THE PRACTICE OF EXCELLENCE

PiperAlderman

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PA e-bulletin

Piper Alderman Legal Update

WELCOME TO THE LATEST EDITION OF THE PIPER ALDERMAN E-BULLETIN. THIS EDITION FOCUSES ON THE COMMONWEALTH GOVERNMENT'S WATER BILL, THE NEWLY CREATED VICTORIAN WATER REGISTER AND SIGNIFICANT COURT JUDGMENTS IN OUR PRACTICE AREAS OF EMPLOYMENT LAW, PROTECTION OF TRADE SECRETS AND CORPORATE REGULATION.

Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2007 – APRA to hand over banning powers to the Courts

Dispute resolution partner, Simon Morris, and law graduate, Kyla Banton, discuss proposed amendments to legislation supervised by APRA which is currently before the Federal parliament and proposes to remove to the Courts APRA's powers to ban directors and senior officers of prudential institutions

The Federal Government has responded to pressure from the insurance and superannuation industry to bring APRA's powers to disqualify directors and other senior officers into line with similar banning powers vested in ASIC.

When presenting the Bill to the House of Representatives Mr Dutton, the Minister for Revenue and Assistant Treasurer, summarised the effect of the amendments as follows:

1. The current process for disqualification is an administrative process whereby APRA makes a determination that a person should be disqualified from responsible officer roles within APRA-regulated entities.
2. The Bill will amend the Insurance Act (and other prudential acts) to introduce a court based process similar to that followed by ASIC under the Corporations Act.
3. The court based process will replace the current administrative approach in which APRA is responsible for making disqualification decisions under the Insurance Act.
4. The court based process will improve the transparency of the disqualification decisions. The new process will give the court flexibility to specify relevant aspects of a disqualification, including the period and the types of positions the disqualified person is banned from holding. The court will also have the power to vary or revoke a disqualification.

The stated purpose of the proposed amendments is to improve the efficiency, transparency and consistency of the process for disqualifying individuals from operating financial sector entities and enhance the accountability of APRA for administrative decision-making. As most APRA-regulated entities are also subject to regulation under the Corporations Act, it is seen as preferable that the disqualification processes under the two regulatory frameworks are suitably aligned to ensure that disqualification decisions are subject to a consistent level of scrutiny.

The amending legislation repeals the provisions of the various legislation that confer power on APRA to disqualify a person if it is satisfied that the person is not a fit and proper person to be, or to act in, a responsible person role, including directors, principal executive officers and senior managers, by way of administrative decision. Those provisions are to be substituted by new provisions with the following effect:

1. APRA may make a determination that it considers a person is not a fit and proper person to be, or act in, a responsible person role.
2. In such circumstances, APRA may make an application to the Federal Court in respect of that determination.
3. The Federal Court may make an order to disqualify a person from being or acting in a responsible person role for a period that the Court considers appropriate if the Court is satisfied that:
   - 3.1 the person is not a fit and proper person to be or act as such a person; and
   - 3.2 the disqualification is justified.
4. The Court is given a wide discretion in respect of its power to disqualify a person and may take into account any matters and criteria for fitness and propriety as the Court considers relevant.
5. While an APRA-determined disqualification is permanent and prohibits a disqualified person from holding any responsible person position in that industry, the new regime will mean that the Court may disqualify an individual from a position or positions in a specific entity, a class of entities or all entities for a period that the Court considers appropriate.

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6. The Court is given powers to revoke or vary a disqualification on application by a disqualified person or APRA. If such an application is made, the disqualified person must give notice of the application to APRA and vice versa.

7. The appeals process will also change. Currently, a disqualification decision is subject to internal review by APRA and then a merits review by the AAT. Under the new regime, a Court ordered disqualification is subject to the normal court-based appeals process. There is no internal review by APRA or merits review by the AAT from a decision by APRA to disqualify.

8. Application of the new provisions and transitional provisions:

8.1 A disqualification by APRA that is in force continues in force but the new provisions will apply in relation to any conduct engaged in by a person, whether before or after the passing into law of the amendments.

8.2 The amendments do not affect:

> any request for an internal review of a disqualification decision made before the passing of the amendments in to law;

> any proceedings in relation to a disqualification decision before the AAT; or

> any appeal to a court in relation to such proceedings before the AAT.

The new regime is broadly consistent with the Court disqualification regime under the Corporations Act and the same regime will apply across all APRA regulated industries.

The amendments are notable as standing out against a legislative trend whereby supervisory jurisdictions over administrative decision making processes have been removed from the Courts. In a sense the amendments are all the more surprising in that they deal with powers of disqualification which have long been recognised as being inherently administrative in character. It would seem that the Government has responded to industry concern about a perceived absence of rigour, consistency and transparency in the exercise by APRA of its banning jurisdiction.

Given the serious consequences to the livelihoods and reputations of individuals banned from holding office on the grounds they are not fit and proper, there is some comfort in the disqualification function coming under the supervision of the Courts. As a matter of public policy, it seems appropriate that the exercise of discretionary judgments impacting on the liberty of individuals, often with a punitive effect and often involving legal judgment, should be left to the impartial supervision and competence of the Court system.

While upholding ASIC's power to disqualify as a proper exercise of administrative power, Justice Kirby in the recent decision of *Visnic v ASIC* noted with unease the absence of independence and impartiality when a corporate regulator acts as investigator and adjudicator. While it is not suggested that the Commonwealth Government has responded to Justice Kirby's unease, bestowing on the Courts the function of adjudicating who should be disqualified from holding senior offices of prudential institutions restores some protective balance to the exercise of this regulatory function.

CGU Insurance v AMP Financial Planning: The High Court explores an insurer's duty of utmost good faith and the reasonableness of settlements

In the November 2005 edition of the PA e-bulletin, Tom Griffith explained the Full Court of the Federal Court's decision in this case, which found that CGU had not fulfilled its duty of utmost good faith to AMP. CGU has now successfully appealed that decision to the High Court. Dispute resolution partner, Anne Freeman, examines the reasoning of the Court.

AMP had professional indemnity insurance with CGU which extended to claims for liability for both negligent and fraudulent acts of AMP's authorised representatives. Two such authorised representatives conducted their own financial advisory business in which investors placed funds and subsequently lost in excess of $3,000,000. The AMP representatives were ultimately banned from participation in the securities industry by ASIC, following an investigation by ASIC of the failed investments. As a result of the ASIC investigation, AMP notified CGU of possible claims that would be made against it in relation to the failed investments.

AMP was required by ASIC to create a claims protocol as to the handling of any claims against AMP by the investors. The protocol was provided by CGU for approval. CGU indicated an "in principle" agreement to the protocol but reserved its rights and instructed AMP to continue acting as a prudent uninsured. Acting in accordance with the protocol, AMP proceeded to settle claims by investors to the value of approximately $3,000,000. CGU continued to reserve its right in respect of the coverage and would not confirm indemnity. Ultimately CGU advised AMP that indemnity would not be granted in respect of claims that had been resolved for which CGU believed that AMP was not liable.

The Full Court of the Federal Court had found that CGU, by accepting the protocol in principle, had induced AMP to assume that it would not be required to establish any underlying liability to each investor. The Full Court also found that CGU had

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breached its obligation of utmost good faith by failing to determine a position on indemnity in a timely manner.

The leading judgment in the High Court was given by Gleeson CJ and Crennan J. Their Honours found that at the time most of the settlements were paid, CGU had made it plain to AMP that it was not accepting liability to indemnify AMP and, in those circumstances, there could be no reliance upon the in principle acceptance of the protocol to found an estoppel argument. Their Honours pointed to advice which CGU provided to AMP that AMP did not appear to have liability to some of the investors.

Callinan and Heydon JJ agreed that AMP had failed to establish the elements of estoppel, finding that AMP did not alter its position on the basis of the conduct of CGU in agreeing in principle to the protocol.

However, Gleeson CJ and Crennan J did find that CGU's in principle agreement with the protocol involved a representation by CGU that it would not, in any subsequent litigation in relation to the indemnification of AMP, rely on policy conditions which prohibited an insured admitting liability or settling a claim. In those circumstances, CGU was liable to indemnify AMP for AMP's reasonable payment of settlement amounts, acting as a prudent uninsured. However, AMP had not adduced evidence which established its liability to investors but rather simply demonstrated that it followed a process in settling the claims that was reasonable. Their Honours held that any assessment of the objective reasonableness of the settlements that AMP made with investors could not be separated from the underlying question of whether AMP was liable to the investors in the first place. They found that it was open to the trial judge to find that AMP had not shown that the settlements were reasonable in the absence of such evidence of liability.

As to the duty of utmost good faith, the majority of the High Court agreed with the scope of the duty as put forward by the Full Court of the Federal Court. A lack of utmost good faith is not to be equated with dishonesty only. Gleeson CJ and Crennan J noted that while it was accepted that the duty of utmost good faith does require an insurer to act with due regard to the interest of an insured, it may also involve an insurer acting legitimately in regard to its own interests, including making a response to a claim for indemnity. Their Honours stated that while CGU's delay in deciding the question of indemnity may have amounted to a breach of the duty of utmost good faith, in the circumstances of the case they did not need to decide the question.

Their Honours did explore the question as to whether a breach of the duty of utmost good faith could ever lead to the insurer being liable to indemnify the insured, there being no necessary link between the alleged breach of the duty by delay and an entitlement to indemnity. That question remains open.

Callinan and Heydon JJ noted that both the conduct of CGU and AMP left something to be desired and clearly frowned upon the delay by CGU in determining its indemnity position. Their Honours noted that "[t]emporising by an insurer can be just as damaging to an insured as outright rejection of a claim. To preserve their businesses, business people often need to act expeditiously".

It is clear from the High Court's judgment that where liability in relation to the underlying claim is in question, an insured who settles that claim without the insurer's consent does so at significant risk. In AMP's case, their failure to lead to evidence of the underlying liability resulted in a failure to establish the objective reasonableness of the settlements. The High Court appears to agree with the comments of the trial judge that AMP should have called some investors to give evidence, in order to prove the underlying liability and therefore the reasonableness of the settlements.

Although no exhaustive definition of the duty of good faith was provided by the Court, it is clear that it is not to be equated with dishonesty only and requires regard to both the insured's interest and the insurer's

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interests. The failure by an insurer to make a decision on indemnity within a reasonable time frame may well give rise to a breach of duty of utmost good faith but does not necessarily do so. Whether such a breach would result in a liability to indemnify remains a question to be determined

Proposed amendments to the *Trade Practices Act* to target "predatory" below-cost pricing

*Corporate partner, George Raitt, and law clerk, Edwina Watson, discuss further changes to the Federal Government's proposed amendments to section 46 of the Trade Practices Act 1974 (Cth) (**Act**) dealing with misuse of market power. The proposed changes, incorporated in the most recent version of the Trade Practices Legislation Amendment Bill (No 1) 2007 (**Bill**), are intended to prohibit anti-competitive below-cost pricing by companies with substantial market share.*

If the Bill is enacted in its present form, it is likely a greater number of corporations will be affected by the operation of section 46, and a wider spectrum of below-cost pricing activities may risk contravening the Act. Companies likely to have a substantial market share will need to reassess their obligations under the Act to avoid substantial penalties for non-compliance.

The proposed amendments to the Bill have been introduced in the final stages of a long term program to amend the misuse of market power provisions, culminating in the Government's introduction of the Bill in June. The Bill responds to a Senate Report delivered in 2004, *"The effectiveness of the Trade Practices Act 1974 in protecting small businesses"*, recommending reforms to promote the effectiveness of section 46 in light of small business concerns about the difficulty of establishing misuse of market power.

In its current form, section 46(1) of the Act prohibits corporations with a substantial degree of market power from taking advantage of that power for three prohibited anti-competitive purposes: to eliminate or substantially damage a competitor, to prevent someone from entering the market, or to deter or prevent someone from engaging in competitive conduct.

In its previous draft forms, the Bill had proposed only minor amendments to section 46. It clarified what factors the courts might consider relevant in determining a breach, and emphasised that a corporation may have a substantial degree of market power even where it does not substantially control the market or enjoy absolute freedom from restraint in its market behaviour.

The new predatory pricing provisions

More controversially, the amendments approved by the Government specifically target corporations pricing below cost by inserting new section 46(1AA) which provides that any corporation with **a substantial share of a market:**

1. must not supply, or offer to supply, goods or services for a **sustained period** at a price that is less than the **relevant cost** to the corporation of providing such goods or services;
2. for an **anticompetitive purpose** (as currently defined by section 46).

The terms "relevant cost" and "sustained period" are not defined.

A second new subsection 46(1AB) provides that a court may have regard to the number and size of other competitors in the market in determining whether a corporation has a substantial market share.

What is the effect of these provisions?

The first major implication of the changes is that the new test would apply to all companies with a "substantial share of the market", instead of requiring a "substantial degree of market power". This new test would catch a wider range of companies with significant market share who engage in below-cost pricing even though they may not in fact have substantial market power. The coverage of the provision is also likely to extend to small corporations who command a substantial share of local and regional markets. The amendments do not address factors other than market share which can affect market power, such as competition from imports and barriers to market entry. This has already attracted criticism from bodies including the Business Council of Australia and the National Retailers Association.

The second key proposed change is that corporations would be prohibited from pricing goods and services below their relevant cost to the corporation for any sustained period, replacing the current requirement that a company must have "taken advantage" of its market power before it infringes section 46. The term "relevant cost" is not defined in the amendments, and although it will be determined by the court in light of the circumstances in each case, exactly how it will be implemented is likely to cause some uncertainty. Neither is it clear what length of time is envisaged by the term "sustained period" Until a test case is run, it may be difficult to determine at what point extended periods of regular price discounting activities, such as special discounting and loss leader selling, will amount to a contravention.

The other proposed amendments to the Act

The Bill also introduces changes to section 51AC, which prohibits corporations from engaging in unconscionable conduct in transactions involving small businesses. This provision will now apply more broadly, to transactions worth up to $10 million rather than the current $3 million limit. Also, the list of factors which may be considered by a court in determining breach will be extended to include the presence of unilateral variation clauses in contracts, preventing large corporations from unconscionably shifting contractual risks on to smaller businesses.

Finally, the Bill also proposes the creation of a position for a second Deputy Chairperson of the ACCC to be filled by a person experienced in small business matters.

Productivity Commission Inquiry in Respect of the Market for Retail Tenancy Leases in Australia

Property and projects partner, Robert Speirs, and Dispute resolution senior associate, Tom Griffith, provide an update now that over 120 submissions have been received by the Productivity Commission in respect of its Inquiry into the Market for Retail Tenancy Leases in Australia.

The purpose of the Inquiry is two-fold:

1. Make recommendations for improving the operation of the retail tenancy market in Australia.
2. Identify, and where practicable, quantify, the likely benefits and costs of its recommendations for retail tenants, landlords, investors and the community generally.

The submissions broadly fall into three camps: tenants' interests, landlords' interests and common interests.

Tenants' Interests

The recurrent themes of tenants' submissions include:

1. Information asymmetry as a result of requirements imposed on tenants to furnish landlords with turnover and business figures are unjust and lead to increases in rent.
2. The imposition of 5 year maximum terms leads to uncertainty for tenants,

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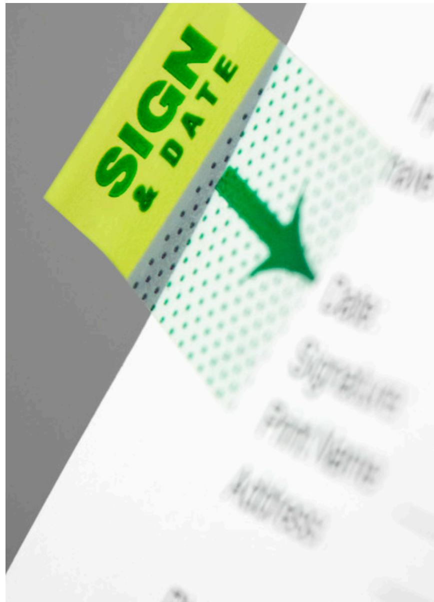

particularly where refitting is required in the later part of that period. Given the cost in relocating and the potential loss of the goodwill created in the area, tenants are vulnerable in the renegotiation period as they feel obliged to accept onerous terms in order to maintain their location.

3. Onerous fit-out obligations can be problematic on retailers.

4. Differences in the rent payable per square metre by anchor tenants who are assisted by strong bargaining positions and expert advice, as opposed to smaller retailers, are unjust.

5. There is a general lack of transparency in regard to business, promotional and costing arrangements between tenants and landlords.

6. There is a lack of real competition in the retail tenancy market given that sites of equal size and similar location are rarely available simultaneously. This creates an imbalance of power given that the lessor may have several prospective lessees to bargain with, whereas the lessee may have limited available sites.

7. There is a need for more stringent legislative controls, including obligations on landlords to offer rent renewals and caps on permitted rent increases.

8. Guarantees required by landlords are unjust as these give the landlord priority over unsecured creditors, such as goods suppliers, in the event of insolvency. There is no justifiable reason why landlords should be allowed to obtain this benefit and in turn prevent retailers from making use of their capital.

Lessors' Interests

The recurrent themes of the lessors' submissions include:

1. Adequate information is available to tenants through the legislative requirement to register leases. For example, all property leases in NSW, ACT and Queensland in respect of which stamp duties are levied are posted on the Department of Lands website (or similar). Legislation also requires landlords to provide specific information and documents to tenants prior to the signing of the lease.

2. The need for tenants to receive professional advice to address the power imbalance.

   (The Real Estate Institute of Australia's submission included a suggestion that legislation be introduced to limit the damages recoverable on professional liability claims. This will consequently reduce the cost of professional real estate agency advice, thereby encouraging more tenants (and landlords) to seek advice.)

3. The ACCC provides tenants with information and services to assist small businesses in the identification of their rights under the *Trade Practices Act*. For example, the publication *Small Business and the Trade Practices Act 2007* includes guidelines on unconscionable conduct and collective bargaining.

4. The sale and turnover information obtained from tenants by landlords is necessary to determine the financial viability of the retail premises and to manage growth and development. Further, the information allows landlords to submit data to independent and industry bodies for benchmarking purposes.

5. Pre-lease disclosure obligations are unwieldy, over-complicated and inefficient. This generates additional temporal and financial costs, which in turn adversely affect all parties.

6. There is a need for an open tenancy market, so that landlords are able to lease the premises to the most successful retailer at the most competitive rent. This ensures the success of the shopping complex and efficient allocation of resources in the market. The synergies available where retail premises are maintained by successful retailers are far greater than those available if unsuccessful retailers were allowed to remain in the centre.

7. There are already sufficient protection mechanisms in place to ensure that tenants are not disadvantaged when dealing with large landlords through the amendments to tenancy legislation, the *Trade Practices Act* and the administrative processes of the ACCC.

8. The submission by Stockland Trust Management Limited identified that the length of leases is negotiable on a case-by-case basis and therefore may exceed 5 years. This reduces the uncertainty of tenure faced by a tenant wishing to develop the premises.

9. Retail tenants have adequate avenues for the resolution of disputes given that legislation provides for compulsory dispute resolution mechanisms.

10. It is inaccurate to describe shopping centre owners as occupying a monopoly over tenancies. The majority of retail tenancies exist in another formats, including street fronts and homemaker centres. Further, within shopping centres there are numerous management groups. This prevents anti-competitive behaviour. There is therefore no need to further regulate the market.

Submissions Common to Tenants and Landlords

Tenants and landlords agree there is a need for a single piece of Retail Tenancies legislation to operate in every State and Territory of Australia. This would reduce the time and cost presently exhausted on education and administration where tenants, landlords and professionals have interstate interests or businesses. This piece of legislation should aim to simplify leasing regulations.

It was also agreed that mandatory registration of leases in all States and Territories is required.

The Real Estate Institute of Australia noted that "turnover rents", which are determined as a percentage of the retailer's turnovers, can be useful in sharing the risk between tenants and landlords. Tenants have raised concerns however at the need to provide the landlord with periodic turnover records and at the risk that a highly successful retailer will be required to pay a rent that is out of proportion to other retailers. Without these factors however, this risk management model is inoperative.

Tenant advisers or advocates are important in giving tenants useful professional advice. It is imperative therefore that these people be

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appropriately trained and qualified. In order to achieve this, an accreditation system should be developed.

The final report of the Commission is due on 21 December 2007.

Support for Representative Actions: *P Dawson Nominees Pty Ltd v Multiplex Ltd*

The Federal Court of Australia has demonstrated support for investment funded representative actions in its recent decision of P Dawson Nominees Pty Ltd v Multiplex Ltd. Dispute resolution law clerk, Elizabeth McGill, explains.

In 2000, Multiplex Corporations (UK) Ltd (Multiplex) contracted to design and build the Wembley Stadium in the UK. Delays in construction and increased costs had a substantial adverse effect on the company's profits and subsequently on the price of Multiplex shares and securities.

Over 40 plaintiffs with interests in these assets claimed to have suffered loss and damage. Their claims were based, inter alia, on allegations that Multiplex knew or would have known of the delay in construction, and that the non-disclosure of this information was contrary to the ASX Listing Rules.

In order to instigate proceedings, the plaintiffs entered into a litigation funding agreement with International Litigation Funding Partners (**ILF**). Multiplex contested the validity of the scheme, arguing that the requirement that members enter into the agreement with ILF in order to form part of the plaintiff group was inconsistent with the terms and rationale behind Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**Act**), which regulates representative actions.

Rationale behind representative actions

Finkelstein J noted the equitable origins of class actions where chancery was able to soften the harshness of the common law principle that only parties to an action can be bound by a judgment. Modern representative actions pursue similar goals, namely:

1. to promote the efficient use of court time and the parties' resources by eliminating the need to try the same issues separately;
2. to provide a remedy in favour of persons who may not have the funds to bring a separate action or who may not bring an action because the cost of litigation is disproportionate to the value of the claim;
3. to protect defendants from multiple suits and the risk of inconsistent findings.

Noting that the current proceedings are likely to cost the plaintiffs in excess of $7.5 million, Finkelstein J found that the nature of these proceedings was suitable for representative action. Injustice would result in the absence of a representative claim as many individual plaintiffs would be unable to proceed due to the high financial demands. Further, this would "undermine the deterrent effect of the existence of sanctions for contravention of the law regulating securities".

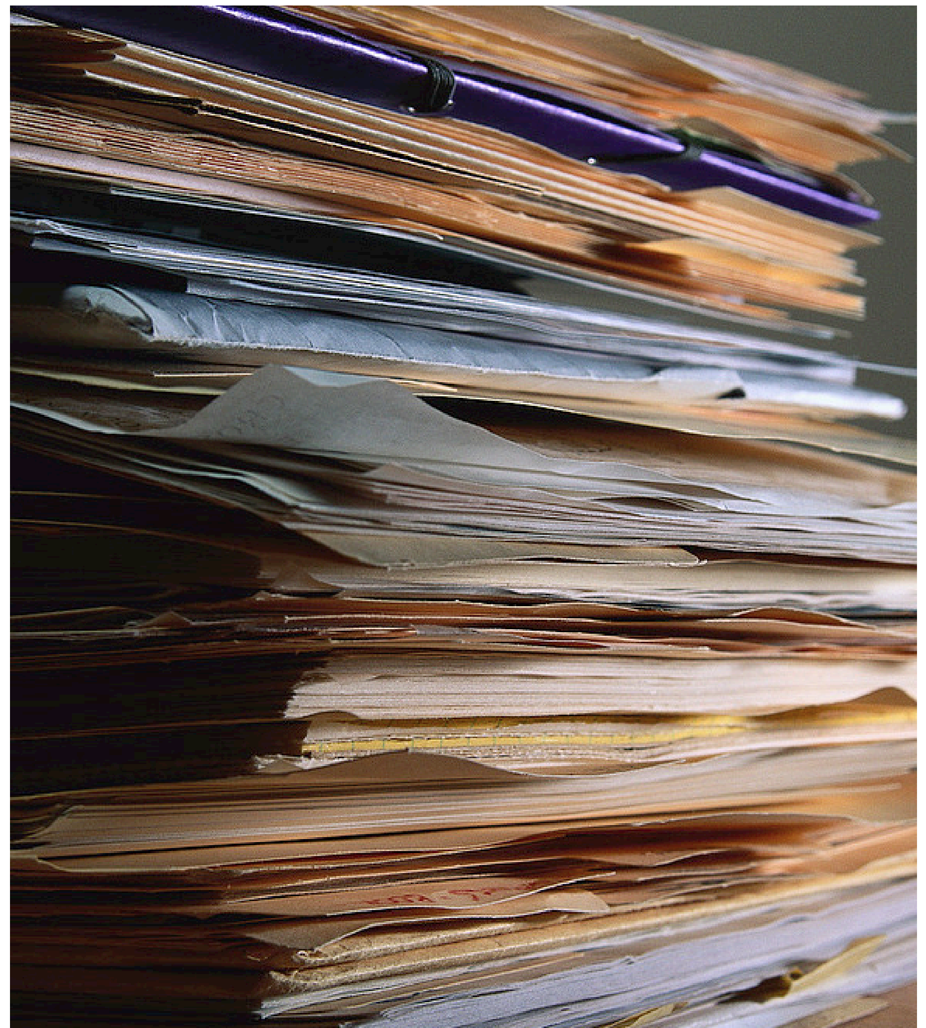
Must every person who has a claim be included in the group?

The Act specifies three conditions that must be satisfied in order to commence a class action:

1. Seven or more persons must be involved in the group.
2. All claims must be in respect of the same circumstances.
3. All claims must give rise to a substantial common issue of law or fact.

In contrast to the recommendations contained in the Law Reform Commission Report No 46 into Grouped Proceedings in the Federal Court, Finkelstein J noted that there is no requirement in the legislation that all persons with a claim against the defendant arising out of the same circumstances be included in the group. Whilst a judgment binds all members in the group except persons who specifically exclude themselves the Act envisages that the "group" itself can be formed by reference to criteria completely unrelated to the cause of action. Indeed there is no express restriction on how the group is to be formed. This represents therefore a curious hybrid between the traditional "opt in" and "opt out" models.

Finkelstein J therefore held that excluding people from the plaintiff group who made no financial contribution is not inconsistent with the purposes of Part IVA. The legislation is *"designed to protect the rights of persons who find themselves members of a group without their prior knowledge…. [whereas] willing participants do not need [this] protection"*. Further, the contractual difficulty of opting out of an agreement is immaterial in the consideration of the validity of the consensual group.



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Court certification

Finkelstein J held that no provision in the Act requires a group to obtain permission from the Court in order to proceed. However, the Court has the power to order that proceedings no longer continue in their representative form where it is in the interests of justice for this to occur, provided one of the following is first established:

1. The costs that would be incurred if the proceedings continued as a representative action would exceed the total sum of costs if proceedings were conducted separately.
2. All of the relief sought could be obtained through non-representative proceedings.
3. The representative proceeding will not provide an efficient and effective means of dealing with the claims of group members.
4. It is inappropriate that the claims be pursued by means of a representative proceeding.

Finkelstein J criticised the judgment in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* which involved a similar representative proceeding, involving allegations of misleading representations. The criteria for membership in the plaintiff group in that case was that specified solicitors must have received instructions to act on the person's behalf, the person must have acquired shares during a specified period and he or she must have suffered loss pursuant to the defendant's conduct. In that case, Stone J held that the criteria established an illegitimate "opt in" procedure as it was not possible to become part of the group without first taking some positive action. She held that this procedure was therefore "inconsistent with the terms and policy of Part IVA" and was therefore "an abuse of the Court's processes". Finally, the criteria was unacceptable as it dictated who should represent the group, which was held to be "repugnant" to the policy of the Act.

In contrast, Finkelstein J, in the current proceedings, held that the criteria had sufficient "opt in" and "opt out" elements such that a prospective member could determine his or her involvement at will. Finkelstein J was unable to determine why Stone J had found the criteria objectionable in Dorajay as she had failed to identify how this was contrary to the rationale of the Act. More importantly though, Stone J had ignored the threshold requirements in the Act, one of which must be satisfied before the Court acquires the power to consider the mandates of justice and stop the representative action if required. It must first be "determine[d] whether the condition for the exercise of the power had been satisfied and, if it had, then go on to decide whether the power should be exercised".

Finkelstein J also noted that under the Act the representative group must be identifiable. Therefore a group that was liable to change up until the date of trial, as was the case in *Dorajay*, may not be valid. Likewise, membership can not be dependent on future action and therefore an unborn child or a future beneficiary of a trust could not form part of the representative group.

Implications

This case strongly supports litigation funding in class actions. It represents a marked departure from Dorajay and signals the possibility of increased representative claims in the future, with significant consequences both for potential investors and legal firms specialising in class complaints as well as defendants.

Brescia Furniture Pty Ltd v QBE Insurance (Australia): Applying contractual principles to an insurance policy

Dispute resolution associate, Mitchell Coidan, discusses the recent decision of Justice Hammerschlag in the NSW Supreme Court which, in an unusual development, applies common law contractual doctrines in assessing an insurer's liability for breach of an insurance policy and the damages that flow from that.

Brescia was an importer and retailer of furniture until March 2005, when its Parramatta Road store was destroyed by fire.

Subsequently, Brescia lodged a claim against its industrial special risk policy and its insurer refused indemnity.

Brescia sought a declaration that it was entitled to indemnity under its policies with QBE, and subsequently took the unorthodox step of amending its claim to not only include damages for amounts it was entitled to under the policy, but also for consequential damages caused by QBE's alleged wrongful failure to indemnify. The move was unusual as there exists a well established line of authorities that provide that an insured must make an election as to whether or not to sue under a policy of insurance, or to accept the insurer's repudiation and thereafter sue for damages.

QBE unsuccessfully defended the claim on the basis that Brescia allegedly failed to take reasonable precautions to protect its Parramatta Road store from fire. In addition, QBE unsuccessfully sought to rely upon section 56 of the *Insurance Contracts Act* (**Act**), by alleging that Brescia's claims for lost business were fraudulently overestimated.

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As well as any amounts Brescia was entitled to under the policy, Brescia successfully claimed consequential damages against QBE, having wrongly refused to indemnify Brescia, on the basis that it would have rebuilt the Parramatta store by around December 2006, and would have recommenced making a profit from that time.

His Honour concluded that the breach of an insurer of its obligation to indemnify *"is no different to a breach by any other citizen of a contract"*, suggesting that the general principle to be applied in accessing damages in such circumstances will be, *"to put the Plaintiff in the position that he or she would have been in but for the breach, that is, the position if the contract had been performed"*. Justice Hammerschlag found that loss established by Brescia, as a consequence of the delay caused by QBE, was in the contemplation of both parties at the time they made the contract as the probable result of its breach and was therefore recoverable.

The decision of Brescia is an interesting case for insurers, as it resulted in an insured obtaining an entitlement to loss of profits, not only for the 12 months business interruption period under the policy (March 2005 to March 2006), but for an additional period from December 2006 until the judgment. Those amounts were in excess of $1.7 million.

The decision also confirms that when considering whether an insured has failed to take reasonable precautions under a policy of insurance, there must be an evaluation of the insured's subjective perceptions of the risks which may foreseeably occur. An insurer may be considered in no different a position to an ordinary citizen when it comes to a breach of contract. An insured may be therefore entitled to damages arising from such a breach on ordinary contractual principles, and will not be required to make the usual election of whether to sue under a policy of insurance, or to accept the insurer's repudiation and sue for damages.

Legal Professional Privilege and In-house Counsel: *Telstra Corporation Ltd v Minister for Communications, IT and the Arts*

In-house counsel may claim privilege in respect of legal advice or communications generated for the dominant purpose of actual or contemplated litigation. However, the person providing or receiving the communication must have the requisite degree of independence from the commercial aspects of their employer. Dispute resolution associate, Florian Ammer discusses the recent decision of Graham J of the Federal Court in which the independence of in-house counsel was considered in the context of a claim made by Telstra for privilege in respect of certain communications.

Difficulties may arise because in-house counsel are often more likely (than external solicitors) to participate in commercial aspects of a corporation and be involved in matters unrelated to legal proceedings, thereby lacking the requisite degree of independence. Communications made or received by in-house counsel may therefore often serve more than one purpose (ie, legal as well as commercial).

In this decision Telstra asserted that the author or recipient of certain communications was an internal legal advisor to Telstra and that the communications were therefore privileged. The decision of Graham J turned on the measure of independence of the person who Telstra asserted made or received the communications.

Graham J found no evidence of the role that Telstra's internal legal advisers performed, nor of their independence and their ability to provide impartial legal advice to their employer.

Graham J stated that in-house counsel will lack the requisite measure of independence if their advice is at risk of being compromised by virtue of the nature of their employment relationship but that if their personal loyalties and interests do not influence the legal advice given, the requisite degree of independence will be satisfied. Graham J however found that this was not established in this case and Telstra's claim for privilege was refused.

The case serves as a warning as to the extent of evidence that must be led in order to make good a claim for privilege when in-house counsel are involved. There will clearly be no presumption of independence and so positive evidence must be led.

Piper Alderman Lawyers

Sydney
Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
DX 10216, Sydney Stock Exchange
Phone: + 612 9253 9999
Facsimile: + 612 9253 9900

Melbourne
Level 24
385 Bourke Street
Melbourne VIC 3000
DX 30829, Collins Street
Phone: + 613 8665 5555
Facsimile: + 613 8665 5500

Brisbane
Level 9
239 George Street
Brisbane QLD 4000
GPO Box 3134
Brisbane QLD 4001
DX 105, Brisbane
Phone: + 617 3220 7777
Facsimile: + 617 3220 7700

Adelaide
167 Flinders Street
Adelaide SA 5000
GPO Box 65
Adelaide SA 5001
DX 102, Adelaide
Phone: + 618 8205 3333
Facsimile: + 618 8205 3300

Email: enquiries@piper-alderman.com.au

www.piper-alderman.com.au

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