
Journal of European Consumer and Market Law

EuCML 4/2024 · Volume 13
22 August 2024 · Pages 157–192

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Editorial

Consumer Protection Law in Australia

Emerging Law from a Rise in Class Actions

I. Introduction

Australia has a wide-reaching consumer protection law — the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) — and an active regulator, the Australian Competition and Consumer Commission ('ACCC'). In 2024, law reform attention has been focused on areas other than consumer protection law, although of interest to consumers, including reforms to the *Privacy Act 1988* (Cth),¹ options for regulating AI,² responding to scams,³ and strengthening the *Online Safety Act 2021* (Cth).⁴ The ACCC has continued its ongoing inquiry into the competition aspects of digital platforms.⁵ The ACCC is active in litigating contraventions of the Australian Consumer Law, for which it can seek orders, including for compensation⁶ and civil pecuniary penalties.⁷ In 2023-2024 there have been a number of significant cases testing these provisions.⁸ However, for me, the interesting trend lies in the rise of class actions producing impactful outcomes for consumers⁹ and illuminating insights on the meaning and scope of the Australian Consumer Law.¹⁰ For me, these actions signal the ongoing relevance of consumer protection law, both 'in the books' and 'on the ground', in Australia, albeit recognising that the rights and interests of consumers are always undergoing threat and this is only likely to escalate with the rising cost of living. I do not think the other current, emerging trend — the rise of generative AI — will, at least in the short term, have nearly the impact on access to justice that is being promoted. In my view, nor should it.¹¹

¹ Attorney-General's Department (Cth), *Government Response: Privacy Act Review Report* (Report, September 2023).

² Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia Consultation: Australian Government's Interim Response* (January 2024).

³ Australian Government, *National Anti-Scam Centre* (Web Page) <<https://www.nasc.gov.au/>>.

⁴ Department of Infrastructure, Transport, Regional Development, Communications and the Arts (Cth), *Statutory Review of the Online Safety Act 2021* (Issues Paper, April 2024).

⁵ ACCC, *Digital Platform Services Inquiry 2020-25* (Web Page) <<https://www.accc.gov.au/inquiries-and-consultations/digital-platform-services-inquiry-2020-25>>.

⁶ *Competition and Consumer Act 2010* (Cth) sch 1 ('Australian Consumer Law') pt 5-2 div 4.

⁷ Australian Consumer Law, n 6, Part 5-2 Div 1.

⁸ See, eg, this decision on unconscionable conduct contrary to s 21 of the Australian Consumer Law: *Productivity Partners Pty Ltd (trading as Captain Cook College) v Australian Competition and Consumer Commission* [2023] FCAFC 54.

⁹ See especially, *Gill v Ethicon Sarl (No 10)* [2023] FCA 228, approving a class action settlement sum of \$300 million for product liability for pelvic mesh. See also, Justice Murphy & Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Herbert Smith Freehills, 2017) [4.2.5].

¹⁰ See also, *Moore v Scenic Tours Pty Ltd* (2020) HCA 17.

¹¹ J M Paterson, V Tan and J Webb, 'Generative AI in Consumer Claims' (forthcoming).

II. Class Actions

An increase in class actions raising consumer claims has become apparent in Australia over the last few years.¹² Professor Morabito has identified 33 class actions in consumer protection law matters from 1992 to 2016,¹³ and 108 from 2001 to 2023.¹⁴ As at 30 May 2024, there were 30 first instance class actions in the Federal Court raising regulatory and consumer protection matters.¹⁵ Not all of these Federal Court cases would be classed as involving consumer protection law, but a significant number of them would be.¹⁶

There are several factors that influence how and where class actions are brought, including procedural rules and the availability of litigation funding.¹⁷ The overall increase in class actions in Australia has been criticised, including with reference to concerns about the ‘commodification of litigation’.¹⁸ The economic incentive for counsel and class action funders to profit from class actions may sit in tension with the aspirations of consumer protection law to affirm the rights of individual consumers.¹⁹ Yet the overall aspiration underpinning class actions is to improve access to justice and deter contraventions of the law.²⁰ These are especially resonant aspirations in consumer claims. Here, as consumer advocates and scholars are well aware, the often-limited resources of consumers and small sizes of their claims may preclude them from undertaking litigation to enforce consumer rights.²¹ Speaking recently about class actions, Justice Beech Jones of the High Court of Australia stated:

my experience was that the representative procedure allowed those litigants to obtain the benefit of highly competent legal representatives to pursue claims about real damage they suffered, and without that procedure, there was no practical likelihood of them vindicating their legal rights.²²

In Australia, consumers have access to small claims courts or tribunals.²³ There are also ombudsman dispute resolution services in some fields, including telecommunications, energy, and financial services.²⁴ These are important avenues for Australian consumers to obtain recognition of their rights and redress for loss. They also have limits on the size and kind of claims that can be brought.²⁵ Further, these forums do not develop the law applying to consumer disputes.²⁶

Not every case should necessarily be heard before a court. However, especially in a common law system dependent on precedent, there is value in courts developing the law. In this way, uncertainties can be identified and resolved and gaps or needs for law reform can be clarified. For example, one group of current class action cases before the Federal Court of Australia are considering the measure of damages for cars with ongoing defects that have reduced their value as compared to the price paid for the cars, but for which the consumers involved have also had the benefit of use.²⁷ In Australia, as

12 On class actions generally in Australia, see Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023); Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Herbert Smith Freehills, 2017).

13 V Morabito, ‘An Empirical Study of Australia’s Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia’ (Report, August 2016) <<http://ssrn.com/abstract=2815777>> 11. The largest categories of claim were investors and shareholders.

14 V Morabito, ‘Empirical Perspectives on Twenty-One Years of Funded Class Actions in Australia’ (Report, April 2023) <<https://ssrn.com/abstract=4422278>>. Again, the largest categories of claim were investors and shareholders.

15 Federal Court of Australia, ‘Current Class Action Statistics’, *Current Class Actions* (Web Page) <<https://www.fedcourt.gov.au/law-and-practice/class-actions/class-actions#statistics>>.

16 For example, six of the class actions listed in the Federal Court of Australia involve claims against car manufacturers.

17 Legg and Metzger (n 12), 1; Murphy and Morabito (n 12).

18 See J Kalajdzic, ‘Review Essay: The Universality of Class Action Dilemmas’ (2023) 45(3) *Sydney Law Review* 423, 424. Also, more generally, Ben Chen and Michael Legg, ‘The Law and Economics of Australian Class Actions’ in Legg and Metzger, n 12.

19 Kalajdzic, *supra*, 425, 430.

20 Ibid 425. See also, Murphy and Morabito (n 12), [4.1].

21 See generally, Productivity Commission, *Consumer Law Enforcement and Administration* (Research Report, March 2017).

22 Justice R Beech-Jones, ‘Federalism, the Courts and Class Actions’ (Speech, Corporate Conduct + Class Actions Symposium 2024, 2 May 2024) <[https://www.hcourt.gov.au/assets/publications/speeches/current-justices/BJJ/Beech-Jones\(2024\)CorporateConductSymposium.pdf](https://www.hcourt.gov.au/assets/publications/speeches/current-justices/BJJ/Beech-Jones(2024)CorporateConductSymposium.pdf)> 1.

23 See, eg, Victorian Civil and Administrative Tribunal, *Goods and Services Disputes* (Web Page) <<https://www.vcat.vic.gov.au/case-types/goods-and-services>>.

24 See, eg, Telecommunications Industry Ombudsman, *Telecommunications Industry Ombudsman* (Web Page) <<https://www.tio.com.au/>>; Australian Financial Complaints Authority, AFCA (Web Page) <<https://www.afca.org.au/>>.

25 However, see M Legg, ‘Access to Justice and Compensation Through the Class Action’ in Legg and Metzger (n 12), 40, regarding some concerns about fair compensation in class action litigation.

26 N Howell, ‘Shutting the Courts Out: Developing Consumer Credit Law in the Shadow of Alternative Dispute Resolution and the New Australian Financial Complaints Authority’ (2019) 30(2) *Journal of Banking and Finance Law and Practice* 57.

27 See, egs, *Toyota Motor Corporation Australia Limited v Williams* [2023] FCAFC 50; *Ford Motor Company of Australia Pty Ltd v Capic* [2023] FCAFC 179. Both of these cases are currently the subject of appeal to the High Court of Australia.

mentioned, the regulator — the ACCC — actively enforces contraventions of the law. These cases may provide compensation to consumers as part of the settlement, but this is not always the case.²⁸ Moreover, enforcement action by the ACCC often seeks a civil penalty as a form of general and specific deterrence. This has meant that cases often settle on an agreed penalty amount, which has benefits in terms of efficient resolution of disputes, but leaves the nuances of the claim underexplored.²⁹ Class actions can also settle without proceeding to a decision in the court. Ideally the combination of dispute resolution options and forums provides individual relief and raises understanding of the demands of consumer protection law in the community.

III. Developing Law: Extraterritorial Jurisdiction and Compulsory Arbitration

A decided example of potential for class actions to clarify the scope of consumer protection law is demonstrated in *Karpik v Carnival plc* ('*The Ruby Princess*').³⁰ The case involved proceedings against Carnival plc claiming compensation for loss or damage allegedly suffered by passengers who travelled on a cruise ship voyage, or relatives of those passengers, following an outbreak of COVID-19. One of the claims in the representative proceedings was made by Mr Ho, a Canadian passenger. Mr Ho's contract was made outside Australia pursuant to 'US Terms and Conditions'. Those terms and conditions included an exclusive jurisdiction clause in favour of the United States District Courts for the Central District of California in Los Angeles, as well as a class action waiver clause.³¹

The Australian Consumer Law contains an unfair contract terms regime in Part 2-3, modelled on the EC Council Directive on Unfair Terms and the UK Unfair Terms in Consumer Contracts Regulations 1999.³² Until recently, it was uncertain whether the Australian unfair contract terms regime extended to contracts concluded overseas but involving a company that carried on business in Australia. It was also unclear whether a class action waiver was an unfair term. In *The Ruby Princess*, the High Court (Gageler CJ and Gordon, Edelman, Gleeson and Jagot JJ) endorsed the extra-territorial operation of the unfair term regime. The High Court held that ss 5(1)(c) and (g) of the *Competition and Consumer Act 2010* (Cth) expressly extended the regime making void an unfair term to conduct — which included making a contract containing an unfair term — outside Australia by a body corporate carrying on business within Australia, 'regardless of whether that corporation is a domestic or foreign corporation'.³³ This was the 'price' of carrying on business in Australia.³⁴

The High Court in *The Ruby Princess* found that the class action waiver clause was void as an unfair term. The clause gave rise to a substantial imbalance in the parties' rights under the contract.³⁵ It was not reasonably necessary to protect the interests of the party favoured by the term.³⁶ It was also not transparent.³⁷ Importantly, the Court acknowledged the cost barriers faced by consumers seeking to vindicate their legal rights and the importance of class actions in enabling those consumers to obtain redress.³⁸ The Court observed that:

there is no legitimate interest in Princess seeking to prevent people from participating in a class action, thereby preventing a person vindicating their rights under the contract where the cost to do so individually may be uneconomical.³⁹

28 In *Productivity Partners Pty Ltd (trading as Captain Cook College) v Australian Competition and Consumer Commission* [2023] FCAFC 54 — which involved unconscionable conduct through students being enrolled in courses they could not complete — the Commonwealth cancelled the fees of affected students. See Australian Competition and Consumer Commission, 'Court Finds Captain Cook College Acted Unconscionably and Misled Students' (Media Release, 2 July 2021) <<https://www.accc.gov.au/media-release/court-finds-captain-cook-college-acted-unconscionably-and-misled-students>>.

29 See JM Paterson and H Bolitho, 'Unfair Terms and Legitimate Business Interests in Standard Form Small Business Contracts' (2023) 30 *Competition and Consumer Law Journal* 19.

30 (2023) 98 ALJR 45 ('*The Ruby Princess*').

31 *The Ruby Princess*, n 30, 49 [3].

32 See J Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33(3) *Melbourne University Law Review* 934.

33 *The Ruby Princess*, n 30, 55 [38].

34 *Ibid.*

35 *Ibid* 58–9 [53]–[54].

36 *Ibid* 59 [55]–[56].

37 *Ibid* 59 [58].

38 *Ibid* 59 [54].

39 *Ibid* 59 [56].

IV. Expanding Law: Data Breach Cases Brought as Consumer Protection Claims

In recent years, Australia has experienced a series of high-profile data breaches,⁴⁰ involving telco data (Optus)⁴¹ and medical data (Medibank).⁴² Class actions have been commenced in response to these breaches.⁴³ Australia does not currently provide a private right of action for data breaches contrary to the *Privacy Act 1988* (Cth), which requires regulated entities to take reasonable steps to protect personal data collected by them.⁴⁴ However, a contravention of the *Privacy Act 1988* (Cth) is only actionable by the Office of the Australian Data Commissioner,⁴⁵ which is taking proceedings for a civil penalty against Medibank,⁴⁶ as well as representative proceedings.⁴⁷ The class actions are therefore relying on other heads of claim, including misleading or deceptive conduct contravening s 18 of the Australian Consumer Law.⁴⁸ However, the Australian Government has committed in principle to reform of the *Privacy Act 1988* (Cth), largely to embrace stronger data protection standards. The reform proposals include an individual right to action for contraventions of the legislation.⁴⁹ In the meantime, the use of the consumer law to bring comparable claims illustrates the agility of that body of law in responding to new kinds of claims, and the role of class actions in providing a novel forum for vindicating consumers' rights that might not otherwise be actioned.

V. AI and the Future of Consumer Dispute Resolution

UK⁵⁰ and Singapore⁵¹ courts have indicated they are investigating the possibility of using generative AI to assist in resolving small claims, which will presumably include consumer claims. There has already been considerable attention on the use of technological advances for online dispute resolution, with the aim of reducing the costs of dispute resolution and improving access to justice.⁵² The idea in using generative AI seems primarily to be in guiding prospective litigants through the claims process,⁵³ although it may also be used to resolve some disputes.⁵⁴

Such proposals, although aimed at assisting consumers, also raise consumer protection issues. As is now increasingly well-recognised, automated systems raise risks of inaccuracy and bias, as well as potentially challenging privacy, data protection and security standards.⁵⁵ These risks must undoubtedly require caution in adapting AI to judicial settings,⁵⁶ including strong governance mechanisms to ensure it is compatible with core judicial values such as fairness, transparency and accountability.⁵⁷

40 Attorney-General's Department (Cth), n 1, 8.

41 Office of the Australian Information Commissioner, 'OAIC Statement on Optus Data Breach' (Media Release, 22 September 2022) <<https://www.oaic.gov.au/newsroom/oaic-statement-on-optus-data-breach>>.

42 Office of the Australian Information Commissioner, 'Medibank Data Breach: Alleged Timeline' (Infographic, June 2024) <https://www.oaic.gov.au/_data/assets/pdf_file/0037/228979/Medibank-data-breach-alleged-timeline-infographic.pdf>.

43 *McClure v Medibank Private Limited* (Federal Court of Australia, VID64/2023, commenced 6 February 2023).

44 *Privacy Act 1988* (Cth) sch 1 pt 4 s 11 ('Australian Privacy Principle 11').

45 Attorney-General's Department (Cth) (n 1), 19.

46 Office of the Australian Information Commissioner, 'OAIC Takes Civil Penalty Action Against Medibank' (Media Release, 5 June 2024) <<https://www.oaic.gov.au/newsroom/oaic-takes-civil-penalty-action-against-medibank>>.

47 Office of the Australian Information Commissioner, 'Representative Complaint: Medibank Data Breach' (Complaint Notice, 3 June 2024) <<https://www.oaic.gov.au/privacy/privacy-complaints/medibank-representative-complaint-notice>>.

48 V Bloch et al, 'Takeaways from the Optus and Medibank Data Breach Class Actions', *Allens* (Blog Post, 7 June 2023) <<https://www.allens.com.au/insights-news/insights/2023/06/Takeaways-from-the-recent-Optus-and-Medibank-data-breach-class-actions/>>.

49 Attorney-General's Department (Cth) (n 1), ch 26, proposal 26.1.

50 Sir G Vos, 'Speech by the Master of the Rolls to the Bar Council of England and Wales' (20th Annual Law Reform Lecture, Lincoln's Inn, 21 June 2023) <<https://www.judiciary.uk/speech-by-the-master-of-the-rolls-to-the-bar-council>>.

51 L Lam, 'Generative AI Being Tested for Use in Singapore Courts, Starting with Small Claims Tribunal', *Channel News Asia* (online, 27 September 2023) <<https://www.channelnewsasia.com/singapore/artificial-intelligence-court-small-claims-singapore-chatgpt-3801756>>; LL Ying, 'Small Claims Tribunals to Roll out AI Program to Guide Users Through Legal Processes', *The Straits Times* (online, 27 September 2023) <<https://www.straitstimes.com/singapore/small-claims-tribunal-to-roll-out-ai-program-to-guide-users-through-legal-processes>>. See also, C Chien et al, 'How LLMS Can Help Address the Access to Justice Gap Through the Courts' [2024] *Loyola Los Angeles Law Review* (forthcoming).

52 On online dispute resolution, see generally, M Legg, 'The Future of Dispute Resolution: Online ADR and Online Courts' (2016) 27 *Australasian Dispute Resolution Journal* 227; R Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) 62–63.

53 Vos (n 50), [19]; Ying (n 51).

54 Vos (n 50), [24].

55 H Frase and O Daniels, 'Understanding AI Harms: An Overview', *Centre for Security and Emerging Technology* (Blog Post, 11 August 2023) <<https://cset.georgetown.edu/article/understanding-ai-harms-an-overview/>>.

56 L Bennett Moses et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, The Australasian Institute of Judicial Administration Inc., June 2022).

57 See, eg, Department of Industry, Science and Resources (Cth), n 2.

Additionally, text-based generative AI, such as ChatGPT, is known to ‘hallucinate’, which refers to the tendency of the technology to create realistic but utterly fabricated content.⁵⁸ The unpredictable inaccuracy of generative AI responses to legally framed questions may cause fewer problems for experienced lawyers who should — presumably — be able to identify such errors.⁵⁹ Conversely, consumer litigants are at a disadvantage precisely because of their lack of experience in navigating the relevant law and legal processes.

There are currently no suggestions for this kind of development in Australia.⁶⁰ However, it seems only a matter of time before the idea of incorporating AI into dispute resolution is explored more comprehensively here. The objective of such efforts must be more than the efficient resolution of disputes. Any AI systems developed to assist consumers, consumer advocates, tribunals and ombudsman services in promoting access to justice in consumer claims must do so in a way that respects rule of law values and the unique features of consumer disputes.⁶¹ As the discussion of class actions indicates, there is a complex set of considerations, often existing in tension, in thinking about resolving consumer disputes, even aside from reform and improvement of the underlying law. Currently the Australian consumer protection regime offers a number of dispute resolution options. An AI system must be coherent in the face of these options and consistent with the values they represent. Ultimately, as urged by principles of responsible AI, human attention may continue to be required to address the complexity of the issues that often arise in consumer claims, and the significant imbalances in power between consumers and traders.

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⁵⁸ See M Dahl et al, ‘Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models’ (2024) 16(1) *Journal of Legal Analysis* 64.

⁵⁹ Cf *Mata v Avianca Inc*, 22-cv-1461, SDNY (2023) <<https://casetext.com/case/mata-v-avianca-inc-2>>, where lawyers were found to have used cases fabricated by ChatGPT in their pleadings.

⁶⁰ Notably, in the European Union under the Artificial Intelligence Act, the use of AI in the administration of justice is classified as a high-risk use with accompanying obligations of transparency, assurance and accountability: see *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts* [2021] art 6, annex III(8).

⁶¹ See discussion of uses of AI by courts in Bennett Moses et al (n 56).

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