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CLASS ACTIONS IN AUSTRALIA

Introduction

Australia has a relatively liberal class action regime, which has led to class actions becoming a growing area of litigation.

The major class action jurisdiction in the country is the Federal Court of Australia. Between 2013 and 2015, the total number of class actions filed in Australian jurisdictions increased from 18 to 33 per year. Of the 33 class actions filed in the 12 months to June 2015, 16 relate to securities, financial products and investments. The rest relate to natural disasters and events, public interest and human rights, alleged breaches of statutory duty and mass consumer claims.

Total settlement payouts in the 12 months to June 2015 were approximately $950 million across 12 class actions. A significant proportion of that figure was accounted for by settlements of Victorian bushfires class actions, one of which more than doubled the previous highest settlement figure for an Australian class action.

Despite steady growth, however, the explosion of class action claims anticipated by some has not eventuated.

YPOL's involvement

This firm has been involved in many of the significant Australian class action cases and related litigation in recent years, including the following:

Leighton Holdings

Two major shareholder class actions have been brought against Leighton since 2013, one relating to a significant profit downgrade announced by the company in 2011 and the other relating to allegations of bribery involving the company's operations in Iraq. Both of these matters were also the subject of investigation by regulators.

The profit downgrade case was resolved in mid-2014 for a figure of just under $70 million. The settlement was approved by the Supreme Court of Victoria.

The alleged bribery case is ongoing and has been the subject of multiple interlocutory decisions, appeals and an unsuccessful application for special leave to appeal to the High Court of Australia.

Storm Financial

Storm collapsed in 2009, leaving a large number of customers unable to service their highly-leveraged investment loans. Following the collapse, class action claims were brought against a number of banks who had provided finance to Storm customers. The collapse also attracted the attention of regulators and the Federal Government.

The Commonwealth Bank of Australia and the Bank of Queensland settled investor class actions for $34 million and $17 million respectively.

In late 2014, Storm investors brought a class action against the Australian Securities and Investments Commission, claiming that the regulator could have stepped in. ASIC is defending the action.

Great Southern

This litigation concerned 16 group proceedings and numerous individual actions commenced after companies in the Great Southern Group went into administration, on behalf of investors who had acquired interests in various managed investment schemes. Great Southern was one of a series of collapses of tax-driven agribusiness schemes in Australia.

After a 90 day hearing, the parties reached a settlement two days before the trial judge was due to deliver judgment. The settlement amount was $23.8 million, of which $20 million was to reimburse legal costs already paid to the claimants' lawyers.

The trial judge's decision was released, not with effect as a judgment of the Court but as part of the settlement approval process. As the judge would have found against the claimants, the group members were put in a better position by the settlement, despite the minimal return to investors (less than $17 per $10,000 invested), and the settlement was approved.

This well-publicised action is a good illustration of the stakes in major class actions and the reasons why there is a palpable reluctance among participants to take them to judgment.

2009 Victorian bushfires

On 7 February 2009, more than 15 significant bushfires occurred in Victoria, killing 173 people and causing widespread damage to homes, farms, livestock and businesses.

Multiple class actions were commenced against energy providers, fire and emergency authorities, various contractors and the State.

The class actions were the subject of publicly-announced and Court-approved settlements in 2013, 2014 and 2015. In one action, relating to the Kilmore East-Kinglake fires, the Supreme Court of Victoria approved a settlement of $494 million, more than twice the amount of the previous highest settlement figure for an Australian class action.

Willmott Forests

The Willmott Forests Group conducted an agribusiness investment scheme. It collapsed in 2010, leading to a class action by investors commenced in the Federal Court in late 2011.

The respondents sought security for costs. The ordering of security for costs is not prohibited in Federal Court class actions, but requires an examination of the group members' financial circumstances and whether such an order would be likely to stultify the action. In this case, where the group consisted largely of individual investors and there was no evidence of a commercial litigation funder being involved, the first instance judge declined to order security for costs. However, the decision was successfully appealed to the Full Court.

2011 Queensland floods

A series of floods caused widespread damage to property and at least 33 deaths in south-east Queensland in December 2010 and January 2011.

In July 2014, a class action was brought in the Supreme Court of New South Wales against the operators of the Wivenhoe and Somerset dams. The claimants allege that the operators' negligence contributed significantly to flooding downstream of the dams in the cities of Brisbane and Ipswich.

Billabong

This is another class action resulting from a profit downgrade. Following the announcement of a $70-75 million downgrade in December 2011, Billabong's share price fell by 51%.

The class action was commenced in 2015 and is scheduled for trial in late 2016.

Other recent developments

Standard & Poor's

Ninety two investors who bought synthetic CDOs issued by Lehman Brothers Australia brought proceedings against Standard & Poor's, alleging misleading and deceptive conduct on the part of the ratings agency, which had assigned AA and AAA credit ratings to the products.

On 19 February 2016, it was reported that the action had been settled for $200 million. The settlement is subject to Court approval.

Slater & Gordon

In 2007, Slater & Gordon became the first publicly listed law firm in the world. It embarked on a robust expansion plan, acquiring smaller firms in Australia before pursuing the same strategy in Britain.

The $1.3 billion acquisition in the UK of the professional services division of Quindell PLC and the impact of proposed legislative changes in the UK, together with the withdrawal of revenue and earnings guidance, have had a severe impact on the firm's share price. Slater & Gordon shares have lost over 90% of their value since April 2015.

More than 1,750 shareholders have signed up to a possible class action promoted by rival firm Maurice Blackburn.

On 29 February 2016, Slater & Gordon reported a net loss of $958.3 million for the first half of FY16. The share price fell further after this announcement.

Downer EDI

This action arose from the Waratah train project, a contract for the design, manufacture and commissioning of 78 eight-car double-decker train sets for the Sydney rail network. On 1 June 2010, following the raising of a provision of $190 million against the project, the price of Downer shares fell by 24.18%.

Internal documents presented to the Supreme Court of Victoria were claimed to show that Downer was aware that its costs had blown out by $117 million one year before disclosure of its troubles to the market.

In February 2016, on the fourth day of trial, Downer settled the action. Court approval has not yet been obtained.

2013 Blue Mountains bushfires

A class action was commenced against Endeavour Energy in 2014 in the Supreme Court of New South Wales for loss caused by the 2013 Blue Mountains bushfires.

Insurers sought to opt out of the proceedings on behalf of 550 class members whom they insured.

Following an interlocutory hearing, the opt out notices were held in August 2015 to be invalid. The Court held that unless there is an express contractual right, an insurer which has paid part of an insured's loss does not have authority to conduct and control the insured's right to recover its entire loss, both insured and uninsured.

Trends and developments

Court regimes continue to be permissive

Australian Federal and State jurisdictions have developed class action regimes which are relatively plaintiff-friendly and do not present some of the threshold issues faced by class actions elsewhere.

The entrenchment of class actions continues with the Federal Court's recent release of a draft practice note for class actions, in relation to which the Court has sought feedback from lawyers. New procedures are proposed for conducting class actions, including a two-judge approach to case management and hearing, along with the creation of a Class Action Registrar position. The practice note has prompted concern from plaintiff lawyers as it proposes disclosure requirements for costs agreements and litigation funding agreements. The Court expects to issue the practice note in March 2016.

Costs can be and generally are awarded to the successful party in Australian class actions, which encourages plaintiff lawyers and litigation funders to pursue class actions, but on the other hand can deter unmeritorious and speculative claims. This is probably a major reason why there has been a steady increase but not an explosion in major class actions.

The advent of litigation funding

The acceptance of third-party litigation funding has fuelled the growth in class actions. By 2015, 17 commercial funders had funded or proposed to fund class actions in Australia. Most major class actions are now funded by third parties and this trend is likely to continue given

the potential for profit, as well as the support expressed to date for litigation funding from the government and the judiciary on the basis that it increases access to justice.

Litigation funders, unlike Australian lawyers, are not prohibited from entering into contingency fee arrangements.

Plaintiff law firms and the emergence of specialists

A number of prominent plaintiff firms have focused noticeably on class actions following the downturn in personal injury claims. Slater & Gordon are currently promoting 22 class actions and proposed class actions. Maurice Blackburn's website lists 26 (including the proposed class action against Slater & Gordon).

A number of smaller, specialist firms have also emerged. One such firm commenced multiple shareholder class actions on behalf of a company controlled by the principal of the firm, putting the dual role of lawyer and representative plaintiff under scrutiny. The Victorian Court of Appeal ruled that this was impermissible, noting that the processes of the Court do not exist merely to enable income to be generated for solicitors.

The rise of shareholder and investor class actions

There has been a continuous increase in the number of class actions brought against corporations by shareholders and investors, which has seen this become the most common type of class action claim in Australia in recent years.

Australia's broad statutory prohibition against corporate conduct that is either misleading or deceptive, or is likely to mislead or deceive, is a strong driver of these types of claims.

Shareholder class actions give rise to a number of technical issues with which Australian courts are yet to grapple, in particular around proof of reliance (market-based causation or direct causation) and measure of loss.

Security for costs

Security for costs is a significant burden for claimants, particularly class action claimants who are not funded.

The Full Federal Court decision in Willmott Forests is an important development in Australian class actions. Among other things, it points to the need for injustice to respondents to be taken into account in the Court's balancing exercise, as well as the relevance of the availability of litigation funding.

Property insurers as class members

Natural disasters and other events which cause property damage on a large scale involve property insurers in class actions, by way of their subrogated rights.

It is common for property owners to suffer both insured loss and uninsured loss. Uninsured loss can have significant consequences for the conduct of recovery actions.

The 'opt-out' decision in the Blue Mountains bushfires case illustrates the need in some cases for insurers to craft their policy wordings to give them greater control over the recovery of uninsured loss from third parties, whilst being mindful of their duty to act with utmost good faith towards insureds.

Settlements

The majority of class actions in Australia are settled. There is often strong interest in settlement on both sides from an early stage, even before proceedings have been commenced.

A number of major class actions have been resolved well before significant costs have been incurred ('significant' being a relative term in this context) and for amounts which represent a clear compromise on publicised quantum estimates.

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