BY PETER CASHMAN, SYDNEY

# The rights of the "*ignorant passive loser*": class action

## legislation under constitutional attack

A British company, Femcare Limited, is seeking to challenge the constitutional validity of Australian class action legislation (Part IVA, *Federal Court of Australia Act*, 1976).

Femcare is the Respondent in class action proceedings brought against it in the Federal Court by an Australian woman who became pregnant following an unsuccessful sterilisation procedure. This procedure used an allegedly defective system involving the use of Filshie Clips which are intended to occlude the fallopian tubes and thus result in sterilisation.

The representative Applicant brought the class action proceedings on behalf of a group of Australian women who encompass:

(a) women whose sterilisation procedures failed thus resulting in unwanted pregnancies and other complications; and

(b) women who have undergone further medical monitoring and, in some cases, further medical procedures, including surgery, as a result of the risk of failure of the devices.

In promotional material the company has claimed that the Filshie Clip System has become accepted as a classical method of female sterilisation by leading surgeons around the world and is in use in over 40 countries.

In the Federal Court proceedings before Justice Lehane, Femcare sought two declarations:

(1) a declaration that the entirety of Part IVA of the *Federal Court of Australia Act*, 1976 is invalid as being beyond the legislative competence of the Commonwealth of Australia; and

(2) a declaration that Sections 33J and 33ZB of the *Federal Court of Australia Act*, 1976 are invalid as being beyond the legislative competence of the Commonwealth of Australia.

In a decision handed down on 6 October 1999 Justice Lehane dismissed the Respondent's application and rejected the contentions that the Australian class action legislation is constitutionally invalid.

On 2 November 1999 Justice Beaumont granted Femcare leave to

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appeal from the decision of Justice Lehane and the matter is likely to be considered by a Full Court of the Federal Court later this month.

In his decision Justice Lehane noted that Femcare's submissions were put in two ways. First, it was contended that the Federal Court only has jurisdiction in relation to "matters", in the constitutional sense (Section 75, 76 and 77 of the Constitution). Femcare contended that the class action provisions empower the Federal Court to determine proceedings relating to subject matter other than "matters" and as such the legislation is invalid. Alternatively, Femcare contended that Part IVA of the *Federal Court of Australia Act* 1976 requires or permits the court to determine class action proceedings in ways which are said to be incompatible with the proper judicial process and with the exercise of judicial power.

Somewhat curiously, Femcare based its argument, in part, on the so-called rights of the "ignorant passive losers", who would be bound by any judgment against them even though they were not informed of the existence of the proceedings and accordingly never had an opportunity to withdraw from, participate in or influence the conduct of the case. It was contended that because such class members are effectively deprived of a right to appear and to make effective decisions concerning the prosecution of their claims, an essential element of the judicial process - the right to be heard - is said to be lacking. Insofar as they have a right to appear at all, even if notified of the proceedings, such right was said to be only able to be exercised pursuant to the discretion vested in the Federal Court given that the conduct of the litigation is entirely under the control of the representative party.

In considering the nature of judicial power, Justice Lehane noted that in a representative proceeding the Federal Court is required to make findings of fact (unless the facts are agreed to), to ascertain the relevant law and to apply the law to the facts in determining whether or not to grant relief. Justice Lehane concluded that this clearly involves the exercise of judicial power in relation to "matters" notwithstanding the fact that any judgment will bind other persons who are not active participants in the Federal Court proceedings.

In relation to the contention that the court did not have before it the particular facts of each individual claim of each group member, Justice Lehane found that there was nothing in Part IVA which dispense with the requirement that the Applicant plead the material facts on which all claims for relief are made on behalf of each group member. His Honour went on to observe that to the extent to which this is not done, the pleading, like a pleading in any other proceeding, is liable to be struck out. Moreover, he went on to note that if a claim made on behalf of any group member is to succeed, the factual basis of each element of the cause of action will have to be established by evidence. As he noted, there is "nothing hypothetical about that process or about any stage of it" (Reasons for Judgment at page 10).

In considering Femcare's second submission, that Part IVA requires or authorises the court to adopt procedures which are antithetical to the proper judicial process, Justice Lehane, whilst acknowledging that the rules of natural justice, particularly the right to be heard, are an essential element in the judicial process, proceeded to find that the arguments advanced on behalf of Femcare were misconceived.

The fact that individual notice is not required to be given to each individual group member was not considered to be fatal. Moreover, senior counsel for Femcare had conceded that there was no absolute principle that, without exception, proper judicial process required either actual notice or a right of direct participation before a party would be bound by a judgment or order of the Federal Court.

Justice Lehane concluded that neither authority nor principle required the conclusion that anything in Part IVA is antithetical to the judicial process and went on to note that recent decisions, particularly those in the High Court, including those relating to the older representative action procedures, suggested the contrary. Accordingly, he rejected the submission by Femcare that Part IVA authorises or requires procedures inconsistent with the judicial process.

In a further novel argument, Femcare contended that Sections 33J and 33ZB involved the potential acquisition of "property" rights of the class members and was therefore invalid.

Although a chose in action is property to which Section 51(XXXi) of the Constitution applies, Justice Lehane did not accept the argument that the chose in action of each of the class members was "acquired" by the operation of Part IVA. As his Honour noted, the legislation gives the representative party authority to enforce claims of the group members, subject to supervision of the court and to the exercise of certain powers under Part IVA (one of which is the right of the group member to opt out). Such enforcement is "on behalf of" and for the benefit of the group members and thus Justice Lehane concluded that the representative party does not, in his view, by the class action process acquire any right of property in the chose in action. Thus, in his view, Section 51(XXXi) is inapplicable.

The outcome of the Appeal to the Full Federal Court will be reviewed in *Plaintiff* in due course. PL

## APLA Membership at 15 November 1999

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| NSW | 605 |
| Queensland | 375 |
| Victoria | 276 |
| South Australia | 81 |
| Western Australia | 58 |
| ACT | 43 |
| Northern Territory | 19 |
| Tasmania | 23 |
| International | 52 |
| TOTAL | **1,532** |