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 has not traditionally been the aim of Australian class action, 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.