Class Actions

Editor: Justice Michael B J Lee

LOOKING INTO THE FISHBOWL – OPEN JUSTICE AND FEDERAL CLASS ACTION SETTLEMENTS

I. Introduction

> Because most civil lawsuits are negotiated in private and settled between the parties without needing judicial consent, our ability to determine for ourselves the merits of these lawsuits and the justness of their settlements is highly constrained. … Class actions, however, are creatures of the court system. … Without the judge's approval, a class action settlement cannot bind class members. … Although most class actions – like most other civil lawsuits – are not tried to verdict, class actions are litigated in a fishbowl.[1]

The comments set out above – made by a group of American researchers led by Professor Deborah Hensler from the Stanford Law School with respect to American class actions – are also relevant to Australia's legislative class actions in light of the fact that they require, among other things, judicial approval of the settlement or discontinuance of class actions. Similarly, settlement has been the most frequent way in which Australian class actions have been ultimately resolved.[2] As aptly noted by a Canadian judge, "since most class actions settle, the integrity and legitimacy of class actions as a means to secure access to justice largely depend upon the court properly exercising its role in the settlement approval process".[3]

Determining whether this desirable scenario – of class action judges protecting the interests of class members when scrutinising settlement agreements executed by the formal parties to the class action proceeding – has in fact been secured does require that the settlement approval process take place in a "fishbowl"; clearly visible to, not only the class members, but also the media, commentators, scholars and the public in general. The purpose of this article is to provide an empirical evaluation of the extent to which the principles underpinning the concept of open justice have been adhered to in federal class action settlements over the last 27 years or so.

II. Methodology

I have identified a total of 154 settlement agreements, executed with respect to a total of 183 class actions filed pursuant to Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (*Part IVA*), which were judicially considered on or before the end of 2018. I will reveal the extent to which the process of evaluating these 154 class action settlement agreements has adhered to the requirements of open justice by considering whether scholars and commentators were able to collect data, after making reasonable efforts,[4] with respect to each of the five important aspects of class action settlement agreements set out below ("core terms"):

1. the gross settlement sum; that is, the total amount paid by respondents pursuant to the settlement agreement, including payments for legal fees and disbursements, funding commissions, settlement administration fees, reimbursement payments to lead plaintiffs, sub-group representatives and active class members; or where the settlement agreements do not envisage payments by the respondents,

[1] Deborah R Hensler et al, *Class Action Dilemmas – Pursuing Public Goals for Private Gain* (RAND Institute for Civil Justice, Santa Monica, 2000) 137.

[2] See Vince Morabito, *The First Twenty-five Years of Class Actions in Australia* (Fifth Report, July 2017) 37 <http://ssrn.com/abstract=3005901>.

[3] *Kidd v Canada Life Assurance Co* [2013] OJ 1468, [118] (SCJ).

[4] I use the term reasonable efforts to describe research of rulings, court orders, media reports, relevant websites and other publicly available information and documents. It does not encompass the review of Court files, transcripts of settlement hearings or seeking information directly from those involved in the settlement.

the type of relief to be provided to the class members, including the monetary value of the relief in question (where such monetary quantification is in fact possible like, for instance, debt relief);
2. the sum paid with respect to legal fees and disbursements;
3. the funding commission payable to commercial litigation funders;[5]
4. the reimbursement awards (called incentive awards in the United States) to class representatives, sub-group representatives and active/sample class members with respect to their efforts on behalf of the class members;[6] and
5. the proportion of the settlement fund that is envisaged will be left for distribution to class members after deduction of the sums outlined above and other expenses, like the expected costs of administering the settlement distribution scheme.

III. Results

The data that emerged, with respect to the availability in the public domain of information with respect to the five core terms of class action settlement agreements listed above, is not encouraging. In fact, in 86 or 55.8% of the 154 settlement agreements in question, either no information or no reliable information[7] was available with respect to one or more of the five core terms in question. I identified five major reasons for this undesirable scenario.

The first, and important, cause of this limited adherence to the requirements of open justice has been the extensive judicial use of non-publication or confidentiality orders with respect to settlement deeds, settlement distribution schemes[8] and several documents filed in support of the settlement approval applications.[9] In recent years, recognition by a number of judges presiding over *Part IVA* proceedings (and in particular Justices Murphy and Lee) that compelling reasons must be provided to justify a departure from the principles and requirements of open justice, has led to a decreased use of those orders with respect to settlement approval applications.[10]

In May 2011, Justice Foster of the Federal Court explained that "it is the practice of the Court to deliver brief reasons when approving the settlement of [*Part IVA*] proceedings".[11] Unfortunately, the fairly frequent failure to adhere to this practice has been another important reason for the limited availability of information with respect to the five core terms. I return to this neglected aspect of Australia's class action settlements landscape in *Part IV* below.

There have also been several instances of no information being available with respect to one or more of the five core terms, despite the fact that settlement approval judgments were handed down and that there were no non-publication orders that compelled the non-disclosure of this information.[12] As recently explained by Justice Wigney of the Federal Court, "it is important that the reasons for approving the

[5] As at the end of 2018, these commissions have exceeded $600 million in settled federal class actions: see Vince Morabito, *Common Fund Orders, Funding Fees and Reimbursement Payments* (Report, January 2019) 12.

[6] See generally Vince Morabito, "An Empirical and Comparative Study of Reimbursement Payments to Australia's Class Representatives and Active Class Members" (2014) 33 *Civil Justice Quarterly* 175.

[7] I am referring here to several instances where I discovered, through my empirical work, that the settlement information that was provided, in various media outlets and websites, was grossly inaccurate.

[8] This practice, with respect to settlement deeds and settlement distribution schemes, commenced in 1999, not in a complex commercial class action, but instead in a simple food poisoning class action: QUD19/1997 *Pascoe v Carlton International Pty Ltd*.

[9] A fact that has surprisingly not attracted the attention of commentators is that these documents have included the reports and affidavits prepared by independent costs assessors, with respect to the deductions to be made from the settlement funds, in relation to legal fees and disbursements. See, for instance, *Muswellbrook Shire Council v The Royal Bank of Scotland NV* [2017] FCA 414, [30].

[10] See *Liverpool City Council v McGraw-Hill Financial, Inc* [2018] FCA 1289, [101]–[120] and references cited therein; *Santa Trade Concerns Pty Ltd v Robinson (No 2)* [2018] FCA 1491, [26].

[11] *Weimann v Allphones Retail Pty Ltd* [2011] FCA 537, [11].

[12] See, for instance, *Tongue v Tamworth City Council* [2004] FCA 972, [17]; *Reiffel v ACN 075 839 226 Pty Ltd (No 2)* [2004] FCA 1128, [5]; *Muswellbrook Shire Council v The Royal Bank of Scotland NV* [2017] FCA 414, [27]; *De Brett Seafood Pty Ltd v Qantas Airways Ltd (No 7)* [2015] FCA 979, [14].

scheme fully expose all of the important aspects of the settlement, including such matters as the payments to be made to the lawyers and litigation funders and the return to group members".[13]

Before the ground-breaking common fund ruling handed down by the Full Federal Court in October 2016[14] a judicial reluctance to reveal the funding commissions that the commercial litigation funders would be entitled to receive, pursuant to the settlement agreements, was evident.[15] There was even an instance of the trial judge accommodating, in the settlement notice and the settlement ruling, the relevant litigation funder's desire not to have its identity revealed publicly.[16]

A major reason for the lack of information, with respect to the percentage of the overall settlement proceeds that was intended or expected to be available for distribution to eligible class members, is the fact that in a significant number of class action settlements what was envisaged was a process for the assessment of the individual claims of each class member and no estimate was either possible or provided to the court or publicly with respect to the expected overall value of these individual assessments.

The information lacuna with respect to these types of settlement schemes is exacerbated by the lack of a general practice of requiring the administrator of class action settlement schemes to provide a short publicly available report at the completion of this process that provides some statistics with respect to the recipients of the settlement proceeds. This will change if one of the recommendations made by the Australian Law Reform Commission in its recent report on class actions is implemented by the Federal Court. It will require, through an amendment to the Court's Class Actions Practice Note, settlement administrators to provide a report to the class on completion of the distribution of the settlement sum, which will be posted on the Court's national class actions database.[17]

Despite the recent greater judicial recognition of the need to apply to class action settlements the requirements of open justice, the data with respect to the last five years, while better than the statistic with respect to all federal class action settlements, is not very positive. In fact, I found that in 49% of the settlement agreements judicially reviewed in the five-year period commencing on 1 January 2014 and ending on 31 December 2018, there has been a failure to secure the desirable scenario of there being accurate information, in the public domain, with respect to each of the five core terms of settlement agreements.

IV. Settlement Rulings

As already noted, an aspect of the judicial review of class action settlements that is frequently overlooked is the extent to which the completion of the judicial assessment of a proposed class action settlement is not followed by the release of a judicial pronouncement that allows class members and scholars and commentators to have information with respect to both the settlement agreements and the judicial assessment of these agreements. I found that with respect to 49 or 31.8% of the 154 settlement agreements that were reviewed before the end of 2018 by trial judges presiding over *Part IVA* cases, no judicial pronouncements were ever handed down following the completion of this judicial review.

A much higher percentage of *Part IVA* settlement agreements exhibited this undesirable feature in the first 12 years or so of the operation of the federal class action regime. Unfortunately, a similar trend is evident with respect to the relatively new New South Wales class action regime. But the review of the last five years reveals a very favourable state of affairs at the federal level. In fact, judgments, containing the

[13] *HFPS Pty Ltd (Trustess) v Tamaya Resources Ltd (in liq) (No 3)* [2017] FCA 650, [128]. Examples of very brief settlement approval judgments include *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029; *Kirby v Centro Properties Ltd (No 6)* [2012] FCA 650; *Hadchiti v Nufarm Ltd* [2012] FCA 1524.

[14] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191.

[15] *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433, [176].

[16] *Hudson Ventures Pty Ltd v Colliers International Consultancy and Valuation Pty Ltd* [2014] FCA 982, [12]. In a state class action, the relevant judge went one step further by not even revealing in his settlement approval judgment that the class action in question was supported by a commercial litigation funder.

[17] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-party Litigation Funders* (Report 134; December 2018) Recommendation 10.

reasons for the orders made with respect to settlement approval applications, were issued with respect to 92.8% of the *Part IVA* settlement agreements reviewed in the 2014–2018 five-year period.

V. Conclusion

The data presented above has revealed that, over the last 27 years or so, there has not been complete adherence to the requirements of open justice with respect to the judicial review of settlement agreements executed by parties to federal class actions. It has also been shown that there has been a significant improvement in this area over the last five years.

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