Class Action

New Class Action Legislation

In spite of intervention by the Federal Opposition and action taken by every major business organisation throughout Australia, the new class action legislation (the Federal Court of Australia Amendment Bill 1991) was passed by the Senate in December 1991 and is expected to be proclaimed by early March 1992. This legislation could result in an increase in complex litigation, an increase in liability insurance premiums and send business costs soaring.

The new representative-proceedings provisions, it is feared, could earn Australia a new reputation as the litigation capital of Asia by creating the same kind of "writ-happy" system which exists in the U.S.

Under the legislation, seven or more people can bring an action in the Federal Court on behalf of all others in their class without having to identify each one. The action will represent all those with the same, similar and related claims. Shareholders, consumers and any disaffected group of people with a similar claim will be automatically included unless they make a formal decision to "opt out".

It is the "opt out" provision of the bill which business groups have objected to most of all on the basis that too many difficulties would ensue. One argument was that it would adversely affect the human rights of individuals who, if seeking to initiate an individual action, would have their rights smothered by the class action. Another area of grave concern was that the size of the group would not be known until claimants came forward for compensation. This would, therefore, make it difficult for the extent of any potential liability to be assessed accurately.

Attempts to make the bill retrospective failed to gain support. Goods already on the market, however, have become potential targets for the new group proceedings if side effects become apparent now the new legislation is in place. Manufacturers and importers have become instantly exposed to potential liability and may be forced, in some cases, to withdraw certain products from the market if insurance costs escalate to an unacceptable degree. Even if companies decided to meet the additional expense and continue to sell such products, the costs which would have to be passed on to the consumer could greatly reduce their market share.

It is important to note that the new provisions do not confer any new legal rights - they simply introduce a new form of procedure which builds on the old representative action which has existed for years in the Federal Court and in some State Supreme Courts.

Because of the way the bill is structured, it will be extremely difficult to measure potential liability in the event of a class action, and companies will have to carefully reconsider their existing liability limits to allow for the possibility.

This new legislation has taken many years to formulate and results from the Australian Law Reform Commission's report on class actions in 1988. An inquiry into the issue began as far back as 1977.

The Minister for Consumer Affairs, Senator Tate, said the bill would redress the imbalance in the legal system against ordinary Australians who "have been barred from the processes of justice for no better reason than that they cannot afford it".

Interestingly, the Federal Court is given the power to order that a class action be discontinued if the likely cost to the respondent of identifying group members and distributing to them any monetary relief would be excessive, having regard to the total amount of any monetary relief which would be likely to be payable. The Court also has power to order that proceedings be discontinued where it is satisfied that it would be less costly to have separate proceedings or where the claims of group members will not be efficiently and effectively dealt with by the class action method.

The Federal Court is also given a broad discretion as to the orders it can make in delivering judgment in a particular case. It can, for example, award damages in a lump sum without specifically allocating amounts awarded in respect of individual group members.

Although Australia appears to be steering closer and closer to the U.S. system, particularly in terms of litigation, the Australian class action legislation differs in one important area in that it does not allow lawyers to charge contingency fees. Any group bringing a class action will face the prospect of having to pay all legal fees under the "loser-pays" provision.

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