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Emerging trends in settlement approval and distribution

The settlement of representative proceedings brings about considerations not otherwise present in single party litigation due to the requirement for any settlement to be approved by the Court.

With two out of three concluded, funded class actions being resolved via a judicially approved settlement, class action settlement approval trends are an important consideration for any practitioner in the space to ensure a smooth and cost effective settlement. Three major observable trends likely to be present in the coming years include: the appointment of separate legal representatives and others to administer settlement schemes; the advent of artificial intelligence in the administration of settlement funds; and indirect or "soft" judicial power.

Separate Fund Administration

A recent trend in settlement administration is the appointment of separate lawyers or a third party service provider to facilitate the distribution of the settlement sum to group members. In class actions, there can be a tension between what is in the best interests of group members and the commercial imperatives of plaintiff class action firms and litigation funders.[1] The appointment of separate fund administrators is one way to address that tension.

The background to this trend includes:

- Judges of the Federal Court of Australia criticising the presumption that plaintiff solicitors should be appointed as settlement fund distributors;[2]
- the Australian Law Reform Commission recommending that the Court be formally granted the power to go to tender for settlement administration;[3] and
- the high profile "pelvic mesh case", in which JGO Saddler and Slater and Gordon, rather than the plaintiff's solicitors, were selected to administer the settlement fund following a tender process orchestrated by the Hon. James Allsop AC.[4]

This follows the Court's encouragement of parties to appoint referees to determine issues in the proceedings,[5] the trend for referring issues for separate determination and the fundamental requirement that all costs incurred be reasonable.

Those matters have made it increasingly likely for separate administrators of settlement funds to be appointed.

Artificial Intelligence

As with most areas of life, the class action space is not immune from the effects of the development of artificial intelligence and it is increasingly important for class action practitioners to be across developments in the AI space. Some applications of AI in the class action settlement context are examined below.

Dissemination of Settlement Information

Group members are required to be notified, among other things, of any settlement, and the process of that notification is often a costly and difficult process for lawyers. The Stanford Law Review proposed that AI could greatly help with dissemination of information to group members.[6]

Technology in and of itself is not yet a silver bullet. For instance, in the United States, one claims aggregator fell afoul of

the Court by using AI to identify potentially relevant group members through aggregation of likely characteristics, and provided a mass registration of tens of thousands of registrations and opt-out notices. The claim administrator rejected the claims due to concerns that misleading and incorrect information had been provided. The Court determined the administrator had properly disallowed the claims, and the Court provided a mechanism for the aggregator's claims to be submitted individually.[7]

While there are still some wrinkles to iron out, once AI technology can be confirmed to be suitably robust, law firms will increasingly turn to AI to expedite necessary notifications in settlements. Such a trend could potentially reduce costs for law firms and ultimately increase return to group members.

Predictive Analytics

Predictive Coding

Through predictive coding, it may also be possible for AI to assist with more banal aspects of the settlement scheme process, such as the preparation of hearing bundles, through accurately identifying documents to form part of the hearing bundle or as being otherwise relevant.

Such a development would greatly reduce the costs of preparing materials for any settlement hearing and assist in making sure all necessary material is before the Court.

Limits

While we may see the above developments in the future, AI is far from transforming the class action space and by extension, settlement schemes.

For instance, the NSW Judicial Commission has reported that while AI could potentially have a broad effect in the long term (going so far as saying the litigation landscape could be altered), such developments are still a long way away. [8]

Similar observations were made by the Law Society of NSW[9] including that:

AI is only ever as good as its human trainer; and

to be of widespread utilisation and applicability in assessing settlement sums, there needs to be a wide and uniform data-set. Unfortunately, most forms of data in the legal sector are not uniform. To rectify this would be costly (also known as "cleaning data").

Judicial Soft Power

The Court assumes a protective role over group members when it comes to approving a settlement,[10] and therefore Courts have to expend *soft power* as well as the more traditional *hard power*.

The two types of power can be defined as follows:

- The concept of soft power can be characterised as comments or informal directions where the Court suggests a course of conduct. The exercise of soft power is consistent with the objectives of active and flexible case management contained in the Class Actions Practice Note.
- The concept of hard power can be conversely thought of as any formal direction or order by the Court.

With an increasing number of large and complex class actions being filed, as well as a commensurate increase in multiplicity disputes, it is likely Courts will rely more on the exercise of soft power to supplement orders and directions made.

Some recent illustrations of soft power from the Courts are as follows:

- In *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 5)* [2020] FCA 1405, the Court of its own motion, wrote to the parties seeking clarification as to whether they wanted to revisit the approval of funding charges and costs approval associated with the original settlement in the case (at [3]). Murphy J was concerned as to events unfolding in the Banksia class action ("Banksia") in the Supreme Court of Victoria. Particularly, as to whether senior counsel for the plaintiffs was on a no-win no-fee retainer as he was in Banksia which would have flow on consequences for a lower funding commissions (at [12]). Ultimately the Court was persuaded by the Contradictor not to re-open the case because of substantial differences with Banksia (at [23]).

- The Medibank litigation before Justice Beach where his Honour suggested that Medibank injunct the OAIC (the data regulator) while an overlapping class action proceeded His Honour went so far as to suggest the procedural course for doing so stating "just file an originating motion, without the fanfare".[11] This was opposed to filing an interlocutory application in the class action. His Honour was of the view this would be the most effective way to deal with an impending multiplicity dispute and the impending investigation and subsequent release of a report on the privacy leak by the regulator.
- The suggestion by Markovic J to appoint a guardian in the Hogs Breath Café litigation given the poor health of one of the franchisee applicants.[12] This was in the context of a serious risk of dismissal because of unpaid security for costs. Her Honour was concerned over the delay in the matter caused by the poor health, noting that the Court had procedures in place for these kinds of issues. Here the Court was offering a pragmatic solution to keep the matter on foot.
- His Honour Justice Murphy's comments in respect of the Aveo settlement. His Honour exercised some hard power in saying it was a "paradigm case for a contradictor".[13] In line with this thinking, his Honour appointed a contradictor as well as a costs referee in rejecting the settlement. In a display of soft power, His Honour made strong comments in respect of the distribution process and the proposed funding equalisation order in relation to the costs claimed. His Honour was concerned that there would be nothing left for the group members. His Honour's exercise of soft power not just having an impact on the immediate proceeding but also serving as a warning to parties in future proceedings.
- The urging of Justice Lee to bring matters as class actions instead of other vehicles. For instance his Honour Justice Lee in connection to the COVID Insurance test cases remarked that the matters would have been more effectively brought through a class action.[14] His Honour commented that the test cases did not bind the constituent parties and therefore did not resolve the disputes of parties in a given class. His Honour made similar remarks in relation to a case by Qantas staff who were terminated during the Covid pandemic.[15] His Honour considered that doing so allowed transparency and protected claims to compensation.

The above examples show that the Court will exercise soft power when it is concerned to ensure effective case management and, at a broader level, a just result for group members. It is in the best interests of practitioners to pay attention to any exercise of soft power, not only in their own proceedings but in others before the Court. This is all the more relevant in the approval of settlement schemes, where the principles of case management and the evaluation of the benefits to group members are paramount.

Final thoughts

Class action practitioners should keep a close eye on these developments to ensure that matters are being progressed efficiently and in accordance with the Court's preferences. In particular, practitioners should keep up to date on the developments with AI to ensure that where opportunities to use AI to streamline processes and reduce costs arise, those opportunities are utilised.

[1] *Gill v Ethicon Sarl* (No 12) [2023] FCA 902 (see [133]-[152])

[2] *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Co Inc in New York)* [2018] FCA 379. His Honour went so far as saying the notion that it should be a prescribed practice and should be "exploded". Wotton v State of Queensland (No 10) [2018] FCA 915 (see in particular at [42]);

[3] Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC Report 134, December 2018) paragraphs 5.32 to 5.52.

[4] *Gill v Ethicon Sàrl* (No 13) [2023] FCA 1131

[5] *Referee and Assessor Practice Note* (GPN-REF), division 28.6

[6] Alissa del Riego & Joseph Avery, "The Class Action Megaphone Empowering Class Members with an Empirical Voice, *Stanford Law* Review, July 2023 Volume 76 (https://www.stanfordlawreview.org/online/the-class-action-megaphone/)

[7] Marc Capuano, Steve Petkis & Gregory Halperin, "California Federal Court Clamps Down on 'En Masse' Class Claims Identified by AI" (https://www.insideclassactions.com/2023/10/03/california-federal-court-clamps-down-on-en-masse-class-claims-identified-by-ai/), case citation is In re Juul Labs, Inc., Mktg., Sales Practices, and Prod. Liab. Litig., 2023 WL 6205473

[8] NSW Benchbook, "Artificial intelligence and litigation — future possibilities", (https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/artificial_intelligence_and_litigation.html#d5e26024)

[9] The Law Society of New South Wales, "Flip: The future of innovation in the profession", 2017.

[10] *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [7] –[8] (Jacobson, Middleton and Gordon JJ)

[11] "Medibank to sue privacy commissioner over possible contempt", *Lawyerly,* https://www.lawyerly.com.au/medibank-to-sue-information-commissioner-over-possible-contempt/

[12] "Hog's Breath class action 'can't be left in abeyance forever", *Lawyerly,* https://www.lawyerly.com.au/hogs-breath-class-action-cant-be-left-in-abeyance-forever-judge-says/

[13] 'It's a disaster: Judge questions $11M settlement in Aveo class action", *Lawyerly,* Lawyerly, https://www.lawyerly.com.au/its-a-disaster-judge-questions-11m-settlement-in-aveo-class-action/

[14] "Class action would have been 'infinitely better' than COVID-19 insurance test cases, judge says", *Lawyerly,* https://www.lawyerly.com.au/class-action-would-have-been-infinitely-better-than-business-interruption-test-cases-judge-says/

[15] "Judge in Qantas case questions why unions don't file class actions", *Lawyerly,* https://www.lawyerly.com.au/judge-in-qantas-case-questions-why-unions-dont-file-class-actions/https://www.lawyerly.com.au/judge-in-qantas-case-questions-why-unions-dont-file-class-actions/