Australian Product Liability Trends: Class Actions & Litigation Funding

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A lively class action market

The Australian Federal class action regime is one of the world’s most liberal and plaintiff friendly. As a consequence of this, and our active litigation funding market, Australia is second only to the United States in respect of class action activity.

A recent study revealed that over the past 17 years, 22.4% of all Australian class actions have been product liability related.¹ This trend is set to continue with the Australian Consumer Law (ACL) fortifying existing consumer protection laws and giving rise to a broader array of possible avenues for class action litigation. The ACL is still relatively new, coming up to its second birthday. Relevantly, the ACL has placed more onerous obligations on manufacturers and suppliers with the introduction of mandatory reporting of product associated injury or illness, a broader test for bans and recalls and increased prescribed requirements for warranties against defects.

This year alone a number of large scale product liability class actions have taken place, the largest three of which involve Bonsoy soy milk, DePuy Hip Implants and Aspen Pharmacare.

Many other recent high profile class actions have been driven by the alleged failure of listed companies to comply with statutorily prescribed continuous disclosure obligations. As a consequence, companies are facing class action claims alleging that they have engaged in conduct that was misleading or likely to mislead.

Trends in class actions – contingency fee arrangements and litigation funders

Funding remains a critical issue in the future development of product liability class action proceedings given the significant costs associated with running such claims and the difficulty of having to prove claims of reliance and loss on the part of all plaintiffs. Australia has a ‘loser pays’ costs regime whereby, in general, the costs of the litigant who prevails are borne by the litigant who ‘loses’ (or gets a worse outcome than already offered). Traditionally, litigation funding by third parties was prohibited by the doctrines of maintenance (where a third party encourages a plaintiff to pursue litigation) and

champetry (where a third party agrees to finance litigation for a cut of any recovered proceeds). However, these doctrines have been abolished in most Australian jurisdictions.\textsuperscript{2}

Class action proceedings are now financed primarily by way of ‘no win-no fee’ cost arrangements and, increasingly, by way of litigation funding which had its genesis in Australia in the early 2000s. Typically, where a person or group of persons lack the requisite funding to bring a matter to court, litigation funders step in and charge fees whereby they agree to finance the costs of litigation, assume the risk of any adverse costs orders and put up any amount required as security for costs in return for a cut of the profits if the case is successful.\textsuperscript{3} The litigation funder then engages lawyers to conduct litigation on its behalf in accordance with the rules governing the legal profession.

Litigation funding of class actions is economically attractive to third party litigation funders as it allows for the accumulation of potential claims and therefore a multiplication of potential returns. However, it is also attractive to potential class action litigants insofar as it enables access to justice for meritorious claims which could otherwise not be pursued given the cost of bringing proceedings is often too great to be borne by an individual claimant.\textsuperscript{4}

The practice of third party litigation funding was legitimised by the High Court in 2006 in \textit{Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd}\textsuperscript{5} where, by a 5:2 majority, the High Court found that it was neither an abuse of process nor contrary to public policy for proceedings to be orchestrated by a third party litigation funder.

At approximately the same time, the Federal Court, in \textit{QPSX Ltd v Ericsson Australia Pty Ltd (No 3)},\textsuperscript{6} recognised the important role played by litigation funding in providing access to justice, improving the efficiency of litigation due to its focus on commercial considerations and spreading the risk of large scale litigation.

The Australian Government has also jumped on the litigation funding bandwagon. The Explanatory Statement to the \textit{Corporations Amendment Regulation 2012 (No.6)} (Cth), states:

\begin{quote}
\textsuperscript{2} Namely, New South Wales, Victoria, South Australia and the ACT.
\textsuperscript{3} Legg M, Travers L, Park E & Turner N, \textit{Litigation Funding in Australia} (University of New South Wales, Faculty of Law Research Series, Faculty of Law, Research Series 2012, Working Paper 12, p.2.
\textsuperscript{4} Standing Committee of the Attorneys-General’s Discussion Paper into Litigation Funding, May 2006.
\textsuperscript{5} (2006) 229 CLR 386 (\textit{Fostif}).
\textsuperscript{6} (2005) 219 ALR 1.
\end{quote}
This regulation promotes access to justice by providing an alternative mechanism for claimants to pursue their rights in court. This permits claims to be brought that might not otherwise have been brought in the absence of this reform.

However, despite Australia being such a fertile ground for product liability class actions and our litigation funding model having been adopted by other nations including the United States, Canada and the United Kingdom, Australia lags behind the rest of the world in the numbers of product liability class actions due to the continued prohibition on lawyers and law firms from entering contingency fee arrangements with their clients and the relatively lower value of damages awarded in such proceedings. As a consequence, the litigation funding market in Australia is dominated by a number of large third party funders who, in the context of class actions, typically seek to retain between 20% and 70% of any damages or settlement sums awarded in a given case.

**Lifting the prohibition**

Given the High Court has found that there are no longer any public policy considerations justifying the prohibition against litigation funding, and the Australian Government accepts that it promotes access to justice, lawyers ought rightfully query why the prohibition remains in place. However, make no mistake, as the Victorian Civil and Administrative Tribunal confirmed in January 2013, as the law presently stands a lawyer who charges a client by way of contingency fees is engaging in professional misconduct. 7

This gives rise to a particularly curious situation. There is nothing to prevent a law firm establishing an associated funding company for the purposes of directing clients to the firm and circumventing the prohibition on lawyers charging contingency fees. We are beginning to see this occur with the close relationship between law firm Maurice Blackburn and litigation funder Claims Funding Australia.

Maintaining the status quo and allowing litigation funding to remain the sole domain of third party litigation funders is worrying as the funding market is largely unregulated in respect of class actions, despite the Australian Standing Committee of Attorney-Generals having recommended regulation since 2006. 8 The Courts and the Federal Government have stopped short of imposing any meaningful boundaries in respect of

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7 Legal Services Commissioner v Barrett (Legal Practice) [2012] VCAT 1800 (23 November 2012).
third party litigation funders, despite recognising that such parties likely exercise a
degree of control over litigation. Current regulations require only that third party litigation
funders manage conflicts of interest. They do not address other concerns such as the
need for capital adequacy, the need for litigation funders to owe duties to their clients
and the court, and the need for disclosure obligations to ensure that these duties are
enforced.

Allowing law firms to enter the litigation funding arena would provide much needed
regulation in the funding market given lawyers are governed by ethical considerations
and owe duties to the court and their clients. Further, lifting the prohibition on lawyers
charging contingency fees would arguably increase competition in the litigation funding
marketplace, force third party litigation funders to reduce their charges, ensure more
capital is available to fund class actions, and increase the availability of litigation funding
products in the market.

In a 2008 report, the Victorian Law Reform Commission (VLRC) recommended that the
prohibition on lawyers charging contingency fees be reconsidered provided that
adequate regulatory safeguards be implemented.9 In particular, the VLRC
recommended that:

- law firms offer clients the choice between percentage based fee agreements and
  other methods of calculating fees;
- percentage fee agreements be approved by the court at the conclusion of
  proceedings;
- there be a means for percentage fee agreements to be varied where there is a
  material change in circumstances in connection with the proceedings;
- there be a cap on the maximum percentage fee charged or a sliding scale of
  permissible fees which decreases as the amount of the recovery increases;
- the existing legislative right of clients to have a costs agreement set aside where it
  is not fair or reasonable be retained; and
- percentage fee agreements be regulated by the Law Society, Bar Council and/or
  Legal Services Commissioner.

These recommendations have not been implemented to date.

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Silencing the critics

Critics of litigation funding argue that contingency fee agreements would open the proverbial floodgates of litigation to levels comparable to the United States. However, this did not occur as foreshadowed following the advent of third party litigation funding after *Fostif* some seven years ago and is unlikely to occur should the prohibition on lawyers charging contingency fees be lifted. Australian cost rules provide a formidable hurdle to speculative law suits with costs ordinarily following the event. By contrast, in the United States parties ordinarily bear their own costs with the only cost being that of running litigation.

Conclusion

Given third party litigation funding has gained widespread acceptance as a mechanism for increasing access to justice, the justification for restricting lawyers from charging contingency fees, whilst allowing third party funders to operate without meaningful regulation, is difficult to maintain.

Advocates strongly argue that allowing law firms to enter the litigation funding arena would increase available levels of funding, promote competition, provide parties with a regulated choice of funder and assist in developing Australia’s product liability class action market by allowing law firms the opportunity to take on the risk of funding proceedings that are inherently expensive and difficult to run.

It is likely that Australia will soon see a further liberalisation of regulation regarding such funding, and that this will have a flow-on effect of increasing product liability (and other) litigation.