

# Cy-pres remedies raise concerns for business

## Opinion

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**N**SW Attorney-General John Hatzistergos this month announced plans to introduce new class action laws that may give the NSW Supreme Court the power to order unclaimed damages awarded in class actions be paid to a public interest beneficiary which is not a party to, or represented in, the proceedings.

Draft laws have not been released but the proposals raise a number of important legal issues and practical concerns for business.

Class action procedures were introduced into the Federal Court in 1991. Victoria introduced laws modelled on these in 2000. Both sets of laws adopt an "opt-out" approach for members of the represented class, so if a potential claimant falls within the class definition, they are bound by the decision of the court unless they take active steps to opt out of the

litigation. Because potential claimants need not be notified individually of a class action, their rights may be affected without their knowledge. Further, in class actions where the total amount of damages can be determined with some accuracy, but individual claims are small, identifying potential claimants may be difficult and some may not bother to recover their damages.

Class action procedures were introduced in Australia to improve access to justice for those who could not otherwise afford to bring court proceedings and to improve the efficiency with which courts were able to deal with a multitude of claims which had substantially common issues in dispute.

Currently, the Federal Court cannot make orders involving direct or indirect payments for the benefit of persons who are not a party to the proceedings or part of a represented class. Any unclaimed money reverts to the defendant. This position will change if so called cy-pres remedies

form part of the proposed class action laws to be introduced in NSW. Other jurisdictions have already used cy-pres remedies to distribute unclaimed money in class actions.

Cy-pres remedies were developed as part of the law of trusts. The term means "as close as possible". Where a trust would otherwise fail, courts imputed an intention to the creator of the trust to confer the benefit on a

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closely related object or purpose. From the early 1970s, US courts have made orders for the distribution of unclaimed damages in class actions for the benefit of all class members, and increasingly, for broader public purposes.

Cy-pres distributions in class actions have been justified on the basis that a failure to make such orders

would result in a windfall to a defendant who has engaged in illegal conduct, and that a fundamental purpose of class actions is to punish a defendant and deter others from engaging in the same conduct.

Such justifications, however, are inconsistent with the fundamental principles of access to justice and individual compensation which underpin the class action procedures that exist in Australia.

Civil litigation should not be used to punish behaviour, particularly where regulators already have power to seek civil and, in some instances, criminal sanctions. Certain states in the United States have introduced legislation requiring that a specified portion of a cy-pres award be distributed for purposes such as legal aid.

The direction of private money into public purpose funding has led to criticisms that cy-pres awards are simply a tax in disguise and enable governments to avoid public funding obligations.

What cy-pres awards inevitably do

is to require judges to make public policy decisions which should be the exclusive provenance of government. Why should persons who were not directly or indirectly involved in the litigation benefit from its outcome? How is a court to choose among a plethora of charities or other public benefit interests?

Cy-pres awards are also likely to give rise to an increase in speculative litigation. While a small number of persons, sufficient to initiate a class action, may have a small and valid claim, a broad definition of a class may potentially include thousands of people, most of whom have no interest in claiming damages.

If cy-pres awards are to be part of the new laws, and assuming they survive potential constitutional challenge, at a minimum, clear and specific direction needs to be given as to how and when judges should exercise their discretion to make such awards.

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