



Our Ref: JC:RRB:Li:CO:2009

Direct Line: 9926 0215

2 July 2009

Ms Jenny Atkinson
Secretary
Uniform Civil Procedure Rules Committee
Supreme Court of NSW
DX 825 - SYDNEY

Dear Ms Atkinson,

Re: Class Actions: Proposed Amendments to UCPR – Rule 7.4

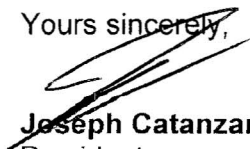
The Litigation Law & Practice Committee (the Committee) of the Law Society has suggested relevant amendments to Rule 7.4 to ensure that a suitable and detailed procedure for representative actions is introduced under the rules of the UCPR. I attach with this letter a paper from the Committee setting out suggested amendments to the UCPR to introduce detailed rules for the purposes of representative actions.

There have been different views expressed by the NSW Court of Appeal on the sufficiency of the rules of court to provide a satisfactory system of representative actions in NSW. In *Esanda Finance Corporation Limited v Carnie* [1992] 29 NSW LR 382, Gleeson CJ recommended more detailed rules for addressing representative actions. This recommendation was subsequently echoed by the Court of Appeal in *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd & Ors* [2005] 63 NSW LR 203. On the other hand, in *Jameson v Professional Investment Services Limited* [2009] NSW CA 28, the Court of Appeal observed that the procedure under the UCPR 7.4 was far more flexible than that in the Federal Court.

The Committee submits that flexibility may lead to uncertainty and the parties and the court would grapple with the rules in interlocutory applications leading to delays and increased costs. Further, the rules are silent on crucial protections for group members.

Could you please place this correspondence on the agenda for discussion by the UCPR Committee and inform me in due course of their decision.

Yours sincerely,


Joseph Catanzariti
President



LAW SOCIETY OF NSW

LITIGATION LAW AND PRACTICE COMMITTEE

Proposed amendments to Uniform Civil Procedure Rules 2005 (UCPR) rule 7.4

Overview

This paper sets out in summary form three specific amendments to the UCPR in relation to representative actions. The amendments relate to (a) adequacy of representation, (b) discontinuance and (c) settlement.

There are other aspects of representative actions where amendments could be examined¹ but they are not as critical as the ones discussed here.

Background

In New South Wales the Uniform Civil Procedure Rules (UCPR) commenced on 15 August 2005 and provided for representative proceedings in rule 7.4 (which effectively mirrored Part 8 rule 13 of the *Supreme Court Rules 1970* (NSW)). Rule 7.4 (1) was amended on 9 November 2007², to overcome the decision in *O'Sullivan v Challenger Managed Investments Limited* (2007) 214 FLR 1 which created procedural restrictions on categories of cases where class actions could be instigated.³

In *Jameson v Professional Investment Services Pty Ltd* [2009] NSWCA 28 (Jameson) the New South Wales Court of Appeal considered the 2007 amendments to representative actions in the UCPR rule 7.4 for the first time. The Court of Appeal observed that the procedure was far more flexible than Part IVA of the *Federal Court of Australia Act 1976* (Cth) (FCAA) which contains the Federal class action procedure. Further, despite the lack of detailed rules, the Supreme Court of New South Wales has the authority to give directions as the matters needed for the Court to be able to monitor and finally determine a representative action.⁴ The Court of Appeal's approach may be contrasted with previous Court of Appeal statements that recommend more detailed rules for addressing representative actions.⁵

The position adopted in this paper is that flexibility may give rise to uncertainty. A regime that contains uncertainty will inevitably lead to increased expense and delay as the parties and the Court grapple with the rules in interlocutory applications. This is not to say that the rules should attempt to address every eventuality but rather that guidance as to critical

¹ See M Legg, V McBride, S Clark, New South Wales Representative Proceeding: A Class Action Half-Way House (2008) 12 *University of Western Sydney Law Review* 176 for other suggested amendments.

² Uniform Civil Procedure Rules (Amendment No 19) 2007, NSW Government Gazette No 167.

³ Jameson at [4]. In Challenger it was held that, inter alia, the relief claimed must be "beneficial to all" and that representative proceedings will not be appropriate for damages claims where loss must be demonstrated by each individual. See M Legg, V McBride, S Clark, The Challenge of Class Actions in the Supreme Court of NSW (2007) 45(8) *Law Society Journal* 56.

⁴ Jameson at [103].

⁵ *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 per Gleeson CJ at 390 and *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd and Others* (2005) 63 NSWLR 203 per Mason P (Hodgson and Sheller JJ agreeing) at [278].

issues will facilitate "the just, quick and cheap resolution of the real issues in the proceedings".

Suggested Amendments

Adequacy of representation for group members

It is fundamental to representative proceedings where group members are bound by the outcome of litigation but are not before the Court to be able to protect their own interests that their representative will loyally advance their interests. Adequate representation is one of the mechanisms that alleviates the otherwise unthinkable situation that a group member's rights are determined *in absentia* without him or her being afforded a hearing that addresses their interests.

The need for adequacy of representation has been recognised by the High Court in *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 408 (Brennan J) in the context of Part 8 rule 13 of the *Supreme Court Rules* 1970 (NSW).

Section 33T(1) of the FCAA provides:

If, on an application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and may make such other orders as it thinks fit.

In the United States, Federal Rule of Civil Procedure 23(a)(4) contains the following precondition to commencing a class action:

the representative parties will fairly and adequately protect the interests of the class.

The Uniform Rules Committee could address adequacy of representation by:

- adding adequacy of representation to the requirements for commencing a representative proceeding in Rule 7.4 (1); or
- adding inadequacy of representation to the grounds for discontinuing a representative proceeding as discussed below; or
- adding a new rule to allow for the Court of its own volition or on the application of a party or group member to remove a representative party who is not able adequately to represent the interests of the group members.

Discontinuance

A representative proceeding may be challenged pursuant to r7.4(2) which states: *Proceedings to which this rule applies may be commenced and, unless the court orders otherwise, carried on by or against any one or more persons as representing any one or more of them.*

While this rule provides the Court with significant flexibility, which should be maintained, it would be better to provide some guidance as to what matters will make a representative proceeding unsuitable.

The FCAA section 33M states:

Where:

- *the relief claimed in a representative proceeding is or includes payment of money to group members (otherwise than in respect of costs); and*

- *on application by the respondent, the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts;*

the Court may, by order:

- *direct that the proceeding no longer continue under this Part; or*
- *stay the proceeding so far as it relates to relief of the kind mentioned in paragraph (a).*

The FCAA section 33N states:

(1) The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:

- 1. the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or*
- 2. all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or*
- 3. the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or*
- 4. it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.*

The FCAA section 33ZF(1) provides:

In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

The Uniform Rules Committee could adopt a rule that provides:

Without limiting subrule (2), the Court may, on application by the defendant or of its own motion, order that a proceeding no longer continue under rule 7.4 where it is satisfied that it is in the interests of justice to do so because:

- 1. the costs that would be incurred if the proceeding were to continue are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or*
- 2. where the relief sought is the payment of money, the cost to the defendant of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts; or*
- 3. all the relief sought can be obtained by means of a proceeding other than a proceeding under rule 7.4; or*
- 4. the proceeding will not provide an efficient and effective means of dealing with the claims of all group members⁶; or*

⁶ This ground for discontinuance is to make express the observations in Jameson at [102] and [122] that whilst a limited or opt in group definition is allowed, there may be circumstances where such a definition excludes other putative group members thus denying them access to justice.

5. *a representative party is not able to adequately represent the interests of the group members.*

The Uniform Rules Committee could go further in seeking to achieve certainty and reduce delay by adopting a certification process whereby the rules provide for a hearing at which the plaintiff must demonstrate compliance with the requirements for commencing a representative action in rule 7.4 (1) and a defendant must raise any arguments for discontinuance. This would allow the interlocutory disputes that have plagued the Federal Court to be minimised.

Settlement of the proceedings

The UCPR is silent on the requirements for settlement in the representative proceeding context. As settlement is the manner in which most representative proceedings will end, and there is a need to protect group members from potential conflicts of interest, settlement should require court approval.

Section 33V of the FCAA provides:

A representative proceeding may not be settled or discontinued without the approval of the Court.

The Federal Court has developed the following criteria for approving settlement:

- to assess whether the proposed settlement or compromise is fair and reasonable and adequate having regard to the claims made on behalf of the group members who will be bound by the settlement; and
- "to be satisfied that any settlement or discontinuance of representative proceedings has been undertaken in the interests of the group members as a whole, and not just in the interests of the applicant and the respondent".⁷

Similarly, in Victoria it has been observed that:

*The principles upon which s33V is based might be said to be those of the protective jurisdiction of the Court, not unlike the principles which lead the Court to require compromises on behalf of infants or persons under a disability to be approved.*⁸

The Federal Court is considering whether to adopt a Practice Note on class actions which would provide further guidance on the settlement procedure for a class action. The Uniform Rules Committee could adopt a rule similar to section 33V and include the standard for a settlement to be approved, ie the court may approve a settlement only after a hearing and on finding that it is fair, reasonable, and adequate, and in the interests of the group members as a whole.

⁷ See *Haslam v Money for Living (Aust) Pty Ltd (admin apptd)* [2007] FCA 897 at [17] citing *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 at [19] for the first proposition and *ACCC v Chats House Investments Pty Ltd* (1996) 71 FCR 250 at 258; *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 at [15] and *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322 at [30] and [31] for the second proposition.

⁸ *Tasfast Air Freight v Mobil Oil* [2002] VSC 457 at [4].