

Proposal for Enhanced Representative Proceedings

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Reform in superior courts

The inadequacy of class action procedures in New South Wales superior courts was highlighted by the recent decision of the High Court in *Carnie v. Esanda Finance*. (1995) 127 ALR 76.

In *Carnie* the High Court gave a unanimous decision favouring class actions, giving a wide interpretation to Rule 13(1) of Part 8 of the *NSW Supreme Court Rules 1970*. Of particular importance was the meaning given to the term "same interest". The decision makes it clear that representative proceedings can now proceed even where members of the class have separate contracts with the defendant and where damages are sought.

While the High Court's decision is seen as facilitating greater use of class action proceedings under common law in Australia, it raises the need for detailed provisions to deal with the complexities of such proceedings. Basic matters such as service, appropriate notice, whether the class is defined by opting in or out of a class, the conduct of proceedings, and settlement or discontinuance are not addressed in the current Rule 13.

Chief Justice Gleeson of the New South Wales Supreme Court has expressed the view that direction from the legislature is essential on this issue if class actions are to be allowed in the circumstances allowed by the High Court. ((1992) 29 NSWLR 390.)

The need for reform

The Coalition for Class Actions supports the introduction in NSW of a scheme for representative proceedings, following the model of Part IVA of the *Federal Court of Australia Act 1976* (Cth), subject to some variations.

The scheme should apply to the Supreme Court, the District Court, the Commercial Tribunal and the Equal Opportunity Tribunal. Consideration should also be given to its application in other state courts and tribunals.

Reform for NSW tribunals

Different procedures for representative complaints and appeals are provided in the Equal Opportunity Tribunal and Commercial Tribunal. Neither procedure is adequate. In the Commercial Tribunal there is provision for grouped proceedings for credit providers, but none at all for credit consumers. In the Equal Opportunity Tribunal the provision for class actions is cumbersome, and damages awards are not allowed in representative proceedings.

The proposed representative proceedings scheme should extend to both Tribunals to bring them into line with the *Federal Court Act* procedures. In the case of the Equal Opportunity Tribunal, the procedures should also be brought in line with representative complaints procedures in Commonwealth discrimination laws.

The Federal Court model

A legislative scheme for class actions in NSW along the lines of Part IVA of the *Federal Court Act* would have a number of benefits. It would:

- provide legislative direction on the scope of class actions;
- provide legislative directions and certainty on procedural issues;
- provide for related legislative issues, such as limitations periods, which could not be covered in court rules;
- provide consistency with the Federal Court, facilitating cross vesting; and
- avoid the current opportunities for forum shopping.

The Coalition or Class Actions believes the Part IVA model should be improved with a provision for distribution of unclaimed funds, known as *cypres* orders. The absence of such a provision in the *Federal Court Act* means that unclaimed monies stay with the defendant. The Coalition believes unclaimed monies should be able to be distributed for an appropriate cause. The NSW Coalition is the initiative of PIAC and Consumer Credit Law Centre.

The Coalition will be holding a seminar to discuss the above on Wednesday 8th November, 1995, 5.30pm-7.30pm at the Legal Aid Commission. If you would like further information about the Coalition or the function, contact Amanda Cornwall at PIAC on (02) 299 7833.