



Class Actions in the Construction Sector

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Class Actions in the Construction Sector

- Outline
 - Background
 - Basic features
 - Some pros and cons
 - Recent controversial issues



Class Actions in the Construction Sector

- Federal: 1992
- Victoria: 2000
- NSW: 2011
- Queensland: 2017



Class Actions in the Construction Sector

- Federal:
 - *Federal Court Act 1976*, PT IVA (ss33A - 33ZJ)
 - Class Actions Practice Note (GPN-CA)
- NSW:
 - *Civil Procedure Act 2005*, PT 10 (ss155-184)
 - Practice Note SC GEN 17



Class Actions in the Construction Sector

- Why now?:
 - *Hunt Leather v TfNSW (Sydney Light Rail) (2018)*
 - *Williamson v SOPA (Opal) (2019)*
 - *Owners SP87231 v 3A Composites (Combustible Cladding) (2019)*
 - *Owners SP91086 v Fairview Architectural (Combustible Cladding) (2019)*



Class Actions in the Construction Sector

- What is a class action?

“An effective grouping procedure is needed as a way of reducing the cost of enforcing legal remedies in case of multiple wrongdoing. Such a procedure could enable people who suffer loss or damage in common with others as a result of a wrongful act or omission by the same respondent to enforce their legal rights in the courts in a cost effective manner. It could overcome the cost and other barriers which impeded people from pursuing a legal remedy. People who may be ignorant of their rights or fearful of embarking on proceedings could be assisted to a remedy if one member of a group, all similarly affected could commence proceedings on behalf of all members. The grouping of claims could also promote efficiency in the use of resources by enabling common issues to be dealt with together. Appropriate grouping procedures are an essential part of the legal system’s response to wrongdoing in an increasingly complex world.”

- -ALRC 1988 Report



Class Actions in the Construction Sector

- The basics
 - 7 or more people have claims against the same defendant;
 - the claims are in respect of / arise out of the same or similar or related circumstances; and
 - the claims give to a substantial common question of law or fact.

[FCA, s33C(1); CPA, s157]



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- Group members
 - Consent is not required for you to be joined as a group member

[FCA, s33E; CPA, s159]

- BUT, you must be given an opportunity to opt out

[FCA, s33J; CPA, s162]



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- Pleadings - things that must be included:
 - describe or otherwise identify the group members to whom the proceeding relates;
 - specify the nature of the claims made on behalf of the group members and the relief claimed; and
 - specify the question of law or fact common to the claims of the group members.

[FCA, s33H(1); CPA, s161]



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- Costs [the basic picture]:
 - Court may not award costs against a person on whose behalf proceedings have been commenced (other than a representative party)

[FCA, s43(1A); CPA, 181]
 - If the Court has made an award of damages, the representative party may apply to the Court for an order for reimbursement of its costs

[FCA, s33ZJ; CPA, s184]

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- Settlement
 - Court approval required
- Criteria used by Federal Court:
 - Is the proposed settlement:
 - fair and reasonable?
 - in the interests of class members?

[FCA, s33V; CPA, 174]



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- Limitation periods
 - on commencement of any representative proceedings, the running of the limitation period that applies to the claim of a group member to which the proceedings relate is suspended
 - the limitation period does not begin to run again until the member opts out or the proceedings (including appeals) are determined without finally disposing of the group member's claim

[FCA, s33ZE; CPA, 182]



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- Some pros & cons
 - Per Garling J in *Giles v Commonwealth* [2014] NSWSC 83



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Common fund orders

- Obliges all group members to pay their share of funder's commission
- Applies regardless of whether member has entered funding agreement
- Favoured by litigation funders



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Common fund orders

- *BMW v Brewster* [2019] HCA 45: No power to make CFOs under Federal Court Act or Civil Procedure Act
- Funders limited to recouping from settlement or judgment (through a funding equalisation order at the end of proceeding)
- ALRC recommended in 2018 that courts be given express power to make CFOs

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Funding equalisation order

- Funding costs actually incurred by funded group members are redistributed pro-rata between all group members
- Permits funder to recover (in whole or part)
 - its costs of the litigation; and
 - any commission payable for group members who entered into a funding agreement providing for payment of such commission.

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Options for class members: Alucobond class action

- Plaintiff's solicitors have published a video on their website
- Class members are told they have 3 options:
 - Opt out (and receive no damages if successful)
 - Sign up including via signing a funding agreement (even if panels not identified yet)
 - Do nothing (but will have to sign up to share in any judgment)

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Options for class members: Alucobond class action

- Federal Court authorised the notification:
The Owners - Strata Plan No 87231 v 3A Composites GmbH (No 3) [2020] FCA 748 per Wigney J
- Followed application by 3A for an order that class be closed
 - Cross-claims may be available
 - Time may be running - eg 10-year backstop under s6.20 EP&A Act
- Wigney J held Court did not have power and would not exercise it if it did

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Choosing from competing class actions

- *Wigmans v AMP* [2021] HCA 7
- 5 open-class actions commenced in wake of Royal Commission
- Ward CJ in Eq stayed all but one, applying “multi-factorial analysis” from *Perera v GetSwift Ltd* (2018) 263 FCR 92
- Security for costs and expected return for group members decisive

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Choosing from competing class actions

- Ms Wigmans argued second-in-time action vexatious and oppressive
- Kiefel CJ and Keane J rejected 'multifactorial' approach
- Applied traditional approach to stays - so first in time should prevail
- Majority (Gageler, Gordon, Edelman JJ) endorsed trial judge's approach
- They held the court rules applied according to their terms



Class Actions in the Construction Sector

The future

- Multi-dwelling residential vs other claims
- Strata schemes legislation has functioned relatively well
- Likely to depend to some extent on outcome of Opal
- May also be affected by any changes in court rules



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Questions

