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Class actions in Australia

The key points

What is a class action?

A type of civil court proceeding brought by a lead applicant (or applicants) on behalf of "group members" who have claims against the same defendant.

The claims need to arise from similar or related circumstances, and involve a substantial common legal or factual issue.

Class actions vs individual court claims

Class actions generally operate in the same way as individual court claims. For example, the same causes of action are generally available, the parties typically need to plead their claim or defence, give discovery, and prepare lay and expert evidence, and the applicants must prove their claims at trial.

However, class actions also have some particular features that individual court claims do not have.

How do group members participate?

Australia has an "opt-out" class action model, where everyone who meets the group member definition automatically becomes part of the class (whether they are aware of it or not). They do not need to take any step to remain a group member.

Group members can "opt out" of the class action if they want to. There is a process for this. If group members opt out they are not bound by what happens in the case.

What does a class action deal with?

The initial trial usually deals with the lead applicant's full claim (and sometimes some sample group members), and the common issues. At that stage, group members generally are not required to take any steps.

If the lead applicant is successful, group members can bring their own "follow-on" claims. These are based on rulings made on common issues, and the group member only has to prove their individual issues (eg the amount of their loss) on a case-by-case basis.

The exception to this is that the court can award "aggregate damages" (a lump sum to be divided up among the class). This can only be done if the court can make a reasonably accurate assessment of group members' total entitlement. Aggregate damages awards are rare, and this area of law has not been fully explored.

Class action funding

Class actions are often funded by a "litigation funder". This usually involves the funder paying the lead applicant's legal fees, indemnifying them against any adverse costs orders and providing security for costs to the defendant. In return, the funder is reimbursed for the costs it paid and gets a percentage of the proceeds of the class action.

Courts can make "common fund orders" at the time of settlement or judgment where the funder receives a percentage of the total proceeds of all group members' claims even if they have not agreed to give a percentage to the funder. In Victoria, solicitors can seek a "group costs order" for a percentage of the proceeds (with the same commercial effect as a contingency fee).

How do class actions typically end?

Most class actions settle before there is an initial trial of the lead applicant's claim – and the settlement deals with the claims of all group members on a global settlement basis. The Court needs to approve the settlement.

How are costs dealt with?

The "loser pays" rule generally applies in Australia, including to class actions. In practice, costs awards are materially less than the costs actually incurred.

The lead applicant generally also has to provide security for the defendant's costs. This means money in court (or other security) in case they lose and a costs order is made against them. The litigation funder usually provides this.

What happens when there are multiple or "competing" class actions?

There have been numerous examples of multiple law firms bringing similar class actions against the same defendant.

The High Court has said there is no "one size fits all" approach to working out how to deal with with competing class actions. The options include: (i) consolidating them into one class action; (ii) stopping them all except for one class action; (iii) a "wait and see" approach – eg joint management and potentially trial of all cases; and (iv) limiting the scope of one of the claims.

Is there "class certification" like in the US?

No. Defendants can apply to stop the claim, although it isn't common.

Where can I get a bit more information?

See Ashurst's Quick Guide here

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