GROUP LITIGATION IN AUSTRALIA
IMPORTANT DEVELOPMENTS FROM DECEMBER 2007 TO NOVEMBER 2008

SECOND NATIONAL REPORT FOR AUSTRALIA PREPARED FOR *THE GLOBALISATION OF CLASS ACTIONS CONFERENCE*, Oxford University, December 2008

By Vince Morabito[*]

In my view, the most significant developments that have taken place over the last twelve months, with respect to group litigation in Australia, are as follows:

1. the judgment handed down by the Full Federal Court of Australia in December 2007, in *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited*, concerning the legality of "closed class" mechanisms;
2. the public release in May 2008 of the final report by the Victorian Law Reform Commission with respect to Phase 1 of its review of Victoria's civil justice system;
3. the initiation by the Federal Court of Australia of a reform strategy, with respect to Part IVA of the *Federal Court of Australia Act 1976* (Cth), which is intended to render more efficient and less costly the judicial management of class proceedings brought pursuant to Part IVA; and
4. Australia's first-ever judicial directive, in October 2008, concerning the creation of a litigation committee, to deal with the problem of multiple class proceedings with respect to the same dispute.

FIRST DEVELOPMENT

As explained in my first national report for Australia, the recent involvement of commercial litigation funders in class proceedings has required scholars and, more importantly, the Federal Court of Australia and the Supreme Court of Victoria (the only two Australian courts where an "American-style" class proceeding may be brought) to determine precisely the restrictions which the opt out devices employed in these two jurisdictions place on the way in which class representatives define/describe the groups of claimants on whose behalf the class proceedings are brought.[1] This is because the funding of class proceedings, provided by these commercial funders, has been made dependent on the restriction of the represented class to only those claimants who have executed litigation funding agreements and/or fee and retainer agreements with the litigation funders and the class representative's solicitors, respectively. A Federal Court judge and a Victorian judge held that these class narrowing mechanisms were inconsistent with the opt out device. In both instances, a relevant claimant was not required to be a party to the already mentioned agreements at the time the proceeding was commenced, in order to be a class member. It was enough, in order to become class members, that these agreements were executed at any stage before the termination of the litigation.

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[1] V Morabito, *Group Litigation in Australia – "Desperately Seeking" Effective Class Action Regimes* (National Report for Australia prepared for *The Globalisation of Class Actions Conference* held at Oxford University in December 2007), 18-20.

In *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited*,[2] another Federal Court judge, Finkelstein J, reached the opposite conclusion. A difference between the mechanism approved in *Multiplex* and those rejected in the previous cases mentioned above was that in *Multiplex* one was required to be a client of the litigation funders at the time the class proceeding was commenced. In *Multiplex* the Full Federal Court upheld Finkelstein J's judgment. At the same time, it reaffirmed the validity of the contrary judicial findings on the basis that, in those cases, the ability of claimants to become class members *at any time after the start of the proceeding* constituted in effect an opt in device. The following comment by Jacobson J captures rather nicely the fact that the ruling of Finkelstein J was upheld by the Full Court in *Multiplex* despite strong concerns, by the three justices in question, as to the consistency of these closed class mechanisms with the objectives of Part IVA:

> Professor Morabito pointed out … that restricting the ambit of class proceedings to those persons who have taken the step of expressly instructing the class representative's solicitors to act on their behalf constitutes "a far cry from the class action landscape … envisaged by the [Australian Law Reform Commission] and by the Federal Parliament when they selected the opt out mechanism".
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> The same observations may be made about the ambit of representative proceedings brought on behalf of a group defined by the criterion of the positive step of signing a litigation funding agreement with a named funder. It is difficult to see how this can be reconciled with the goals of enhancing access to justice and judicial efficiency in the form of a common binding decision for the benefit of all aggrieved persons.[3]

SECOND DEVELOPMENT

As noted above, May 2008 saw the public release of the final report by the Victorian Law Reform Commission ("VLRC") with respect to Phase 1 of its review of Victoria's civil justice system.[4] A number of the VLRC's recommendations dealt with Part 4A of the *Supreme Court Act 1986* (Vic), which governs class actions in the Supreme Court of Victoria.

One such recommendation was that it is not necessary for all class members to have individual claims against all defendants in class action proceedings involving multiple defendants. In the VLRC's view, Part 4A should be amended to make it clear that in cases where there is a least one defendant against whom all class members have individual claims, additional defendants may be joined even if only some members of the class have individual claims against such additional defendants.[5] This recommendation was necessitated by the enunciation, by the Full Federal Court in 2000, of a principle (commonly referred to as the *Philip Morris* principle) to the effect that where a Part IVA proceeding is brought against multiple respondents each class representative and each class member must make a claim against each respondent.[6]

The VLRC also recommended that Part 4A should be amended to make it clear that there should be no legal impediment to a class action proceeding being brought on behalf of a smaller group of individuals or entities than the total number of persons who may have the same, similar or related claims, even if the class comprises only those who have consented to the conduct of proceedings on their behalf.[7]

Part 4A proceedings to be brought on behalf of only the clients of the class representative's solicitors and litigation funders.

The VLRC also recommended that the Supreme Court of Victoria should be empowered to order *cy pres* remedies where: (a) there has been a proven contravention of the law; (b) a financial or other pecuniary advantage has accrued to the person or entity contravening the law as a result of such contravention; (c) a loss suffered by others, or the pecuniary gain obtained by the person contravening the law, is capable of reasonably accurate assessment; and (d) it is not possible, reasonably practicable or cost effective to identify some or all of those who have suffered a loss.[8]

Another important recommendation of the VLRC was that a fund should be established, the Justice Fund, to provide financial assistance to class representatives and provide a limited indemnity for cost orders that are made against such representatives.[9]

THIRD DEVELOPMENT

In May 2008 reports appeared in Australia's media concerning meetings that had been convened in Melbourne by Justice Finkelstein of the Federal Court to consider reform of Part IVA. Such reform was said to be required, to some extent, in order to deal with an expected increase in shareholder class actions. According to these reports, the reforms being considered by the Federal Court included restricting an appeal on an interlocutory issue until the entire case is heard, and having interlocutory disputes heard "on the papers" rather than in court, helping to keep costs down.[10] Similarly, the New South Wales Class Action Users Group, headed by Justices Moore and Lindgren, has been considering effective reform strategies with respect to Part IVA litigation brought in the New South Wales registry of the Federal Court.

FOURTH DEVELOPMENT

On 9 May 2008 two Part IVA proceedings were filed against the Centro Group by the law firm of Maurice Blackburn. A closed class mechanism, similar to the one discussed above, was employed. On 23 May 2008, a third class action was filed with respect to the same dispute by the law firm of Slater & Gordon on behalf of all the alleged victims of the impugned conduct.

On 10 October 2008, Finkelstein J was required to deal with this undesirable scenario of several contemporaneous class proceedings with respect to the same dispute. His Honour was of the view that:

> What … should be done is that notice be given to group members in each action telling them that it is proposed to establish a litigation committee to oversee each action. The notice, which may be given by letter, will: (1) give details about the case; (2) inform group members why a committee is being set up; and (3) invite interested persons to nominate themselves or other group members for membership with reasons why their nomination should be accepted (eg size of financial interest, ability or experience in monitoring solicitors etc). The response should be returned to the Court with a copy to the applicants' lawyers. The Registrar in conjunction with the applicants' lawyers can then finalise the membership of the committee.[11]

[8] Ibid 559-560 (recommendation no 101).
[9] Ibid 614.
[10] See http://news.theage.com.au/fed-court-to-look-at-class-action-reform-2008052.
[11] *Kirby v Centro Properties Limited* [2008] FCA 1505, para 37 (per Finkelstein J).