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High court ruling opens a wide gate for commencement of class actions

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The High Court decision in *Wong & Ors v Silkfield Pty Ltd*[1] establishes the ready availability of representative proceedings where the claims of group members satisfy the conditions of Section 33C of Part IVA of the *Federal Court of Australia Act 1976* (Cth).

Although French J in *Zhang v Minister for Immigration, Local Government and Ethnic Affairs*[2] recognised that Part IVA "significantly widens the scope for representative or class actions", the view taken by Drummond J in *Brian Connell & Ors v Nevada Financial Group Pty Ltd & Ors*[3] and by the majority of the Full Court in *Wong v Silkfield*[4] limited the utility of the legislation. Litigants have been reluctant to institute representative proceedings because of the cost and delay of prospective appeals and the uncertainty of the outcome.

Part IVA was introduced in response to Law Reform Commission Report No. 46 *Grouped Proceedings in the Federal Court* with the object of providing an efficient and cost effective procedure to deal with multiple claims, and to promote consistency in decision making. The purpose of the reformatory legislation was in effect defeated.

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was properly constituted as a representative proceedings. The application sought relief including a declaration that the respondents had engaged in misleading and deceptive conduct contrary to Section 52 of the *Trade Practices Act*.

The applicants were purchasers of four units "off the plan" in a building to be known as "Phoenician North Tower" at Broadbeach on the Gold Coast. The respondent was the developer and vendor of lots in the building. The Statement of Claim identified eighteen purchasers of a total of thirty nine lots, and set out oral representations made in varying combinations to the named group members, who had not settled their contracts to purchase. The group was defined to include all persons who entered into contracts to purchase lots in "Phoenician North Tower" from Silkfield Pty Ltd through the agency of Skye Court Pty Ltd prior to the date of registration of the plan for the building, and who were provided by Silkfield with a Section 49 statement under the *Building Units and Group Titles Act* 1980 (Qld). That statement was included in every contract. Although all of the named members of the group had received a financial projection document, that element would not necessarily be common to unidentified group members, and so the common issue was whether Section 49 Statement was accurate.

In interlocutory proceedings it was established that purchasers of 124 lots met the description of the class or group. The unidentified group members had completed their contracts and were, of course, known to the respondent Vendor.

Section 33C(1) provides:-

Commencement of proceedings:

33C (1) Subject to this Part, where:-

(a) 7 or more persons have claims against the same person; and

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(c) the claims of all those persons give rise to a substantial common issue of law or fact; a proceeding may be commenced by one or more of those persons as representing some or all of them.

The meaning of the word "substantial" has been the subject of judicial disagreement.[9] However, all agree that the word "substantial" is imprecise, has shades of meaning and was included in Section 33C(1)(c) without explanation by parliament, and as a variation to Section 12 of the draft bill proposed by the Law Reform Commission. The majority in the Full Court in *Wong v Silkfield Pty Ltd* considered that "the imposition of this requirement (for a "substantial" common issue) demonstrates a clear intention on the part of the Parliament to restrict the wider availability of the representative procedure recommended by the Law Reform Commission".[6] O'Loughlin and Drummond JJ rejected the suggestion in *Connell v Nevada* that the only approach was one of comparing or balancing the common and non common issues. They acknowledged that Part IVA would apply where an issue had "some special significance for the resolution of the claims of all group members", where the determination of the issue "is likely to have a major impact on the conduct and outcome of the litigation,"[7] where an issue is "a matter the resolution of which will have a major impact on the litigation because it is at the core of the dispute"[8] or where litigation of the common issue "would be likely to resolve wholly or to any significant degree the claims of all group members."[9]

In the minority in the full Court, Froster J said "the word 'substantial' indicates no more than that the common issue should not be a merely trivial one".[10] Like Spender J at the first instance, Foster J considered the common issue to be substantial.

In argument before the High Court, Brett Walker SC submitted for Silkfield that determination of whether an issue was likely to have a major impact on settling the dispute "involves an evaluation of the relative significance of the putative common issues of law or fact".[11]

For the appellant representatives, David F. Jackson QC argued that section 33C(1) invoked no discretion in the Court. If the requirements of the section are satisfied, the proceedings may be commenced. The discretion to disband an action is found in other provisions of section 33.

In finding for the representatives, the High Court referred to the safeguards in the legislation, and considered the difficulties of evaluating the issues at the time the proceedings are commenced, i.e. before pleadings close. The Court asked "How in the present case...could one sensibly ask whether the issue with respect to the s 49 statements... is an issue at the core of the dispute between [Silkfield] and each group member".[12]

The Court said "Clearly, the purpose of enactment of Pt IVA was not to narrow access to the new form of representative proceedings beyond that which applied under regimes considered in cases such as *Carnie*."[13]

The High Court held that it was not necessary for the allegations to be "major" or a "core" issue. It was enough that the common issue be "one of substance".

The ruling of the High Court finally establishes the utility and availability of the class action procedure referred to the Australian Law Reform Commission by the Attorney-General in 1977.[14]

Class Action Controversies

The Australian class action model has been the subject of many controversies. The "opt-out" model has been said to interfere with the due process rights of group members; on the other hand, under an "opt-in" model, the defendant may escape a large proportion of liability.[15] The Australian "opt-out" model has given rise to argument that the class action procedures are unconstitutional because s 75 of the Constitution limits the court's jurisdiction to matters arising between named individuals.[16]

In *Wong v Silkfield* the class is readily identifiable. Advertising the action to group members is easily achieved. Each member of the class can decide to accept the Court's ruling on liability, or can opt-out, either to pursue an individual

action, or to withdraw completely. Similarly, the common difficulty of funding a class action and protecting the representatives in the event of an adverse costs order, is minimised where all class members can be identified early in the proceedings.[17]

Insurers see the ruling in *Wong v Silkfield* as a catalyst for more class action litigation, and a risk factor which may lead to increased insurance premiums. The administrative challenges of running a representative action and the liability of the representative for costs make it certain that such litigation will not be lightly undertaken.

The cost factors in representative proceedings are particularly contentious. Senator Durack in the second reading debate in Federal Parliament (Hansard, Senate 13 November 1991) referred to "revolutionary proposals about contingency fees, assistance funds and so on". Both sides of Parliament rejected the proposal of the Australian Law Reform Commission for approval of fee agreements with legal practitioners, and establishment of a special fund to provide financial assistance for grouped proceedings. The Australian Law Reform Commission itself rejected arrangements by which legal costs could be ascertained by reference to the amount recovered in proceedings.

In the United States, Federal Rule of Civil Procedure 23 requires Court approval of fees charged by attorneys. The judicial discretions in class actions "effectively remove the threat of ethical dilemmas related to attorney self-dealing in settlement negotiations that might otherwise be detrimental to the class..."[18]

Ultimately Part IVA is a system of case management. If resolution of common issues can go some way to finalising a case, the rules are useful. Consistency in decision-making, economical and efficient conduct of proceedings and consumer access to the Courts are the benefits. PL

Sue SOCOG over seats? Ridiculous

JOHN LEHMANN

LAWYERS believe it would be extremely difficult for ticket applicants to successfully sue Olympics organisers if they dropped their "first in, first served" policy.

People who wanted to sue SOCOG for misleading conduct would have to prove they suffered a real loss by SOCOG changing its policy after advising applicants last week that supplementary ticket applications would be processed on a "first-in" basis.

Sydney lawyers Peter Cashman and Andrew Grech said it was doubtful a person would be able to demonstrate suffering substantial loss on the grounds that their supplementary ticket application was not treated on a first-in basis.

SOCOG could argue that the "loss" only came after a postal mistake gave the applicant an unfair and unexpected advantage.

Any loss might also be qualified by the fact that applicants in the supplementary round were applying for tickets they decided not to order in the first round.

Mr Grech said his firm, class-action specialists Slater & Gordon, would not accept any briefs, saying it would be "ridiculous" to take such action.

Mr Cashman pointed out that even in clear-cut cases where people had bought cruise tickets and the cruise was cancelled they were only awarded nominal damages for loss of enjoyment.

Uncertainty also exists as to whether SOCOG is even governed by the NSW Fair Trading Act or Commonwealth Trade Practices Act.

Mr Cashman acted for Greenpeace this year in a case where the Olympic Co-ordination Authority argued that it was not subject to the Commonwealth Trade Practices Act or Fair Trading Act because it was not a corporation engaged in business, trade or commerce.

It also argued that it had Crown immunity as it was a statutory corporation under ministerial control.

SOCOG is also protected against restrictive trade practices under the Trade Practices Act through a special clause in the SOCOG Act.

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1 Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ in a single judgement, [1999] HCA 48, 9 September 1999, B26/1999.

2 (1993) 45 SCR 384 at 403.

3 (1996) 139 ALR 723.

4 Drummond and O'Loughlin JJ (1998) ALR 329.

5 Wilcox J extra-judicially in an article "Representative Proceedings in the Federal Court of Australia: A Progress Report" (1997) 8 APLR 77; see also the summary of conflicting views by Moore J in *Peter Shanka & Ors v Employment National (Administration) Pty Ltd* SCA, 9 September 1998, unrep.

6 (1998) 159 ALR 329 at 343.

7 (1998) 159 ALR 329 at 344.

8 (1998) 159 ALR 329 at 345.

9 (1998) 159 ALR 329 at 345-346.

10 (1998) 159 ALR 329 at 333.

11 [1999] HCA 48, 9 September 1999, page 10.

12 [1999] HCA 48, 12

13 [199] HCA 48,13

14 Australian Law Reform Commission Report No. 46, Summary page 1.

15 See discussion by Vince Morabito in "Class Actions: The Right to Opt Out under Part IVA of the Federal Court of Australia Act 1976 (CLM) (1994) XIX" MULR 615

16 Application by respondent in *Bright v Femcare Ltd* [1999] FCA 1377 dismissed by Lehane J on 6 October 1999.

17 Law Reform Commission Report No. 46 proposed Court approval of fee agreements with lawyers, however this was rejected by Parliament.

18 Ethical considerations for attorneys in class action by Martin B Chitwood & Nikole M Davenport http://www.class-law.com\Articles\Ethics.htm. This article also discusses the process of class certification and the ethical dilemmas facing an attorney who has a fiduciary responsibility to class members he or she never meets.