SOME CURRENT PRACTICAL ISSUES IN CLASS ACTION LITIGATION

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I INTRODUCTION

I have been asked to write about some current practical issues in class action litigation. Therefore what follows does not purport to be a scholarly essay, of which there are now many fine examples.[1]

I will be referring to proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('*FCA Act*') and therefore to proceedings under the virtually identical Part 4A of Victoria's *Supreme Court Act 1958* (Vic).

After this article was written, on 23 September 2009 the Commonwealth Attorney-General, The Hon Robert McClelland, released *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, a report by his Department's Access to Justice Taskforce.[2] Recommendation 8.11 in that report is to the effect that the Attorney-General should commission a review of Part IVA's class action provisions to ensure that they are operating in a manner consistent with the objects of improving access to justice, improving judicial economy, and contributing to behaviour modification.[3] The Recommendation states that the issues to be considered in such a review should include:

- means to limit interlocutory proceedings in class actions
- whether the ability for the Federal Court to terminate a class action under s 33N should be limited or removed, and whether it should be replaced with any specific criteria
- whether the legislation appropriately takes account of the behaviour modification aspects of class actions, including whether there is scope for the greater involvement of regulatory agencies in class actions and whether the Court should be allowed to award cy-pres remedies, and
- whether the current opt-in arrangements for class actions funded by litigation funders are appropriate or should be amended.

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1 See the 'Further Reading' list in the recent book, the Hon Justice K E Lindgren (ed), *Investor Class Actions* (2009) 119–22 (published by the Ross Parsons Centre of Commercial, Corporate and Taxation Law).

2 Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce (2009).

3 Ibid 117.

A review of the operation of Part IVA is to be welcomed. That Part has been in force since 1992 without any substantial review of its operation.

I have not revised this paper in the light of the discussion in the *Strategic Framework* report, but it should be noted that that report refers to some of the matters discussed below.

II INTERLOCUTORY DISPUTATION

It is well known that class actions tend to be beset by numerous interlocutory contests. Most of these are initiated by the respondent (I will use applicant/respondent rather than plaintiff/defendant terminology). In many cases leave to appeal from the interlocutory orders has been sought and granted.

The delay and cost involved in these interlocutory disputes is a problem.[4] Rather than simply bemoaning the problem or blaming one party or the other, I will suggest below one practical device that may go some way towards overcoming it.

A respondent may move for summary dismissal on the basis that the commencement of the proceeding did not conform to section 33C(1) of the *FCA Act*. That subsection provides that a proceeding may be commenced under Part IVA where:

> (a) 7 or more persons have claims against the same person; and
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
> (c) the claims of all those persons give rise to a substantial common issue of law or fact.

Section 33C(1) goes to the authority to commence a proceeding under Part IVA. Respondents must be able to challenge the commencement of a proceeding purportedly under Part IVA in reliance on that provision.

Section 33N is of a different kind. It goes to the Court's discretion to order that a proceeding no longer continue under Part IVA. According to section 33N(1), the discretion is enlivened where the Court is satisfied that it is in the interests of justice that a proceeding no longer continue under Part IVA because:

> (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
> (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
> (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
> (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

4 See ibid (Recommendation 8.11).

It is not uncommon for respondents to seek an order under section 33N(1), often in the alternative to an order founded on an alleged failure to satisfy the requirements of section 33C(1). As noted earlier, the Access to Justice Taskforce has recommended that the Court's power to terminate a class action under section 33N be reviewed. The question posed by the Taskforce is whether the discretion should be limited or removed – an important question which I will not discuss.

It should be acknowledged that, generally speaking, there are proper reasons why there are more interlocutory challenges by respondents in representative proceedings than in ordinary proceedings. Most obviously, the mandatory criteria of section 33C(1) and the discretion given by section 33N(1) are absent from conventional litigation. Those provisions invite respondents to attempt to stop a class action in its tracks.

Respondents are often criticised on account of their interlocutory challenges in group proceedings. It is important, however, from their viewpoint and from that of the Court, not only that the issues for decision be clearly defined, but also that class related questions be identified early.

No doubt respondents desire to stop a group proceeding at an early stage in the hope that they will never have to face numerous proceedings brought by the individual group members. This motivation is understandable and in my opinion it is futile simply to deplore it or to dismiss it as unworthy. Any respondent which has the means to do so, when faced with a crippling lawsuit, whether a class action or not, will use any procedure at its disposal to bring the lawsuit to an early halt. This is not to say that the Judge should indulge a respondent. In particular, a Judge should not be too easily alarmed by the emphasis that a respondent will attempt to place on the individual issues at the expense of the common issues.

What proper measures can be taken to avoid the admittedly numerous, expensive and time consuming interlocutory applications in Part IVA proceedings consistently with a recognition of the legitimate interests of respondents?

I suggest that a useful procedural device directed to that end is the holding of an early case management conference. I further suggest that a practice note might well be issued instituting this as the norm in all class action proceedings.

What is a case management conference? I will give a description based on my own practice.

The case management conference is held, not in a court room, but in a conference room at the Court where all concerned sit around a conference table.

Although a transcript of the proceedings at the conference is made, the procedure is unlike that in court in other respects.

First, there is no motion claiming interlocutory relief to which the conference is addressed. Rather, there is an 'agenda' which will ordinarily have been settled by the Judge.

Second, each agenda topic is discussed to conclusion before attention is directed to the next one.

Third, there is not an established sequence of addresses as in court (applicant/respondent/applicant). Rather, counsel *and solicitors*, in no particular sequence, are at liberty to address remarks to each agenda topic. (I concede that solicitors have tended to leave the running to counsel.)

Fourth, the conference takes place in private, not in public, and no evidence is given.

Fifth, no orders are made except by consent. If the parties desire the Judge to give an indication of how he or she would decide a particular contested issue, the Judge may do so. The parties may have agreed to conduct themselves in accordance with the Judge's indication and to provide consent orders subsequently to give effect to that indication.

Sixth, it may be desirable that the client or the client's responsible officer be directed or encouraged by the Court to attend. It may be thought that the client or officer will acquire a better grasp of the issues and uncertainties touching the case in the more intimate and less formal context of the case management conference.

The benefits offered by the case management conference are also relevant to proceedings other than class actions, such as complex commercial proceedings.

I have used the case management conference as described above several times with the result of expediting the progress of a proceeding and exposing the real issues in dispute. In one case the parties asked me to indicate how I would decide certain issues relating to categories of documents for discovery. I did so and the parties gave effect to the indications in the form of consent orders which I made subsequently. The procedure saved the time and cost associated with:

- the filing and service of a notice of motion including the formulation of the orders to be sought;
- the making, filing and service of an affidavit in support;
- a directions hearing on the motion;
- the hearing of the motion and possibly associated written submissions;
- the giving of a judgment on the motion including written reasons.

I accept that even in court some of these steps, such as (with the parties' consent) the giving of written reasons, can be eliminated. It must be acknowledged too that the case management conference itself involves time and cost probably equivalent to the hearing of a motion. Nonetheless, I suggest that a substantial saving remains. In the case to which I referred, other matters that were of concern to the parties were also addressed in the case management conference.

III LITIGATION FUNDING

Litigation funding has become a fairly common feature of class actions. A committee of judges acting under the auspices of the Council of Chief Justices of Australia and New Zealand considered the question whether there should be

harmonised rules of court relating to litigation funding. The committee considered a proposal that the following minimalist rules be made:

1. In this Order/Part, "litigation funder" means a person whose business consists wholly or mainly of financing civil proceedings for profit, but does not include–

   (a) an organisation which finances, or assists in financing, a member of that organisation in relation to a civil proceeding; or

   (b) a solicitor who conducts a civil proceeding on a no-win no-fee basis.

2. A party to a proceeding who is funded in respect of the proceeding to any extent by a litigation funder must file a notice stating that fact and identifying the litigation funder in accordance with Form ...

3. The notice must be accompanied by a copy of the litigation funding agreement between the party and the litigation funder contained in a sealed envelope bearing the title of the proceeding, and the date of, and names of the parties to, the litigation funding agreement.

4. The envelope referred to in rule 3 will not be opened or the agreement contained within it inspected, without the leave of the Court.

5. The notice referred to in rule 2 accompanied by the agreement referred to in rule 3 must be filed upon the filing of the originating process or, if the litigation funding agreement is entered into after that filing, as soon as practicable after the agreement is entered into.

6. Where a party is being or has been funded in respect of a proceeding to any extent by a litigation funder, the Court may make such orders as it thinks just in the circumstances of the particular case for:

   (a) the provision of security for costs by the litigation funder; and

   (b) payment by the litigation funder of the costs, in whole or in part, of any party to the proceeding.

The committee did not agree to the proposal, not because of matters of detail, but because the majority considered that the courts should not make rules on the matter at all in the absence of legislation on the matter.

The Standing Committee of Attorneys-General ('SCAG') has considered legislating in relation to litigation funding. Nothing has come of this to date, but it is understood that the question is likely to arise again when SCAG considers the *Strategic Framework* report referred to earlier at SCAG's November 2009 meeting.

I favour the making of rules generally along the lines set out above, but only on a harmonised basis. Although the proposed rules are modest, the reality is that each court will see them as creating what litigation funders will perceive as an obstacle in the way of the commencement of funded proceedings in the court, which may drive litigation funders to courts that have not made the rules.

The following remarks are directed to some issues raised by the draft rules set out above.

A threshold question is the definition of 'litigation funder'. If the proper inquiry is simply to ask who funded the applicant, the following might be caught (whether desirably or not):

- a relative or friend of the litigant;
- an insurer;

- a trade union or trade or professional association;
- a legal aid provider.

Mr John Walker of IMF (Australia) Ltd has written recently on this issue, arguing that regulation, whether by legislation or rules of court, should apply equally to insurers and commercial litigation funders.[5]

The following comparisons can be made between commercial litigation funders and insurers:

- like the litigation funder which has financial interest in the success of the applicant whom it funds, an insurer will be better off financially if its insured succeeds, and to that extent has a financial interest in the outcome of the litigation;
- both insurer and litigation funder enter into tripartite contractual relations with the funded client/insured and a firm of lawyers;
- both assume day to day responsibility for the provision of instructions to the lawyers who have the carriage of the matter;
- both pay for the conduct of the litigation;
- both pay any adverse costs orders.

I will say nothing further on the question of policy whether insurers should be covered by rules of the kind mentioned.

Two points may be made in relation to draft rule 6 above. First, an order that the applicant provide security would in practice have the effect of extracting security from the applicant's litigation funder if the proceeding is to continue. Second, it may well be that the courts have power to make orders that a litigation funder provide security for costs and pay costs,[6] but a rule saying so seems advantageous. Indeed, the recent High Court decision in *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd*[7] shows that a particular court's Act or rules of court may deny it the power save in special circumstances.

IV OPTING OUT

Why do some class members opt out? They may make an informed decision to do so. A corporation which is a class member and has or wishes to have ongoing commercial relationships with the respondent may conceive it to be in its overall commercial interests to opt out and to negotiate directly with the respondent. Considerations may enter into those negotiations which cannot be

5 John Walker, 'Policy Issues in Litigation Funding' (Paper presented to the Supreme Court and Federal Court Judges' Conference, Hobart, 26 January 2009).

6 Cf *Knight v FP Special Assets Limited* (1992) 174 CLR 178, 192–3; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807, 2817.

7 *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd; Jeffery & Katauskas Pty Limited v Rickard Constructions Pty Limited* [2009] HCA 43 (French CJ, Gummow, Hayne, Heydon and Crennan JJ, 13 October 2009).

accommodated within the class action regime, under which all class members are treated in the same way.

There is, however, a troubling question as to whether some group members who opt out do so as a result of ignorance. At present there is no empirical research as to what motivates group members to opt out.

The Court is required by section 33J(1) of the *FCA Act* to fix a date by which a group member may opt out of a representative proceeding. Order 73 rule 6(1) of the *Federal Court Rules* requires an opt out notice filed under section 33J to be in accordance with Form 131.

There is some ambiguity in the expression 'opt out notice'. Sometimes it is used to refer to the notice given *by* a group member in exercise of the right to opt out, that is to say, the notice provided for in section 33J(1) and Order 73. This is Form 131 – 'Notice of Opting Out by Group Member'. Sometimes, however, the expression is used to refer to a different notice, namely, the notice *to* group members of their right to opt out that is provided for in section 33X(1)(a). Section 33Y(2) provides that the form and content of this notice to group members must be as approved by the Court.

I favour the making of a practice note with a sample form of notice to group members which could be adapted to the circumstances of the individual case. One thing to be made clear by the sample form of notice would be that by continuing to be a group member a person will not incur a liability for the costs of the group proceeding.

The notice must, however, be accurate. Unfortunately, the provisions relating to a group member's liability for costs are a little complex and cannot be explained in a few words.

Section 43(1A) of the *FCA Act* provides that in a representative proceeding under Part IVA, costs may not be awarded against a group member: costs may be ordered only against the representative party. However, the provision acknowledges the exceptional cases provided for in sections 33Q and 33R. Section 33Q makes a sub-group representative party, rather than the representative party, liable for the costs associated with the determination of issues common to the sub-group members. Section 33R empowers the Court to permit an individual group member to appear in the proceeding for the purpose of the determination of issues that relate only to the claims of that individual group member, in which case he or she, rather than the representative party, is liable for the associated costs.

In addition, section 33ZJ should not be overlooked. That section provides that where there is an award of damages in a representative proceeding, and, upon application, the Court is satisfied that the costs reasonably incurred in relation to the representative proceeding are likely to exceed the costs recoverable from the respondent, the Court may order that an amount equal to the whole or part of the shortfall be paid out of the damages awarded. In effect, in the circumstances described, an individual group member would be required to contribute to the costs incurred by the representative party.

All of these considerations relating to costs may be relevant to the individual group member's decision whether to opt out. At least, the notice to group

members will not be accurate if it ignores them, or at least if it ignores sections 33R and 33ZJ (apparently by the time the notice to group members is given, it will be known if there are sub-groups to which section 33Q would be relevant).

The notice to group members could include a paragraph along the following lines (with modification if section 33Q has or might have application):

> You will not become liable for any legal costs simply by remaining as a group member for the determination of the common questions. However:
>
> (a) the finalisation of your personal claim might require work to be done in relation to issues that are specific to your claim. You can engage [*Applicant's lawyers*] or other solicitors to do that work. A copy of the terms on which [*Applicant's lawyers*] are acting in the class action may be obtained from them on the number/s shown below;
>
> (b) if any compensation becomes payable to you as a result of any order, judgment or settlement in the representative proceeding, the Court may make an order that some of that compensation be used to help pay a share of the costs which are incurred by the Applicant in running the representative proceeding but which are not able to be recovered from the respondents. Indeed, the Applicant will seek such an order.

V DISCOVERY, PRELIMINARY DISCOVERY AND IDENTIFICATION OF CLASS MEMBERS

Solicitors and litigation funders may wish to identify and approach persons falling within the class description. The desire may be of relevance, for example, to an investor class action: who are the persons who acquired or disposed of shares, debentures or interests on a certain date or within a certain period?

Section 173 of the *Corporations Act 2001* (Cth) provides that a company (or registered scheme) must allow anyone to inspect a register kept under Chapter 2C. Such a register, however, will often not convey details of past transactions or events in which the inquirer will be interested.

Does discovery or preliminary discovery assist?

Where the class action has already been commenced, the documents required to be discovered (or disclosed) are those described in rule 2(3) of Order 15 of the *Federal Court Rules* (the range may be further reduced by orders for discovery by 'categories'). Those documents do not include documents that would identify members of the class.

Where the class action has not yet been commenced, Order 15A does not assist either. Rule 3 of Order 15A is directed to ascertain the description of a person sufficiently for the purpose of commencement of a proceeding against that person. Rule 6 of Order 15A assumes knowledge of the prospective respondent. That rule is directed to the obtaining of sufficient information to enable the *applicant* for preliminary discovery to decide whether to commence a proceeding against the person, and there is reasonable cause to believe that the person has or is likely to have, or has had or is likely to have had, possession of documents relating to the question whether the *applicant* has a right to obtain the

relief, and the inspection of the documents by the applicant would assist the applicant in deciding whether to sue.

In sum, the rules relating to discovery and preliminary discovery are not directed to the present issue and are not broad enough in their scope to cover it.

There is a question whether attainment of the objectives underlying Part IVA would be served by the giving of a right to an applicant or prospective applicant to obtain information of the kind described. The question raises privacy issues which would have to be taken into account.

VI CONCLUSION

The measures that I have discussed above are practical ones: that is what I undertook to write about. The importance of the issues raised should not, however, be underestimated.