

EMPLOYMENT CLASS ACTIONS THREATEN TO DISRUPT EMPLOYERS AND UNIONS ALIKE

30 October 2018 | Australia

Legal Briefings - By **Anthony Wood and Dean Farrant**

Over the past decade at least, many businesses have become alert to the burgeoning trend of class action law suits in Australia. Class actions, for example, have been commonly used to litigate shareholder actions and product liability claims. But until recently, they have been rarely used in the context of employment related disputes.

With a flurry of recent activity, plaintiff-focussed litigation funders and law firms are instituting and threatening to commence class action claims in the mining, direct sales and marketing and labour hire sectors over the alleged underpayment of employees who have been misclassified as 'casual' employees.

Many employers are asking whether this is the start of a new trend of aggressive litigation in relation to employment disputes. If it is, what does it mean for trade unions and the risks to their traditional role as employee representatives?

Currently in the spotlight is a trend of increasing employment related class action litigation being commenced in relation to the alleged misclassification of workers supplied by labour-hire firms to the mining industry. Plaintiff law firms have foreshadowed further employment related class actions across the mining industry, said to be worth more than \$325 million.

In class action proceedings currently on foot in relation to that industry, it is alleged that casual employees supplied by labour hire contractors are - when properly characterised - actually permanent employees, and therefore, entitled to be paid overtime, penalties, leave and other benefits afforded to permanent employees.

Following the Full Federal Court's decision in *WorkPac v Skene*, it is also alleged that the employees are not 'casual employees' under the Fair Work Act and are therefore entitled to receive leave entitlements under the National Employment Standards. (This is despite the employees already receiving a casual loading in their take home pay, in lieu of such leave benefits).

These types of class action proceedings are also utilising (or threatening to utilise) the accessorial liability provisions in the Fair Work Act to allege 'involvement in' the alleged contraventions, drawing parties other than the labour-hire employers in as respondents.

WHAT IS A CLASS ACTION?

A class action is a legal proceeding that is brought by a person on behalf of themselves and a group of people who are seeking redress for an alleged wrong.

The threshold for commencing a class action is relatively low. Where:

- 7 or more persons have claims against the same person;
- the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances;
- the claims of all those persons give rise to a substantial common issue of law or fact,

a class action proceeding may be commenced by one or more of those persons as representing some or all of them.

In the context of an employment related dispute, a class action might be commenced where, for example, a group of employees is claiming underpayments under an enterprise agreement or an award. In fact, there are multiple scenarios where an employment related class action claim could arise. Theoretical possibilities include claims regarding safety breaches or discriminatory employment practices. Given that the process for commencing class actions is so simple, it's surprising that employment related claims have been relatively rare, despite the growth of Corporations Act and product liability claims over the past decade.

HOW DO CLAIMANTS PARTICIPATE IN A CLASS ACTION?

A class action proceeding can be commenced without the consent or knowledge of other group members. All group members will be bound by the outcome of the proceeding unless they elect to opt out of the proceeding during the Court determined opt-out period.

Therefore, aspiring plaintiff lawyers need only identify one disgruntled employee in order to bring a claim on behalf of every other employee who may have a similar claim against the employer.

Class action litigation is typically backed by a litigation funder – a company that pays the costs associated with litigation in return for a share of the proceeds of the dispute if it is successful. Therefore, for many group members, there may be little reason to opt out of the proceeding because if the claim fails, they don't really lose anything.

Litigation funding is a potentially lucrative business and new entrants to the Australian market (US and UK firms are leading the charge) are quite open about the potential for high returns on their investments. The contrast with the value to employees of traditional union membership is stark. Unions typically charge a membership fee, which is tax deductible by members. Litigation funders (or self-funding law firms) can identify a class of employees (or ex-employees) and potentially run litigation on a no-win, no-fee basis.

Some concerns have been raised, including with the ACCC, about the return that one litigation funder Augusta Ventures is allegedly seeking from class members in relation to the funding of class actions to recover entitlements in the mining industry. It has been reported that the funder must first make a 250 per cent return on their costs before the class members will see any money.

Unions in the mining industry, which are seeking to protect their traditional domain of prosecuting collective claims on behalf of members, have also urged their members to exercise caution and consider opting out of the class action litigation in the mining industry. The response of other unions is less clear and may depend upon whether they see threats or opportunities from non-unions intervening in territory previously reserved for unions.

Of course, not all employees are members of a union, which leaves room for plaintiff law firms to continue pursuing class action litigation. If the CFMMEU does commence its own competing proceeding, the Court may be required to decide which of the two proceedings should be allowed to proceed.

Our Employment and Industrial Relations team is leveraging off the experience of our specialist class action lawyers to deliver a seamless employment related class action service. This previous experience includes representing clients in class actions associated with the Victorian bushfires, thalidomide litigation; Takata airbags; and writing the book 'Class Actions in Australia', the leading text in the field.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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