# Class Actions in Australia Update

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# Overview

- Opt out class action regime first introduced federally in 1992
- Now also available in some but not all states
- Two recent High Court decisions on common fund orders and competing classes
- Australian Law Reform Commission Inquiry: *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (2018)
- Cth Parliamentary Inquiry (2020)

# Competing Class Actions

- Australia has no formal equivalent to U.S Federal Rule 23G
- Can court use its procedural powers to "choose" one proceeding to continue by staying the others? Yes according to High Court
- *Wigmans v AMP Limited* [2021] HCA 7

# Factors relevant to “choosing” class counsel

- In matters involving competing open class representative proceedings with several firms of solicitors and different funding models, where the interests of the defendant are not differentially affected, it is necessary for the court to determine which proceeding going ahead would be in the best interests of group members. The factors that might be relevant cannot be exhaustively listed and will vary from case to case. (Gagelar, Gordon and Edelman JJ [52])
- The court can take into account proposed funding models

# The value of adversarialism for dealing with conflicts

‘Is the court to act as inquisitor and as such investigate itself how choosing to stay one or more of the actions might affect group members, or should it use existing procedures, methods, steps and mechanisms to identify and resolve such issues on an adversarial basis? The answer to that question will invariably depend on the nature of the case in hand. But where there are complex and interrelated considerations and real potential for conflicts of interest, an adversarial approach is to be preferred.’ (Gagelar, Gordon and Edelman JJ [118])

# Competing Actions: Process

- HC indicated the court could appoint a referee or a contradictor to act on behalf of the common group members

‘Adopting one or more of these approaches, the court's task could not be characterised as an "auction process". It would instead be more akin to that used when considering the position of trustees, liquidators, attorneys or persons under disability and would include considerations such as prospects of success and cost of the proceedings. No less significantly, it would allow for conflicts of interest and the best interests of the group members to be neutrally and squarely addressed.’ (Gagelar, Gordon and Edelman JJ [123])

# Common Fund Orders

- Could they be made under Australian class action statutes?
- Yes according to the Federal Court, no according to the High Court
- *BMW v Brewster* [2019] HCA 45
- The statutory power: section 33ZF(1) FCA:

…the Court may… make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

# Purposive interpretation of class action statutes?

'The objectives of Pt IVA of the FCA were identified by the Australian Law Reform Commission… They were two-fold: first, to enhance access to justice for claimants by allowing for the collectivisation of claims that might not be economically viable as individual claims; and secondly, to increase the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple suits.

The defects in the existing law targeted by the ALRC in order to improve access to justice simply did not include the absence of sufficient incentive for litigation funders to fund litigation.' (Kiefel CJ, Bell and Keane JJ [82])

- Note Federal and NSW courts have interpreted *Brewster* to allow for common fund orders to be made *at the end of the proceeding*

# Empirical Evidence – Impact of Common Fund Orders

- ‘[T]here are indications that there was a significant reduction in commission rates over the period in which common fund orders were being made, reflecting the increased level of competition between funders and the greater involvement of the courts in setting rates when common fund orders were available.’ (Law Council of Australia)

# Empirical Evidence – Costs and Funding

- Of all matters identified (for which the amount of approved legal fees is known), the total settlement sum over the period is $4.489 billion, inclusive of costs
- The approved legal costs and disbursements for those matters totals $679 million being 15.14 per cent of the gross settlement amount;
- Of the funded matters identified (for which funding commissions are known), the total settlement sum over the period is $2.389 billion, inclusive of costs;
- Commissions earned by funders totalled $642.63 million, being 26.9 per cent of the gross settlement sum;
- Of the funded matters identified the proportion of approved legal fees plus commission paid to the funders to the approved gross settlement sum is 41.4 per cent

(Law Council of Australia)

# Cth Parliamentary Inquiry - Dec 2020

- The Minority Report:

  '[1.1] Over the last three years, the current Government's approach to policy-making in relation to class actions and litigation funding has been an embarrassing shambles.

  [1.7] And now, three years after the ALRC launched its inquiry into class action proceedings and third-party litigation funders, this Committee is tabling a report that largely repeats the recommendations that the ALRC made two years ago –

  [1.8] If that was all the majority report did, this inquiry could be dismissed as a waste of the Parliament's time and resources. But, alarmingly, the Government members of the Committee have gone well beyond the terms of reference of this inquiry by endorsing the Treasurer's ill-considered and rushed 'temporary' changes to Australia's continuous disclosure laws.'

# The view from corporate lawyer land

- ‘The [Parliamentary] report recommends sweeping reforms to the regulation of litigation funders and plaintiff firms and to the class actions regime more broadly. These recommendations seek to better reflect the original objectives of the class actions regime in order to restore access to justice, promote the interests of group members and deter opportunistic entrepreneurialism in the class actions space.’ Allens – Linklaters

# Parliamentary Inquiry - Recommendations

- An express power to permit the Federal Court to resolve competing and multiple class actions, with discretion to allow more than one class action with respect to the same dispute to continue (Recommendations 2 and 3);
- New legislation recognising power to make common fund orders at end of proceeding (Recommendation 7);

# Recommendations Regarding Costs

- Proposals for proportionate and fair legal costs, including capping of uplift fees, and consideration to be given to the imposition of a minimum return of the gross proceeds of a class action to group members (Recommendations 13, 14, 16, 20, 21);
- Litigation funding agreements must provide a complete indemnity for adverse costs (Recommendation 8);
- Agreements only enforceable where it has received Court approval (Recommendation 11);
- Introduction of a statutory presumption which requires a litigation funder to provide security for costs (Recommendation 10);
- The Federal Court being empowered to make costs orders directly against litigation funders (Recommendation 15).

# Transparency & Conflicts of Interest

- The publication of a consistent prescriptive list of information following approval of any settlement (Recommendation 17). Designed to increase transparency as to class size, number of members that opt-out, funding details/terms and fees, average payments to group members (including by reference to the gross settlement sum);

- The appointment of an independent contradictor where there is the potential for significant conflicts of interest to arise or complex issues in the court approval process (Recommendation 18);

# Substantive Corporate Law Changes

- The Australian Government permanently legislate changes to continuous disclosure laws, consistent with the temporary changes introduced during the COVID-19 pandemic to introduce a fault based element into these laws (Recommendation 29).

# Shareholder Class Actions Under Scrutiny

- [17.118] Shareholder class actions do not appear to be limiting agency costs in corporations. Indeed, it appears that shareholder class actions may be costing shareholders more than the problems they seek to resolve. They provide limited deterrence for corporate misconduct, because those responsible for continuous disclosure breaches do not receive timely sanctions or bear the full costs of their actions.
- [17.119] Additionally, the increasing prevalence of shareholder class actions has broader undesirable outcomes on the availability and cost of D&O insurance, with consequential challenges for attracting and retaining experienced and high quality directors and officers. A culture of risk-averse decision-making across Australian boards is a further adverse outcome of shareholder class actions, with harmful long-term impacts on economic growth, job creation and investors' returns on equity.