

THE NEW CLASS ACTION REGIME IN QUEENSLAND

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Introduction

In early August the Attorney General announced the Government's intention to introduce a regime for class actions in Queensland. On 16 August 2016, the Government introduced a bill into Parliament, the "Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill". Relevantly, the Bill inserts a new Part 13A into the *Civil Proceedings Act 2011* (Qld). The proposed Part 13A provides for the introduction of a comprehensive regime for representative actions, modelled very much upon Part 1VA of the *Federal Court of Australia Act 1976* (Cth), Part 4A of the *Supreme Court Act 1986* (Vic) and Part 10 of the *Civil Procedure Act 2005* (NSW). The Bill has been referred to the Legal Affairs and Community Safety Committee.

The current position

Hitherto, representative actions in Queensland had been sanctioned by s 75 of the *Uniform Civil Procedure Rules 1999*, whereby a plaintiff could commence a proceeding by or against one or more persons who have the same interest in the subject matter of the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding. The equivalent former rule in New South Wales was considered in *Carnie v Esanda* (1995) 182 CLR 398, a proceeding in which two borrowers sued their lender on their own behalf and on behalf of others who had entered into loan contracts (which shared the same characteristics). Declaratory relief was sought that no represented party was liable to pay any credit charge. The High Court construed "same interest" as requiring the plaintiff, and represented persons, to hold a 'community of interest' in the determination of some substantial issue of fact or law.

In *Wong v Silkfield* (1999) 199 CLR 255, a case which construed the vital provision authorising representative actions under Part 1VA (s 33C), the High Court also referred to the availability of representative actions in equity; noting that equity intervened to prevent a multiplicity of proceedings to vindicate the legal rights of persons.

A problem with these general procedures was the absence of detailed prescription on important substantive and practical issues such as the need for group members to consent to their being represented, whether they might 'opt out' and the circumstances in which settlement and discontinuance of such proceedings could occur.

These and other concerns were picked up in the first model for prescribed class actions, being Part 1VA of the *Federal Court of Australia Act*, which commenced in 1992. That model

¹ Liability limited by a scheme approved under the Professional Standards legislation

was generally followed when similar regimes were introduced in Victoria (2000) and then in New South Wales (2011).

For Queensland residents contemplating a group action, short of instituting a proceeding in the Queensland Registry of the Federal Court (on the basis of federal jurisdiction), the alternative to invoking the general procedure in the Court Rules, was to commence a class action in another jurisdiction. This has been seen, for example, with the representative proceeding² arising from the Queensland floods in January 2011, in which claims for damages were brought for property damage and economic loss in negligence, being commenced in New South Wales.

In November 2014, the then (LNP) Government introduced a bill that would have seen the introduction of a detailed regime for representative actions, which bill was referred to a committee, but with the dissolution of the Parliament in January 2015, that legislative initiative fell away. It is only now that the initiative has been picked up by the Labor Government.

The proposal for change & reasons underlying it

The regime for class actions is contained in an omnibus bill containing amendments to a range of legislation. As the title to the Bill suggests, the main focus of the bill is the removal of limitations provisions affecting the entitlements of victims of institutional child sexual abuse to bring their claims. When introducing the Bill, Premier Palaszczuk linked this change with the introduction of a class action regime, indicating that it might be a “hollow change” for victims if they could not litigate their claims in a representative action³. That is tantamount to an invitation to sue.

The Premier also cited the limitations of the existing regime for representative actions (under Court Rules) which, she said, operated as an obstacle to justice. Further, more detailed prescription would create greater certainty and promote transparency, efficiency and consistency in class actions in the state. By their nature, the Premier noted, the regime would be likely to strengthen access to justice, by overcoming costs barriers and a lack of knowledge which might otherwise deter affected Queenslanders from pursuing a claim.

Introducing counterpart legislation to the class action regimes in the Federal Court, Victoria and New South Wales is thought to relieve Queenslanders of the burden of commencing costly litigation interstate and allowing actions relevant to Queensland to be dealt with, by judges and lawyers alike, who “know Queensland best”⁴.

² *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority* (commenced in the Supreme Court of NSW in 2014)

³ *Hansard*, 15/8/16 p 2747

⁴ *Ibid*, p 2747

Guidance for interpreting new provisions and practice requirements

An important supplement to the legislative provisions and rules in these other jurisdictions are Practice Notes in the jurisdictions⁵, which outline the expectations of the particular judges that administer the class actions in those jurisdictions of the conduct and management of representative proceedings. These Practice Notes are also vital in terms of the guidance (including template forms) they provide practitioners for such matters as the content of opt out notices and the type of considerations relevant to any determination to approve a settlement. There may even be some de facto control over those actions that receive litigation-funding: the Federal Court, for example, requires such arrangements to be transparent.

As with other practice notes, the requirements outlined in these documents are not immutable; and they may be adjusted to meet the exigencies of a particular case. In addition, certain judges have their own preferences as to the nature and extent of judicial case management⁶, such as the frequency of case management conferences, or directions hearings; the timing for mediations; the use of expert witness conclaves etc.

It would be expected that the Supreme Court of Queensland will, in due course, fashion a Practice Direction.

Snapshot of legislative regime

It is not my purpose, nor is it possible for me to, provide any comprehensive description or commentary of each and every one of the provisions in the proposed regime.

My purpose is to provide a barrister's perspective of the proposed provisions which, if enacted in their current form, are likely to be the subject of judicial consideration in Queensland class actions. This is because of their general topicality in class action litigation.

Where reference is made to provisions, they are the proposed provisions of the *Civil Proceedings Act 2011 (Qld)* if the Bill is eventually enacted in its current form.

Commencing a valid class action (s 103B)

The criteria for the valid commencement of a class action is usually identified by the shorthand labels of 'numerosity', 'typicality' and 'commonality' and these concepts are reflected in this key provision.

By numerosity, there must be at least "7 or more persons" who have claims against the same person. Wrapped up in that beguilingly simple formulation are two further concepts: the meaning of 'claims' and the significance of the expression 'same person'. As to the former, the notion of claims has elsewhere been interpreted broadly. One formulation indicates that the term encompasses anything that might lawfully be brought before the

⁵ Federal Court of Australia Practice Note CM 17; Supreme Court of Victoria, Practice Notes 8 & 9; Practice Note SC Gen 17 (NSW)

⁶ The practice in the NSW Registry of the Federal Court and the Supreme Court of NSW is to involve special list judges to case manage representative proceedings.

Court for a remedy⁷. Another indicates that group members need not actually share the same claim⁸; although for practical purposes, and in particular the incidence of litigation funders, it would be a rare class action that did not seek, as a common claim, the remedy of compensation or damages.

As to the latter aspect, there was a long-running and (in retrospect) probably unnecessary controversy in the Federal Court as to whether, in the situation where there is more than one defendant, group members must all have a claim against each of those defendants. That controversy appears to have been resolved following the Full Federal Court's decision in *Cash Converters International Limited v Gray* (2014) 223 FCR 149, which indicated that it was not necessary for this to be so⁹. The proposed Queensland legislation confirms that there is no such requirement.

By typicality, these claims must be in respect of, or arise out of the "same, similar or related" circumstances. By this expression, it is not necessary that there be one event, or transaction, but there can be multiple transactions. 'Relatedness' in this context, marks what has been called the outer limits of eligibility. A good illustration was the case of *Phillip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 where the requirement was found not to be satisfied. Although the thrust of the case concerned complaints of misleading cigarette advertising (in separate transactions), and to that extent, the claims against three different respondents were similar, the divergence between the forms of advertising and promotion over long periods of time denied the description of being 'related'.

By commonality, the claims of all group members must give rise to a "substantial common issue of law or fact". This is usually the object of contention in any action by a respondent to 'declass' the proceeding as a representative action. About this, there are certain requirements for applicants to establish:

- The issue of fact or law must be justiciable in the sense that a Court will not answer a hypothetical question. This is a basic test of jurisdiction.
- The issue should be of weight or significance, but it is unnecessary to show that its resolution will likely resolve wholly, or to a significant degree, the claims of all group members¹⁰. It would be expected, however, that resolution of the issue would at least *advance* determination of the claims of all group members.
- An issue of fact or law is not likely to be common if its resolution will involve consideration of the particular circumstances or characteristics of individual group members (such as issues of causation or quantification of damages).

⁷ *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179

⁸ *King v GIO Australia Holdings* (2000) 100 FCR 209 per Moore J at [30]

⁹ This brought the Federal Court jurisprudence into line with the statutory position in NSW (*Civil Procedure Act* 2005 (NSW) s 158(2)).

¹⁰ *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at [23], [30]

It is in respect to this last point that I can foresee a potentially greater readiness of applicants to use the Supreme Court of Queensland as the forum, in preference to the Federal Court where there is a choice (assuming that the former has federal jurisdiction in respect to a particular action). There have been some recent decisions in the Federal Court which, in this presenter's view cast a narrow, if not overly technical, view of the requirement of commonality¹¹, and it may be that the Supreme Court in this state would feel less beholden to follow those decisions than an individual Judge of the Federal Court.

The requirement to identify a common issue is not only critical to determining the *validity* of the action as a representative proceeding, but is also likely to be critical in terms of (a) the conduct of a trial of the representative proceeding; and (b) the rights of group members after determination of the common questions.

As to the former aspect, it will be noted, below, that it is a legislative requirement that the originating process must identify the common questions. Quite apart from that, however, a practice has emerged in the Federal Court whereby, once the pleadings are closed, with the prospect that other common issues may emerge (from the respondent's pleadings), the docket judge will require an applicant, in case management, to list the common questions to be determined at the initial trial¹². This is attributable to the general practice that the first trial will involve determination of the common questions, as well as the applicant's individual claim.

As to the latter aspect, there is a live controversy currently before the High Court as to the operation of the doctrine of 'Anshun estoppel'. There is little doubt that, at least to the extent that the initial trial will determine common issues, group members are the "privies" of the lead applicant and will be bound by the determination of those questions. Proposed s 103X(b) of the legislation confirms this. But what happens, once the common questions are determined in the initial trial, when a group member seeks to specifically rely upon a contention (legal or factual) in its individual claim against a (or defence to a claim by) respondent, or respondents, which arises from its own peculiar circumstances? Can a respondent (or respondents) assert that the individual group member is estopped from the raising contention if it could fairly be said that the contention was so closely connected to the way that the lead applicant ran the common trial that it was unreasonable not to run the point? The Court of Appeal of the Supreme Court of Victoria has said that a respondent could not run an *Anshun* point¹³, but that is a question that has been argued, but not, as yet, determined by the High Court. The question will, I expect, turn upon the High Court's evaluation of the nature of the representation by the lead applicant and that evaluation will be referable to articulation of the 'common' issues.

¹¹ These are the decisions in *Larsson v Wealthsure Pty Ltd* [2013] FCA 926 (which denied that the requirement was satisfied as the relief sought in the action would require consideration of the individual circumstances of group members) and *Meaden v Bell Potter Securities Ltd (No.2)* (2012) 291 ALR 482 (in which it was determined, virtually as a matter of degree, that the determination of the applicant's claim of misleading conduct by a stockbroking firm would not determine any issue of sufficient significance)

¹² *Merck Sharp and Dohme (Australia) Pty Ltd v Peterson* [2009] FCAFC 26

¹³ *Timbercorp Finance Pty Ltd v Collins & Tomes* [2016] VSCA 128. The appeal in the High Court was heard on 1 September 2016.

Limited class actions

Section 103B(2) also indicates that the proceeding may be on behalf of “some or all of the other persons”. The provenance of this provision was a controversy stirred by a decision in the Full Federal Court¹⁴ which permitted ‘limited’ class actions. It was controversial because of the view that prevailed for a long period, based upon contextual considerations, that representative actions should be ‘open’; or rather, there should be no limitations to class eligibility other than those identified in the statute.

Recognition of limited class actions is helpful to litigation funders to ‘block build’ cases so as to finance the commencement of class actions, in a way which excluded ‘free riders’, being group members who were not willing to enter into funding agreements (or associated retainers with the firm retained by the funder) or otherwise contribute to the cost of running such actions. Indeed, the Bill (s 103K(2)) may be said to facilitate limited class actions being financed by litigation funders by expressly excluding, as one criterion for discontinuance of representative actions, the circumstance that the proceeding has been arranged and financed through a litigation funder.

The provision does, however, open the door to another controversy: namely, the prospect of competing class actions, and how the Court might deal with multiple actions.

Requirements of originating process (s 103F)

To more practical matters, the originating process must identify the group members, the nature of the claims made and the relief sought on their behalf and state the common questions of law or fact. It is not necessary to actually name or state the number of group members. By the is requirement, the proceeding receives its ‘group definition’.

These requirements fulfil a number of functions in this context. First, they will facilitate the Court’s determination of whether the criteria for a valid representative action are satisfied. Secondly, it will assist group members to understand the nature of the case, for the purposes of their consideration as to whether to opt out of the proceeding. Third, as with the general function of pleadings, they help a defendant (or defendants) to understand the nature of the case.

In practice, a representative action in Queensland is likely to be formally commenced by a ‘claim’, which itself attaches a pleading: if it were commenced by an ‘Application’, that would need to be followed by a pleading anyway. There is a balance to be struck in the drafting of pleadings, between drafting the allegations at a level of generality so that the lead applicant’s claim can be used as a vehicle for determining common issues; as well as illuminating the issues so that group members can understand the claims and they are bound by determinations of the issues.

Discontinuance of proceeding as a representative action (s 103I - 103K)

Typically, a defendant who seeks to contest the constitution of a representative proceeding will have two lines of attack. The first is to attack the proceeding as not satisfying the criteria

¹⁴ *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 at 279

for a valid action (here, proposed s 103B). The second, which is usually made at the same time as the first attack, is to argue that the proceeding, if it was valid, should be discontinued as a representative action.

There are multiple categories of circumstance in which a representative proceeding would be discontinued:

- If (contrary to what might have appeared at the date of commencement of the proceeding) it appears that there are fewer than 7 members (s 103I). In this case, the Court has the discretion to discontinue the proceeding as a representative action or to allow it to continue in that form;
- If the amount of the monetary judgment ultimately likely to be recovered is disproportionately small set against the cost to the defendant of identifying group members and distributing the monies to group members (s 103J);
- The interests of justice (s 103K). I will return to that category below; and
- Where leave is sought to discontinue the proceeding as a representative action (s 103R). This is overlaid with the circumstances of a settlement of a class action. I will also return to this category below.
- Where the common questions have been determined¹⁵. This is overlaid with the 'interests of justice' category.

'Interests of justice'

This category is not at large, but circumscribed by a range of criteria (although the last criterion is vague). To paraphrase, this criteria is:

- (a) the costs of continuing a representative action will exceed the costs incurred if all group members brought their own separate proceedings.
- (b) all relief sought for group members can be obtained otherwise than by a representative action;
- (c) a representative action will not provide an efficient and effective way of dealing with the claims of group members;
- (d) the lead plaintiff is not an adequate representative; and
- (e) some other basis (beyond the circumstance that the proceeding is a limited representative action or one whose members are aggregated by a litigation funding arrangement).

A key feature in all of this is the 'comparator', or alternative to a representative action. On the premise that a proceeding has been validly commenced as a representative action, it is incumbent upon a defendant to establish that the alternative would be

¹⁵ *Zhang v Minister for Immigration* (1993) 45 FCR 384

more consistent with the overriding principles of case management, being the just and expeditious resolution of the real issues in dispute¹⁶.

There is something of a symbiotic relationship between the facility to discontinue a representative action in the interests of justice and the nature and extent of the commonality of claims. At least until recently, the Federal Court had taken the broad view that so long as the commonality criterion was satisfied, then even if there was an extensive range of 'non-common' issues arising from the claims of group members, there was utility in allowing the representative action to continue; at least until common issues were determined. It was said that because the Court's powers to case manage were so extensive, this was a protection against representative actions becoming unwieldy.

As a result of the *Bell Potter* litigation however, I would not feel so sanguine. This is one of the reasons why, if a choice was to be made between commencing a representative action in the Federal Court, as distinct from the Supreme Court of Queensland (under the new regime), I would prefer the latter; especially because, in its early days, I expect that the Supreme Court would try to give the regime life.

A defendant must be judicious when it launches any challenge to the continuance of a representative action: by s 103K(3), absent the Court's leave, once a defendant has failed with such an application, it cannot bring a further application on this basis.

Standing requirements, adequacy of representation and replacing a representative (or sub-group representative) (ss 103C, 103P, 103S)

One important difference between class actions in Australia and those in the United States is that, in the latter, the suitability of a lead plaintiff to represent the group is something that needs to be established at the outset. In this country (and under the proposed Qld regime) the adequacy of a representation may become an issue.

Issues of a lead plaintiff's suitability have not featured significantly in this country, although there is always the potential, say, where the lead plaintiff has a conflict with the interests of group members or takes steps that are prejudicial to the group as a whole. Incompetence or inability to perform the role may also be relevant, although in the circumstance where a litigation funder has de facto control of such proceeding, it is less of a consideration.

A conflict may arise where the material relief sought by the plaintiff is different to the relief that would be regarded as the main relief sought for group members. The *Carnie v Esanda Finance Corporation* litigation (involving a representative action under Chancery Rules) was a demonstration of conflict, where the lead applicant may have wished to avoid a contract whilst at least some in a group might wish to keep it on foot.

Dealing with non-common issues (ss 103M-103O)

By definition, representative actions cannot hope to resolve all the issues of all the claims of group members. Provision is made for the Court to make directions after common issues

¹⁶ Uniform Civil Procedure Rules, s 5.

have been determined. This may include, but is not limited, to determination of questions affecting only a subset, or sub-group of group members. In the case of a mass-tort, for example, there may be different types of injury: property damage; economic loss, personal injury etc. Discrete questions may arise as the existence of or content of a duty of care in each of these categories of loss.

A specific power is provided for the appointment of sub-group representatives, who might take on the burden of representation for a sub-group. This can have a very important consequence: under the proposed Queensland legislation, sub-group representatives may have personal liability for the costs associated with determining issues common to a sub-group.

The general power to make directions after common issues are determined is, of course, broad. This might include, for example, the Court to select a sample of cases from amongst group members to determine issues of causation or damages. Those cases might not themselves bind all other group members, but they may facilitate settlement of claims. Group members might be directed to attend further alternative dispute resolution mechanisms.

Settlement of group members' claims (s 103R)

This is a vital feature of class action litigation, particularly where, as is more often than not the case, such litigation generally settles. Two features are obvious: first is the requirement for Court approval. In this way, the interests of the group (as distinct from the lead plaintiff and its lawyers or litigation funder) are closely scrutinised. Just how far that is so is illustrated by the Federal Court of Australia's recent rejection of an application for court approval of a settlement in *Kelly v Willmott Forests Ltd (in liq) (No. 4)* (2016) 112 ACSR 584; [2016] FCA 323.

The second is the significance of the practices of the individual courts. The Federal Court's practice note sets out, in a very detailed fashion, the types of considerations a Court will take into account when approving a settlement. They include: the complexity and likely duration of the litigation, reaction of group members to the (proposed) settlement (manifested by the incidence of objections to it), the risks on liability and quantum and generally maintaining the representative proceeding; the range of reasonableness of settlement in the light of best recovery and the ability of a respondent to withstand a greater judgment¹⁷. Usually, the advice of Counsel on the risks associated with the representative proceeding is tendered on a confidential basis.

The bringing of this application is perhaps the most acute demonstration of the lead applicant's likely fiduciary obligation to group members. This accounts, for example, for the legislative requirement that group members be notified of a settlement and have the opportunity to raise objections to being bound by it. For that opportunity to be meaningful, prior to the approach to Court for approval, there needs to be full disclosure to group

¹⁷ These factors were identified from the decision of the United States Court of Appeals for the Third Circuit in *Re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation* 55F 3d 768 (1995)

members of the advantages and disadvantages of the settlement, as against continuation of the proceeding. Naturally, a group member will want to know that the settlement means for their respective circumstances and if, as is usually the case, it is not possible to identify a precise dollar amount which a group member would receive, there should be some indicative mechanism to enable a member to know what part of the whole s/he or it is likely to receive.

Judgments and orders by the Court (ss 103V – 103X)

One current topical issue in class action litigation is the extent to which a court may flexibly grant remedies to individual members. The quantum of a damages claim of an individual group member is an obvious ‘non-common’ issue. The proposed s 103V sets out a long list of powers as to what a trial judge might do after determining the common issues in the initial trial.

These extend to making damages awards for group members, sub-group members, or even individual members; and a power to award damages for an aggregate amount; and finally (and in contrast to the NSW regime), a broad power to “make any other order the court considers just”.

An example of where an aggregate award of damages was made was in *ACCC v Golden Sphere International Inc* (1998) 83 FCR 424, where damages were calculated at \$50 per member of the class.

Although there is no express power, conceivably the Court would have the power to deliver ‘cy-pres’ awards. These are not an uncommon remedy in the United States where it is impossible, or impracticable, for group members to prove individual claims. Thus, in anti-cartel, price-fixing litigation, it may be unrealistic to expect, not to say expensive exercise to determine, whether consumers have kept receipts of products they purchased. Monies might be paid to their “next best use”, which might mean some charitable or educational institution, or some other entity to benefit the public. There is some Australian authority to support the making of orders, at least as part of the remedy that a court might order¹⁸.

Section 103X contains the all-important stipulation that judgments will bind those group members expressly referred to.

General power to make orders (103ZA)

By this provision, the Supreme Court would be empowered to make any such order as is “appropriate and necessary” to ensure “justice is done” in the proceeding.

This power is plainly intended to facilitate a broad discretion to make orders of a procedural kind though, as one judge has suggested, it does not authorise re-writing the general procedural scheme for representative actions¹⁹.

¹⁸ *Guglielmin v Trescowthick* (Federal Court of Australia proceeding SAD 153 of 2002) and *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980

¹⁹ *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [47]-[54]

The experience in the Federal Court has seen the provision invoked to more clearly delineate common issues, resolve the dilemma as to what to do about competing multiple class actions, 'closing the class', dispensing with notice requirements, requiring discovery from a small number of important members of a group.

There have been two interesting recent instances of attempts to invoke this power. The first, unsuccessful, attempt occurred in *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 106 ACSR 49, when the docket judge rejected the respondent's attempt to ensure the practical participation in the litigation of two leading institutional investors in a shareholder action. The second, successful, attempt occurred under the equivalent rule in NSW, concerning the a judge's dismissal of the claims of group members who had not registered to participate in a proceeding (*Lam v Rolls Royce Plc (No. 5)*[2016] NSWSC 1332).

Costs (s 103ZB – 103ZC)

On conventional reasoning, group members are not parties to a representative proceeding. It is the lead applicant who is the party and it is the lead applicant who will be liable to an order for costs should the action on the representative proceeding fail. A very important practical question is the extent to which group members (or sub-group members) may be immunized from liability for costs. Section 103ZB(b), in line with corresponding provisions elsewhere, would suggest that there is immunity. However, that is not to say, that for a proceeding that is not financed by a litigation funder (who usually agrees to provide security), group members may not be liable to contribute to a fund to secure the costs of respondents²⁰.

Just as a lead applicant bears the burden of a prospective costs order upon defeat, the legislative regime confers a special benefit upon the applicant in the event of success, by permitting reimbursement of the applicant's costs to come out of any order for damages should the applicant's costs exceed what would be recoverable against the respondent/s: proposed s 103ZC.

Common fund applications

A very topical issue in class action litigation arises from the circumstance where a litigation funder finances a class action, but not all group members have entered into a litigation funding agreement. Can the litigation funder, who has assumed the commercial risk for the outcome of the litigation and may have indemnified the applicant (and others) in respect to costs, seek recourse from the Court for approval of an arrangement whereby all group members – including those who have not entered into arrangements with the funder – are liable to contribute payment (usually a percentage of the damages award or settlement sum) to the funder's fees, prior to disbursement of the proceeds of a settlement sum or damages award? If it could, this would provide greater incentive for a funder to commence a representative action with an open class, rather than a limited group comprising only those who have entered into funding arrangements. The theory is that the sub-group of group

²⁰ *Madgwick v Kelly* (2013) 212 FCR 1

members who have not contributed to the lead plaintiff's costs (by entering into funding arrangements) should not be enriched at the successful plaintiff's expenses.

In an interlocutory decision in the Federal Court, in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (receivers and managers apptd) (in liq)* (2015) 325 ALR 539 Wigney J rejected a funder's application under the equivalent provision to s 103ZC. However, reading between the lines, it may be that such application might have greater prospects of success at the tail-end of the proceeding, at the point of settlement. At this point, more would be known about the settlement sum and what proportion might be obtained by the funder.

Summary

This is far from an exhaustive catalogue of the issues likely to arise in class actions under the proposed new regime: I have not, for example, referred to notice requirements to group members.

Because of the experience of other jurisdictions, which share similar legislative provisions, the terrain upon which Queensland class actions will be conducted is well-trodden. However, the increase in class actions across the country and the volume of decisions (particularly of the interlocutory variety) speaks to the procedural complexities that can arise in the management of cases. That complexity calls, in turn, for laterally minded lawyers.

I expect that the proposed regime will be utilised in mass torts, such as cases involving product liability or public liability, and where a common question arises in a contract whose exclusive forum is Queensland. Where a claim has federal and non-federal components, then a choice will arise.

Class actions might be a new experience for Queensland judges and practitioners. If, however, the experience of NSW practitioners, when the counterpart regime was introduced into that state earlier in the decade is anything to go by, it may be expected that Queensland judges will, by and large, try to make it work and possibly even try to make the Court a more attractive forum for home-grown group actions than other jurisdictions.

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