Class Action Reforms – Wooing Classes to the NSW Supreme Court?

The NSW Attorney-General has released a consultation draft Bill to introduce what he calls "a comprehensive representative proceedings regime". Dispute Resolution Partner, Anne Freeman, examines the draft.

The draft Bill, which will amend the *Civil Procedure Act 2005 (NSW)*, is modelled on Part IVA of the *Federal Court of Australia Act 1976 (Cth)* (Part IVA), but with some noteworthy differences.

First, proposed section 158(2) enables representative proceedings to be taken against a number of defendants even if not all group members have a claim against all defendants. This proposal has been suggested in order to overcome the interpretation of Part IVA in the Full Federal Court decision of *Phillip Morris (Australia) Limited* v *Nixon*, which was to the effect that all members of the class must have claims against each of the defendants.

Second, proposed section 166(2) clarifies that it is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals. This is consistent with the Full Court of the Federal Court's decision in *Multiplex Funds Management Limited* v *P Dawson Nominees Pty Limited*, which reversed the earlier view in *Dorajay Pty Limited* v *Aristocrat Leisure Limited*.

The Court is to be given power to establish a fund consisting of the money to be distributed as damages to members of the group. The costs of administering such a fund are to be borne by the fund or by the defendant(s). It is proposed that if any money remains in the fund that cannot be practicably distributed to group members, the Court may order that the money be distributed "cy-pres". Literally meaning "as near as possible", this mechanism has been adopted in class actions in the United States where settlements resulted in left-over money in funds and the Courts have distributed that money to third parties, often charities.

The cy pres remedy was suggested in the Commonwealth Attorney General Department's 2009 Justice Report and also in The Victorian Law Commission's Civil Justice Review in 2008, which also recommended the other differences in the Bill to Part IVA. In doing so, the Commonwealth report noted that such a remedy may be appropriate given that one of the aims of allowing class actions is "behaviour modification", that is, that defendants should be punished for wrongs, and any left over settlement money should therefore not be returned to them if it is unable to be fully distributed to class members.

The Victorian Civil Justice Review noted, however, that punishment and deterrence have not traditionally been the aim of Australian class actions, with the focus to date being on compensating those who can prove their loss.

Allowing a cy pres remedy represents a policy decision that defendants should not be permitted to retain any of the damages, even where such damages are "unclaimed" by a class member or members.

The power contained in section 178(5) of the Bill is unfettered. This contrasts with the position in a number of Canadian jurisdictions, where the Court must be satisfied that the distribution of funds by cy pres may be reasonably expected to benefit class or subclass members, and the Court must consider whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass.

The Victorian Civil Justice Review recommended that the Court have a general discretion as to whether a cy pres remedy should be ordered and how the remedy should be implemented. It rejected the Canadian idea that the funds should be only directed for the benefit of those in the class or subclass. It pointed, in this regard, to the tobacco excise litigation in the NSW Supreme Court which involved a fight between tobacco retailers and wholesalers as to who should be entitled to retain money after it had been held that collection of the excise by state revenue authorities was constitutionally invalid. The excise had, in fact, been collected from consumers of tobacco products, who could not relevantly be identified in order to satisfy a class action. The Victorian Review suggested that in such circumstances it may not be considered appropriate to apply the funds to bring about a reduction in the price of tobacco products, but rather assist anti-smoking groups and campaigns.

As currently proposed, the Courts will be able to take any manner of factors into account in deciding whether to order a cy pres remedy and the manner of distribution.

Submissions on the draft Bill were received until 10 November 2010. It is expected that the remedy will be the subject of debate in these submissions.

The Social Network and Work – what employers should do when these worlds collide

The growing use of social networking services, such as Facebook, Twitter and LinkedIn, is creating a growing set of problems for employers. As the recent Fair Work Australia decision in Fitzgerald v Dianna Smith t/a Escape Hair Design demonstrates, employers need to ensure that these problems are handled correctly. Employment Relations Lawyer, Elise Jenkin, examines the issues.

As more and more Australians join social networking services, employers face increasing problems in managing employee use of these sites. Many employers choose to block or limit access at work, while others attempt to harness the social networking phenomenon as a marketing tool.

However, questions arise about what employers can do when their employees' use of social networking services, even when outside of working hours, impacts on the workplace.

Out of hours conduct

Employers and employees have an implied duty of trust and confidence towards one another. If conduct outside of working hours undermines that trust and confidence, it can become a legitimate basis for disciplinary action and even dismissal.

In *Fitzgerald v Dianna Smith t/a Escape Hair Design*, the employee, Ms Fitzgerald, posted the following message as a status update on her Facebook page:

"*Xmas 'bonus' along side a job warning, followed by no holiday pay!!! Whoooooo! The Hairdressing Industry rocks man!!! AWSOME!!!* [sic]".

Commissioner Bissett of Fair Work Australia decided that the posting of this message was not a valid reason for dismissal. The reasons for this included that the message did not cause any detriment to the employer's business, the message was only visible to Ms Fitzgerald's Facebook "friends", the message did not identify the employer and it only stayed on the site for a couple of weeks.

Importantly, when the employer found out about the message, she did not immediately act upon this information. In fact the employer did not raise the issue until she dismissed Ms Fitzgerald more than a month later, citing the Facebook message and three other issues as reasons for the dismissal. Commissioner Bissett considered that this lack of immediate action suggested that the message had not damaged the relationship of trust and confidence between employer and employee.

However, Commissioner Bissett did have some words of caution for employees who make disparaging comments about their employers on Facebook and other social networking services. She commented that *"[w]hat might have previously been a grumble about their employer over a coffee or drinks with friends has turned into a posting on a website that, in some cases, may be seen by an unlimited number of people."*

It was clear from her decision that she believed that there is scope for comments made on social networking sites to be a valid ground for dismissal where they damage the employer's business or undermine the trust and confidence in the employment relationship.

More recently, in *Dover-Ray v Real Insurance*, Commissioner Thatcher decided that Ms Dover-Ray's posting of disparaging comments about her employer, Real Insurance, on her MySpace blog was a valid reason for dismissal.

Ms Dover-Ray posted the comments on MySpace after Real Insurance had informed her that it had investigated her allegations of sexual harassment against a co-worker and had found the allegations to be unsubstantiated. The blog repeatedly accused Real Insurance of corruption and bias in the course of the investigation.

In finding that the blog constituted a valid reason for dismissal, Commissioner Thatcher noted that, although the blog did not identify Real Insurance by name, it would have been clear to anyone who knew Ms Dover-Ray that she was referring to her employment with Real Insurance. The blog was publicly accessible through a Google search and was readily accessible to a number of Ms Dover-Ray's co-workers who were among her MySpace "friends". Ms Dover-Ray left the blog on her MySpace page for several weeks, despite requests from Real Insurance to remove it.

Commissioner Thatcher commented the blog may not have been a valid reason for dismissal had Ms Dover-Ray posted the blog in the heat of the moment after hearing of the outcome of her sexual harassment complaint, but removed it within a reasonable period of time once she had had time to reflect on the consequences.

In contrast to the comments made by Commissioner Bissett in *Fitzgerald*, Commissioner Thatcher took the view that it was *not* necessary to find that the implied duty of trust and confidence had been damaged in order for there to be a valid reason for dismissal.

Of course, problems can arise not only from disparaging comments about employers, but also from comments that are made about co-workers, especially where this amounts to bullying or sexual harassment.

Confidential Information

Another area that causes problems for employers is in relation to confidential information and post-employment restraints. Although there have not been any cases on this issue in Australia, an English case, *Hays Specialist Recruitment v Ions*, dealt with the problems caused when an employee left to work for a competitor but remained in contact with clients via LinkedIn.

Hays alleged that the former employee had breached his post-employment restraints regarding confidential information by using contacts that he had obtained at Hays to further his new business.

The Court ordered the former employee to hand over all of his LinkedIn contacts and all messages sent from his LinkedIn email account as part of a pre-action disclosure.

Steps for employers

The most important step for employers is to make sure that they have an appropriate social networking policy in place. This policy should, as a minimum, contain the following:

- a clear definition of "social networking"
- clear guidelines on the use of social networking services at work (if allowed) and outside of work, including what is and what is not acceptable social networking behaviour
- a warning about disclosure of confidential information on social networking websites
- an explanation of the consequences and a disciplinary process for breaches of the policy.

Obviously, there is little point in having a policy if no one knows about it, so employers must ensure that all staff are made aware of the policy and understand it.

It is also worthwhile to review other workplace policies in light of the impact of social networking. This includes policies on bullying, harassment, confidential information and intellectual property.

Finally, if an employee's use of social networking sites does impact upon the employment relationship, it is important for employers to learn from *Fitzgerald v Dianna Smith t/a Escape Hair Design* and take immediate action to address the problem. In situations where an employer is considering dismissal based on an employee's use of social networking, they should seek advice.

Exclusion of Liability – High Court Clarifies Efficacy Clauses

On 3 November 2010 the High Court handed down the decision of Selected Seeds Pty Ltd v QBEMM Pty Limited regarding the extent to which an insurance company could rely on the terms of an exclusion clause known as an "Efficacy Clause" in a product liability insurance policy to avoid liability to pay an insured's claim. Dispute Resolution Partner, Tom Griffith, reviews the decision.

On the facts recounted in the Court's unanimous judgment, the appellant Selected Seeds is a seed and grain merchant which purchased seed from another merchant in the Northern Territory that was represented to be Jarra grass seed. The seed was in fact substantially Summer grass seed or substantially contaminated with Summer grass seed. Jarra grass seed is extremely palatable to all types of stock as green feed, dry feed or hay and is grown for these purposes. Summer grass is fit only as a low-quality stock feed and is viewed as a weed when present in commercial hay and seed crops.

Selected Seed was joined to a damages claim brought by one of the ultimate consumers of the seed, the Shrimps. The Shrimps claimed the cost of eradicating the Summer grass seed from their land and the loss of use of their land during that period. The Shrimps' claim was settled and Selected Seeds contributed $150,000.00 to the settlement. There was no dispute about the reasonableness of the settlement. Selected Seeds' insurer refused to indemnify Selected Seeds for the loss.

The relevant insuring clause provided that the insurer agreed to pay to Selected Seeds:

"a. all sums which You become legally liable to pay by way of compensation

b. all costs awarded against You

in respect of…Property Damage happening during the Period of Insurance and caused by an Occurrence within the Territorial Limits in connection with Your Business."

Selected Seeds' policy also contained an Efficacy Clause which had the effect of excluding liability arising from particular defined events:

"This Policy does not cover any liability arising directly or indirectly from or caused by, contributed to by or arising from:

1. the failure of any Product to germinate or grow or meet the level of growth or germination warranted or represented by the Insured, or

2. the failure of any Product to correctly fulfil its intended use or function and/or meet the level of performance, quality, fitness or durability warranted or represented by the Insured."

The insurer contended that the second limb of the exclusion clause was engaged because Selected Seed's liability arose from the failure of the seed planted by the Shrimps to *"fulfil its intended use or function"* namely to produce Jarra grass and Jarra seed.

The High Court rejected the insurer's argument and found that Selected Seed's liability was not caused by the failure of the seeds to produce Jarra seeds, it arose by reason of the direct effect of the seeds upon the land. The seeds were so contaminated that Summer grass only was produced. The High Court found that the Efficacy Clause did not apply.

In assessing whether the exclusion clause should apply the Court applied general rules of construction – that is that the clause had to be read in light of the contract of insurance as a whole, thereby giving due weight to the context in which the clause appears. The High Court noted that the concern of the Efficacy Clause in Selected Seed's policy was to exclude warranties and representations about what their product might do or achieve.

The High Court concluded that the Trial Judge was correct to hold that Selective Seed's liability was for damage to the Shrimps' land by the introduction of the weed, Summer grass. The Court found that the policy responded to such a claim. It was not damage caused by the seed sown failing to fulfil its intended use or function. The liability to the Shrimps was for what the seed did, not what it failed to achieve. That was the literal construction to be given to the Efficacy Clause.

The decision is a reminder of the need to draft exclusion clauses with specific regard to the potential types of liability arising under the relevant contract.

The National Insolvent Trading Program Report

On 13 October 2010 ASIC released the National Insolvent Trading Program (NITP) Report, which sets out key messages, promoting greater director responsibility by encouraging directors to remain properly and fully informed about a company's financial affairs, and to be aware of the implications of insolvent trading; and to seek (timely) professional advice from accountants, lawyers and insolvency practitioners. Special Counsel, Dr Malcolm Quirey and Law Clerk, Dean Gerakiteys examine the report.

After consulting over 1500 companies displaying solvency concerns, ASIC has identified several possible insolvency indicators including:

Internal indicators

- A history of continuing trading losses, cash flow difficulties or difficulties in selling its stock, or collecting debts
- Creditors not being paid on agreed trading terms
- Not paying Commonwealth and state taxes
- Cheques being returned dishonoured
- Unable to produce timely financial information showing the company's financial position
- There are concerns about the ability to meet financial obligations.
- No certainty assets can be sold for funds in a short period without affecting profitable trade.

External indicators

- Legal action is threatened or has commenced against the company, in relation to outstanding debts.
- The company has reached the limits of its funding facilities and is unable to obtain appropriate further finance to fund operations.
- The company auditor has qualified their audit opinion on the grounds that there is uncertainty about whether the company can continue as a going concern.

Outcomes

The NITP has facilitated positive outcomes by encouraging better practices guiding directors as to:

- **Improved financial information** - to make informed decisions about a company's financial position.
- **Fundraising** - to obtain finance by transparent/accountable fundraising options/processes.
- **Refinancing –** to examine optional loans/banking facilities to obtain additional working capital.
- **Restructuring –** to seek appropriate professional advice for insights
- **Regulatory Compliance –** to fully understand and comply with directors duties

Key Messages For Directors

Four key messages are now stressed as basic duties:

1. Maintain appropriate books and records

Ensure proper books and records are kept by the company and take reasonable steps to keep properly and fully informed about the company's financial affairs.

2. Identify insolvency concerns and assess available options

Where there are reasonable grounds to *suspect* financial difficulty:

a. take positive steps to confirm the company's financial position and realistically assess the options available; and

b. carefully consider the company's solvency before incurring new debts.

3. Seek professional advice

Where there are reasonable grounds to *suspect* financial difficulty, obtain appropriate advice from suitably qualified, competent and reliable persons about the financial position of the company and how the financial difficulties can be addressed.

4. Act in a timely manner

Where there are reasonable grounds to *suspect* the company is insolvent, take steps **not to incur further debts** and obtain and consider advice about the options available to deal with the company's financial difficulties.

Where there are reasonable grounds *to expect* that the company cannot pay its debts based on the advice received, directors should consider the immediate appointment of an external administrator to the company.

If, based on advice, a restructuring plan is adopted, directors should continue to monitor trading to ensure the company is able to meet debts.

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