, there is no threshold requirement that the proceedings be reviewed and certified by the court as appropriate to be determined as a class action. This is in sharp contrast with the US where the plaintiff in a class action must come before the court at an early stage in the proceedings and demonstrate that the formal requirements to commence a class action have been satisfied and that it is appropriate that the proceedings continue as a class action.

Second, in Australia there is no requirement that the common issues between class members predominate over the individual issues. Rather, there is merely a requirement that there be at least one "substantial" common issue of law or fact. Once again, this is in contrast with the US where the plaintiffs must demonstrate to the court that the common issues between class members predominate.

Third, the Australian procedure expressly provides for the determination of "sub-group", or even individual, issues as part of a class action. Thus, even though a claim may commence as a class action, it can quickly degenerate into a mass of what are, in effect, individual claims which must be considered by the court on an individual basis.

These differences are much more than just theoretical differences. As a result of these differences Australian plaintiffs have been able to pursue class actions which would simply not be allowed in the United States. For example, claims against pharmaceutical companies or the manufacturers of medical devices will generally not be heard in the United States as class actions. This is because the determination of each class member's claim will, ultimately, turn on individual issues. No such restriction exists in Australia. As a consequence, the Australian courts are now obliged to hear and determine complex product liability claims which would not even be commenced in the United States.

The relative ease with which a class action can be commenced in Australia has led to proceedings being commenced in a wide variety of circumstances. While there were surprisingly few class actions commenced in the years immediately following the introduction of the new procedure. However, that has radically changed over the past two or three years. More ominously events of recent months have added a new impetus to class action litigation in Australia.

Class actions in the State and Territory Supreme Courts

After the FCAA was amended in 1992 to make provisions for class actions there was considerable interest at the state level in adopting similar provisions. However, as the implications of the new procedure became clearer, most states and territories quickly lost interest. Indeed, only Victoria has pursued the matter with the introduction of a class action procedure in 2000. In doing so, the Victorian Parliament simply adopted the provisions found in the FCCA with the consequence that the procedures are, in essence, identical in both courts [2].

For a number of years the fact that the state and territory supreme courts had not introduced a class action procedure was of little consequence. As a result of the cross-vesting legislation that had been enacted throughout Australia a person who wished to bring a class action based on common law causes of action could utilise the Federal Court procedure. This changed in 1999 when the High Court of Australia held that key components of the cross-vesting legislation were unconstitutional. Since that time common law causes of action, or those based solely on state and territory legislation, cannot be pursued in the Federal Court other than in concert with a claim based on a federal cause of action.

As a consequence, lawyers wishing to pursue class actions that lack a federal law component have, once again, turned to the old rules which provide for representative actions in the state and territory courts. Ironically, the High Court had already breathed new life into these rules in 1995 when it swept away some of the traditional restrictions that had been applied by the courts over many years [3].

Class actions in the Federal Court are governed by a comprehensive set of rules which determine how each step of the case will proceed. For example, there are clear rules to determine the make up of the class, the procedural steps required to ensure a degree of fairness to the defendants and the way in which the proceeds of any judgment should be distributed. However, in the case of a state court representative action, the rules are silent on these issues, leaving the parties and the court to make up them up as the case proceeds.

Somewhat surprisingly the High Court did not see this as a problem - in effect leaving it up to the judges to determine the rules and procedure as the case proceeded. While this has some theoretical attraction it has, inevitably, led to extensive litigation where plaintiffs and defendants have spent as much time arguing over how the case should proceed as they have in dealing with the substantive issues.

Notwithstanding these very significant difficulties a number of representative actions have been commenced in the Supreme Court of New South Wales over the past year. In each case the claims bought by

[2] Supreme Court Act 1986 (Vic) Part 4A.
[3] Carnie v Esanda Finance (1995) 185 CLR 398.

the plaintiffs have not been the 'traditional' subject matter of class actions. Rather, the claims have involved attempts by retailers to recover monies allegedly paid to their suppliers in relation to state government licence fees which were subsequently held to be unconstitutional. While these early cases have encountered a range of procedural challenges and difficulties there is no doubt that the state based representative action is here to stay.

Subject matter of class actions

Traditionally, there has been a tendency to think of class actions in the context of product liability litigation. However, while class actions involving product liability claims are by no means uncommon, the Australian experience has demonstrated the diverse range of circumstances in which a class action can be commenced. Indeed, and unfortunately from the defendant's perspective, the limits are probably only bounded by the imagination of the lawyers acting for plaintiffs.

The first class action that was commenced in Australia under the new rules was one involving financial services Since then Australia has seen class actions involving the sale of real property and allegedly defective food, pharmaceuticals, medical devices and other consumer goods. Other actions have involved the marketing of home burglar alarms, financial losses said to have arisen out of the Longford gas explosion and the Sydney Water contamination crisis. Dissatisfied asylum seekers have sued the Minister.

Perhaps most ominously for corporate Australia 1999 saw the commencement of the first Australian class action involving securities claims. The action involved allegations that shareholders had been misled during the takeover battle with AMP. This case ultimately proved to be a bonanza for the lawyers acting for the class members when the defendants agreed to settle the case, pay the plaintiffs' claims and pay the plaintiffs' lawyers a further fifteen million dollars in 'legal fees'[4] . Towards the end of 2003 the firm of plaintiffs' lawyers which promoted this case announced that it was commencing a second class action against a corporate defendant. On this occasion the case involves allegations by shareholders of misleading conduct in relation to a profit downgrade. The firm acting for the class members has made it very clear that they see this area of the law as one with a significant future.

[4] King v AG Australia Holding Limited (formerly GIO Australia Holdings Limited) [2003] FCA 980.

A new impetus for class actions

The past twelve to eighteen months have seen a number of factors contribute to a significant increase in the level of interest in class action litigation in Australia. It is inevitable that this interest will translate into new actions in a range of areas over the next few years.

First, and somewhat ironically, one of the more immediate drivers for the increased interest in class action litigation has been the success of the recent broad ranging campaign for tort law reform. The changes introduced across Australia in 2002/2003 have resulted in real fall in the level of personal injury and medical negligence litigation. This, coupled with earlier changes which effectively brought to an end much of the litigation associated with motor vehicle accidents and workers compensation claims, has decimated the income of many plaintiffs' lawyers. At the same time they still have their mortgages and school fees to meet - as a consequence it is hardly surprising that they are searching for new fields of endeavour.

Second, in an unfortunate coincidence of timing, news of the settlement of Australia's first securities class action was announced just as the consequences of tort law reform were being recognised by those who had previously represented plaintiffs in personal injuries claims. The settlement not only gave the plaintiffs what they wanted, it also delivered a fee of no less than fifteen million dollars (paid by the defendants rather than their clients) to the plaintiffs' lawyers. On any view this represented a handsome reward for the effort that had been expended. It also signalled the emergence of two factors that had thus far been absent in the Australian market. Securities litigation was demonstrated to have a future in Australia and there was now hard evidence that Australian corporations may, as in the US, be willing to pay a premium to 'buy' peace.

Third, a way has been found to circumvent the rules which prevent Australian lawyers entering into true, US style contingency agreements. In the US it is normal for a plaintiffs' lawyer to sign up clients to an agreement which provides that the lawyer receives forty per cent of the verdict awarded to the plaintiff plus the expenses (disbursements) incurred by the lawyer in conducting the case. In Australia an agreement between a lawyer and client which provides for the lawyer to receive an agreed proportion or share of any judgement is illegal. Rather, the lawyer can only take his or her 'normal' fee plus an agreed uplift which is usually expressed as a percentage of the so called normal fee. These restrictions have effectively limited the amount plaintiffs' lawyers can earn and have been particularly effective in preventing them from receiving the enormous fees their class action colleagues are accustomed to in the United States.

While the restrictions on lawyers remain non lawyers are not so constrained. Thus, a new breed of entrepreneur has emerged to promote and fund class action litigation - indeed Australia is said to be home to the world's only publicly listed litigation funder. The mechanism is relatively straight forward. A non lawyer or corporation, the promoter, identifies a potential claim and then enters into agreements with potential claimants. These agreements provide for the promoter to receive an agreed percentage of any monies that come to the claimant - be that by way of settlement or judgement. In addition the claimants will often assign the benefit of any costs order they may receive to the promoter who is also given a broad discretion to conduct the litigation as they see fit The promoter then retains a lawyer who agrees to conduct the litigation on behalf of the promoter on the basis of the 'normal' rules governing the legal profession. In recent months agreements providing that the promoter will receive thirty-three and one-third per cent of the proceeds of the action plus GST plus the benefits any costs order have been used in a number of state court class actions.

While the litigation funders have experienced some early setbacks in the last few months, it is entirely possible that it will become the norm for class actions to be funded by third parties. Indeed, the most recently commenced shareholders' class action is said to be supported by a promoter in exchange for between twenty and forty per cent of the proceeds of the action.

Clayton Utz' class action experience

The team at Clayton Utz is and has been a participant in most of the significant class actions that have been commenced in Australia since the Federal Court rules were amended in 1992. We currently represent clients involved in class actions in the Federal Court and in the NSW, South Australian and Victorian State Courts. Many of the cases in which we have been involved have resulted in developments of the law in relation to particular aspects of class action law and procedure. This has included, for example, strengthening the requirement that class plaintiffs who commence a class action must disclose the substance of the class members' case and establishing the right of class action defendants to communicate directly with class members - even for the purpose of settling individual claims. These developments have significantly improved the position of defendants in class actions.

We have been involved in the recent developments in relation to litigation funding. We successfully challenged the constitution of a class action in the NSW Supreme Court in part on the basis that the litigation funder's involvement rendered the proceedings an abuse of process. This decision is currently the subject of an appeal to the NSW Court of Appeal.

Our class actions experience has extended to shareholder or securities litigation as well as claims involving consumer finance, infrastructure failure and recovery of monies paid in respect of license fees found to be unconstitutional.

In product liability claims, the team successfully defended the largest quasi class action ever tried in Australia. It has also successfully defended actions involving chemicals, a variety of pharmaceutical products, medical devices and other consumer products.

Finally, we have developed innovative procedures that allow corporations to use a class action to settle claims and thus bring an incident to an end, maintaining customer loyalty and corporate reputation but at the same time avoiding fraudulent or exaggerated clams.

In one such class action we developed and subsequently executed a settlement scheme which resolved significant business loss claims that had been made against the defendant in less than two years and for an amount that was significantly less than originally anticipated. This ensured that along tail of claims was avoided and minimised on going legal and administrative costs. At the same time the corporation was able to reassure both its customers and government regulators that it was treating the claimants fairly thus helping to rebuild its brand reputation.

Contacts

For further information please contact:

Stuart Clark

Partner
T +61 2 9353 4158
E sclark@claytonutz.com

Colin Loveday

Partner
T +61 2 9353 4193
E cloveday@claytonutz.com

www.claytonutz.com

Sydney

Levels 22–35
No1 O'Connell St
Sydney NSW 2000
T +61 2 9353 4000
F +61 2 8220 6700

Melbourne

Levels 17–19
333 Collins St
Melbourne VIC 3000 T +61
3 9286 6000
F +61 3 9629 8488

Brisbane

Levels 18–27
215 Adelaide St
Brisbane QLD 4000
T +61 7 3292 7000
F +61 7 3003 1366

Perth

Level 27, QV1 Building
250 St. George's Tce
Perth WA 6000
T +61 8 9426 8000
F +61 8 9481 3095

Canberra

Level 8, Canberra House
40 Marcus Clarke St
Canberra ACT 2601
T +61 2 6279 4000
F +61 2 6279 4099

Darwin

17-19 Lindsay St
Darwin NT 0800
T +61 8 8943 2555
F +61 8 8943 2500

Adelaide

Level 18
Santos House
91 King William Street
Adelaide SA 5000
T +61 8 8111 2000
F +61 8 8111 2099

Introduction

Prior to 1992, class actions did not form part of the Australian legal landscape. While the rules of the various Australian courts made provision for what were known as 'representative actions' based on common law and the old English rules they were of comparatively limited application. Indeed, they were generally considered to have no useful application in modern society.

All of this changed in 1992, when the Federal Parliament amended the *Federal Court of Australia Act*[1] **("the FCAA")** to introduce what are referred to in that legislation as "representative proceedings". These are, in essence, analogous to what are referred to in the United States as "class actions".

The 1992 amendments to the FCAA formed part of a package of reforms which also included amendments to the *Trade Practices Act* that established a new product liability regime based on the concept of strict liability. At the same time as these changes were made by the Federal Parliament the various state and territory legislatures were persuaded to amend the rules governing the practice of law in Australia so as to remove the long standing restrictions on lawyers' advertising for clients and introduce a modified form of contingency fee agreements.

Taken as a whole these changes 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 a number of prominent law firms specialising in large scale litigation on behalf of plaintiffs. In many instances these firms simply attempted to advance claims in Australia which were identical with proceedings being run by their associates in the US. Australia quickly became the place outside the United States where a corporation was most likely to become embroiled in speculative, lawyer driven, litigation.

It is now generally accepted that the 'reforms' of the early 90s made a not insignificant contribution to the public liability crisis that came to prominence in 2002. This, in turn, led to the Federal Government establishing the Ipp Committee to review key areas of the law of negligence and the subsequent passage by all state and territory governments of civil liability reform legislation. In some jurisdictions, notably New South Wales, this has included attempts to reimpose restrictions on advertising by lawyers.

Unfortunately, much of this is simply too late - the genie is well and truly out of the bottle and Australian society has, perhaps irreversibly, adopted the culture of 'blame and claim' with a vengeance.

[1] Federal Court of Australia Amendment Act 1991 (No.181 of 1991).

Class actions in the Federal Court of Australia

In the Federal Court, class actions are more properly referred to as "representative proceedings". Similarly, the applicants (plaintiffs) represented in a representative proceeding are referred to in the FCAA as "group members" rather than class members. Nevertheless, the more popular terminology of class actions and class members has become common - even in the courts.

In simple terms a class action can be commenced by a representative applicant in circumstances where seven or more people have a claim which arises out of "the same similar or related circumstances" that gives rise to a "substantial common issue of fact or law". The representative plaintiff does not need the consent of the class members - indeed the representative plaintiff does not even need to know who they are or where they live.

Take, for example, a class action against an internet service provider or a superannuation fund. In either instance a representative plaintiff, who is a customer or member, can commence an action on behalf of, say, all other customers of that ISP or members of that fund.

Once the class action has been commenced all members of the class are bound by the outcome of the proceedings unless they "opt out". In order to take that step the class member must give written notice to the Court of their intention to opt out.

While the Australian class action procedure is often portrayed as similar to that of the United States, there are a number of significant differences between the two countries' procedural requirements, all of which tend to make the Australian class action procedure more 'plaintiff-friendly' than that in the US.

First, the Australian class action procedure has no certification procedure or requirement. That is, there is no threshold requirement that the proceedings be reviewed and certified by the court as appropriate to be determined as a class action. This is in sharp contrast with the US where the plaintiff in a class action must come before the court at an early stage in the proceedings and demonstrate that the formal requirements to commence a class action have been satisfied and that it is appropriate that the proceedings continue as a class action.

Second, in Australia there is no requirement that the common issues between class members predominate over the individual issues. Rather, there is merely a requirement that there be at least one "substantial" common issue of law or fact. Once again, this is in contrast with the US where the plaintiffs must demonstrate to the court that the common issues between class members predominate.

Third, the Australian procedure expressly provides for the determination of "sub-group", or even individual, issues as part of a class action. Thus, even though a claim may commence as a class action, it can quickly degenerate into a mass of what are, in effect, individual claims which must be considered by the court on an individual basis.

These differences are much more than just theoretical differences. As a result of these differences Australian plaintiffs have been able to pursue class actions which would simply not be allowed in the United States. For example, claims against pharmaceutical companies or the manufacturers of medical devices will generally not be heard in the United States as class actions. This is because the determination of each class member's claim will, ultimately, turn on individual issues. No such restriction exists in Australia. As a consequence, the Australian courts are now obliged to hear and determine complex product liability claims which would not even be commenced in the United States.

The relative ease with which a class action can be commenced in Australia has led to proceedings being commenced in a wide variety of circumstances. While there were surprisingly few class actions commenced in the years immediately following the introduction of the new procedure. However, that has radically changed over the past two or three years. More ominously events of recent months have added a new impetus to class action litigation in Australia.

Class actions in the State and Territory Supreme Courts

After the FCAA was amended in 1992 to make provisions for class actions there was considerable interest at the state level in adopting similar provisions. However, as the implications of the new procedure became clearer, most states and territories quickly lost interest. Indeed, only Victoria has pursued the matter with the introduction of a class action procedure in 2000. In doing so, the Victorian Parliament simply adopted the provisions found in the FCCA with the consequence that the procedures are, in essence, identical in both courts [2].

For a number of years the fact that the state and territory supreme courts had not introduced a class action procedure was of little consequence. As a result of the cross-vesting legislation that had been enacted throughout Australia a person who wished to bring a class action based on common law causes of action could utilise the Federal Court procedure. This changed in 1999 when the High Court of Australia held that key components of the cross-vesting legislation were unconstitutional. Since that time common law causes of action, or those based solely on state and territory legislation, cannot be pursued in the Federal Court other than in concert with a claim based on a federal cause of action.

As a consequence, lawyers wishing to pursue class actions that lack a federal law component have, once again, turned to the old rules which provide for representative actions in the state and territory courts. Ironically, the High Court had already breathed new life into these rules in 1995 when it swept away some of the traditional restrictions that had been applied by the courts over many years [3].

Class actions in the Federal Court are governed by a comprehensive set of rules which determine how each step of the case will proceed. For example, there are clear rules to determine the make up of the class, the procedural steps required to ensure a degree of fairness to the defendants and the way in which the proceeds of any judgment should be distributed. However, in the case of a state court representative action, the rules are silent on these issues, leaving the parties and the court to make up them up as the case proceeds.

Somewhat surprisingly the High Court did not see this as a problem - in effect leaving it up to the judges to determine the rules and procedure as the case proceeded. While this has some theoretical attraction it has, inevitably, led to extensive litigation where plaintiffs and defendants have spent as much time arguing over how the case should proceed as they have in dealing with the substantive issues.

Notwithstanding these very significant difficulties a number of representative actions have been commenced in the Supreme Court of New South Wales over the past year. In each case the claims bought by

[2] Supreme Court Act 1986 (Vic) Part 4A.
[3] Carnie v Esanda Finance (1995) 185 CLR 398.

the plaintiffs have not been the 'traditional' subject matter of class actions. Rather, the claims have involved attempts by retailers to recover monies allegedly paid to their suppliers in relation to state government licence fees which were subsequently held to be unconstitutional. While these early cases have encountered a range of procedural challenges and difficulties there is no doubt that the state based representative action is here to stay.

Subject matter of class actions

Traditionally, there has been a tendency to think of class actions in the context of product liability litigation. However, while class actions involving product liability claims are by no means uncommon, the Australian experience has demonstrated the diverse range of circumstances in which a class action can be commenced. Indeed, and unfortunately from the defendant's perspective, the limits are probably only bounded by the imagination of the lawyers acting for plaintiffs.

The first class action that was commenced in Australia under the new rules was one involving financial services Since then Australia has seen class actions involving the sale of real property and allegedly defective food, pharmaceuticals, medical devices and other consumer goods. Other actions have involved the marketing of home burglar alarms, financial losses said to have arisen out of the Longford gas explosion and the Sydney Water contamination crisis. Dissatisfied asylum seekers have sued the Minister.

Perhaps most ominously for corporate Australia 1999 saw the commencement of the first Australian class action involving securities claims. The action involved allegations that shareholders had been misled during the takeover battle with AMP. This case ultimately proved to be a bonanza for the lawyers acting for the class members when the defendants agreed to settle the case, pay the plaintiffs' claims and pay the plaintiffs' lawyers a further fifteen million dollars in 'legal fees'[4] . Towards the end of 2003 the firm of plaintiffs' lawyers which promoted this case announced that it was commencing a second class action against a corporate defendant. On this occasion the case involves allegations by shareholders of misleading conduct in relation to a profit downgrade. The firm acting for the class members has made it very clear that they see this area of the law as one with a significant future.

[4] King v AG Australia Holding Limited (formerly GIO Australia Holdings Limited) [2003] FCA 980.

A new impetus for class actions

The past twelve to eighteen months have seen a number of factors contribute to a significant increase in the level of interest in class action litigation in Australia. It is inevitable that this interest will translate into new actions in a range of areas over the next few years.

First, and somewhat ironically, one of the more immediate drivers for the increased interest in class action litigation has been the success of the recent broad ranging campaign for tort law reform. The changes introduced across Australia in 2002/2003 have resulted in real fall in the level of personal injury and medical negligence litigation. This, coupled with earlier changes which effectively brought to an end much of the litigation associated with motor vehicle accidents and workers compensation claims, has decimated the income of many plaintiffs' lawyers. At the same time they still have their mortgages and school fees to meet - as a consequence it is hardly surprising that they are searching for new fields of endeavour.

Second, in an unfortunate coincidence of timing, news of the settlement of Australia's first securities class action was announced just as the consequences of tort law reform were being recognised by those who had previously represented plaintiffs in personal injuries claims. The settlement not only gave the plaintiffs what they wanted, it also delivered a fee of no less than fifteen million dollars (paid by the defendants rather than their clients) to the plaintiffs' lawyers. On any view this represented a handsome reward for the effort that had been expended. It also signalled the emergence of two factors that had thus far been absent in the Australian market. Securities litigation was demonstrated to have a future in Australia and there was now hard evidence that Australian corporations may, as in the US, be willing to pay a premium to 'buy' peace.

Third, a way has been found to circumvent the rules which prevent Australian lawyers entering into true, US style contingency agreements. In the US it is normal for a plaintiffs' lawyer to sign up clients to an agreement which provides that the lawyer receives forty per cent of the verdict awarded to the plaintiff plus the expenses (disbursements) incurred by the lawyer in conducting the case. In Australia an agreement between a lawyer and client which provides for the lawyer to receive an agreed proportion or share of any judgement is illegal. Rather, the lawyer can only take his or her 'normal' fee plus an agreed uplift which is usually expressed as a percentage of the so called normal fee. These restrictions have effectively limited the amount plaintiffs' lawyers can earn and have been particularly effective in preventing them from receiving the enormous fees their class action colleagues are accustomed to in the United States.

While the restrictions on lawyers remain non lawyers are not so constrained. Thus, a new breed of entrepreneur has emerged to promote and fund class action litigation - indeed Australia is said to be home to the world's only publicly listed litigation funder. The mechanism is relatively straight forward. A non lawyer or corporation, the promoter, identifies a potential claim and then enters into agreements with potential claimants. These agreements provide for the promoter to receive an agreed percentage of any monies that come to the claimant - be that by way of settlement or judgement. In addition the claimants will often assign the benefit of any costs order they may receive to the promoter who is also given a broad discretion to conduct the litigation as they see fit The promoter then retains a lawyer who agrees to conduct the litigation on behalf of the promoter on the basis of the 'normal' rules governing the legal profession. In recent months agreements providing that the promoter will receive thirty-three and one-third per cent of the proceeds of the action plus GST plus the benefits any costs order have been used in a number of state court class actions.

While the litigation funders have experienced some early setbacks in the last few months, it is entirely possible that it will become the norm for class actions to be funded by third parties. Indeed, the most recently commenced shareholders' class action is said to be supported by a promoter in exchange for between twenty and forty per cent of the proceeds of the action.

Clayton Utz' class action experience

The team at Clayton Utz is and has been a participant in most of the significant class actions that have been commenced in Australia since the Federal Court rules were amended in 1992. We currently represent clients involved in class actions in the Federal Court and in the NSW, South Australian and Victorian State Courts. Many of the cases in which we have been involved have resulted in developments of the law in relation to particular aspects of class action law and procedure. This has included, for example, strengthening the requirement that class plaintiffs who commence a class action must disclose the substance of the class members' case and establishing the right of class action defendants to communicate directly with class members - even for the purpose of settling individual claims. These developments have significantly improved the position of defendants in class actions.

We have been involved in the recent developments in relation to litigation funding. We successfully challenged the constitution of a class action in the NSW Supreme Court in part on the basis that the litigation funder's involvement rendered the proceedings an abuse of process. This decision is currently the subject of an appeal to the NSW Court of Appeal.

Our class actions experience has extended to shareholder or securities litigation as well as claims involving consumer finance, infrastructure failure and recovery of monies paid in respect of license fees found to be unconstitutional.

In product liability claims, the team successfully defended the largest quasi class action ever tried in Australia. It has also successfully defended actions involving chemicals, a variety of pharmaceutical products, medical devices and other consumer products.

Finally, we have developed innovative procedures that allow corporations to use a class action to settle claims and thus bring an incident to an end, maintaining customer loyalty and corporate reputation but at the same time avoiding fraudulent or exaggerated clams.

In one such class action we developed and subsequently executed a settlement scheme which resolved significant business loss claims that had been made against the defendant in less than two years and for an amount that was significantly less than originally anticipated. This ensured that along tail of claims was avoided and minimised on going legal and administrative costs. At the same time the corporation was able to reassure both its customers and government regulators that it was treating the claimants fairly thus helping to rebuild its brand reputation.

Contacts

For further information please contact:

Stuart Clark

Partner
T +61 2 9353 4158
E sclark@claytonutz.com

Colin Loveday

Partner
T +61 2 9353 4193
E cloveday@claytonutz.com

www.claytonutz.com

Sydney

Levels 22–35
No 1 O'Connell Street
Sydney NSW 2000
T +61 2 9353 4000
F +61 2 8220 6700

Melbourne

Levels 17–19
333 Collins Street
Melbourne VIC 3000
T +61 3 9286 6000
F +61 3 9629 8488

Brisbane

Levels 18–27
215 Adelaide Street
Brisbane QLD 4000
T +61 7 3292 7000
F +61 7 3003 1366

Perth

Level 27, QV1 Building
250 St. George's Terrace
Perth WA 6000
T +61 8 9426 8000
F +61 8 9481 3095

Canberra

Level 8, Canberra House
40 Marcus Clarke Street
Canberra ACT 2601
T +61 2 6279 4000
F +61 2 6279 4099

Darwin

17-19 Lindsay Street
Darwin NT 0800
T +61 8 8943 2555
F +61 8 8943 2500

Adelaide

Level 18
Santos House
91 King William Street
Adelaide SA 5000
T +61 8 8111 2000
F +61 8 8111 2099

www.claytonutz.com