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CASUALTY MATTERS®

Class Actions in Australia – A Quarter Century Later

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The Australian Law Reform Commission (ALRC) released a discussion paper on 31 May 2018 as part of their "Inquiry Into Class Action Proceedings and Third-Party Litigation Funders". It is therefore an opportune time to reflect on the class action regime – the prescriptive regime that contains detailed provisions for the commencement and conduct of class actions in Australia. Class actions became part of Australia's litigation landscape more than 26 years ago.

In March 1992, Part IVA of the *Federal Court of Australia Act 1976 (Cth)* was enacted, enabling class actions to be pursued for the very first time. Access to justice and judicial economy were given as reasons when the bill was introduced in the Australian Parliament by the then Attorney-General. Since then, Victoria (in 2000), New South Wales (in 2011) and Queensland (in 2016) have created class action regimes, with Western Australia soon to follow. Six class actions were filed in 1992, initiating a steady stream of class action filings.

The class action regime in Australia has been described as one of the most liberal in the world. For example, the onus to establish that the threshold requirements are met is placed on the defendant rather than the plaintiff.

The threshold requirements are:

- A minimum of seven or more persons must have claims against the same defendant.
- The claims must be in respect of, or arise out of, the same, similar or related circumstances.
- The claims must give rise to at least one substantial common issue of law or fact.

Unlike the class action regime in the United States, "the loser pays" principle applies in Australian class actions, which to some extent does deter speculative litigation.

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Gen Re's *Casualty Matters Australia* reviews new liability developments. Our underwriters and claims specialists provide perspectives on the developments mean to insurers and specific types of insureds.

Litigation funders

In August 2006, the High Court in a majority judgement held that litigation funding neither constituted an abuse of process nor was it against public policy.[1] This opened the door for litigation funders to fund class actions, which may account for the steady rise in class actions since that time. More than 15 litigation funders are currently involved in funding class actions in Australia with IMF Bentham Limited being the biggest and most high profile of these.

Types and sizes of class action claims

Initially class actions were dominated by product liability claims; the first securities class action was filed in 1999, seven years after the class action regime came into effect. We now see class action claims arising from securities, financial products and investments, product liability, natural disasters, environmental events, consumer protection, actions against the government and human rights violation. Almost half the class actions in recent times are related to securities, financial products and investments.

One of the first large class actions settled in Australia was initiated in 1998 by shareholders against GIO Insurance for misleading, deceptive and/or negligent statements during a hostile takeover bid. This action settled in 2003 for about AUD 97 million.[2]

The "Black Saturday" Victorian bushfire claims settled for AUD 900 million, which included the two largest class actions in Australia against electricity company AusNet and others that settled for about AUD 500 million and AUD 300 million.[3] The next biggest was the Centro Properties and Centro Retail class action for misleading and deceptive conduct, which settled for AUD 200 million.[4]

Do class actions work?

Justice Bernard Murphy of the Federal Court of Australia in an address marking 25 years since Part IVA was emphatic that while the regime is not perfect, **class actions can work.** He said that provided class actions are filed in relation to serious misconduct, with the primary aim to deliver substantial compensation or other relief for the claimant, and are properly conducted and managed, they serve an important role in providing access to justice. The regime allows everyone who is impacted by mass civil wrongs a cause of action to seek compensation that they would otherwise be unable to obtain. While they were previously virtually impossible, class actions have resulted in more than AUD 3.5 billion in compensation for civil wrongdoings suffered by consumers, shareholders, investors and other classes of victims.[5]

The class action regime has faced criticism, which includes that it not only promotes a U.S.-style litigation in Australia that stymies business, but that it opens the door to unmeritorious claims and the floodgates to litigation. Empirical research, however, does not support this criticism. In his study on Australian class action regimes, Professor Vince Morabito found that the floodgates have not opened. In 51% of the cases, class actions are either discontinued or do not continue in the form of a class action.[6] As Justice Allsop noted, in the last 26 years 500 class actions have been filed relating to 350 disputes. This is by no means a flood.[7]

The operation of Part IVA has been considered by various stakeholders, including various law reform and related governmental commissions, federal and state legislatures and Australia's main corporate regulators. While recommendations were made for improvements to reduce the barriers to its use, all of these stakeholders have been supportive of the regime.

The judiciary were initially less than enthusiastic about the use of class actions. The legislation did not have bipartisan support. Former Attorney-General Durack (1977-1983) remarked:

> *"A number of people would even go so far as to say that [the Legislation] is a monstrosity…It really is one of those rather loopy proposals that come up from time to time from commissions like the Law Reform Commission."*[8]

Over the years, however, the judiciary have embraced it and some judges now see great utility in class actions as a tool that enables better

access to justice. For example, in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*, the New South Wales Court of Appeal expressed strong support for litigation funding of class action proceedings for providing access to justice.[9] Judges also agreed that shareholder actions benefit investors in allowing access to justice in order to recover losses caused by misconduct of companies. In Australia's largest class action to date, the two Black Saturday bushfires, Justice Forrest of the Victorian Supreme Court strongly voiced his support for class actions,

> *"This demonstrates that the class action process works. It shows that when it is properly managed, many substantially disadvantaged and affected people can recover compensation that they would otherwise not have been able to obtain."*[10]

Although the class action regime may not be perfect, Australian courts are more than capable of dealing with any problems that might arise. In the last 26 years, there has been no judgement from a superior court that points to any fundamental issues with the operations of the class action regimes. On the other hand, a number of judgements demonstrate that if difficulties do arise, the courts are more than capable of addressing them.

Looking forward

In 2018 we will see a number of shareholder and consumer class actions resulting from the findings of the current Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Law firm Quinn Emanuel Urqhart is seeking the approval of the New South Wales Supreme Court to act for AMP shareholders who bought the company's stock from May 2013 to mid-April 2018. According to news reports, four other law firms Shine Lawyers, Phi Finney Macdonald, Slater & Gordon, and Maurice Blackburn, arguably the most active class action law firm, are also courting AMP shareholders with some even lowering their commission rates to attract clients.[11]

Class actions will continue to be the subject of review. In 2017 both the Victorian Law Reform Commission (VLRC) and the Australian Law Reform Commission commenced separate reviews of the respective class action regimes. The VLRC received a reference from the Victorian Attorney-General concerning access to justice by litigants who seek to enforce their rights using the services of litigation funders and/or through group proceedings (class actions). The VLRC has been tasked by the Victorian Attorney-General to review and report on the regulation of legal costs, including whether to legalise contingency fees, regulation of litigation funding, certification of class actions, and settlement of class actions. The VLRC's report is due to be presented in the Victorian Parliament before 19 June 2018.

The ALRC was also tasked with investigating the regulation of legal costs and litigation funding in class actions, conflicts of interest and class action settlement distributions. The commission recently published a voluminous discussion paper in which it is seeking submissions from a broad cross-section of the community. The ALRC is due to report to the Attorney-General by 21 December 2018. Insurers and reinsurers should take time to consider the ALRC discussion paper and make submissions by the 30 July 2018 closing date. All aspects of the class action regime are being considered by the ALRC; therefore, it is important that the views of insurers and reinsurers be heard. For example, one of the proposals is to lift the ban on contingency fee arrangements for solicitors with limitations. What are insurers and reinsurers views about this proposal?

What does this mean for insurers and reinsurers?

The Australian class action regime will continue into the future. All stakeholders consider class actions a valuable tool in the legal environment with no group seeing any reason for abandoning a regime that has served the community well for more than 26 years.

Insurers and reinsurers that write policies that would respond to class actions should price for the fact that class actions are here to stay and will continue to be a feature of the Australian litigation landscape. The recommendations arising from the VLRC and ALRC reviews, and what is finally adopted by the respective governments, will have an impact on the shape of a future class action regime that will in turn determine what impact it will have on insurers and reinsurers.

About the Author

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10 Ibid., at Note 3.

11 http://www.abc.net.au/news//2018-05-18/first-investor-class-action-against-amp-hits-the-courts/9776504.

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