CLASS ACTIONS

In Barcelona (Spain), we decided that in 2016, our Second Study Commission will focus on class proceedings. We have limited the questionnaire to five questions and we expect to receive short but concise answers.

**Question 1: Do you have class proceedings in your jurisdiction? If so, what is the nature of those class proceedings?**

1. In Australia "class actions" can be distinguished from traditional representative proceedings and other court procedures for the grouping or consolidation of related claims. These forms of traditional representative proceedings have their origin in Australia from the adoption of the Judicature system in the UK beginning in the 1870s, and at both the Federal level and in most of the States and Territories of Australia these forms of proceedings are embodied by the court rules in these jurisdictions.

2. There are, however, limitations to the use and effectiveness of these forms of traditional representative proceedings, and these were identified by the Australian Law Reform Commission in its report "Grouped Proceedings in the Federal Court", in 1988.

3. In response to this ALRC report, and its recommendations, a new procedure for “grouped proceedings” which would advance the objectives of access to the courts and judicial economy were introduced by the Federal Court of Australia Amendment Act 1991 (Cth), which provided for representative proceedings through the insertion of Part IVA into the Federal Court of Australia Act 1976 (Cth) (“the Act”). This came into operation on 4 March 1992.

4. Part IVA of the Act has become the model for class action procedures in other Australian States, with the enacting of legislation to this effect in these jurisdictions which have created similar regimes. In Victoria, Part 4A of the Supreme Court Act 1986 (Vic), which came into operation on 1 January 2000, and in New South Wales, Part 10 of the Civil Procedure Act 2005 (NSW), which came into operation on 4 March 2011. In all three of these jurisdictions

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1 Damian Grave, Ken Adams and Jason Betts, Class actions in Australia (Thomson Reuters, 2nd ed, 2012), [1.120]; see also Chapter 1 and 2 of this work for a more detailed history of representative proceedings in Australia.
2 Ibid; Appendix 6 (p. 995) for a list of the relevant Court Rules for each jurisdiction.
4 Ibid [2].
5 Michael Legg and Ross McInnes, Annotated class actions legislation (LexisNexis Butterworths, 2014), [1.5].
6 Having been introduced by the Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000 (Vic).
7 Having been introduced by the Courts and Crimes Legislation Further Amendment Act 2010 (NSW).
"class actions" are termed "representative proceedings".

Commencement procedure under Part IVA of the Federal Court of Australia Act 1976 (Cth)

5. The criteria for the commencement of class action proceedings are set out in section 33C(1) of the Act:
   - There must be at least seven people, all with claims against the same person;
   - The claims must arise out of the same or similar (or related) circumstances; and
   - The claims must give rise to substantial common issues of law or fact.

6. Class action proceedings may be commenced irrespective of whether the relief sought includes equitable relief or claims for damages. Further, proceedings may be commenced even though the relief sought is not the same for each person and even though relief may require individual assessment in cases of damages being sought. The claims also need not arise out of the same transaction or contract, or act or omission.

7. The requirements set out in section 33H of the Act, for the drafting of the originating process in a class action proceeding, reflect the criteria set out in section 33C, however it is not necessary for the originating process to include the names of the group members or even to specify the number of group members. Moreover, in the main, class action proceeding regimes in Australia provide for an “opt out model” of litigation, ie, that the representative litigation will proceed on behalf of all group members unless a person chooses to opt out of the proceeding: “...all affected persons receive the benefit of the class action unless they make the positive choice to opt out and to separately pursue their own individual claim”.

8. Notwithstanding this, it has been noted that more recently “closed class” representative proceedings have been used with the group members signed up to litigation funding agreements. A “closed class” of identified persons assists litigation funders to avoid “free rider” group members and “inject more certainty into case specific funding models”.

9. In Australia the adequacy of the class representative’s representation is not a prerequisite to the commencement of proceedings, as it is in some other jurisdictions. Section 33T of the Act provides that, on an application by a group member, if it appears to the Court that a

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8 See section 33C(2) of the Act.
9 See section 33C(2) of the Act.
representative party is not able adequately to represent the interests of group members, the Court may substitute another group member as representative party.

10. Section 33W provides a mechanism for a class representative, with leave of the Court, to settle their individual claims in whole or in part at any stage in the proceedings and to withdraw as representative of the class; as well as a mechanism (in conjunction with section 33X of the Act) for advising other members of the class of this withdrawal, and thereby giving other members the opportunity to assume the role of class representative.

Question 2: What are the advantages or disadvantages to class action proceedings in your jurisdiction?

Advantages

11. The 1988 Report of the Australian Law Reform Commission that proceeded the introduction of the class action regime in the Federal Court of Australia was addressed specifically to the question of whether the introduction of such procedural changes would make it easier and less costly for people to obtain legal remedies in court proceedings in cases of multiple wrongdoing, by reducing the costs and inefficiencies of legal proceedings.\(^\text{15}\) The ALRC broadly identified the issues with which its Report was concerned in respect of these aims:

- Reducing the cost of court proceedings to the individual;
- Enhancing access by the individual to legal remedies;
- Promoting efficiency in the use of court resources;
- Ensuring consistency in the determination of common issues; and
- Making the law more enforceable and effective.\(^\text{16}\)

12. The ALRC Report specifically outlined the potential advantages of the introduction of a class action regime:

- Where a number of people suffer loss, injury or damage as a result of a multiple wrong, a class action or other effective grouping procedure could help to reduce costs for each member of the group as well as promote efficiency in the administration of justice;
- Where the claims are “individually recoverable”, the primary policy goals of such procedures are to enable the most efficient use to be made of resources and to ensure consistency in decision making;
- Where the claims are 'individually non-recoverable', that is, where the cost of legal proceedings is high in relation to the amount claimed, the grouping of claims may reduce the costs of litigation to the individual and thus enhance access to a legal remedy.\(^\text{17}\)

\(^{15}\) ALRC, above n 3, [13].
\(^{16}\) Ibid.
\(^{17}\) ALRC, above n 3, [61].
Disadvantages

13. In relation to class action proceedings with respect to Part IVA of the Act, the following comments made by Justice Jessup of the Federal Court of Australia identify a potential disadvantage with the regime:

"What sets a Part IVA proceeding apart from other proceedings with multiple parties is that the named party – the applicant – represents others who are not on the record. Steps taken by the applicant in the conduct of the case are binding on the group members because he acts as their representative. Likewise, findings and rulings made in the course of the applicant’s case are binding on the group members not because they have the legal status of final orders but because the group members are represented by the applicant." 19

14. Section 33T of the Act provides a mechanism for the removal and replacement of class representatives, which is particularly significant for the protection of the interests of absent class members given that the regime is an opt-out system, though such replacement can only be made on application by a group member, and not at the initiative of the Court. 20

15. Other noted potential disadvantages of the class action regime in Australia are:

- The relative novelty of class actions, in comparison to conventional forms of litigation; 21
- The fear of legal entrepreneurialism, and a flood of "US-Style" litigation; 22
- The capacity of the system to affect the power balance between applicants and respondents; 23 and
- The increased role of the media in litigation. 24

Question 3: Is there an access to justice component to class action proceedings in your jurisdiction?

16. As noted in the previous response, issues in relation to access to justice were at the heart of the development of the present regime, with the ALRC Report in 1988 noting these as key advantages of the implementation of such a system of grouped proceedings. With the introduction of the relevant legislation into the Federal Parliament in 1991 (Federal Court of Australia Amendment Bill 1991), the Attorney-General noted this in the Second Reading Speech and acknowledged that promoting access to justice was a central aim of the class action regime in Australia. 25

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18 Cited by Morabito, above n 8, 147.
19 Peterson v Merck Sharpe and Dohme (Australia) Pty Ltd (No3) [2009] FCA 5, [50].
20 For discussion of this point see: Morabito, above n 8.
21 Grave, Adams and Betts, above n 1, [1.270].
22 Ibid, [1.280] and [1.310].
23 Ibid, [1.290].
24 Ibid, [1.300].
25 Commonwealth, Parliamentary Debates, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General). See also discussion of this point in Bernard Murphy and Camille
Third Party Funding

17. In Australia, third party funding of class action litigation is advocated on the basis that it enhances access to justice with the provision of funds to potential claimants for whom the cost of prosecuting a claim would be otherwise prohibitive. Since the decision of the High Court of Australia in *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, authority remains that it does not justify a conclusion that litigation is contrary to public policy, or an abuse of process, when it is funded by a third party funder with no other interest in the litigation, and which exercises a significant level of control of the conduct thereof.

18. As discussed above, “closed class” representative proceedings can be more attractive to funders in terms of greater certainty in funding recovery however other mechanisms such as “common fund orders” and “funding equalisation formulas” have been recently propounded by funders as solutions to “free riding” group members.

Question 4: How is case management achieved in class proceedings in your jurisdiction?

19. The Federal Court of Australia, and both the Supreme Courts of Victoria and New South Wales (the three jurisdictions in Australia that have established regimes for the prosecution of group claims via statutory representative proceedings) have extensive powers to manage class action proceedings, under the relevant legislation (which is noted in the response to the first question), including the powers to act on their own motions in respect of a number of matters in relation to the roles and functions of group members.

20. The three jurisdictions have issued Practice Notes for representative proceedings:

- Federal Court: *Practice Note CM 17 - Representative proceedings commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth).*

- Supreme Court of Victoria: *Practice Note No. 10 of 2015 - Conduct of Group Proceedings (Common Law Division).*

- New South Wales Supreme Court: *SC Gen 17 - Supreme Court - Representative Proceedings.*

21. Cases (including class actions) are managed using an individual docket system in the Federal Court. In Victoria and New South Wales the respective Practice Notes provide specifically for the management of group proceedings directly by an assigned Judge.

22. In general the courts’ powers of management of representative proceedings include:

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Grave, Adams and Betts, above n 1, [17.100].

Ibid, [1.210].


Grave, Adams and Betts, above n 1, [11.120].

See also the Federal Court of Australia's *Case Management Handbook*, which was updated in 2014 to include a chapter on the case management of class actions.
• The power to discontinue representative proceedings;
• The power to substitute a representative party;
• The power to establish subgroups, in cases of issues not common to all group members, and to appoint a subgroup representative;
• The power to order that notice of any matter be given to group members;
• The power to decline to approve settlement; and
• The power to make any other orders necessary to ensure that justice is done in the proceedings.  

23. It has been observed in a number of decisions that a useful approach for the management of large group proceedings is to identify common questions for initial determination, following which directions for hearings in relation to non-common questions, or in relation to cross-claims etc., can be made if necessary. The need for Courts to work to prevent complex representative proceedings from being slowed by numerous interlocutory applications has also been observed. 

Question 5: If you do not have class action proceedings, how are the cases involving a large quantity of victims or involving a group of individuals with a collection interest dealt with?

24. N/A

31 See Grave, Adams and Betts, above n 1, [11.120] and Chapter 11 generally for discussion of these powers.

32 See for example remarks made by Wilcox J in Ryan v Great Lakes Council (1999) 102 LGERA 123, at [10]; and Gillard J in Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3) [2001] VSC 372, at [12].