Book review

CLASS ACTIONS IN AUSTRALIA

Class Actions in Australia by Damian Grave, Ken Adams and Jason Betts (2nd ed, Thomson Reuters, 2012) ISBN 9780455228698, 634pp: paperback $195.

INTRODUCTION

Class actions were introduced into Australian law in 1992 with the commencement of Pt IVA of the *Federal Court of Australia Act 1976* (Cth).[1] After a slow start as the legal profession and the judiciary acquainted themselves with the new procedure, class actions were used in a range of disputes. Reflecting this significant development, the first edition of *Class Actions in Australia*, written by Damian Grave and Ken Adams, was published in 2005. In 2007, Professor Peter Cashman from the University of Sydney produced his text, *Class Action Law and Practice* (Federation Press). Class actions have also become the subject of specific chapters in text books on civil procedure and in various loose-leaf/online services.[2] In 2012, the second edition of *Class Actions in Australia* written by Damian Grave, Ken Adams and Jason Betts was published, bringing the text up to date as at 1 March 2012.

This amounts to a great deal of scholarly interest for a type of proceeding that in the 17-year period from when Pt IVA of the *Federal Court of Australia Act* took effect until 30 June 2009 gave rise to a total of 253 proceedings, or an average of just under 15 proceedings per year.[3] However, class actions are, as observed by the former Chief Justice of the Federal Court of Australia, Michael Black, of "legal, commercial and social importance".[4] A single class action may combine hundreds or thousands of claims and create a potential liability for a defendant of many millions of dollars.

COMPREHENSIVE COVERAGE

A key strength of *Class Actions in Australia* is its comprehensive coverage of all of the class action steps so as to ensure the practitioner is fully informed as to both judicial decisions and academic commentary on the requirements for conducting class actions. The text deals comprehensively with the steps in litigation that one would normally expect to be discussed, such as pleadings, discovery, settlement and costs. However, it also is very clear as to the differences between the class action procedure and the normal rules in litigation – something that can trip up the novice class action practitioner. For example, Ch 5 is devoted to the role of a representative party, which is a unique aspect of class actions as a representative commences proceedings on their own behalf but also on behalf of the group members. This creates additional obligations for the representative party and the lawyers. Further, the unique requirement in class actions that any settlement or discontinuance be approved by the court is discussed in detail in Chs 14 and 15. The practical orientation of the text is supported by the appendices, which contain a number of examples of pleadings and notices.

The text also goes beyond discussing the class action legislation that exists in the federal jurisdiction, and addresses the Victorian and New South Wales legislation. It also discusses other forms of representative action. The need for such a comprehensive approach is illustrated by the claims arising from the Queensland floods and, in particular, the Wivenhoe Dam. These claims are

[1] Prior to Pt IVA of the *Federal Court of Australia Act 1976* (Cth), grouped or representative proceedings needed to rely on the former practices of the Court of Chancery (which still exists in many jurisdictions, such as the *Federal Court Rules 2011* (Cth), r 9.21), consolidation, joinder or the use of test cases.

[2] See eg Boniface D, Kumar M and Legg M, *Principles of Civil Procedure in New South Wales* (2nd ed, Thomson Reuters, 2011) Ch 7; *Practice & Procedure High Court & Federal Court of Australia* (LexisNexis Online) at [34,795.5] ff; Lindgren K and Branson C (eds), *Federal Civil Litigation Precedents* (LexisNexis Online) at [115,001] ff.

[3] Morabito V, *An Empirical Study of Australia's Class Action Regimes – First Report: Class Action Facts and Figures* (December 2009) discussed in Grave D, Adams K and Betts J, *Class Actions in Australia* by (2nd ed, Thomson Reuters, 2012) at [1.200].

[4] Grave et al, n 3, p v.

likely to be based on negligence and would most obviously be brought in the Queensland courts; however, no comprehensive class action procedure exists, which may necessitate reliance upon the *Uniform Civil Procedure Rules 1999* (Qld), r 75.[5]

NEW DEVELOPMENTS

The text addresses all of the major developments that have taken place in relation to class actions since the first edition in 2005. Chapter 17 is devoted to third-party funding of class actions and provides a comprehensive treatment of the rise and acceptance of funded class actions. It includes valuable information about how litigation funders operate, the way in which they select cases and the contents of funding agreements. It deals with specific issues that the involvement of a litigation funder creates for class actions such as the discovery of funding agreements, a third-party funder's ability to access documents (including insurance policies), and costs orders where there is a funder involved, including security for costs. The chapter also discusses the regulation of third-party funders in detail, although the text's publication predated the final position on regulation as set out in the *Corporations Amendment Regulation 2012 (No 6)* dated 12 July 2012. The new regulation excludes litigation funding in relation to class actions or insolvency proceedings from the managed investment scheme and Australian Financial Services Licence regimes that courts had found applicable[6] but imposes requirements on litigation funders to manage conflicts of interest.

Related to the rise of litigation funding of class actions is the employment of the so-called "closed class" and as a further result, the advent of competing class actions. In Ch 13, the text discusses the development of the closed class group definition from its initial rejection in the Aristocrat Leisure shareholder class action[7] through to its acceptance in the Multiplex shareholder class action.[8] The closed class resulted from litigation funders wanting to exclude "free riders" from funded class actions so that all group members were required to provide a percentage of their recovery to the funder. Under a traditional opt-out class action, it was possible for a group member to be part of the proceedings due to the group definition used but not enter into a litigation funding agreement. As a result, when a settlement was achieved, those unfunded group members were able to come forward and claim a share of the settlement without paying part of it to the litigation funder. Despite the Full Federal Court's acceptance of a closed class there have been misgivings about how it may be contrary to access to justice.[9] Nonetheless, in New South Wales the closed class has been specifically endorsed through s 166 of the *Civil Procedure Act 2005* (NSW). The endorsement is to the effect that it is not otherwise inappropriate for claims to be pursued by means of a class action simply because a closed class is being employed.[10] However, the wording of the New South Wales legislation is such that a challenge may be launched on the basis of one of the other grounds for class actions being discontinued, such as "the group proceeding will not provide an efficient and effective means of dealing with the claims of group members".[11]

[5] See Grave et al, n 3 at [2.670].

[6] The Full Federal Court in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11 found that funded class action litigation was a managed investment scheme subject to Ch 5C of the *Corporations Act 2001* (Cth). The New South Wales Court of Appeal in *International Litigation Partners Pte Ltd v Chameleon Mining Ltd* (2011) 248 FLR 149 found that a litigation funder of commercial litigation was required to hold an Australian Financial Services Licence. The *Chameleon Mining case* has been granted special leave by the High Court.

[7] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394.

[8] *Multiplex Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

[9] Legg M, "Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – the Need for a Legislative Common Fund Approach" (2011) 30 *Civil Justice Quarterly* 52.

[10] Grave et al, n 3 at [13.585].

[11] See eg *Jameson v Professional Investment Services Pty Ltd* (2009) 72 NSWLR 281 at [122] where the New South Wales Court of Appeal in considering the now repealed *Uniform Civil Procedure Rules 2005* (NSW), r 7.4, observed that if representative proceedings were instituted on behalf of a limited set of group members before the relevant parties, or at least the full range of those parties, has been contacted with a view to participating in any proceeding then this may be a factor in not allowing the proceedings to continue.

In addition to the closed class hampering access to justice, it may also be criticised for being contrary to the efficiency goals that supported the enactment of class action legislation originally. In Ch 9 of the text, the issue of multiple competing class actions is discussed. With a closed class, multiple class actions become more likely because a class action is limited to those people that have entered into funding agreements with a litigation funder. As a result, where there are multiple funders each is able to sign up their own group of claimants and bring an action only on behalf of those claimants. This hampers efficiency because there is then multiple lawyers bringing multiple claims in relation to the same dispute. A number of suggestions have been put forward for trying to deal with this development, including consolidation, a stay of all but one class action or a joint trial. Further, more unconventional mechanisms were suggested by Finkelstein J in the Centro shareholder class actions, where his Honour considered the use of a litigation committee or an auction system.[12] Such suggestions would require reform to the existing legislative regime. The authors of the text are in the ideal position to comment on these issues, having acted for some of the Centro entities involved in that litigation.

The text addresses the adoption of the Fast Track list in the Federal Court, which has been employed in the bank fee class action proceedings before Gordon J.[13] The use of the Fast Track results in pleadings being replaced by abbreviated fast track statements and tight, predetermined timetables.[14] The bank fee class action required that those timetables be extended in a number of ways. As a result, whether the Fast Track can be adapted to host class actions or the situation is really class action proceedings being subject to tight case management orders that draw inspiration from the Fast Track is a matter for debate. The effectiveness of using the Fast Track (and the separate question procedure) will only be borne out in time after the matter has been determined on the substantive law,[15] including the resolution of outstanding issues such as the calculation of loss.

Class Actions in Australia expands its coverage from the original jurisdictions of the Commonwealth and Victoria to include New South Wales, which adopted a similar regime in Pt 10 of the *Civil Procedure Act*. The text helpfully highlights the differences between the New South Wales regime and the Federal Court and Victorian regimes. The acceptance of the closed class discussed above is one of those differences. Another is s 158(2), which states that a person may commence representative proceedings on behalf of other persons "against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings". This provision apparently being designed to overcome the debate in the federal jurisdiction that arose as a result of the different approaches taken by Sackville J in the Full Federal Court in the Tobacco class action,[16] compared to Finkelstein J, also in the Full Federal Court, in the Vitamins cartel case.[17] The debate centred on whether s 33C(1)(a) in the *Federal Court of Australia Act* required the applicant and each group member to have a claim against each and every respondent. Sackville J held that it did, while Finkelstein J stated that it did not.[18] The New South Wales provision sides with Finkelstein J as made clear by the Explanatory Note to the Bill that introduced s 158(2). The New South Wales provision also differs in that s 166(1)(d), which is similar to s 33N of the *Federal Court of Australia Act*, adds an additional ground for the discontinuance of a class action,

[12] *Kirby v Centro Properties Ltd* (2008) 253 ALR 65.

[13] Grave et al, n 3 at [3.245], [11.185]. See also *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 281 ALR 113.

[14] Federal Court of Australia, *Fast Track – Practice Note CM8* (1 August 2011); Legg M, *Case Management and Complex Civil Litigation* (Federation Press, 2011) Ch 8.

[15] See the guidance given by *Andrews v Australian and New Zealand Banking Group Ltd* [2012] HCA 30.

[16] *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at [126]-[127].

[17] *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317 at [248].

[18] See Grave et al, n 3 at [4.310]-[4.460] for a detailed elucidation of the issue.

namely, if the representative parties are "not able to adequately represent the interests of the group members". This is a welcome addition considering the previous academic commentary arguing for its adoption.[19]

The text also adopts a new chapter devoted solely to shareholder class actions.[20] This type of class action has become the most common form of class action commenced in Australia with Professor Morabito's empirical study showing that although only three shareholder class actions were commenced in the first eight years of the federal regime, there had been 21 proceedings commenced in the second eight years, which concluded on 3 March 2009.[21] One suspects the growth of shareholder class actions since March 2009 has only increased as a proportion of all class actions. The only exception may be growth in the related area of financial product/investment advice class actions as a result of the global financial crisis. Chapter 19 of the text contains a comprehensive discussion of the main shareholder class actions and the way in which the law has developed in relation to these substantive causes of action. It also provides a useful discussion of the as yet undecided areas in shareholder class actions – namely, causation and the calculation of loss or damage. Causation and damages remains a major unsettled area of shareholder class actions due to novel approaches being put forward by plaintiffs – including an equivalent to the American fraud-on-the-market theory but based on statutory construction concepts – however, there is yet to be a decision of even a court at first instance. This uncertainty has been seen as increasing the cost and delay associated with shareholder class actions. However, an alternative view is that this very uncertainty is what allows for shareholder class actions to be resolved through negotiation or some form of alternative dispute resolution because that uncertainty creates scope for a negotiated outcome. Nonetheless, practitioners will be helped immensely in navigating this contentious area by the new text.

CONCLUSION

Class actions will continue to grow as part of the Australian litigation landscape. The mass action is the civil justice system's response to mass production, mass marketing and mass share ownership. It holds the prospect of efficiently extending access to justice to many claimants. However, the conclusion that class actions will grow also follows if legal aid is insufficient, court filing fees are being increased to deter use of the courts so as to promote ADR, but litigation funding is being encouraged through a minimalistic legislative regime.[22] The class action with litigation funding support may become a lucrative investment for class action promoters; equally it may be the only way that individuals can access the courts.

Consequently, whether one is for or against class actions, or, for class actions but with improvements as to their governance, a text such as *Class Actions in Australia* is invaluable in explaining the law on this important and evolving procedural mechanism.

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[19] Legg M, "Judge's Role in Settlement of Representative Proceedings: Lessons from United States Class Actions" (2004) 78 ALJ 58 at 63-64.

[20] For another discussion on shareholder class actions, see Baxt R, Black A and Hanrahan P, *Securities and Financial Services Law* (8th ed, LexisNexis, 2012) Ch 9.

[21] Grave et al, n 3 at [19.300].

[22] Hon Nicola Roxon MP (Federal Attorney-General), *Speech to the NSW Bar Association Alternative Dispute Resolution Workshop* (4 August 2012).