



Insight

Commercial Dispute Resolution

22 September 2011

An introduction to commercial class actions: some points to note

We have seen a rise in shareholder and investor class actions being launched in recent times. Some of these have been “mega” class actions, like the Leighton Holdings and the ANZ Bank cases. However, a class action (or group or representative proceeding) may be commenced by a much smaller group of affected persons than most people realise. Class actions are not confined to issues relating to product defects or personal injury. The Leighton Holdings and the ANZ Bank cases are evidence of a rise in economic loss class action claims.

Leighton Holdings Class Action

In recent weeks, shareholders of Leighton Holdings Limited (Leighton), a large construction company with interests in Australia and overseas, launched a \$400 million class action against the company following a series of profit downgrades and concerns that Leighton failed to disclose problems it faced on key infrastructure projects to investors. In February 2011 Leighton announced an estimated full year profit of \$480 million. Less than two months later, on 11 April 2011, Leighton announced a \$427 million loss, causing its share price to fall almost 14% and wiping billions of dollars off the company.

The shareholders will allege that:

- Leighton breached the continuous disclosure provisions of the Corporations Act 2001 (Cth) by failing to disclose information regarding material cost increases and delays on the Brisbane Airport Link project, the Victorian desalination plant project and the need for further writedowns on its international interest, Al Habtoor Leighton Group to investors; and
- by November 2010 and certainly by February 2011, Leighton should have told the market of the need for the massive writedowns, and proper risk management and reporting systems should have ensured much timelier announcements of difficulties faced on key infrastructure projects.

ANZ Bank Class Action

In 2010, the “bank fees class action” was launched by almost 28,000 individuals and businesses who held personal or business accounts with the ANZ Bank. ANZ customers allege that the charging of exception fees by the bank (honour fees, dishonour fees, late payment fees and over-limit fees on credit cards) is unconscionable, unfair or unjust, and that exception fees incurred as a result of a breach of contract by the customer are more than a reasonable pre-estimate of the actual cost of the breach. The total value of the ANZ class action is expected to be in excess of \$50 million, and it is also expected that similar actions will be launched against other banks.

Commencing a class action

Under the Rules of the Supreme and Federal Courts, a class action can be commenced by 7 or more people who have a claim against the same person or entity which arises out of the same, similar or related circumstances and gives rise to a substantial common question of law or fact. The claims by each individual group member may relate to separate contracts, transactions or omissions.

Who or what makes a class?

One of the members of the class must nominate themselves as the plaintiff. That person commences the class action on behalf of themselves and the other members of the class. Any person who has sufficient interest to bring the action on their own behalf can be a plaintiff or a member of the class action.

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It is important to note that any person who has an interest in a matter arising from the same, similar or related circumstances will automatically become a member of the class, regardless of when or how that person hears about the existence of the class action.

A notice is issued to all members of the class giving them a right to opt out of the action by a nominated date, before the Court sets a trial date for the action. The Court then has discretion to determine whether the action will continue if it appears that there may be fewer than 7 members of the class remaining at any stage.

A class action may not be settled or discontinued without the approval of the Court. However, the plaintiff (but not the other members of the class) may settle his or her claim in whole or in part without the Court's approval.

Risks of class actions

It is important that the person nominated as plaintiff bears in mind that he or she may have costs orders made against them by the Court. Other members of the class are not exposed to this risk, unless they have:

- consented to being substituted as the plaintiff;
- consented to being appointed as the 'representative party' of a sub-group formed to determine questions which are only common to some of the group members; or
- been permitted to take part in the proceeding for the purpose of determining a question that relates only to the claim of that member.

In most "mega" class actions, the members of the class seek litigation funding to fund their legal costs in running the case and protect themselves against any adverse costs orders. In these circumstances the funder and the class members agree that if the case is successful or it settles for an amount approved by the Court and by the funder, the funder will receive a percentage of the sum awarded to the members of the class.

Barriers to successful class actions

In any class action, the defendant to the action may apply to the Court for an order that the class action be discontinued on the grounds that:

- the costs of continuing the group proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding;
- all the relief sought can be otherwise obtained;
- a class action is not an efficient and effective means of dealing with the claims;
- the cost to the defendant of identifying the members of the class and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely relief granted; or
- it is otherwise inappropriate.

Utilising the class action mechanisms

The class action mechanism can also benefit smaller groups of disgruntled shareholders or investors provided their claim arises out of the same, similar or related circumstances. For example, a case similar to Leighton may be raised against the directors of a much smaller company with a much smaller shareholder base, providing the claims of the class members arose out of similar circumstances.

Class actions are a useful tool by which 7 or more affected persons who are wronged by the same person or entity can join together to protect their rights and recover their losses in a cost-effective and efficient manner.

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Our team

Holding Redlich's commercial dispute resolution team aim is to achieve their clients' objectives. They pride themselves on working with clients as a team. They consult from the outset with their clients to identify their objectives and provide clear, concise and practical advice to achieve their goals.

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