

**CONSULTATION DRAFT
CIVIL PROCEDURE AMENDMENT (SUPREME COURT
REPRESENTATIVE PROCEEDINGS) BILL 2010**

DISCUSSION PAPER

The NSW Government intends to introduce a comprehensive representative proceedings regime in NSW. This new regime will create a greater level of certainty for both litigants and the court, and way to enhance the community's access to justice through:

- promoting the efficient use of court time and parties' resources by eliminating the need to separately try the same issue,
- providing a remedy in favour of persons who may not have the funds to bring a separate action, or may not bring an action because the cost of litigation is disproportionate to the value of the claim, and
- protecting defendants from multiple suits and the risk of inconsistent findings.

Comments are invited on the draft Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010 (the draft Bill). The draft Bill inserts a Part 10 into the *Civil Procedure Act 2005*. The new draft Part 10 is modelled on Part IVA of the *Federal Court of Australia Act 1976* (Part IVA), with some modifications.

Part IVA and Part 4A of the *Supreme Court Act 1986 (Vic)* have already proven to be effective mechanisms for the resolution of disputes involving numerous claimants. Once the proposed new regime becomes operational NSW courts and litigants will be able to draw upon the jurisprudence that has developed in the Federal and Victorian Courts. It will also be beneficial to have increased cross-jurisdictional consistency in the three major commercial jurisdictions in Australia.

The draft Bill differs from Part IVA in two ways.

Firstly, minor modifications have been made to reflect NSW legislation and practices. For example, the language of Part IVA has been modified to accord with the current language of the Uniform Civil Procedure Rules. Also, provisions that are unnecessary in the NSW context have not been replicated.

Secondly, three additional amendments have been inserted. These amendments principally clarify the law, and were suggested in the 2009 Commonwealth Attorney-General's Department's Access to Justice Report and the Victorian Law Reform Commission's Civil Justice Review in 2008.

The three additional amendments provide that:

- i. **a plaintiff may represent a limited class of persons.**

In 2005, a limitation on the power of the representative plaintiff to identify a limited group of persons having the same interest for the purposes of representation was

imposed in *Dorajay Pty Ltd v Aristocrat Leisure Ltd*¹. The Full Court of the Federal Court in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*² reversed that constraint.

Proposed section 166(2) has been included in the draft Bill to clarify that it is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals.

- ii. **that a representative proceeding can be taken against several defendants when not all group members have a claim against all defendants.**

The Full Federal Court in *Phillip Morris (Australia) Ltd v Nixon*³ interpreted Part IVA of the Federal Court Act to require that all members of the class must have claims against each of the defendants. This approach can significantly limit the availability and flexibility of representative proceedings to deal with a full group of related claims, and has affected a number of actions.

Both the Victorian and Commonwealth reviews noted that differences in judicial interpretation in this area has led to controversy between judges, judicial criticism, and ongoing interlocutory battles and appeals, which has impacted upon the intended efficiency of pursuing matters through representative proceedings.

Proposed section 158(2) has been included in the draft Bill to clarify that representative proceedings may be taken against several defendants even if not all group members have a claim against all defendants.

- iii. **the court has a power to order a cy-pres remedy in circumstances where a plaintiff has been successful and a defendant has been ordered to create a fund to reimburse injured parties, but not all the moneys in the fund can practicably be distributed.**

Payment of an award of damages may not always be possible, for example:

- not all the members of a particular class may be able to be identified,
- the proportionate share which should go to each member cannot be ascertained, or
- it is impractical (due to administration costs) to return each affected person's share and thus redress the wrong.

Currently, if the damages cannot be paid the respondent retains them. However, this is arguably not consistent with the view that representative proceedings may be an important way to regulate behaviour. The Victorian Law Reform Commission, in its 2008 report, recommended the introduction of a cy-pres like remedy. The cy-pres doctrine allows the whole or a portion of a fund that cannot be directly or fairly distributed to individual members to be put to its 'next best' use, and administered to

¹ [2005] FCA 1483; 147 FCR 394

² [2007] FCAFC 200; 164 FCR 275

³ [2000] 170 ALR 487

the affected class by another means, through the distribution of the damages, either in whole or in part, to an associated charity or public interest beneficiary.

Proposed section 178 has been included in the draft Bill to enable the Supreme Court, in determining representative proceedings, to order the establishment of a fund consisting of money to be distributed to group members. It also enables the court to make orders in respect of the administration of the fund, and establishes a scheme for money remaining in the fund (or any part of it), that cannot practicably be distributed to group members, to be applied *cy pres*.

Litigation funding

Within the context of introducing reforms to representative proceedings procedures the NSW Government is also considering minor changes, either through administrative or legislative action, to deal with issues arising from the growth of the litigation funding industry. The actions being considered include ensuring that:

- legal practitioners are aware that their responsibility is to the plaintiff and not to the litigation funder,
- that litigation funding arrangements are disclosed to the court, and
- the court has the power to issue cost orders to relevant third parties.

**Please forward your comments to
lpd_enquiries@nsw.agd.gov.au by 10 November 2010.**