Class Actions and ADR

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What are Class Actions?

Seven or more people with similar claims against the same defendant whose claims give rise to a substantial common issue of law or fact may bring what is called a "representative proceeding."[1] Commonly known as a "class action", a representative proceeding is one in which one of claimants becomes a representative for the whole group, and conducts litigation on behalf of that group.

Class actions operate on an opt out, rather than an opt in, basis. Unless someone in the claimant group chooses not to be a part of the class action before a date fixed by the court,[2] they are a part of the representative proceeding regardless of whether the consent or not.[3]

Since its introduction, class action litigation has become a crucial mechanism for furthering access to justice in the Australian court system – allowing individuals to access the courts and obtain civil remedies in contexts where it otherwise would not otherwise be possible due to the expense, time, and stress of litigation. This is because class actions allow individual members of a class to share the burden of expenses, making otherwise impossibly expensive civil suits affordable, as well as enabling them to carry on with their lives while the litigation is managed by a representative of the class.

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[1] *Federal Court Act 1976* (Cth) (**Federal Court Act**), s33C(1); *Civil Proceedings Act 2011* (Qld) (**CPA (Qld)**), s103B(1); *Civil Procedure Act 2005* (NSW) (**CPA (NSW)**), s157(1); *Civil Procedure (Representative Proceedings) Act 2022* (WA) (**CPRPA (WA)**), s 6(1); *Supreme Court Act 1986* (Vic) (**SCA (Vic)**), s 33C; *Supreme Court Civil Procedure Act 1932* (Tas) (SCCPA (Tas)), s 66(1).

[2] Federal Court Act, s 33J; CPA (Qld), s 103G; CPA (NSW), s 162; CPRPA (WA), s 12; SCA (Vic), s 33J; SCCPA (Tas), s 71.

[3] Federal Court, s 33E; CPA (Qld), s 103D; CPA (NSW), s 159; CPRPA (WA), s 8; SCA (Vic), s 33E; SCCPA (Tas), s 68.

In the Federal Court, contexts in which class actions have proven their usefulness include, but are not limited to, shareholder disputes, consumer actions, environmental actions, and human rights actions.[4]

On the state level, the representative proceedings regimes accommodate different kinds of actions. For example, proceedings related to institutional child sexual abuse.[5]

ADR in Australian Class Actions

ADR plays a substantial role in Australian class action proceedings. This is primarily seen in the fact that, by and large, class actions are resolved by settlement. These settlements arise through ADR processes, such as mediation, which modern courts take active steps to promote and facilitate.

It is a common practice of the Federal Court to hold a case management hearing specifically to discuss steps towards reaching settlement and ADR options for parties at the close of pleadings.[6] Similarly, in state jurisdictions, relevant Supreme Court practice notes for the management of class actions prescribe that referral of the dispute to ADR is to occur "as a matter of general practice."[7] In order to deal with the fact that a significant number of parties in the class action are absent,[8] such settlements require approval of the court.[9]

For all its prominence, the use of ADR in the class action litigation context does not come without its drawbacks. Most notably, as this type of litigation is highly expensive, returns for individual class members where a settlement occurs can be rendered insignificant by the fact that legal costs are often paid out of the settlement amount. For example, in the case of *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511, it cost the class $10 Million to receive a return of $6.85 Million. On

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4 Class actions in the Federal Court (otherwise known as representative proceedings).
5 *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld) Pt 3, Div 1.
6 Class actions in the Federal Court (otherwise known as representative proceedings).
7 See, eg, Practice Direction No. 8/2023 (Qld); Supreme Court Practice Note SC Gen 17 (NSW); SC GEN 10 Conduct of Group Proceedings (Class Actions) (Second revision) | The Supreme Court of Victoria (7.5).
8 Theo Broodryk, 'Mediation as a Tool to Manage and Resolve Class Actions' (2020) 31(2) *Stellenbosch Law Review* 226 at 227.
9 Federal Court Act s 33V(1); CPA (Qld), s 103(1); CPA (NSW), s 173(1); CPRPA (WA), s 23(1); SCA (Vic), s 33V(1); SCCPA (Tas), s 82(1).

the other hand, respondents to class actions may end up paying more to their lawyers in legal costs than to the class at settlement.[10]

ADRAC acknowledges that, while the prominence of ADR in the course of class action proceedings is promising, it is advantageous to both parties to the dispute if class damage claims can be resolved outside of litigation entirely

Regulatory Redress as ADR in Mass Damage Scenarios

To understand the impetus for regulatory redress in Australia, and the outcomes it seeks to replicate, it is helpful to consult the redress achieved in the aftermath of the collapse of Storm Financial, and the role the Australian Securities and Investments Commission (**ASIC**) played.

The Storm Financial Collapse

Storm Financial, an Australian financial planning network that held $4.5 Billion under management, went in to voluntary administration due to the effects of the Global Financial Crisis in 2008. This collapse was followed by demands for redress from some of the 14,000 clients it had at the time. In short, they alleged that, by advising clients to take out high-risk margin loans in a "one-size-fits-all" manner, unresponsive to the personal circumstances of the individual client, many clients were exposed by Storm to catastrophic risk.[11] As Storm was insolvent, complainants sought redress from the banks that had made loans to Storm Financial customers. While some of the adversely affected commenced Representative Proceedings under Pt IVA of the Federal Court Act, others used ADR pathways established by banks that made loans to Storm Financial customers.[12]

ASIC assisted in the dispute resolution process in various ways. Most notably, it developed financial models to project the losses suffered by the customers of Storm

[10] See Inquiry into Class Action Proceedings Final Report | ALRC at 237.
[11] Michael Legg, 'A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers (2016) 38(3) *Sydney Law Review* 311.
[12] Ibid.

Financial, and negotiated settlement on behalf of those who were involved in the ADR scheme, applying these models. Through this involvement, ASIC secured better results for many of those who opted for ADR than members of the class action even before legal costs were deducted from the settlement amount – no expenses existing for those under the scheme ASIC oversaw as ASIC bore their own costs.[13]

Furthermore, the models that ASIC developed became powerful tools for bringing about the settlement of the ongoing class actions, which were settled according to these models.

Opportunities for Reform

Referring to the Storm Financial case, the Australian Law Reform Commission in *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* concluded that:

> "…regulatory intervention to support redress can achieve outcomes for victims that are superior to class actions or individual ADR. The case study also demonstrates that regulatory redress schemes and class actions can be mutually reinforcing in supporting appropriate outcomes for victims."[14]

The success of ASIC's involvement in obtaining redress for wronged parties has led to calls for the introduction of new powers for Australian regulators to establish redress schemes with which the pertinent body is required to comply. This is a power already possessed, for example, by the Financial Conduct Authority in the United Kingdom.[15]

The introduction of provisions empowering regulator-led ADR would be an even more powerful alternative to class actions in areas where representative proceedings are rarely run i.e., outside of the shareholder/financial services context. As the ALRC notes, due to the fact the monetary backing of these proceedings often depends upon litigation funders and lawyers having confidence in the profitability of the case, certain areas end up largely unrepresented in the class action context.[16] For

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[13] Ibid.
[14] Inquiry into Class Action Proceedings Final Report | ALRC at 242.
[15] *Financial Services and Markets Act 2000* (UK), s 404.
[16] Inquiry into Class Action Proceedings Final Report | ALRC at 237.

example, class actions based on breaches of competition law, such as cartel provisions, are almost non-existent in Australia. This is despite the fact there being a large volume of these actions in the UK and no reason to believe there would be any less cartel conduct in Australia.[17]

Anti-discrimination class actions are another type of representative proceeding which, outside very rare cases such as *Wotton v Queensland (No 8)*,[18] instead tend to be run as individual cases.[19]

ADRAC encourages the empowering of Australian regulatory bodies with the capacity to institute redress schemes and oversee those schemes, as this will encourage the fast and cost-effective resolution of matters that may otherwise be subject to the long and expensive process of class-action litigation.

[17] Inquiry into Class Action Proceedings Final Report | ALRC at 237.
[18] [2017] FCA 639.
[19] *Nojin v Commonwealth of Australia* (2012) 208 FCR 1; [2012] FCAFC 192.