

## **New Class Action Proposals Ring Alarm Bells For Business**

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

While a draft of these laws is not yet available, 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 the Federal Court procedures in 2000. Both sets of laws adopt an "opt-out" approach for members of the represented class. 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.

When class action procedures were introduced in Australia, the expressed purpose was 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 monies revert to the defendant. This position will change if the proposed class action laws are introduced in NSW.

Other jurisdictions have already used so called Cy-pres Remedies to distribute unclaimed monies in class actions.

Cy-pres Remedies were developed by Courts 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 closely related object or purpose.

So, for example, money placed on trust in order to eradicate polio from Australia, could be redirected by the Court toward the eradication of glaucoma once the polio problem had been successfully tackled. Without such remedies the trust monies would revert to the trust's creator or beneficiaries after polio had been eradicated.

From the early 1970s US Courts applied similar reasoning to enable them to make 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 which currently 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 U.S. have introduced legislation requiring that a specified portion of a cy-pres award be distributed for designated purposes such as legal aid. The direction of private monies 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 potential include thousands of people most of whom have no interest in claiming damages. If the total of such damages may be proved, a substantial sum may remain available for cy-pres distribution. While lawyers in Australia (unlike the U.S.) may not be able to claim a portion of such funds directly, who is to say that the establishment of a litigation fund, perhaps administered by one of the established commercial litigation funders, is not in the public interest? Lawyers may also seek to influence the choice of charitable institutions which are to receive these monies and indirectly benefit in this way.

Under the existing class action procedures, a Court may order that a class action not proceed because the costs involved in identifying and distributing funds to class members would be excessive. These provisions discourage speculative litigation, but are unlikely to be included in the new class action proceedings for that very reason.

Very careful consideration needs to be given to these new class action laws once a draft bill is released. 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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