

Representative Proceedings

Discussion Paper

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Law Reform
Commission of
Western Australia

The Law Reform Commission of Western Australia

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Chapter 1

Introduction

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Introduction

TERMS OF REFERENCE

1.1 In July 2011, then Attorney-General Christian Porter MLA directed the Law Reform Commission of Western Australia (‘the Commission’) to ‘examine and report upon whether, and if so in what manner, the principles, practices and procedures pertaining to representative proceedings require reform’.

1.2 In particular, the Commission was requested to give close consideration to the following factors in relation to such an examination:

- (i) the need for a detailed guiding framework for the manner in which representative proceedings are to be conducted or concluded;
- (ii) the need to reduce the uncertainty and lack of clarity in the area;
- (iii) the adoption of an appropriate and effective model, either through amendment to the Supreme Court Rules or statutory reform, taking into account recent developments regarding representative proceedings in other jurisdictions both nationally and internationally;
- (iv) the need to ensure that representative proceedings are conducted in a fair manner which give those who will be bound by orders made in the proceedings a reasonable opportunity to decide whether or not to participate in the proceedings and to be heard in relation to issues affecting their rights; and
- (v) any related matter.

THE ISSUE IN BRIEF

Representative proceedings in Western Australia

1.3 The terms of reference set out above relate specifically to the existing framework within which representative proceedings operate in Western Australia. The framework is contained in Order 18 Rule 12 of the *Rules of the Supreme Court 1971 (WA)* (‘the RSC’), which provides:

12. Representative proceedings

- (1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
- (2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued, to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this subrule, the Court appoints a person not named as a defendant, it shall make an order under Rule 6 adding that person as a defendant.

- (3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.
- (4) An application for the grant of leave under subrule (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.
- (5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.
- (6) The Court hearing an application for the grant of leave under subrule (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.

1.4 As discussed in Chapter 2, this provision reflects the traditional rule for representative proceedings employed by the English Court of Chancery and can be traced back to the 16th century.¹ There have been no substantive amendments to the Western Australian provision since it was introduced in 1971.²

1.5 The traditional rule has been the subject of considerable criticism. Professor Morabito, who has written extensively on the topic, has noted that ‘the uncertainty that has been created by the excessive brevity of the rules governing representative actions greatly hinders the ability of such proceedings to secure the social benefits’ of access to justice, reduced costs and increased efficiency.³

1.6 The principal problem is that, unless parties ultimately can satisfy the court that they have the ‘same interest’ in a proceeding, the represented parties have not ‘begun’ a proceeding in compliance with the rule. The lack of case law interpreting key terms, such as ‘same interest’, has fuelled the uncertainty referred to by Morabito. If the court later finds there is no relevant same interest, there is a risk that only the named representative has begun proceedings. In that circumstance, the statute of limitations will continue to run against the represented parties, and attempts to institute further proceedings may be dismissed for being out of time. Uncertainty about this fundamental matter appears to discourage plaintiffs from employing the Order 18 Rule 12 procedure found in the RSC.

1.7 The present rule causes increased costs for the parties because of the care that must be taken (and the interlocutory points that may arise) as a result of the uncertainty about whether the represented parties do have the “same interest” in the proceeding.

1. See Yeazell SC, ‘From Group Litigation to Class Action Part 1: The industrialisation of group litigation’ (1980) 27 *University of California, Los Angeles Law Review* 514, especially 514–16.
2. However, it should be noted that the current provision had its origins in the *Rules of the Supreme Court 1955*, O16 rr 9–13. In the 1955 rules, the application was described as a ‘representative action’. While the wording of the provisions differ, the principles that apply to the interpretation of the respective orders do not.
3. Morabito V, ‘Statutory Limitation Periods and the Traditional Representative Action Procedure’ (2005) 5 *Oxford University Commonwealth Law Journal* 113, 114.

1.8 In *Esanda Finance Corporation Ltd v Carnie*,⁴ Gleeson CJ (sitting as a member of the New South Wales Court of Appeal) observed:

The subject of class actions is controversial. One thing, however, seems generally to be agreed. If they are to become part of our litigious procedures, then they need to be governed by rules that make them manageable and effective. An example is to be found in the recently enacted Pt IVA of the *Federal Court of Australia Act 1976* (Cth). That legislation permits representative proceedings in circumstances that extend well beyond what was traditionally regarded as the scope of a rule such as that with which we are presently concerned. However, the legislation which permits such proceedings deals with, and regulates, such important matters as whether or not consent is required from persons who are to be group members in representative proceedings, the position of persons under disability, the right of a group member to opt out of a representative proceeding, alterations to the description of the group, settlement and discontinuance of proceedings, and the giving of various notices to group members.⁵

1.9 The Commission's research indicates that representative proceedings under Order 18 Rule 12 are rarely begun in Western Australian courts. Further, a review of Western Australian cases reveals there is no published authority on the proper interpretation of Order 18 Rule 12 of the RSC, either in terms of the procedural mechanisms that are contained (or said to be contained) within the rule, or in respect of how it may impact upon the substantive rights of litigating parties.⁶

Representative proceedings in other jurisdictions

1.10 While the representative proceeding provision in Western Australia has remained effectively unchanged since its inception, there has been substantial reform of the means by which such proceedings may be conducted in federal courts and, more recently, in New South Wales and Victoria.

1.11 The federal amendments arose as a consequence of a reference given to the Australian Law Reform Commission (ALRC) in 1977.⁷ There was a concern at that time that the federal representative proceeding provisions did not adequately meet their intended purpose. In particular, there was a perception that the provisions did not promote access to justice or efficiency of the court system where large numbers of individual claimants all had the same, or strikingly similar, causes of action. This was especially an issue in circumstances where the damages sought were relatively modest.⁸

1.12 The ALRC released its report – *Grouped Proceedings in the Federal Court* – in 1988, 11 years after it received the reference.⁹ The report recommended significant

4. (1992) 29 NSWLR 382.

5. Ibid 388.

6. The only published judgment the Commission has been able to locate in relation to O 18 r 12 is *Minara Resources Ltd (ACN 060 370 783) v Ashwin* [2007] WASCA 107. In that case the discussion in relation to representative proceedings is brief; it not being the primary point upon which the appeal was argued. The discussion of the court in relation to O 18 r 12 in *Minara* simply sets out and endorses the principles expressed in *Duke of Bedford v Ellis* [1901] AC 1 and *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 405–406.

7. The provision contained in the Federal Court Rules was (and still is) a provision similar to our current O 18 r 12 RSC, with its origins dating back to the UK Chancery Courts – see *Federal Court Rules* r 9.21.

8. ALRC, *Access to the Courts – II Class Actions*, Discussion Paper No 11 (1979). See also ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 1–7. The move towards law reform discussion in relation to representative actions was not confined to the federal jurisdiction. In the late 1970s, the Law Reform Committee of South Australia also reported on class actions as a result of a reference relating to the need to widen the existing representative action provisions in the Supreme Court Rules in South Australia: see Law Reform Committee of South Australia, *Report to the Attorney-General Relating to Class Actions* (1977).

9. ALRC, *Grouped Proceedings in the Federal Court*, *ibid*.

reform to the federal representative proceeding provisions, which were subsequently amended as part of a package of reforms introduced into the federal Parliament on 14 November 1991, becoming Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('Part IVA').

1.13 When introducing the legislative reforms, the Commonwealth Attorney-General, Mr Michael Duffy, observed that a new procedure for federal representative proceedings was required for two purposes:

The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.

The second purpose of the Bill is to deal efficiently with the situation where damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case in individual actions.¹⁰

1.14 The introduction of Part IVA in 1992 significantly altered the traditional rule governing representative proceedings. In particular, it clarified the ability of plaintiffs to bring proceedings, where rules such as Order 18 Rule 12 of the RSC would have left the effectiveness of such proceedings in doubt. Part IVA is set out in full in Appendix 1 of this Discussion Paper.

1.15 In 2000, Victoria made amendments to the *Supreme Court Act 1958* (Vic) to govern representative proceedings in that state. Part 4A of the Victorian Act was enacted in substantially similar terms to Part IVA.¹¹ In 2005, following a number of cases that dealt with the interpretation of the New South Wales representative proceedings rule,¹² the New South Wales Parliament enacted Part 10 of the *Civil Procedure Act 2005* (NSW). Like its Victorian counterpart, the New South Wales provisions provide for procedures to govern representative proceedings in substantially similar terms to Part IVA.

1.16 Those state jurisdictions (South Australia, Queensland, Tasmania and Western Australia) that have not enacted legislation to govern representative proceedings continue to conduct representative proceedings under rules of court.¹³ Some court rules have undergone substantial amendment, which are discussed in further detail in Chapter 3.

IS THERE A NEED FOR REFORM IN WESTERN AUSTRALIA?

1.17 The terms of reference require an analysis of whether the principles, practices and procedures of representative proceedings require reform. A useful starting point

10. See Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174–5 (Michael Duffy, Attorney General). See also Morabito V, 'Class Actions in the Federal Court of Australia – The Story So Far' (2004) 10 *Canterbury Law Review* 229.

11. The Victorian reference adapted much of the same numbering as its federal counterpart – with the exception of the numbering in its title (note the use of Hindu Arabic numbering as opposed to Roman numeral numbering). For specific comparisons, see the table of equivalent provisions at Appendix 2.

12. Discussed in further detail in Chapter 4.

13. For a more detailed discussion of these regimes, see Chapter 3.

is to consider the numbers of representative proceedings begun in jurisdictions that have legislative schemes governing such actions.¹⁴

1.18 In relation to representative proceedings issued in the Federal Court:

- (a) A total of 253 applications have been filed pursuant to Part IVA from its inception in 1992 until 30 June 2009.¹⁵
- (b) In that period, an average of 14 class actions were filed every year in the Federal Court, representing less than 1% of all Federal Court proceedings.¹⁶
- (c) Close to half of all Part IVA proceedings filed in the first 17 years of its operation (119 applications) were related to 39 disputes.¹⁷
- (d) The average opt-out rate was 13.78%.¹⁸ Furthermore, at least one group member¹⁹ has opted out in 78.76% of the Part IVA proceedings where an opportunity to opt out was extended to group members. These opt-out statistics are significantly higher than corresponding empirical data for the United States federal class action regime.²⁰
- (e) In 17 years of operation of Part IVA (as at the time of Morabito's study), litigation funders funded 18 representative proceedings in the Federal Court. Thirteen of these used what is known as a 'closed class',²¹ requiring group members to enter into an agreement with the litigation funder and/or agree a retainer with the solicitor.²²
- (f) More than 62% of lead plaintiffs in securities representative proceedings filed in 2011 were institutions, including the trustees of pension plans.²³

1.19 In relation to representative proceedings instituted in the Victorian Supreme Court:

- (a) Twenty-eight Part 4A representative proceedings (or 'group proceedings' as they are known in Victoria) had been brought in the Supreme Court of Victoria as at the end of 2009.²⁴ This equates to an average of 2.8 Part 4A proceedings per year since the regime commenced on 1 January 2000.²⁵
- (b) Several Part 4A proceedings were brought in respect of disputes that also led to the filing of Part IVA proceedings in the Federal Court.²⁶

14. The statistics included in this paper do not include cases issued in New South Wales under the representative proceedings legislative provisions, given they have only been introduced relatively recently.

15. See Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [1.200], citing Morabito V, *An Empirical Study of Australia's Class Action Regimes – First Report: Class action facts and figures* (Department of Business Law and Taxation, Monash University, 2009) and *An Empirical Study of Australia's Class Action Regimes – Second Report: Litigation funders, competing class actions, opt out rates, Victorian class actions and class representatives* (Department of Business Law and Taxation, Monash University, 2010).

16. Morabito, *First Report*, ibid 13.

17. Ibid 4.

18. Opting out of a representative action is a process discussed in further detail in Chapter 4. Broadly speaking, it means when a member of a representative group (as opposed to the named plaintiff) decides not to be a part of the class, the member decides to formally 'opt out' of the claim, so he or she is not bound by the end result.

19. Section 33A of the *Federal Court of Australia Act 1976* (Cth) provides that group member 'means a member of a group of persons on whose behalf a representative proceeding has been commenced'.

20. Morabito V, *An Empirical Study of Australia's Class Action Regimes – Second Report: Litigation funders, competing class actions, opt out rates, Victorian class actions and class representatives* (Department of Business Law and Taxation, Monash University, 2010) 4.

21. The concept of a 'closed class' is also discussed in further detail in Chapters 4 and 5.

22. Morabito V, *An Empirical Study of Australia's Class Action Regimes – Second Report: Litigation funders, competing class actions, opt out rates, Victorian class actions and class representatives* (Department of Business Law and Taxation, Monash University, 2010) 39.

23. NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2011 year-end review* (2011) 19.

24. The 28 proceedings were brought in respect of a total of 25 separate disputes.

25. Morabito V, *An Empirical Study of Australia's Class Action Regimes – Second Report: Litigation funders, competing class actions, opt out rates, Victorian class actions and class representatives* (Department of Business Law and Taxation, Monash University, 2010) 3, 24.

26. Ibid 24. Morabito noted that 'eight Part 4A proceedings concerned six disputes that also resulted in the filing of a total of eleven Part VIA proceedings'.

- (c) Opt-out orders were made in 14 of the 28 proceedings.²⁷
- (d) The average opt-out rate was 20.63%.²⁸

1.20 Having regard to the dearth of published judgments in relation to cases that have been litigated pursuant to Order 18 Rule 12 of the RSC, together with consultations with practitioners and interested parties both in Western Australia and throughout the country, it is apparent that while the empirical data above supports the conclusion that there are a relatively steady flow of representative actions being commenced in other jurisdictions, they do not appear to be litigated in our state courts. Further, from anecdotal discussions with practitioners practising in New South Wales and Victoria, it appears that traditional rules-based group proceedings are rarely, if ever, now commenced in those state courts.

1.21 Why is this occurring? First, it appears (from consultations with the practitioners and litigation funder who regularly commence proceedings in Western Australia) that litigants who do bring representative proceedings in Western Australia regularly contain within their pleadings a cause of action attracting federal jurisdiction. That invocation of federal jurisdiction has the result, as appears to be intended, that the proceedings are not conducted in Western Australian state courts.

1.22 Secondly, those same consultations disclose that cases which might otherwise fit the criteria to be progressed as a representative action in Western Australia (and do not have any characteristics which would attract federal jurisdiction) are simply not being issued as a representative proceeding because of uncertainty with the operation of Order 18 Rule 12 of the RSC.

1.23 The latter cases are more likely to be run as ‘group proceedings’, where individual writs are lodged on behalf of plaintiffs (or a single writ is issued by a large number of plaintiffs), that are ultimately either case managed by the Court together as a group, or they sit in a ‘holding pattern’ behind a test case, of which the findings may then have application to the broader group of claims.

1.24 In certain cases, this creates an undesirable effect in our courts in terms of efficiencies, case flow management, pressure on resources and access to justice. It also raises issues relating to costs of litigation and an unnecessary cost of maintaining the proceedings, having regard to the principles of case flow management.²⁹

The Commission’s view

1.25 Representative proceedings can be very significant where, for example, the relief sought is not economically viable to recover in a stand-alone action, but may be where a large number of claimants have a common interest; or where there are clearly a large number of affected individuals who have a substantially similar cause of action (and similar facts must be established), but with different levels of loss.

1.26 Multi-party court proceedings are an increasingly frequent method of litigating claims and have included matters such as shareholder actions (for losses incurred by directors, officers, auditors or others allegedly causing loss to shareholders),

27. Ibid 31. Accordingly, the remaining actions were either closed class matters or matters that proceeded by way of an ‘opt in’ regime.

28. Ibid.

29. That is, the general principles of managing claims within the court system so as to promote the just determination of litigation, dispose efficiently of the business of the court, maximise the efficient use of available judicial and administrative resources, and facilitate the timely disposal of business at a cost affordable by the parties. See *Rules of the Supreme Court 1971* (WA) O 1, r 4B(1).

cartel actions (enforcing competition law rights and obligations) and large-scale product liability class actions. Although, as demonstrated above, the numbers of such proceedings are still relatively small, that is not reflective of their significance, because a single representative proceeding may seek very substantial relief on behalf of a large number of plaintiffs.³⁰

1.27 Western Australian courts should not be an unattractive forum to conduct and resolve such disputes by reason of the uncertain application of the existing test for the valid commencement of representative proceedings.

TERMINOLOGY

1.28 This report concerns proceedings that are brought by numerous plaintiffs or against numerous defendants (or both) under a rule that permits a representative plaintiff to begin a legal proceeding on behalf of identified plaintiffs, or a class or plaintiffs (who may be identified only by the nature of their interest), or against numerous defendants (whether identified individually or by a class).

1.29 Discussion of representative proceedings in Australia must begin with the recognition that, in the popular imagination, proceedings with numerous plaintiffs or defendants are often influenced by perceptions of the ‘class action’ as that term is applied to multi-party litigation in the United States of America. The expression ‘class action’ has antecedents in English and Australian law, although it is often now associated with (or with what is perceived to be) American-style class actions. Such cases in the United States have a number of differences to their Australian counterparts.

1.30 As the High Court noted in *Carnie v Esanda Finance Corporation*:

The term ‘class action’ is used in various senses. Sometimes it is employed as a generic term to comprehend any procedure which allows the claims of many individuals against the same defendant to be brought or conducted by a single representative. At other times, when the ‘same interest’ stipulation was thought to preclude the application of the representative action procedure to actions for damages on the ground that each individual’s entitlement to damages would have to be independently assessed, the term ‘class action’ was employed to refer to an extension of the representative action to cover such actions.

The remaining sense in which the term ‘class action’ is used is by way of reference to the class action procedures prescribed and applied in the United States, such as the procedures prescribed by the Federal Rules of Civil Procedure, r. 23.³¹

1.31 Within Australia there are two separate models of representative proceedings. The first is the traditional rules-based representative proceeding. In many states (as seen in Chapter 3) this is the sole means of implementing a representative proceeding (other than naming each plaintiff (or defendant) in the statement of claim or writ). Rules governing representative proceedings are found in the *High Court Rules*, *Federal Court Rules* and *Court Procedure Rules* in the Australian Capital Territory; *Uniform Civil Procedure Rules* in Queensland; and in the *Supreme Court Rules* in the Northern Territory, South Australia, Tasmania and Victoria.³² Importantly,

30. See, eg, *Andrews v Australia & New Zealand Banking Group Ltd* [2012] HCA 30 (more commonly known as the ‘bank “over limit” fees case’) where the number of members of the representative class comprise of approximately 38 000 group members.

31. *Carnie v Esanda Finance Corporation* (1995) 182 CLR 398, 403–4 (Mason CJ, Deane & Dawson JJ) (footnotes omitted).

32. *High Court Rules 2004* (Cth) r 21.09; *Federal Court Rules* (Cth) O 6 r 13; *Court Procedure Rules 2006* (ACT) Pt 2.4 Div 2.4.7; *Supreme Court Rules* (NT) O 18; *Uniform Civil Procedure Rules* (Qld) rr 75ff; *Supreme Court Civil Rules 2006* (SA) rr 80–82; *Supreme Court Rules 2000* (Tas) rr 335, 336; *Supreme Court (General Rules Procedure) Rules 2005* (Vic) O 18. As will be clear from this list, those states that have

in the present context, traditional rules-based representative proceedings are the only form of representative proceedings currently accepted in Western Australian courts. Throughout this paper, the terms ‘**traditional proceedings**’ or ‘**rules-based proceedings**’ are used to refer to this type of representative proceeding governed by delegated legislation.

1.32 As discussed earlier, Part IVA led the way in 1992 in instituting a statute-based model for representative proceedings in Australia. Since that time models based on Part IVA have been enacted in Victoria³³ and New South Wales.³⁴ Although the New South Wales and federal legislation refers to ‘representative proceedings’ and the Victorian legislation to ‘group proceedings’,³⁵ in order to distinguish the statute-based schemes modelled on Part IVA from the traditional rules-based schemes discussed above, the terms ‘**Part IVA proceedings**’ or ‘**legislative schemes**’ are used.

ABOUT THIS DISCUSSION PAPER

1.33 This Paper examines the current traditional representative proceedings provision in Western Australia in Chapter 2 and representative proceedings provisions in other Australian jurisdictions in Chapter 3. Chapter 4 discusses some key features of Australian legislative schemes for representative proceedings, while Chapter 5 looks at how representative proceedings are governed in other countries. The final chapter – Chapter 6 – examines the need for reform in Western Australia and makes proposals indicating the Commission’s preliminary view on the shape of necessary reforms.

SUBMISSIONS

1.34 The Commission conducted a number of consultations to gather information concerning the terms of reference from October 2011 to August 2012.³⁶ In conjunction with the research conducted for this reference, these consultations informed the Commission’s conclusions and proposals for reform.³⁷ The Commission invites interested parties to comment on its proposals and to submit suggestions for reform of other aspects of representative proceedings that, although not discussed in this paper, are within the Commission’s terms of reference.

1.35 Submissions may be made by telephone, fax, letter or email to the address below. Those who wish to request a meeting with the Commission may telephone for an appointment.

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Submissions received by **31 May 2013** will be considered by the Commission in the preparation of its final report.

statutory schemes relating to representative actions (ie, the Commonwealth, and Victoria) still have representative proceedings provisions contained within their respective rules, although they are rarely invoked.

33. *Supreme Court Act 1958* (Vic) Pt 4A.

34. *Civil Procedure Act 2005* (NSW) Pt 10.

35. The term ‘group proceedings’ was used in 1988 by the ALRC in its report: ALRC, *Grouped Proceedings in the Federal Court* (1988).

36. Those consulted are listed in Appendix 3.

37. Refer Ch 6, p 95.

Chapter 2

Representative Proceedings in Western Australia

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Representative proceedings in Western Australian

2.1 This chapter discusses the origin of the current Western Australian rule relating to representative proceedings and examines how (if at all) the rule is currently being utilised in courts throughout the state.

HISTORICAL CONTEXT TO ORDER 18 RULE 12

2.2 Order 18 Rule 12 of the *Rules of the Supreme Court 1971* (WA) ('the RSC') has been in existence in Western Australia since the inception of the current version of the RSC. Other than a minor linguistic amendment to the rule, it has remained unaltered.¹ However, as noted in the previous chapter, the origin of the rule dates back to well before the RSC. It is commonly understood that the ability to bring a representative proceeding was made possible as a result of a rule observed in the English Court of Chancery from the 16th century.

2.3 Lord Macnaghten, in *Duke of Bedford v Ellis*,² explained the rationale for the rule:

The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice', to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.³

2.4 While the observation of Lord Macnaghten in *Duke of Bedford v Ellis* effectively summarised the justification for the rule, representative proceedings were actually being litigated some 150 years before.⁴ Professor Yeazell traces the progression of representative proceedings from its origin in English pre-industrial agrarian society, starting with the land tenure case of *Brown v Howard*.⁵ Yeazell explains how the notion of common interests have 'acted as a lowest common denominator'; and how 'courts have been able to claim that the element justifying group litigation among cohesive social groups is not the groups' cohesion but the presence of a shared interest for hundreds of years'.⁶

1. See *Government Gazette*, 28 June 2011, cl 6: where the word 'paragraph' appeared in O 18 it was substituted with the word 'subrule'. Its predecessor appeared in the *Rules of the Supreme Court 1955* (WA) as O 16 r 9.
2. [1901] AC 1.
3. Ibid 8.
4. As explained in considerable detail by Yeazell S, 'From Group Litigation to Class Action – Part I: The industrialisation of group litigation' (1980) 27 *University of California Los Angeles Law Review* 514.
5. 21 Eng Rep 960, 960 (ch 1701).
6. Yeazell S, 'From Group Litigation to Class Action – Part I: The industrialisation of group litigation' (1980) 27 *University of California Los Angeles Law Review* 514, 515.

2.5 In *Brown v Howard*,⁷ a group of tenants had to pay an additional fee for land otherwise owned by the Lord of Greystock Manor. The tenants alleged that the fee imposed by the Lord had become ‘fixed or at least limited by immemorial custom, generally at a proportion of the rent’ and ought not to have been increased.⁸ As observed by Yeazell ‘for the Court in *Brown* therefore, the ... question was whether the contributing tenants must be formal parties to the action to avoid the crime of maintenance’. The answer was no: ‘it is no maintenance for all the tenants to contribute for it is the case of all’.⁹

2.6 Yeazell also draws attention to what may well have been the first ever shareholder class action in the case of *Hichens v Congreve*.¹⁰ This case related to aggrieved shareholders who brought a proceeding against defendant directors who had failed to reveal to shareholders that they would retain a significant amount of profit in a stock release relating to Irish coal mines.

2.7 As explained by Yeazell, in the space of almost 150 years, through the Court of Chancery, the transformation of a group proceeding had evolved from individuals united by a social grievance to a litigation procedure utilised by aggrieved plaintiffs pursuing a purely economic interest:

Between *Brown* and *Hichens* the social context has been transformed. In the century and a quarter that separate the cases, we have moved from a rural, customary, agricultural world to one that is urban, individualistic, entrepreneurial-capitalist. The subject of group litigation has changed from allegedly an immemorial custom to all-too-modern stock fraud. Group litigation has begun its transformation into class litigation: it stands on the verge of becoming a generalized procedural device and has begun to enter the main stream of an emergent capitalist economy.¹¹

2.8 Upon the fusion of common law and equity in 1873 when the *Supreme Court of Judicature Act* was passed in England, it was then only a matter of time before representative proceedings as made available in the Court of Chancery were being prosecuted in English common law courts.¹²

Interpretation of Order 18 Rule 12

2.9 A review of the Western Australian authorities in relation to representative proceedings and the use of Order 18 Rule 12 of the RSC as a procedural device suggests that the local interpretation of the rule has received little judicial attention. Indeed, it appears that there has been only one Western Australian Court of Appeal case examining Order 18 Rule 12.

2.10 In the matter of *Minara Resources Ltd v Ashwin*,¹³ the Court of Appeal was required to deal with an application for leave to appeal together with an appeal relating to a decision dismissing an application for a stay of a representative proceeding. The proceeding related to an application on behalf of representative

7. 38 Eng Rep 917 (ch 1828).

8. Yeazell S, ‘From Group Litigation to Class Action – Part I: The industrialization of group litigation’ (1980) 27 *University of California Los Angeles Law Review* 514, 521.

9. Ibid 519, citing *Brown v Howard* 21 Eng Rep 960, 960 (ch 1701).

10. 38 Eng Rep 917 (ch 1828).

11. Yeazell S, ‘From Group Litigation to Class Action – Part I: The industrialisation of group litigation’ (1980) 27 *University of California Los Angeles Law Review* 514, 521

12. See Morabito V, ‘Statutory Limitation Periods and the Traditional Representative Action Procedure’ (2005) 5 *Oxford University Commonwealth Law Journal* 1, 113.

13. [2007] WASCA 107 (Wheeler J & McLure JA).

plaintiffs, who sought to register an interest over land pursuant to the *Native Title Act 1993* (Cth).

2.11 Master Sanderson, at first instance, observed that:

[The rule was] not often relied upon – either in this jurisdiction or in other States which all have a broadly similar provision. However, the New South Wales equivalent of this rule did receive detailed consideration by the High Court in *Carnie v Esanda Finance Corp Ltd*.¹⁴ From this decision, two rules emerge which are important for present purposes. First, once the existence of numerous parties and the requisite commonality of interest are ascertained, the rule is brought into operation subject only to the exercise of the court's power to order otherwise ... It is important to note that it is for the party commencing proceedings to determine whether or not it satisfies the requirements of O18 R12(1). No application has been made to the Court to authorise representative proceedings. Those proceedings can be commenced by the party and 'unless the Court otherwise orders' continued.

The second point that emerges from the decision is that when considering whether representative proceedings should be allowed to continue, matters to be taken into account include whether representative proceedings would involve greater expense and prejudice than other modes of trial, whether consent is required from the group members, the right of members to opt out, the position of persons under a disability, alterations to the description of the group, settlement and discontinuance of the proceedings and notices to the various group members.¹⁵

2.12 Master Sanderson held that it was appropriate to allow the action to proceed as a representative proceeding.¹⁶

2.13 Notwithstanding that the Court of Appeal (comprising Wheeler and McLure JA) was of the view that Master Sanderson was correct in his reliance upon the principles set out in *Carnie v Esanda Finance Corporation*,¹⁷ it subsequently held that the order that the action proceed as a representative proceeding should be set aside on the basis that 'it was not an order sought by either party'.¹⁸

2.14 The Court of Appeal held that having regard to the proper construction of Order 18 Rule 12:

[T]he Court has no power to order that a proceeding be a representative proceeding, as the Master has purported to do. That rule suggests that the only role for the Court is to determine either: whether the proceeding satisfies the description in r 12(1), if it is purportedly brought as a representative proceeding; or whether, assuming it satisfies the description, it should be continued as such a proceeding.¹⁹

2.15 While there remains no other appellate authority dealing with the Western Australian rule relating to representative proceedings, Cashman observes that 'given the similarity between these rules and the representative action rules in other jurisdictions, it is likely that they will be applied in the same way'.²⁰ On that basis, much of the discussion relating to traditional proceedings in Chapter 3 of this Paper has application to a discussion involving Order 18 Rule 12 of the RSC.

14. (1995) 182 CLR 398.

15. *Ashwin v Minara Resources Ltd* [2006] WASC 75, [19]–[20].

16. *Ibid* [21]–[22].

17. (1995) 182 CLR 398.

18. See *Minara Resources Ltd v Ashwin* [2007] WASC 107, [42].

19. *Ibid*.

20. Cashman P, *Class Action Law and Practice* (Sydney: Federation Press, 2007) 57.

2.16 However, as is noted by Jamieson,²¹ while it appears likely that the Western Australian courts will approach the interpretation of Order 18 Rule 12 in a manner consistent with Cashman's observation, increasing differences between the rules across the jurisdictions has led the High Court in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd*²² to caution that:

[T]he rules governing representative or group proceedings vary greatly from court to court. Two things of present significance follow from this. The first is that close attention must be given to the particular Rules of the Supreme Court upon which this litigation turns. The second is that the outcome of the present proceedings with respect to those Rules is not to be taken necessarily as indicating there would have been the same outcome in proceedings under the rules of other courts.²³

INADEQUACY OF THE CURRENT RULE

2.17 The absence of detailed procedural provisions in the RSC has created considerable uncertainty as to whether representative proceedings instituted in reliance on the rule may later be open to challenge for failing to meet the same interest requirement.

2.18 In *Esanda Finance Corporation Ltd v Carnie*,²⁴ Gleeson CJ noted the brevity of the rules then found in New South Wales as compared to class action frameworks in Canada and concluded that:

[I]f class actions of the kind available in the Federal Court are to be permitted in New South Wales, then this should only be done with the backing of appropriate legislation or rules of Court, adequate to the complexity of the problem, and appropriate to the requirements of justice.²⁵

2.19 In 1988 the ALRC identified specific deficiencies in the traditional proceedings regime then extant in the federal jurisdiction as:

- (a) individuals have no means of obtaining legal remedies in courts where the amount of the claim, though significant, does not warrant the cost of legal proceedings; in any event, where claims arise from multiple wrongdoing, individual litigation is not an efficient use of resources
- (b) alternative, less expensive means of resolving small claims are not available in all cases; alternate means require individual action and are inadequate to deal effectively with multiple wrongdoing
- (c) there is no effective federal procedure by which claims for damages arising from multiple wrongdoing can be grouped together so that common issues can be dealt with at the same time, thus reducing the costs of litigation to the individual and avoiding a multiplicity of proceedings
- (d) There is no federal procedure enabling proceedings to be brought for damages on behalf of a group or class of people who have suffered loss or injury as a result of a multiple wrong.²⁶

21. Jameison P, 'Representative Proceedings – Need for Reform of Supreme Court Rules (WA) O18 R12' (Unpublished memo, Supreme Court of Western Australia, 30 March 2011) 4.

22. (2006) 229 CLR 386.

23. Ibid 417.

24. (1992) 29 NSWLR 382.

25. Ibid 388–90. See also the discussion in relation to traditional proceedings in Grave D & Adams K, *Class Actions in Australia* (Sydney: Law Book Company, 2005) 15, [1.270].

26. ALRC, *Grouped Proceedings in the Federal Court: Summary of report and draft legislation*, Report No 46 (1988) [7].

2.20 As well as the deficiencies identified above by the ALRC (which, in the view of the Commission, have application to the current Western Australian rule) the interpretation of the ‘same interest’ requirement has provided fertile ground for lawyers to argue at an interlocutory stage as to whether a representative proceeding can validly be brought. Such argument is certainly not new.²⁷

2.21 The narrow scope of the same interest test was summarised effectively by the Law Reform Commission of Hong Kong in its 2012 report relating to class actions.²⁸ In that report, the Hong Kong Commission observed that the practical impact of the principles set out by Lord Macnaghten in *Duke of Bedford v Ellis* ‘is that all class members have to show identical issues of fact and law, and have to prove’:²⁹

- (a) the same contract between all plaintiff class members and the defendant – a representative action could not be founded upon separate contracts between each of the class members and the defendant. Separate contracts do not have a ‘common source of right’ and are ‘in no way connected’.³⁰

The result is that a representative action is not available in consumer cases, even where each class member’s claim arises out of a ‘standard form’ contract with the same defendant. In other words, a representative action is unavailable where it is otherwise likely to have most effect.

- (b) the same defence (if any) pleaded by the defendant against all the plaintiff class members – if a defendant can raise separate defences against different plaintiff class members, separate trials may be required and liability cannot be decided in the same proceedings. On the other hand, it would be unjust to disallow the defendant from raising such defences which could have been raised in a unitary action.

The result is that the mere availability of a defence against one member of a plaintiff class is sufficient to deny the class the ‘same interest’ in the proceedings.

- (c) the same relief claimed by the plaintiff class members – no representative action could be brought where the relief sought by the representative plaintiff is damages on behalf of all class members severally.³¹ Since proof of damages is unique to each class member and the facts underlying the measure of damages would be different, the damages awarded may not be the same for all class members. This further limits the utility of the representative procedure. The phrase ‘beneficial to all’ in Lord Macnaghten’s statement can also be interpreted to mean that ‘the plaintiff must be in a position to claim some relief which is common to all’, but there is no objection if he also claims relief unique to himself.³²

The result is that, because of the same relief requirement, representative proceedings cannot be used to claim damages where some class members do not have a claim for relief identical to those of all other members, even though their claims have the same factual basis (for example, where passengers on a ship which sinks can claim personal

27. Jameison P, ‘Representative Proceedings – Need for Reform of Supreme Court Rules (WA) O18 R12’ (Unpublished memo, Supreme Court of Western Australia, 30 March 2011) 7. See also Mulheron, R, *The Class Action in Common Law legal Systems. A comparative perspective* (Oxford: Hart Publishing, 2004) 80.

28. Law Reform Commission of Hong Kong, *Report on Class Actions* (2012).

29. *Ibid* 1.8, where the following quote appears with original footnotes (emphasis omitted).

30. *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA) 1040 (Fletcher Moulton LJ).

31. *Ibid* 1040–1 (Fletcher Moulton LJ). In this case, each of the class members had a separate measure of damages (ie, the value of their lost cargos) and had no interest in the damages claimed by the representative plaintiffs. Hence, proof of damages was personal to each class member and had to be proved separately since the facts underlying the measure of damages differed.

32. *Ibid* 1045 (Buckley LJ).

injury or property damage or both). Proof of damage is a necessary ingredient of a tortious cause of action, and the representative plaintiff cannot, by proving his or her own damage, claim to represent the class and obtain relief on behalf of all class members.³³ Hence, equitable relief, such as a declaration or injunction, has normally, if not invariably, been the only form of relief which has been awarded in English representative actions.³⁴

2.22 So while it may be argued that the decision of the High Court in *Carnie v Esanda Finance Corporation Ltd*³⁵ allows the same interest requirement in representative proceedings to be understood more broadly than in past cases,³⁶ it remains the case that almost any traditional proceeding in which damages are sought will be susceptible to dispute on the basis of failing to meet the same interest test. This has the result that – in addition to the risk of conducting proceedings at all – there is added the risk that whether or not a procedural requirement for the same interest has been satisfied may not be known until the end of the proceedings. That procedural risk, unrelated to the merit (or otherwise) of the plaintiff's case, is the consequence of the rule in its current form.

Limitation periods and Order 18 Rule 12

2.23 In addition to the restrictions identified above (and particularly those in relation to the inability to use a representative proceeding provision such as Order 18 Rule 12 of the RSC with any confidence in relation to a claim for damages), another aspect of the limited application of the rule relates to limitation periods that may apply to claims otherwise brought as representative proceedings.

2.24 As observed by Professor Morabito:

[I]t has been acknowledged that the uncertainty that has been created by the excessive brevity of the rules governing representative actions greatly hinders the ability of such proceedings to secure the social benefits described above [i.e., access to justice, reduced costs, increased efficiency and ensuring defendants are not exposed to conflicting judgments]...

In both representative proceedings and class actions, the only claimants who are named on the originating process are the representative plaintiffs. Consequently, as far as the personal causes of action of the representative plaintiffs are concerned, time stops running when the representative proceedings are initiated before the expiry of the limitation period.³⁷

33. '[T]here was a long-held view that, under the English representative rule, "if the cause of action of each member of the class whom the plaintiff purported to represent was founded in tort and would, if established, be a separate cause of action and not a joint cause of action belonging to the class as a whole, no representative action could be brought." Proof of damage was a necessary ingredient of a tortious cause of action, and the representative plaintiff could not, by proving his or her own damage, claim to represent the class and obtain relief on behalf of all class members.' See R Mulheron, *The Class Action in Common Law Legal Systems: A comparative perspective* (Oxford: Hart Publishing, 2004) 82.

34. *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229, 244, 255. His Lordship went on to say that even with injunctive relief, there was the 'separate defences' problem – class members needed to prove separately an apprehension of injury and were subject to individual defences of laches or acquiescence.

35. (1995) 182 CLR 398.

36. See the discussion in Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [2.520]–[2.530].

37. Morabito V, 'Statutory Limitation Periods and the Traditional Representative Action Procedure' (2005) 5 *Oxford University Commonwealth Law Journal* 113, 114–15.

2.25 After reviewing the authorities in relation to the interaction between limitation of actions legislation and traditional representative actions, Morabito concluded:

There are conflicting judicial conclusions as to whether limitation periods constitute an obstacle for those class members who wish to be appointed as plaintiffs in the representative proceedings where the Court holds that the proceedings should not have been brought as representative proceedings.³⁸

2.26 As Curthoys and Kendall highlight,³⁹ the preferred view in relation to the Western Australian rule is that the limitation periods for the recovery of damages continue to run against any member of the class of representative persons until a separate action is brought.⁴⁰ This position can be distinguished in the federal framework. In *Fostif Pty Ltd v Campbell's Cash & Carry Pty Ltd*,⁴¹ it was held that 'whether the rule for the commencement of representative proceedings was properly engaged, limitation periods stopped for the whole of the representative group'.⁴²

CONCLUSION

2.27 It appears clear that, despite having its origins as a rule considered to be created for convenience, Order 18 Rule 12 of the RSC is unlikely to be used by plaintiffs for the purpose of litigation where there are many potential group members. Its restrictive scope makes the proceeding vulnerable to be struck out; and if struck out, only the named plaintiff is protected from the expiration of time limits. Having regard to those matters, Order 18 Rule 12 of the RSC does not appear adequately to facilitate the efficient and certain commencement of proceedings for parties in actual or contemplated multi-party litigation.

38. Ibid 138.

39. Curthoys J & Kendall C, *Seamans's Civil Procedure in Western Australia* (LexisNexis, looseleaf).

40. See *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] CH 229, 255.

41. (2005) 63 NSWLR 203.

42. Ibid [201] (Mason P).

Chapter 3

Representative Proceedings in Other Australian Jurisdictions

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Introduction

3.1 The terms of reference require the Commission to take into account ‘recent developments regarding representative proceedings in other jurisdictions both nationally and internationally’. The developments within the Australian context can be divided into two types: those jurisdictions that have adopted statutory frameworks that allow for representative actions to proceed through federal or state courts (‘Part IVA proceedings’); and those which have retained the traditional rules-based representative proceeding provisions (‘traditional proceedings’), but have either amended them (as in South Australia) or left them unaltered (as in Western Australia).

3.2 This chapter examines developments in Australia in both of those jurisdictional frameworks. An overview of some of the overseas jurisdictions is undertaken in the following chapter.

Part IVA proceedings

COMMONWEALTH

3.1 In 1992 the Commonwealth Parliament introduced Part IVA of the *Federal Court of Australia Act 1976* (Cth) (Part IVA) entitled ‘representative proceedings’.¹ The introduction of this legislation took place four years after the Australian Law Reform Commission (ALRC) made its recommendations² and 15 years after the reference was given to the ALRC.³

3.2 According to the second reading speech, Part IVA was introduced to:

- (a) provide a mechanism where many people are affected but each person’s loss is small and it is not economically viable to recover in individual actions; and
- (b) deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent.⁴

3.3 In short, Part IVA operates such that a group proceeding is validly commenced, even if it is subsequently deconsolidated or dealt with otherwise than as a representative proceeding.⁵ The constitutional validity of Part IVA was challenged in *Femcare Ltd v Bright*,⁶ and was found to be valid by the Full Court of the Federal Court.⁷

VICTORIA

3.4 Many attempts have been made to improve the representative proceedings regime in Victoria. An early reform occurred in 1984. At that time, s 62(1C) was introduced into the *Supreme Court Act 1958* (Vic) to allow the bringing of representative actions in certain circumstances. It provided:

Where provision is made by any Act, law or rule for two or more persons to be joined in one action as plaintiffs one or more of such persons may ... sue on behalf of or for the benefit of all the persons who may be so joined.

3.5 This provision was not without problems. In *Marino v Esanda Ltd*,⁸ Tadgell J found that the rules did not justify the joining of all members of the ‘class’ of plaintiffs. It was held that representative proceedings could only be brought where the actions arose from the same series of transactions.⁹

1. Part IVA was introduced by way of the *Federal Court of Australia Amendment Act 1991* and commenced operation on 5 March 1992.

2. ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988).

3. Ibid.

4. Commonwealth, Senate, *Parliamentary Debates*, Senate, 12 September 1991, 1447 (Senator Michael Carter Tate),

5. For a detailed exposition of the provisions of Part IVA, see below ‘Key Features of the Legislative Schemes’.

6. (2000) 100 FCR 33.

7. See Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [2.240].

8. [1986] VR 735, 714.

9. O 16 r 1 of the *Supreme Court Rules* (Vic) allowed plaintiffs to sue jointly for the ‘same transaction or series of transactions’, and it was found that the plaintiffs’ right to relief did not arise from the same series of transactions: *ibid* 740–1.

3.6 Sections 34 and 35 were introduced into the *Supreme Court Act 1986* (Vic) in 1986 in response to the decision in *Marino v Esanda Ltd*¹⁰ to provide for new procedures to govern representative proceedings.¹¹ In the 1992 case of *Zentathope v Bellotti*,¹² Tadgell J described the amendments as ‘so attenuated and imprecise as to leave almost to guess work what the draftsman had in mind’ and recommended their repeal.¹³

3.7 In 1995 an expert report of the Victorian Attorney-General’s Law Reform Advisory Council recommended the adoption of a legislative scheme modelled on Part IVA of the *Federal Court of Australia Act 1976* (Cth).¹⁴ This recommendation was not immediately taken up by Parliament. In December 1999 the Supreme Court of Victoria took action to overcome the deficiencies in the *Supreme Court Act* by amending the *Supreme Court (General Civil Procedure) Rules 1996* (Vic) and introducing, in Order 18A, a representative proceedings regime modelled on Part IVA. A challenge to the validity of the amendments was later rejected by the Court of Appeal.¹⁵

3.8 Following a change of government, in late 2000 the Victorian Parliament passed amendments to the *Supreme Court Act 1986* (Vic) introducing Part 4A which, like Order 18A, was also modelled on Part IVA of the of the *Federal Court of Australia Act 1976* (Cth).¹⁶ Parliament’s stated intention in this action was to ‘place the validity of the procedure [established by Order 18A] beyond doubt’.¹⁷ Although the amendments creating Part 4A received royal assent on 28 November 2000, they were deemed to have commenced on 1 January 2000 to coincide with the commencement date of Order 18A. The legislative regime also survived a challenge to its validity in *Mobil Oil Australia Pty Ltd v The State of Victoria*.¹⁸

3.9 As a result of these developments, Victoria now has both a rules regime and a legislative regime; however, the legislative regime has some restrictions in its scope of operation. Specifically, Part 4A does not apply to proceedings involving deceased estates or property subject to a trust, or to proceedings commenced under Order 18 or under the now repealed ss 34 and 35 of the *Supreme Court Act*.¹⁹

3.10 The traditional representative proceeding rule is still contained within Order 18 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic). Order 18.02 provides that ‘[a] proceeding may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more persons having the same interest as representing some or all of them’. Order 18.01 applies ‘where numerous persons have the same interest in any proceeding’, but *does not apply* to a proceeding under

10. [1986] VR 735.

11. Victoria, *Parliamentary Debates*, Legislative Council, 5 December 1986, 1659 (Jim Kennan, Attorney-General), reproduced in Grave D & Adams K, *Class Actions in Australia* (Sydney: Lawbook Co, 2005) 53–4.

12. Unreported, Victorian Supreme Court, Appeal Division, 2 March 1992 (Brooking, Fullagar & Tadgell JJ). See also, Grave & Adams, *ibid* 54; Morabito V & Epstein J, *Class Actions in Victoria – Time for a New Approach*, Expert Report No 2 (Melbourne: Victorian Attorney-General’s Law Reform Advisory Council, 1997) [3.1]–[3.37].

13. *Ibid* [24]; see also [12] (Brooking J).

14. Morabito V & Epstein J, *Class Actions in Victoria – Time for a New Approach*, Expert Report No 2 (Melbourne: Victorian Attorney-General’s Law Reform Advisory Council, 1997). See also, the recommendation of the judges of the Court of Appeal to this effect in *Schutt Flying Academy Australia Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545, 549 (Brooking JA).

15. *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd*, *ibid*.

16. *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic).

17. Victoria, *Parliamentary Debates*, Legislative Council (4 October 2000) 431 (R Thomson).

18. (2002) 211 CLR 1. This case related to the manufacture and supply of aviation fuel by Mobil. For a discussion as to the factual and procedural background as well as the legal consideration of the provisions by the High Court, see Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [2.452]–[2.465].

19. *Supreme Court Act 1986* (Vic) s 33B(2).

Part 4A; or to a proceeding concerning the administration of the estate of a deceased person or property subject to a trust.²⁰

NEW SOUTH WALES

3.11 Up until 2005, Part 8 Rule 13 of the *Supreme Court Rules 1970* (NSW) contained a representative proceeding provision similar to the current provision in the *Rules of the Supreme Court 1971* (WA). In 2005, the provision was replaced by rules 7.4 and 7.5 of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR'). The rules in the UCPR left the provisions that were previously set out in Part 8 Rule 13 essentially unchanged.

3.12 In 2006, Gummow, Hayne and Crennan JJ of the High Court noted that the UCPR 'contained few provisions equivalent to those found in the more elaborate regulation of representative proceedings provided by Part IVA'.²¹ In *O'Sullivan v Challenger Managed Investments Ltd*,²² the New South Wales Supreme Court subsequently 'reinforced the restrictive scope of representative actions', leading to amendment of Rule 7.4 in November 2007.²³ This amendment made the regime more comprehensive than other jurisdictions with traditional representative proceedings regimes by making it apply to:

- (a) Any matter in which:
 - (i) Numerous persons have claims against the same person;
 - (ii) The claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
 - (iii) The claims of all those persons give rise to a substantial common issue of law and fact; or
- (b) Any matter in which numerous persons have the same liability.

3.13 The amendments theoretically made Rule 7.4 similar to the regime found in Part IVA of the *Federal Court of Australia Act 1976* (Cth);²⁴ however, the rule did not address the procedural steps of representative proceedings in the same detail and, as a result, uncertainty as to the potentially restrictive scope of the rule remained.

3.14 The *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) repealed Rule 7.4 and established Part 10 of the *Civil Procedure Act 2005* (NSW). Part 10, which came into operation on 4 March 2011, is a statutory representative proceedings regime substantially similar to that found in Part IVA.

DIFFERENCES BETWEEN THE LEGISLATIVE SCHEMES

3.15 As can be seen by a review of the comparative table at Appendix 2, there are a number of differences between Part 10, and Part IVA and Part 4A²⁵ including differences in language between the regimes in relation to the description of proceedings, parties and method of commencement of proceedings.²⁶ In addition,

20. *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 18.01.

21. *Campbells Cash & Carry Pty Ltd v Postif Pty Ltd* (2006) 229 ALR 58, [47]. See also *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382, 388 (Gleeson CJ).

22. (2007) 214 FLR 1.

23. *Ibid* [41], as noted in Clark S & Harris C, 'Class Actions in Australia: (Still) a work in progress' (2008) 31 *Australian Bar Review* 63, 66.

24. Legg M & Dowler J, 'The Class Actions Juggling Act' (2010) 48 *Law Society Journal* 59, 59.

25. For further discussion, see Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [2.495]. Provisions that are substantially similar across all three regimes do not feature in Appendix 2.

26. Grave, Adams & Betts, *ibid* [2.495].

Part 10 of the New South Wales legislation contains a provision that allows a court to order that a proceeding under that Part be discontinued if the representation of the interests of the group members is inadequate.²⁷ The same section also expressly permits an action to proceed on the basis of a ‘closed class’,²⁸ whereas there had been some conjecture as to whether this could occur under the federal and Victorian provisions.²⁹

3.16 However, perhaps the largest difference relates to standing.³⁰ Unlike the New South Wales legislation,³¹ the federal and Victorian provisions do not expressly allow a group member of a class action to have a claim against only one of the defendants in a proceeding where there are multiple defendants named.

KEY FEATURES OF THE LEGISLATIVE SCHEMES

3.17 Notwithstanding the differences noted above, the Victorian and New South Wales legislative schemes are substantially similar to the federal regime found in Part IVA of the *Federal Court of Australia Act*. The key features of the legislative schemes are discussed below. Unless specific reference is made to the Victorian or New South Wales legislation, a reference in the following to a section should be taken as a reference to the section in Part IVA.

Commencement of the proceeding

3.18 Section 33C of Part IVA³² establishes the threshold for commencing Part IVA proceedings and is central to the statutory regime.³³ There are three requirements for the commencement of a Part IVA proceeding:

- (a) there must be a claim by seven or more persons against the same person;
- (b) the claims must arise out of related circumstances; and
- (c) there must be a substantial common issue of law or fact.³⁴

Nature of a ‘claim’

3.19 The word ‘claim’ in s 33C has been interpreted broadly and is not limited to a cause of action.³⁵ It encompasses ‘everything that might lawfully be brought before the Court for a remedy’.³⁶ Section 33C does not require that the claimants have ‘the same claim’, but they must satisfy the requirements of the section.³⁷

3.20 Lindgren J set out the key aspects of determining whether a claim exists for the purpose of s 33C in *ACCC v Giraffe World Australia Pty Ltd*,³⁸ among them that the claims must be recognised by the law; and that they are not confined to claims to relief as of right – s 33C(2)(a)(i) allows claims for discretionary equitable relief.

27. See *Civil Procedure Act 2005* (NSW) s 166.

28. For discussion on the concept of a closed class, see Chapter 4.

29. Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [2.495].

30. This issue was at the heart of the case *Philip Morris v Nixon* [1999] 165 ALR 515, discussed in Chapter 4.

31. See *Civil Procedure Act 2005* (NSW) s 158(2).

32. See also *Civil Procedure Act 2005* (NSW) s 157; *Supreme Court Act 1986* (Vic) s 33C.

33. *Mobil Oil Australia Pty Ltd v The State of Victoria* (2002) 211 CLR 1, [35] (Gaudron, Gummow & Hayne JJ).

34. Grave D & Adams K, *Class Actions in Australia* (Sydney: Lawbook Co, 2005) 91.

35. *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209, 213–14.

36. *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179, [20].

37. *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209, [7].

38. (1998) 84 FCR 512, 523 (per Lindgren J).

In addition, Lindgren stated that ‘it is not required that the persons who have the claims be aware that they have them, let alone that they have asserted them’.³⁹

3.21 This last point is particularly important given the nature of the proceeding. In an opt-out scheme (like the legislative schemes operating in Australia), it is entirely feasible that possible claimants have no real knowledge of the type of claim they have, any requirement to the contrary would have a deleterious effect upon the composition of the class.

Number of claimants

3.22 Section 33C(1)(a) requires seven or more persons to have a claim;⁴⁰ however, it is not necessary to name or specify the number of group members (s 33H). Where the number of group members proves to be less than seven persons, the court may in its discretion order proceedings to continue as a representative proceeding (s 33L).

3.23 Wilcox J explained the apparent contradiction in these provisions by stating that the object of s 33C(1) is to ‘weed out’ claims that obviously involve less than seven persons.⁴¹ It is not, therefore, a true threshold requirement. The approach to s 33C(1)(a) is to ask whether there is a likelihood of there being seven or more persons, on the assumption that the facts were as alleged.⁴²

3.24 In *Falfire Pty Ltd v Roger Davis Stores Pty Ltd*,⁴³ 32 of the 35 group members opted out and the proceedings did not continue as a representative action. In *Symington v Hoechst Schering Agrevo Pty Ltd*,⁴⁴ it was not clear whether seven or more persons had the same claim. Wilcox J said the claimants must satisfy the court ‘at some appropriate time’ that the claim was shared by seven persons. In *Council for the City of the Gold Coast v Pioneer Concrete (Qld)*,⁴⁵ Drummond J exercised the discretion under s 33N to order the proceedings not to proceed as a representative action.

The class representative

3.25 As pointed out by Grave, Adams and Betts, Part IVA ‘provides little prescription of the functions of the representative party. There are no express requirements of the representative party other than that they need standing to bring their own claim.’⁴⁶

3.26 So what happens when, for whatever reason, the individual who is selected as the class representative is no longer considered adequately to represent the interests of the class? This can occur if there is a tension or a contradiction between what might be required to prove the class representative’s claim as opposed to a group member’s claim, leading to an inherent conflict.

39. Ibid.

40. Note, in its report the ALRC did not recommend a minimum number of claimants as part of the threshold requirements, but did include an equivalent of s 33L giving the court discretion to disallow proceedings if less than seven claimants appeared: ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) Appendix A, Cl 10.

41. *Tropical Shine Holdings Pty Ltd (t/as KC County) v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 462 (Wilcox J).

42. See, eg, *ibid*. See also Wilcox M, ‘Representative Proceedings in the Federal Court of Australia: A progress report’ (1996–67) 15 *Australian Bar Review* 91, 92.

43. [1996] 853 FCA 1.

44. (1997) 78 FCR 164.

45. (1997) ATPR 444076.

46. Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [5.100].

3.27 While s 33T of the *Federal Court of Australia Act* empowers the court to remove a representative party if it appears to the court that the representative party ‘is not able adequately to represent the interests of the group members’ this does not solve the problem of a conflict between the representative and a group member. As observed by Gleeson CJ, ‘this is not a mechanism for the plaintiff to be replaced on the application of group members who disagree with the way the case is being run’.⁴⁷

3.28 There is presently no express rule that sets standards to which the representative plaintiff must adhere, nor any express test to determine whether there is a failure to represent the class. The Commission will receive and consider submissions about the need for codification of the role of the representative plaintiff and requirements for removal of a representative plaintiff in certain circumstances. The Commission’s preliminary view is that the codification of rules to deal with a conflict between the representative plaintiff and the class is not necessary at this point in time.

Plaintiff groups – open classes and closed classes

3.29 By default, claimants are ‘in’ the representative action unless they take the step of opting out of the proceedings. Sections 33E(1), 33J and 33ZB create what is known as an opt-out scheme. The practical effect of a default opt-out framework is that all plaintiffs who have a common interest in the litigation remain in the representative action unless they make a deliberate decision to leave the group.

3.30 Often, plaintiffs seek to restrict representative proceedings to persons who are members of closed classes, such as those who may specifically retain the solicitors conducting the proceedings, or group members who enter into a contract with the litigation funder who has agreed to fund the litigation on behalf of the plaintiff group.⁴⁸

3.31 An example of a representative action that was issued (and subsequently resolved) by way of a closed class was *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited*,⁴⁹ more commonly known as the Visy/Amcor class action.

3.32 The Visy/Amcor class action arose out of an allegation of price fixing and market sharing in the cardboard packing industry. In that case the plaintiff group was defined as persons who had purchased and paid more than \$100 000 for corrugated fibreboard packaging between 1 May 2000 and 1 May 2005.⁵⁰ This had the effect of restricting the class of persons who could take part in the action to approximately 7,500 claimants.⁵¹

3.33 Proceeding by way of a closed class will (perhaps always) make the management of the claim less costly for solicitors or litigation funders because there will be fewer plaintiffs with whom to deal and it is likely those claims will have a higher claim value. In addition, closed classes may narrow the issues in dispute in terms of matters that may need to be proved at trial in order to establish a common interest. For example, in a hypothetical representative action on behalf of smokers

47. *Mobil Oil Ausatralia Pty Ltd v the State of Victoria* (2002) 211 CLR 1, [5], cited in Grave, Adams & Betts, *ibid* [5.400].

48. *Ibid*.

49. [2011] FCA 167.

50. See ‘Notice of Proposed Settlement – Amcor/Visy Class Action (Cardboard Box Cartel)’ in Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [A7.700].

51. ‘Amcor, Visy Settle Cartel Class Action Out of Court’, *The Australian*, 8 March 2011 <<http://www.theaustralian.com.au/archive/business-old/amcor-visy-settle-cartel-class-action-out-of-court/story-e6fgr98x-1226017902626>>.

who it is said contracted lung cancer as a result of inhalation of tobacco smoke, restricting the class of plaintiffs to those with a particularly high level of tobacco consumption might facilitate proof of causation for that class (restricted, as it will be, by a previously identified minimum level of consumption).

3.34 A closed class will also facilitate requests for further and better particulars of the claims by defendants of each group member, because the claimants are identified with greater precision (and are likely to be fewer and more readily identifiable).⁵²

3.35 However, the effect of closed classes is that it effectively converts the statutory opt-out regime into an opt-in system.⁵³ Although the courts have allowed this practice,⁵⁴ the justice of closed classes has been questioned.⁵⁵

3.36 One concern is that members who fail to register might miss out on the ability to claim if they do not commence proceedings of their own or join another representative action (if available).⁵⁶ For a further discussion of the tension between closed classes and the opt-out and an opt-in system, see Chapter 4.

Proceeding with a claim against multiple respondents

3.37 One of the key distinctions in the federal and Victorian legislative schemes, as opposed to the New South Wales scheme, relates to the ability to proceed in a representative action against multiple respondents.

3.38 In the federal and Victorian schemes, where one applicant is suing multiple respondents on behalf of a group then that applicant must have a claim against each respondent.⁵⁷ The requirement that the claims be against the same respondent becomes complex when there are multiple respondents. There are conflicting authorities on the question whether every group member must have a claim against each respondent. These authorities may be summarised as follows:⁵⁸

- (a) In *Nixon v Phillip Morris (Australia) Pty Ltd*,⁵⁹ Wilcox J (following his decision in *Symington v Hoechst Schering Agrevo Pty Ltd*⁶⁰) said that all applicants must have a claim against each respondent. In the subsequent appeal,⁶¹ the applicants conceded this point.
- (b) In *Bray v F Hoffman-La Roche Ltd*,⁶² two judges held that there was no such requirement.
- (c) Kiefel J in *Milfull v Terranora Lakes County Club Ltd (in Liq)*⁶³ followed the decision in *Bray*.
- (d) However, in *Johnstone v HIH Insurance Ltd*,⁶⁴ the trial judge followed the *Philip Morris* decision taking the comments in *Bray* as obiter only.

52. *Meaden v Bell Potter Securities Limited* [2011] FCA 136.

53. King & Wood Mallesons, *Class Actions in Australia: The year in review 2011* (2011) 8.

54. *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

55. King & Wood Mallesons, *Class Actions in Australia: The year in review 2011* (2011) 9.

56. See, eg, *Thomas v Powercor Australia limited* [2011] VSC 614, [31]–[35], class action arising from 2009 Victorian bushfires.

57. *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164, 166.

58. For the full discussion of these conflicting Full Court of the Federal Court authorities, see Grave D & Adams K, *Class Actions in Australia* (Sydney: Lawbook Co, 2005) 103–13.

59. (1999) 95 FCR 453.

60. (1997) 78 FCR 164, 167.

61. *Philip Morris (Australia) Ltd v Nixon* [2000] 170 ALR 487.

62. (2003) 130 FCR 317.

63. (2004) 214 ALR 228.

64. [2004] FCA 190.

(e) *Guigielmin v Trescowthick (No 2)*⁶⁵ followed *Johnstone* in applying the *Phillip Morris* rule.

3.39 Concern with the effect of *Phillip Morris* is ongoing;⁶⁶ however, the issue was resolved for New South Wales when it introduced its legislative scheme for representative proceedings. Section 158(2) of the *Civil Procedure Act 2005* (NSW) provides that representative proceedings may be taken against several defendants, even if not all group members have a claim against all defendants.⁶⁷

3.40 To the extent the absence of enabling legislation has become an issue in the federal and Victorian jurisdictions where such a situation may apply, the Commission is informed that the practice undertaken by plaintiff law firms has been to issue multiple claims against separate respondents and then apply to consolidate them into a unified representative action. This appears to occur without significant resistance from defendants or the court and, accordingly, appears to be a de facto solution to the *Phillip Morris* issue.

Claims must arise out of related circumstances

3.41 Section 33C(1)(b) provides that claims the subject of representative proceedings must be ‘in respect of [or] arise out of the same, similar or related circumstances’.⁶⁸ Whether the circumstances giving rise to the claims are sufficiently related requires a practical judgement.⁶⁹

3.42 In *Connell v Nevada Financial Group Pty Ltd*,⁷⁰ 16 group members represented by six applicants brought an action against the respondent for misleading representations made to different group members at different times and in a different manner. Drummond J held that, although each representation was made at a different time, they were made by representatives of the respondent and had the same substance and effect, thereby satisfying s 33C.⁷¹

3.43 *Phillip Morris (Australia) Ltd v Nixon*⁷² concerned a group that suffered injury from smoking cigarettes produced by Philip Morris after seeing the company’s advertising. The Full Court of the Federal Court found that the claims were not sufficiently related because the specific advertisement each smoker saw and the effect on them had to be related.

3.44 The plaintiffs in *Williams v FAI Home Security Pty Ltd (No 2)*⁷³ commenced proceedings alleging misleading representation concerning home alarm systems sold through door-to-door sales. Goldberg J, agreeing with Drummond J in *Connell*, found that the subject matter and effect of the various representations were sufficiently linked.

65. [2005] FCA 138.

66. See, eg, *Richards v Macquarie Bank Ltd* [2011] FCA 1085, 1087–8.

67. For further discussion, see Chapter 3.

68. Note that s 33C(2)(b) allows proceedings to be brought relating to ‘separate contracts or transactions between the respondent in the proceedings and individual group members’.

69. Grave D & Adams K, *Class Actions in Australia* (Sydney: Lawbook Co, 2005), 114. *Zhang v Minister for Immigration Local Government and Ethnic Affairs* (1993) 45 FCR 385, 404 (French J).

70. (1996) 139 ALR 723.

71. *Ibid* 728, 730 (Drummond J).

72. (2000) 170 ALR 487.

73. [2000] FCA 726.

3.45 *Guiglielmin v Trescowthick (No 2)*⁷⁴ was brought by shareholders alleging misleading and deceptive representations made by the directors of a company. The applicants relied on 77 documents on which the group members may have relied when purchasing their shares. Despite diverse representations and the extended time over which they were made, Mansfield J allowed the representative action.

Common issue of law or fact

3.46 The third threshold requirement under s 33C⁷⁵ – that the claims give rise to a substantial common issue of law or fact – may be difficult to establish in circumstances where there is more than one respondent.⁷⁶ It requires the identification of at least one issue of law or fact common to all claims.⁷⁷

3.47 In *Brisbane Broncos Leagues Club v Alleasing Finance Australia Pty Ltd*,⁷⁸ the court confirmed that there need only be one common issue and it need not be large or of major importance to the litigation, as proceedings can be discontinued as class actions at a later stage if there is no benefit in determining the common issues together.

Costs and security for costs

3.48 Group members are immune from an adverse costs order with the exception of costs authorised by ss 33Q or 33R.⁷⁹ Section 33Q allows the court to establish a sub-group to address issues common to the claims of some of the group members. Where a sub-group is established, the appointed representative party is liable for the costs associated with the determination of the common issues. Under s 33R, an individual may be permitted to appear to determine an issue relating to that person and will be liable for the costs of that determination.

3.49 In Australian representative proceedings costs generally follow the event; that is, the loser pays. As Grave, Adams and Betts point out, while a plaintiff effectively volunteers to be exposed to an adverse costs order by commencing proceedings, with all of its inherent risks, a defendant ‘does not choose to be exposed to the credit risk’ and ‘therefore has a special claim to an indemnity for the financial risk imposed upon it by reason of being sued in a proceeding’.⁸⁰

3.50 In certain circumstances, a court may order that the plaintiff provide security for a defendant’s costs. The general principle behind the court’s consideration as to whether security for costs will be ordered is to ‘interfere whenever there is vexation and oppression to prevent the administration of justice being perverted from an unjust end’.⁸¹

3.51 Murphy and Cameron have observed that security for costs applications were ‘not a major concern in class actions’.⁸² That observation is consistent with the ALRC’s observation that it was ‘not contemplated that a natural person would be

74. [2005] FCA 138.

75. As noted earlier, the other two threshold requirements in s 33C are that there must be a claim by seven or more persons against the same person and the claim must arise out of related circumstances.

76. Grave D & Adams K, *Class Actions in Australia* (Sydney: Lawbook Co, 2005) 118.

77. *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 37 ACSR 236, [63].

78. [2011] FCA 106.

79. *Federal Court of Australia Act* s 43(1A); *Supreme Court Act* (Vic) s 33ZD.

80. Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [10.110].

81. *Ibid* [10.110], citing *McHenry v Lewis* (1882) 22 Ch D 397, 408.

82. Murphy B & Cameron C, ‘Access to Justice and the Evolution of Class Action Litigation’ (2006) 30 *Melbourne University Law Review* 399, 420.

ordered to provide security for costs subject to falling within one of the exceptions to the traditional rule'.⁸³

3.52 However, in *Bray v Hoffman-La Roche Ltd*,⁸⁴ the Full Federal Court held, contrary to the above observations, that 'the characteristics, including the financial circumstances of group members generally, should be taken into account in determining whether to make an order for security for costs'.⁸⁵ So whilst the above approach may influence the approach to security for costs in the Federal Court, the attitude towards security for costs and representative actions in New South Wales and Victoria is 'largely undetermined'.⁸⁶ Grave, Adams and Betts are of the view that those states that have representative actions regimes 'have applied and continue to apply the traditional rule (subject to its exceptions) that security for costs are not ordered against a natural person solely on the basis of impecuniosity'.⁸⁷

3.53 On 17 December 2012 Murphy J held that while he was bound to follow the decision of the Full Court in *Bray*, on the facts of the case before him in *Kelly v Willmott Forests Ltd (in Liquidation)*,⁸⁸ in that case he declined to make an order for security for costs, on the basis that the order was 'likely to stifle the applicants and group members' pursuit of their claims'.⁸⁹

3.54 The Commission accepts that there is arguably a tension between the approach in the Federal Court and the state courts. However, it does not consider that the issue warrants the introduction of a specific security for costs provision in relation to any legislative regime that may be introduced in Western Australia. The existing law as it relates to security for costs appears to be adequate to accommodate security for costs applications in such proceedings.

ADVANTAGES OF THE LEGISLATIVE SCHEMES

3.55 Advantages of a legislative regime for representative proceedings include:⁹⁰

- (a) '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'.⁹¹
- (b) 'Where the claims are "individually recoverable", the primary policy goals of procedures are to enable the most efficient use to be made of resources and to ensure consistency in decision making'.⁹²
- (c) 'Where claims are "individually non-recoverable", that is, where the cost of legal proceedings is high in relation to the amount claimed, the grouping of

83. Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Lawbook Co, 2005) [10.220].

84. (2003) 130 FCR 317.

85. See Murphy B & Cameron C, 'Access to Justice and the Evolution of Class Action Litigation' (2006) 30 *Melbourne University Law Review* 399, 420, see also *Ibid* at 374.

86. Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [10.100].

87. *Ibid*

88. [2012] FCA 1446.

89. *Ibid* [133].

90. ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [61]. See also Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Lawbook Co, 2005) [1.170].

91. ALRC, *ibid*.

92. *Ibid*.

claims may reduce the costs of litigation to the individual and thus enhance access to a legal remedy'.⁹³

- (d) Where claims 'are so small, that even where efficient, economic and fair grouping procedures are available, the costs of recovery will exceed the total benefits of litigating ... it is not necessary to extend the new procedures to this kind of case'.⁹⁴
- (e) 'The objective of new procedures should be to reduce the costs of litigation where it is necessary and worthwhile in the interests of justice, not to encourage abuse or the pursuit of the trivial'.⁹⁵
- (f) The opt-out system also allows class members to partake without taking on a highly visible role. This can make class actions attractive to large institutional investors or a group member who maintains a commercial relationship with the defendant companies; and representative plaintiffs who do not have to secure consent of potential group members.⁹⁶

3.56 Australian legislative regimes for representative proceedings are also not without detractors. Criticisms have included that the introduction of the legislative schemes would 'open the flood gates' for litigation⁹⁷. However, an empirical analysis of representative proceedings brought under the legislative schemes over a 17 year period showed no support for this argument.⁹⁸ Part IVA proceedings have also been criticised for the length and complexity of the plaintiff's pleadings.⁹⁹ In *Mercedes Holdings Pty Ltd v Waters (No 3)*,¹⁰⁰ the presiding judge restricted the plaintiff to a 50-page limit, refusing leave to file an amended claim that was over 600 pages long.¹⁰¹ Another issue that has emerged is that of competing class action claims, a topic previously discussed above (and also discussed in further detail in Chapter 4). Of the 28 class actions brought under Part 4A between 2001 and 2009, six proceedings related to three disputes.¹⁰²

93. Ibid.

94. Ibid.

95. Ibid.

96. King & Wood Mallesons, *Class Actions in Australia: The year in review 2011* (2011) 6.

97. See, eg, Clark S & Harris C, 'Representative Proceedings in Australia: A work in progress' [February 2001] *New South Wales Law Society Journal* 54–9.

98. Morabito V, *An Empirical Study of Australia's Class Action Regimes: Second report* (2010) 25.

99. King & Wood Mallesons, *Class Actions in Australia: The year in review 2011* (2011) 11.

100. [2011] FCA 236.

101. King & Wood Mallesons, *Class Actions in Australia: The year in review 2011* (2011) 11.

102. Morabito V, *An Empirical Study of Australia's Class Action Regimes: Second report* (2010) 24.

Traditional proceedings

3.57 Those jurisdictions that have only rules-based provisions relating to representative proceedings almost invariably share two characteristics. The first is that they are almost all variations of the traditional rule originating from the Court of Chancery (discussed earlier in relation to the Western Australian provision); and the second is that, as a result of judicial interpretation of the rule, the rules-based provisions are rarely invoked as a means by which to commence representative litigation.

QUEENSLAND

3.58 Prior to 1 July 1999 representative proceedings in Queensland were governed by Order 3 Rule 10 of the *Rules of the Supreme Court (Qld)*, which provided:

When there are numerous persons having the same interest in the subject matter of a cause or matter, one or more such persons may sue, and the Court or a Judge may authorise one or more of such persons to be sued, or may direct that one or more of such persons may defend, in such cause or matter, on behalf, or for the benefit of, all persons so intended.

3.59 In 1999 the Queensland Parliament instituted widespread civil procedural reforms by enacting the *Uniform Civil Procedure Rules 1999* (“UCPR (Qld)”). The reforms provided for uniform court rules for the conduct of civil litigation in the Supreme, District and Magistrates Courts in Queensland. As part of these reforms, the rules governing representative proceedings were amended.

3.60 Under Rule 75 of the UCPR (Qld):

A proceeding may be started and continued by or against one or more persons who have the same interest in the subject matter of the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding.

3.61 As can be seen from the above, the 1999 reforms removed the previous requirement to obtain court authorisation to proceed against a representative defendant and added a requirement that all represented persons or parties must have been able to be joined as parties in the proceedings.

3.62 In *Minister for Industrial Development of Queensland v Taubenfeld*,¹⁰³ McKenzie J considered the two sets of rules.¹⁰⁴ He noted the absence of the requirement for court authorisation under Rule 75 and held that court approval for the appointment of a representative defendant was no longer required.¹⁰⁵ However, neither change appears to have attracted significant academic or judicial comment. Despite the clear distinction between the old rule and the new rule, it is the understanding

103. [2003] 2 Qd R 655.

104. Ibid 658.

105. Ibid. See also Cashman P, *Class Action and Practice* (Sydney: Federation Press, 2007) 54–5.

of the Commission that there has been no appreciable increase in the number of representative proceedings instituted in Queensland as a result of the change.¹⁰⁶

Features of the Queensland regime

Commencement of proceedings

3.63 The UCPR (Qld) does not provide any framework for commencement of representative proceedings; however, it is clear that two conditions must be satisfied:

- (a) represented parties must have the same interest; and
- (b) represented parties must have been able to have been joined in the original proceeding.

3.64 As already noted, the second requirement is a departure from the earlier provisions existing in Queensland. The UCPR (Qld) provides for joinder of parties where their presence is necessary for the adjudication of all issues; where common questions of law or fact are likely to arise if separate proceedings are commenced; or where the relief sought arises out of the same transaction or event.¹⁰⁷ Thus, there appears to be additional emphasis on the need for commonality of interest between represented persons.

Appointing a representative

3.65 Ordinarily no prior court approval is required for the appointment of a representative party in Queensland.¹⁰⁸ Furthermore, it has been held that a representative need not identify every party who shares the same interest in a proceeding. It will be adequate that the parties be identified with sufficient particularity.¹⁰⁹ Where a person is suing or being sued in a representative capacity, the plaintiff or applicant must state that representative capacity on the originating process.¹¹⁰

3.66 The court may also authorise a representative to act on behalf of all persons in an action commenced under Rule 75 at any stage of the proceedings. The representative may be a person named in the proceeding or another person. Where the chosen representative is not named in the proceeding the court must make an order including him or her as a party.¹¹¹

Binding judgment

3.67 The unnamed persons or entities in a representative action are not parties to the proceeding. They need not consent to the institution of proceedings on their behalf and are not subject to the ordinary liabilities of litigants in respect of discovery or disclosure.¹¹² Nonetheless, orders and judgments in representative proceedings bind the representative party and all parties with the same interest who

106. Consultation with Rod Hodson, Maurice Blackburn Queensland, 5 May 2012.

107. *Uniform Civil Procedure Rules 1999* (Qld) rr 62, 65.

108. *Minister for Industrial Development of Queensland v Taubenfeld* [2003] 2 Qd R 655, 658.

109. *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 403, 408.

110. *Uniform Civil Procedure Rules 1999* (Qld) r 18.

111. *Uniform Civil Procedure Rules 1999* (Qld) rr 62, 76.

112. *Cameron v National Mutual Life Assn of Australasia Ltd (No 2)* [1992] 1 Qd R 133, 141, 144.

could have been party to proceedings.¹¹³ However, judgment cannot be enforced against a person who is not named as a party except by leave of the court.¹¹⁴

Costs

3.68 Generally, the represented persons or entities not party to proceedings will not be liable for costs.¹¹⁵ Instead, the liability for costs will fall on the representative party or parties. However, the Queensland Supreme Court has inherent jurisdiction to award costs against non-parties. ‘Party’ is defined broadly in the UCPR (Qld) to include persons not party to proceedings by or to whom costs are payable.¹¹⁶

Examples of representative proceedings in Queensland

3.69 There are few case examples in Queensland of the use of the UCPR (Qld) provisions.¹¹⁷ In 2003 an action was brought by the Minister for Industrial Development of Queensland against protestors occupying a site where a food irradiation plant was being constructed.¹¹⁸ It was held that court approval was not required for the nomination by the plaintiff of a representative defendant.¹¹⁹ However, an applicant commencing a proceeding is obliged to define with sufficient particularity the class that is said to have the same interest in the subject matter of the proceeding.¹²⁰ In this case, choosing the named defendant as the representative of ‘all protestors in occupation’ of the site failed to meet this requirement.¹²¹

3.70 In 2004 the court denied the claimant’s use of the Rule 75 representative proceeding provisions.¹²² In this case the plaintiff, an elder of the Dalungdalee people, was not permitted to bring representative proceedings on the basis that he did not share an interest with three Dalungdalee people who were also beneficiaries of the will in dispute in the proceedings.¹²³

3.71 More recently, in 2011, Martin J accepted that a representative claim under Rule 75 was available to applicants seeking interlocutory orders against several companies involved in a managed investment scheme.¹²⁴ However, the orders were ultimately refused on substantive grounds.¹²⁵

Advantages and criticisms of the Queensland model

3.72 The current representative proceedings regime in Queensland shares some of the same advantages of the more defined legislative regimes.¹²⁶ These include:

- (a) reducing the cost of court proceedings to the individual by sharing the costs of proceedings between all claimants;

113. *Supreme Court of Queensland Act 1999* (Qld) s 82(2)

114. *Supreme Court of Queensland Act 1999* (Qld) s 82(3); *Uniform Civil Procedure Rules 1999* (Qld) r 77(1).

115. *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021, 1039.

116. *Uniform Civil Procedure Rules 1999* (Qld) r 679.

117. There is no indication yet as to whether the large number of persons affected by the 2011 Queensland floods will issue representative proceedings to seek to recover losses in the Queensland courts or in another jurisdiction.

118. *Minister for Industrial Development of Queensland v Taubenfeld* [2003] 2 Qd R 655.

119. *Ibid* 658.

120. *Ibid* 660.

121. *Ibid* 659–60.

122. *Jones v Public Trustee* (2004) 209 ALR 106.

123. *Ibid* 110–11.

124. *IS Schache and K Schache as Trustees for the Schache Superannuation Fund and as Representative for Investors in the Arafura Pearl Project for the Financial Year 2005/2006 v GP No 1 Pty Ltd* [2011] QSC 413, [15].

125. *Ibid* [43]–[48].

126. See, eg, Grave D & Adams K, *Class Actions in Australia* (Sydney: Lawbook Co, 2005) 2.

- (b) reducing the value of an adverse costs order by combining potential actions against a single defendant so as to reduce their overall legal costs;
- (c) promoting efficiency in the litigation process and the use of court resources, by running one claim that covers multiple claimants, as opposed to numerous individual claims;
- (d) increasing access to legal remedies, particularly for claimants who have limited resources or who would otherwise be unable to access the courts; and
- (e) ensuring consistency in the determination of common issues;

3.73 However, concerns remain about the lack of certainty for litigants in the absence of a clear framework for the bringing and management of representative proceedings.¹²⁷ Other aspects of the Queensland regime that might be undesirable are consistent with the challenges raised in Chapter 2 in respect of the Western Australian regime, which include:

- (a) the requirement that represented members have the same interest in the subject matter of the proceedings, rather than merely similar or related circumstances;
- (b) the absence of consent of represented persons to the initiation of litigation given that judgment will be binding on all members of a represented class;
- (c) the risk of an adverse costs order being borne solely by the representative of a represented class;
- (d) the need to examine whether separate damages claims are likely to split the proceeding; and
- (e) the issue of uncertainty in relation to the lack of protection of statute of limitations provisions.

3.74 In the past, various groups have made submissions advocating for the establishment of a legislative regime in Queensland to correct some of these shortcomings.¹²⁸

SOUTH AUSTRALIA

3.75 South Australia first published a review of its representative proceedings rules well before it may have been considered fashionable to do so. Over a decade before the ALRC published its recommendations to establish a legislative regime for representative proceedings, the Law Reform Committee of South Australia published a draft class actions Bill in its 1977 *Report to the Attorney-General Relating to Class Actions*.¹²⁹

3.76 At that time, the South Australian representative proceeding provisions followed the traditional rule which still exists in Western Australia today.¹³⁰ Although the recommendations of the Law Reform Committee were not implemented by Parliament, the rule was subject to significant amendment in a subsequent version

127. Triggs R, 'Representative Actions under the Uniform Civil Procedure Rules' (2001) 21 *Queensland Lawyer* 117.

128. See, eg, Queensland Public Interest Law Clearing House Incorporated, 'Class Actions Submission to Hon Rod Welford MLA Attorney-General and Minister for Justice' (5 February 2002) 2.

129. Law Reform Committee of South Australia, *Report to the Attorney-General Relating to Class Actions* (1977) vol 36.

130. The relevant order was found in the *Supreme Court Rules* (SA) O16, r 9.

of the *Supreme Court Rules* in 1987. The effects of the amendments embodied in Rule 34 of the *Supreme Court Rules 1987* (SA) were threefold.

3.77 Firstly, the amendments allowed cases to proceed as representative actions on a more ‘liberal’ assessment of common issues of fact and law.¹³¹ Secondly, an amendment was introduced that required the representative parties to seek an order from the court authorising the action be maintained as a representative action.¹³² And thirdly, the amendments specifically addressed the issue of damages and expressly stipulated that individual assessments of damages (and other individual remedies sought) were not to preclude a representative action from proceeding.¹³³

3.78 As noted by Cashman, the effect of the introduction of the 1987 amendments was to import procedural guidelines into the rules.¹³⁴ As with many other rules-based representative proceedings regimes, the paucity of procedural instructions contained within Rule 34 was criticised by members of the judiciary.¹³⁵

3.79 In 2006, the nature and scope of the representative proceeding rule was amended (and expanded). The current rule relating to representative proceedings in South Australia is found in Division 3, Rules 80–84 of the *Supreme Court Civil Rules 2006* (SA).

3.80 In some respects the 2006 amendments to the rules relating to representative proceedings in South Australia produced a hybrid model, whereby a plaintiff can bring an application for authority to proceed as the representative of a class pursuant to Rule 80(2) of the *Supreme Court Civil Rules 2006*. This aspect of the South Australian legislation appears to have a similar affect to a US style ‘certification’ requirement, not otherwise found elsewhere in Australian jurisdictions. For this reason, the amendment to the South Australian regime has resulted in its label of a ‘quasi class action provision’.¹³⁶

3.81 Another point of difference between the South Australian procedure and any other state or federal procedure relates to the fact that consent of group members is required before the proceedings have commenced, which as Grave, Adams and Betts have observed ‘demonstrates a clear preference in South Australia for an “opt-in” approach to representative proceedings, in contradistinction to the basic structure of proceedings commenced under Part IV A of the Federal Court Act’.¹³⁷

3.82 The Commission’s observations made in relation to the Queensland regime¹³⁸ also apply in respect of South Australia.

131. Cashman P, *Class Action and Practice* (Sydney: Federation Press, 2007) 45.

132. See *Supreme Court Rules 1987* (SA) r 34.02.

133. See *Supreme Court Rules 1987* (SA) r 34.03.

134. Cashman P, *Class Action and Practice* (Sydney: Federation Press, 2007) 45.

135. See *Albrook v Paterson* (1995) LSJS 24 where Burley J was less than complimentary of the regime in terms of guidance to be found as to the scope and operation of Order 34.01, either by way of previous authority or instructions within the rules themselves.

136. Cashman P, *Class Action and Practice* (Sydney: Federation Press, 2007) 45.

137. Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [2.710].

138. See above [3.72]–[3.73].

TASMANIA

3.83 The representative proceedings provisions in Tasmania are governed by Part 10 Division 5, Rule 335 of the *Supreme Court Rules 2000* (Tas).¹³⁹ There is no substantive difference between the Tasmanian rule and the rule in Western Australia.

AUSTRALIAN CAPITAL TERRITORY

3.84 The representative proceeding provisions in the Australian Capital Territory are contained in Order 19 of the *Supreme Court Rules 1937* (ACT) and Rules 265–270 of the *Court Procedures Rules 2006* (ACT). Those provisions establish a regime substantially the same as the traditional provisions in relation to Western Australia discussed above.

NORTHERN TERRITORY

3.85 In the Northern Territory, Regulations 18.01, 18.02 and 18.04 of the *Supreme Court Regulations* (NT) apply to representative proceedings. Like the provisions of the Australian Capital Territory, the Northern Territory provisions establish a regime substantially the same as that existing in Western Australia.

SUMMARY OF TRADITIONAL PROCEEDINGS PROVISIONS

3.86 Traditional or rules-based representative proceedings provisions have been widely criticised for their lack of clarity in respect of two fundamental issues.

3.87 The first issue relates to the manner and complexity in which large-scale litigation evolves throughout the court process before trial. There is little contained within the rules to direct how proceedings are to be managed at the interlocutory stage.

3.88 While the obvious response to this issue is that these proceedings could be managed within the case management frameworks of each jurisdiction, such a proposition is, in the Commission's view, only superficially attractive. It is open to question whether current court administration frameworks are robust enough to absorb representative proceedings, which often have significant organisational complexity and may deal with plaintiff groups numbering in the thousands. The Commission is of the view it is desirable to have some degree of uniformity in this area to, among other things, discourage forum shopping.

3.89 The second issue concerns the lack of clarity surrounding the scope of representative proceedings rules in terms of interpretation of the notion of a 'same interest', as well as the inability of the provisions to protect members of the class from exposure to limitations provisions if the representative proceeding is disbanded. The rules that currently exist do not, therefore (in any form), satisfactorily promote the objectives advanced by the ALRC.¹⁴⁰ In this regard, it appears that, where legislative regimes exist, they are being used in preference to other jurisdictions that offer only representative proceedings within various versions of the Supreme Court Rules.

139. There is also scope for a representation order to be made in the Magistrate's Court in Tasmania, as a result of Pt 3, Div 1 – Parties to An Action, rr 16–17.

140. ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [13]; see also [354].

Chapter 4

Comparison of Models

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Comparison of legislative rules-based models

4.1 The previous chapters have described the legislative and rules-based frameworks that apply to representative proceedings in Australia. What emerges from that discussion (having regard to the terms of reference) are a number of key issues that distinguish legislative and rules-based representative proceedings regimes in Australia, in particular:

- (a) the extent to which limitations of actions are protected upon issuing representative actions;
- (b) the criteria for characterisation and identification of a group or a class;
- (c) opting in or opting out of the proceeding and notice of an action; and
- (d) approval of settlement or discontinuance.

These are discussed in this chapter.

LIMITATION OF ACTIONS

4.2 As discussed earlier, the Western Australian rule is silent in respect of limitation periods. Therefore, if a representative proceeding is not properly ‘begun’, statutes of limitation will continue to run against the represented persons (whether named or not).

4.3 This is not the case in the legislative regimes. For example, s 33ZE of the *Federal Court of Australia Act 1976* (Cth)¹ provides as follows:

33ZE Suspension of limitation periods

1. Upon the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended.
2. The limitation period does not begin to run again unless either the member opts out of the proceeding under section 33J or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member’s claim.

4.4 While this may appear to be a straightforward proposition, there is possible scope for argument in the event a class is disbanded by order of the court. As Grave and Adams state, ‘the effect that the commencement of a representative proceeding has on limitation periods is one area where class action jurisprudence has not evolved much to date in Australia’.²

1. See also *Supreme Court Act 1986* (Vic) s 33ZE; *Civil Procedure Act 2005* (NSW) s 182.

2. Grave D & Adams K, *Class Actions in Australia* (Sydney: Law Book Company, 2005) [16.100].

4.5 In the United Kingdom, Professor Rachael Mulheron has observed that:

There is both English and overseas judicial opinion which states that this provision changes the substantive law governing an individual's entitlement to bring proceedings ... Some law reform commissions have expressed the view that the tolling of limitation periods is a matter of substantive law, requiring legislation and not rules of court: Alberta Report, para 484; South Australian Report, p 10–11; Manitoba Report, p 38.³

4.6 This concern is consistent with the position in Australian case law which, as noted by Professor Morabito,

would suggest that it would be beyond the power of courts to insert, in the rules of court governing representative actions, provisions similar to the ones that are found in legislative class action regimes and which suspend the operation of statutory limitation periods upon the commencement of a class proceeding.⁴

4.7 Morabito concluded that, as indicated by the Supreme Court of Canada, these problems 'undoubtedly [require] legislative intervention ... and is but a further illustration of the need for a comprehensive legislative scheme for the institution and conduct of class actions'.⁵

4.8 While the position in relation to the protection of the rights of class members under the federal, Victorian and New South Wales legislative schemes may not be determined with precision, there cannot be any doubt that the statutory protection that is afforded by the language in s 33ZE goes much further than the rules-based regimes, which are silent on this aspect.

4.9 Given it is now clear that laws pertaining to limitations are of a substantive nature and not simply procedural impediments to bringing a claim,⁶ it appears that the only way to ensure certainty (as well as consistency and fairness) in relation to group proceedings is to implement any amendment by way of legislative reform, as opposed to amending rules of court. This is discussed further in the following chapter.

CRITERIA FOR CHARACTERISATION AND IDENTIFICATION OF A GROUP OR A CLASS

4.10 The threshold requirements for commencing a representative proceeding under the Federal Court model are dramatically different to the threshold requirements for commencement of a representative proceeding under Order 18 Rule 12 of the *Rules of the Supreme Court 1971* (WA). Under the Western Australian rule, the following threshold tests apply:

- (a) there must be 'numerous persons';
- (b) they have the 'same interest' in any proceedings; and

3. Mulheron R, 'Implementing an Opt-Out Collective Action in England and Wales: Legislation versus court rules', Appendix N in Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a more efficient and effective procedure for collective actions* (2008) 421–2.

4. Morabito V, 'Statutory Limitation Periods and the Traditional Representative Action Procedure' (2005) 5 *Oxford University Commonwealth Law Journal* 113, 128–9 (footnotes omitted).

5. Ibid 138, quoting *General Motors of Canada Ltd v Naken* [1983] 1 SCR 72, 105.

6. See *John Pfeiffer & Co v Rogerson* (2000) 203 CLR 503.

- (c) unless the court otherwise orders, the proceedings may be continued by or against any one or more of them as representing all or as representing all except one or more of them.

4.11 In order to meet the threshold of ‘numerous persons’ it has been suggested that five persons ‘would not normally be regarded as numerous’.⁷ The difficulty in capturing the ‘same interest’ provisions has been explained elsewhere in this Discussion Paper and will not be repeated here.⁸ In respect of the third threshold requirement, in *Minara Resources Ltd v Ashwin*,⁹ the court held that it appears to have

no power to order that a proceeding be a representative proceeding ... That rule suggests that the only role for the Court is to determine either: whether the proceeding satisfies the description in r 12(1), if it is purportedly brought as a representative proceeding; or whether, assuming it satisfies the description, it should be continued as such a proceeding.¹⁰

4.12 In contrast to the traditional rule, the legislative schemes use precise language to establish the threshold requirements for the commencement of a representative proceeding. For example, s 33C of the of the *Federal Court of Australia Act 1976* (Cth) provides:¹¹

33C Commencement of proceeding

(1) Subject to this Part, where:

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

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

(2) A representative proceeding may be commenced:

- (a) whether or not the relief sought:
 - (i) is, or includes, equitable relief; or
 - (ii) consists of, or includes, damages; or
 - (iii) includes claims for damages that would require individual assessment; or
 - (iv) is the same for each person represented; and
- (b) whether or not the proceeding:
 - (i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or
 - (ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

7. *Re Braybrook; Braybrook v Wright* [1916] WN 74.

8. See Chapter 2.

9. [2007] WASCA 107.

10. *Ibid* [42].

11. See also *Supreme Court Act 1986* (Vic) s 33C; *Civil Procedure Act 2005* (NSW) s 157.

4.13 Grave and Adams set out in considerable detail the threshold requirements for the commencement of a Part IVA proceeding.¹² In summary, there are four threshold requirements that must be met before the representative proceeding can be commenced:

- (a) there must be a claim of seven or more persons;
- (b) the claims must be against the same person;
- (c) the claims must arise out of related circumstances; and
- (d) there must be a substantial common issue of law or fact.

4.14 While there are a number of areas of contention that have been the subject of judicial review, the requirements to commence a proceeding under the legislative framework are substantially clearer than the rules-based framework.

4.15 An area of divergence between the federal and Victorian Acts and the New South Wales Act relates to the second threshold criteria, being that the claims must be against the same person. This gave rise to a challenge in *Philip Morris (Australia) Ltd v Nixon*,¹³ where the Full Court of the Federal Court interpreted the criterion as requiring that represented plaintiffs must have a claim against all named defendants in the proceedings, otherwise the proceedings were susceptible to being struck out. However, as noted earlier, this problem (colloquially known as the ‘Philip Morris’ issue) has not proved significant. In practice, where it is likely to become an issue in any particular matter, separate proceedings are issued against respective defendants and thereafter consolidated. In addition, it has been suggested that the Federal Court may be adopting a broader approach in relation to the need for each group member to have a claim against each respondent.¹⁴

4.16 The New South Wales legislation effectively overcomes any concern in this regard by providing in s 158 of the *Civil Procedure Act 2005* (NSW) that:

[A] person may commence representative proceedings on behalf of other persons against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings.

4.17 A question has been raised whether proportional liability legislation (introduced in Western Australia by the *Civil Liability Act 2002*) could produce anomalous results, given that pursuant to that legislation a plaintiff must join all possible wrongdoers or risk the court apportioning some damage to a non-party.¹⁵ As stated by Grave and Adams, ‘it would be unfortunate if an unintended consequence of the apportionment liability legislation was to deter or perhaps even frustrate legitimate claims from being brought in a representative proceeding’.¹⁶

4.18 The third threshold requirement for the commencement of a representative proceeding is that the claims must arise out of related circumstances. The leading analysis of the related circumstances requirement is found in *Zhang v Minister for Immigration, Local Government and Ethnic Affairs*,¹⁷ where French J stated:

12. Grave D & Adams K, *Class Actions in Australia* (Sydney: Law Book Company, 2005) ch 4.

13. (2000) 170 ALR 487.

14. Grave D & Adams K, *Class Actions in Australia* (Sydney: Law Book Company, 2005) [4.340], discussing the outcome in *Bray v F Hoffman-La Roche* (2003) 130 FCR 317.

15. *Ibid.*

16. *Ibid* [4.430].

17. (1993) 45 FCR 384.

The question whether the claims of the persons who are proposed as members of a group arise out of 'the same, similar or related circumstances' as required by s 33C(1) is not to be answered by an elaboration of that verbal formula. It contemplates a relationship between the circumstances of each claimant and specifies three sufficient relationships of widening ambit. Each claim is based on a set of facts which may include acts, omissions, contracts, transactions and other events.

...

The word 'related' suggests a connection wider than identity or similarity. In each case there is a threshold judgment on whether the similarities or relationships between circumstances giving rise to each claim are sufficient to merit their grouping as a representative proceeding. At the margins, these will be practical judgments informed by the policy and purpose of the legislation. At some point along the spectrum of possible classes of claim, the relationship between the circumstances of each claim will be incapable of definition at a sufficient level of particularity, or too tenuous or remote to attract the application of the legislation.¹⁸

4.19 The threshold for group claims arising out of the same, similar or related circumstances is much easier to satisfy than the 'same interest' test which arises in traditional representative proceedings, because the former is broader than the latter.¹⁹

4.20 The final threshold requirement for commencing a Part IVA proceeding is that:

[The] claims of the applicants as group members give rise to a substantial common issue of law or fact. Analysis of this claim involves a consideration of three separate matters:

- (a) What constitutes a common issue of law or fact?
- (b) To whom must that issue be common?
- (c) What is a substantial common issue (as opposed to an insubstantial one)?²⁰

4.21 As can be seen, the differences in threshold requirements between representative proceedings taken under legislation and those taken under the traditional rule (such as currently exists in Western Australia) are significant. In essence, there are detailed provisions in the legislative model, which, it is suggested, provides greater certainty for all parties in commencing and conducting a representative proceeding.

4.22 Enacting the same or substantially similar provisions in Western Australia is desirable. Not only do uniform laws provide certainty and clarity, the fact that the provisions have already received considerable judicial attention also assists the interpretation of the provisions.

18. Ibid 404. Note as set out in Grave D & Adams K, *Class Actions in Australia* (Sydney: Law Book Company, 2005) [4.500], *Zhang* was referred to by the High Court of Australia in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 266.

19. This threshold is discussed in detail in Grave & Adams, *ibid*, [4.460]–[4.560].

20. Grave D & Adams K, *Class Actions in Australia* (Sydney: Law Book Company, 2005) [4.570]

Closed classes

4.23 Reference has been made in this Paper to the increased use of the ‘closed class’. A ‘closed class’ is an expression to describe where the membership of the plaintiff group is restricted, usually to those who enter into a specific retainer agreement with either a law firm or a litigation funder. Often the law firm or litigation funder will themselves impose a restriction upon those who are eligible to join the group (as illustrated by the Amcor/Visy class action referred to in Chapter 3).

4.24 Before the decision of the Full Federal Court in *Multiplex Ltd v P Dawson Nominees Pty Ltd* (‘*Multiplex*’),²¹ there was conjecture as to whether the provisions of Part IVA allowed representative actions to proceed as closed classes.

4.25 However, the outcome of *Multiplex* was to the effect that closed classes could proceed pursuant to the provisions of s 33N(1) of the Federal Court Act.²²

4.26 It is apparent that with the advent of legislation in New South Wales explicitly permitting closed classes to proceed (see s 166(2) of the *Civil Procedure Act 2005*), there is a clear difference between the federal and Victorian legislation and that in New South Wales.

4.27 The lawyers and litigation funder who regularly commence proceedings in New South Wales have not suggested that this difference has led to different practical outcomes in that state. Those practitioners suggest there are two reasons for this. First, those who practice in that area (identified in Appendix 3) say that commencing representative proceedings with a closed class in the Federal Court or the Victorian Supreme Court has occurred without controversy since the decision in *Multiplex*.

4.28 Second, we are also told that because the legislation is still so relatively recent, there are no published New South Wales authorities relating to s166(2) of the *Civil Procedure Act 2005* that provide any guidance about whether there exist clear points of distinction between the federal and Victorian legislation, and that in New South Wales.

OPTING IN OR OUT OF THE PROCEEDINGS AND NOTICE OF THE PROCEEDINGS

4.29 The terms of reference require the Commission to give close consideration to:

[T]he need to ensure that representative proceedings are conducted in a fair manner which give those who will be bound by the orders made in the proceedings a reasonable opportunity to decide whether or not to participate in the proceedings and be heard in relation to issues affecting their rights.

4.30 The issue involving the freedom of an affected claimant to choose whether to be part of the representative action or not is a crucial element of any class action regime. According to Grave, Adams and Betts, this ‘was the subject of considerable debate prior to the enactment of Part IVA of the *Federal Court of Australia Act 1976*

21. (2007) 164 FCR 275.

22. Ibid 293.

(Cth)'.²³ Ultimately, the 'opt-out' process was accepted and it is now reflected in all three jurisdictions with legislative representative proceedings provisions.

4.31 It is important at this juncture to make clear the difference between the two mechanisms traditionally used for participating in a representative action.

4.32 The first is to opt in to a representative action.

[Opting in] is used to describe the means of determining the members of the group where the persons represented must consent in writing before the commencement of the proceeding (or with leave thereafter) in order to receive the benefit of any judgment.²⁴

4.33 Opting out, however, is a process where group members who fit the 'related circumstances' criteria are automatically deemed to be part of the group, even if they have not given their consent, but can formally elect not to continue as group members if they wish, and then pursue their own claim.

4.34 The recent report of the Law Reform Commission of Hong Kong observed that 'law reform agencies in other jurisdictions have regularly acknowledged that the choice between an opt-in and an opt-out regime is possibly the most controversial issue in the design of a multi-party litigation regime'.²⁵ The differences between an opt-out procedure (where a party is required to make a conscious decision not to belong to the proceeding) and an opt-in process were discussed in detail by the Australian Law Reform Commission (ALRC) in its 1988 report,²⁶ which concluded that:

Subject to the provision of appropriate protection, it should be possible to commence a group member's proceeding without first obtaining consent of that group member. Provision should be made to ensure that group members are notified of the proceedings and that a group member can discontinue his or her proceeding or continue it independently. The rights of persons should not be prejudiced by the commencement of proceedings without consent.²⁷

4.35 The opt-out model was considered by the ALRC to enhance access to legal remedies and reduce costs while increasing efficiency.²⁸

4.36 An effective opt-out regime requires strong provision for notification to advise potential group members that they have ability to opt out of the proceeding by a specified date. Grave and Adams note that:

It is important that the notice contain sufficient information to enable group members to exercise their rights in relation to the proceeding and the content of any notice be clear and easy to understand. There needs to be balance between the sometimes conflicting objectives of accuracy, simplicity and the avoidance of unnecessary distress to the recipients.²⁹

23. Grave D & Adams K, *Class Actions in Australia* (Sydney: Law Book Company, 2005) [8.100].

24. Ibid [8.100].

25. Law Reform Commission of Hong Kong, *Report on Class Actions* (2012) 110, [4.1]. The competing arguments in relation to adopting the opt-out approach model are also set out very neatly in the Law Reform Commission of Hong Kong Report as adapted from Professor Mulheron's text: see Mulheron R, *The Class Action in Common Law Legal Systems, A Comparative Perspective* (Oxford: Hart Publishing, 2004) 37–8.

26. See ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) ch 4.

27. Ibid [127] (footnotes omitted).

28. Ibid [108].

29. Grave D & Adams K, *Class Actions in Australia* (Sydney: Law Book Company, 2005) [8.120].

4.37 Courts in South Africa and in the United States have each recognised the importance of notice to members of the class, enabling them to opt-in or opt-out of the litigation involving the class of which they are a member.³⁰

4.38 While there are competing (and compelling) arguments favouring both methods of participating in representative proceedings, ultimately the balance is most fairly struck in a regime that protects the legal right of a claimant (by virtue of automatic inclusion in a claim), but also ensures that the same claimant has ample notice of their ability to withdraw from the proceeding and/or litigate their claim individually.

4.39 The Commission agrees with the ALRC's preference for an opt-out regime as opposed to an opt-in regime. This approach is consistent with the approach taken by the Law Reform Commission of Hong Kong in its recent report on class actions.³¹

4.40 Adoption of an opt-in regime in Western Australia would place it at odds with other Australian jurisdictions and may increase the prospect of forum shopping. In contrast, adoption of an opt-out regime as a default position (together with clear notification requirements) would promote consistency and uniformity, both in terms of procedure and judicial interpretation.

APPROVAL OF SETTLEMENT OR DISCONTINUANCE

4.41 An area of significant distinction between the rules-based and legislative representative proceedings regimes is in the resolution of claims. As observed by the ALRC:

Apart from the question of fairness to group members, it may be necessary for the Court to ensure that the precise scope of the settlement, with respect to the description of the group members and, in appropriate circumstances, with respect to the questions resolved by the settlement, has been adequately considered. Further, it may be necessary for the Court to be satisfied that appropriate methods for distributing any monetary relief have been devised and to give specific attention to possible conflicts of interest. In considering any application for approval, the Court could use its general powers to close the Court or impose reporting restrictions if it considered that potential prejudicial material should not be disclosed in open Court or reported to the general public.³²

4.42 As stated by Grave and Adams:

[A] representative proceeding involves a representation of persons – core group members – by a representative party with a claim against the same person. It is because there are group members with interests that need to be protected that there is a requirement for Court approval for settlement or compromise of a representative proceeding can take legal effect.³³

30. In relation to the opt-out process in the USA, see below [5.79]–[5.81]; in South Africa, see below [5.115]. For a discussion about opting in and out of proceedings in new Zealand, see below [5.64].

31. Law Reform Commission of Hong Kong, *Report on Class Actions* (2012) ch 10, Recommendation 3 (see also [4.23]).

32. ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [218].

33. Grave D & Adams K, *Class Actions in Australia* (Sydney: Law Book Company, 2005).

4.43 The relevant legislative provision in relation to settlement and discontinuance is s 33V of the *Federal Court of Australia Act 1976* (Cth), which reads as follows:

33V Settlement and discontinuance—representative proceeding

- (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
- (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

4.44 The nature and extent of settlement of representative actions is covered in substantial detail by many commentators.³⁴ As Cashman has indicated:

[C]lass action settlements raise unique and complex issues for a number of reasons. Unlike with traditional settlements in conventional litigation, group members in class actions who will be bound by the settlement agreement if it is approved by the Court, will usually not have participated in the settlement negotiations and not have consented to, or often be aware of, the proposed terms of settlement.³⁵

4.45 The present legislative provision contains no statutory guidance or criteria that a court should take into account when considering whether to approve the settlement or discontinuance of an action.

4.46 Another issue that arises from the brevity of the legislative provision relating to settlements is the extent to which persons other than the lawyers for the group members ought to communicate with them about resolution of a group member's claim. Clark and Harris argue that '[f]rom a respondent's perspective, direct communication with unrepresented group members is consistent with a desire for the early resolution of claims'.³⁶ The contrary view is that if reform is contemplated in this area, there should be clear guidelines requiring all settlement communications to take place only through the solicitors instructed to represent the class.³⁷

4.47 The Commission considers that it is desirable to achieve as much uniformity as possible between jurisdictions in relation to the way in which settlements of representative action proceedings are effected. This will reduce forum shopping and provide benefits in terms of consistency of judicial approach. Having regard to the similarity of the approach in the jurisdictions with legislative schemes, it is the view of the Commission that any framework adopted by Western Australia in relation to the settlement of claims should be substantially based on the provisions of Part IVA.

34. See, eg, Murphy B & Cameron C, 'Access to Justice and the Evolution of Class Action Litigation' (2006) 30 *Melbourne University Law Review* 399, 427–31; Grave & Adams, *ibid.*, ch 13; Cashman P, *Class Action Law and Practice* (Sydney: Federation Press, 2007) ch 6.

35. Cashman, *ibid.* See also Morabito V, 'An Australian Perspective on Class Action Settlements' (2006) 69 *Modern Law Review* 347.

36. Clark S & Harris C, 'The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?' (2008) 32 *Melbourne University Law Review* 775, 819.

37. Murphy B & Cameron C, 'Access to Justice and the Evolution of Class Action Litigation' (2006) 30 *Melbourne University Law Review* 399, 431.

OTHER ISSUES

Certification of the class

4.48 A fundamental distinction between Part IVA proceedings in Australia and the American class action regime relates to class certification (discussed in detail in the following chapter). Class certification is effectively a threshold requirement that requires a proceeding to be ‘judicially certified as appropriate to be brought as a class action’.³⁸ Such certification is not required under the Australian regime.

4.49 The absence of a certification regime has created significant debate among commentators. As observed by Clark and Harris, the ALRC were of the view that Australia ought not adopt a certification procedure, on the basis that it was more likely to be both costly and time consuming (provided that respondents had a right to challenge the validity of the action at any time).³⁹ The absence of such a mechanism is seen as creating a more ‘plaintiff friendly’ jurisdiction than in the United States.

4.50 However, there are commentators who have an opposite view, and argue that the absence of a certification regime actually adds to the complexity and delay of litigating representative actions. Professor Morabito argues that ‘this desired scenario – of not expending excessive time and resources on deciding whether the use of the class action device is appropriate ... has not been maintained’.⁴⁰

4.51 These observations appear to have also found approval among members of the Federal Court, with both Finkelstein and Lindgren JJ commenting that the prevalence of interlocutory disputes (not all of which are as the result of the lack of certification) is clearly a cause for concern.⁴¹

4.52 The Commission is of the view that any proposal advocating reform of such a significant nature as the introduction of a certification regime is also one which should be adopted in conjunction with the other states and the Commonwealth. The Commission is of the view that it would be undesirable in the circumstances to suggest the introduction of a certification procedure in any Western Australian legislative regime for representative proceedings in the absence of a harmonised approach.

Competing representative proceedings

4.53 One of the consequences of having a legislative regime for representative proceedings without a certification procedure is the prospect of multiple proceedings being issued by competing law firms in relation to the same cause of action. As stated by Grave, Adams and Betts, such competing actions are:

[A] corollary of the fact that group members’ consent is not required and that a representative party may commence a representative or group proceeding without certification by a court and on behalf of any group of persons the representative

38. Clark S & Harris C, ‘Class Actions in Australia: (Still) a work in progress’ (2008) 31 *Australian Bar Review* 63, 67.

39. Ibid. See also ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [146]–[149].

40. Morabito, V, ‘Group Litigation in Australia – “Desperately Seeking” Effective Class Action Regimes’ (paper presented at the *Globalisation of Class Action Conference*, Oxford University, 12–14 December 2007) 27.

41. Ibid 27–8. See the comments of Finkelstein J in *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061, [18]; Lindgren KE, ‘Class Actions and Access to Justice’ (paper delivered as the keynote address at the *International Class Action Conference*, Sydney, 25–26 October 2007).

party may desire ... similarly, there is a risk of competing claims against the same respondent in respect of the same subject matter.⁴²

4.54 But just how prevalent is such a situation? Professor Morabito's analysis reveals that since March 1992 a total of 45 competing representative proceedings have arisen (under the federal and Victorian legislation) in relation to 17 disputes.⁴³

4.55 There was concern that after the decision in *Multiplex Limited v P Dawson Nominees Pty Ltd*,⁴⁴ (which permitted representative actions to proceed as closed classes) the courts would see a dramatic increase in the number of competing representative proceedings.⁴⁵

4.56 While Professor Morabito's data analysis supports the proposition that there has been an increase of competing representative proceedings issued,⁴⁶ feedback from practitioners regularly working in the jurisdiction, as well as commentators, is that this competition is managed productively between the respective law firms, either through agreement or through the formation of a litigation committee.⁴⁷ In the event that such an arrangement is not being managed in this way, the Commission notes that in each jurisdiction (including Western Australia) power exists for the court to consolidate proceedings.

4.57 It is acknowledged that current Australian legislative regimes do not provide any guidance about the management of competing representative proceedings. It is also acknowledged that litigation committees and other management mechanisms are largely untried in Australia. However, in light of the practical measures presently undertaken by courts and law firms to manage or consolidate proceedings, the Commission considers there is currently no compelling case to suggest that proposed reform in Western Australia should include a mechanism for managing the issue of competing representative proceedings.

Interlocutory disputes

4.58 An issue that has been raised with the Commission relates to the prevalence of interlocutory disputes that are sometimes characteristic of representative actions. As summarised by Finklestein J in *Bright v Femcare Ltd*:

There is a disturbing trend that is emerging in representative proceedings which is best brought to an end. I refer to the numerous interlocutory applications, including interlocutory appeals, that occur in such proceedings. This case is a particularly good example. The respondents have not yet delivered their defences yet there have been approximately seven or eight contested interlocutory hearings before a single judge, one application to a Full Court and one appeal to the High Court. I would not be surprised if the applicants' legal costs are by now well in excess of \$500,000. I say nothing about the respondents' costs. This is an intolerable situation, and one which the court is under a duty to prevent, if at all possible. One possible approach in these types of cases (that is, product liability or mass torts claims) is to bring the action on for speedy determination. By giving appropriate directions the court can ensure

42. Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [9.100].

43. Morabito, V, 'Clashing Classes Down Under – Evaluating Australia's Competing Class Actions through Emirical and Comparative Perspectives' (2012) 27 *Connecticut Journal of International Law* 273.

44. (2007) 164 FCR 275.

45. Morabito, V, 'Clashing Classes Down Under – Evaluating Australia's Competing Class Actions through Emirical and Comparative Perspectives' (2012) 27 *Connecticut Journal of International Law* 273, 274.

46. *Ibid.*

47. Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [9.100].

that the parties get on with the litigation and do not become bogged down in what are often academic or sterile arguments about pleadings, particulars, practices and procedures. What I say should not be taken as a particular criticism of the present respondents. But it is not unknown for respondents in class actions to do whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful.⁴⁸

4.59 Lindgren J has suggested that a practical solution to prevent unnecessary interlocutory disputes is to convene an early case management conference.⁴⁹

4.60 Much of the discussion around management of interlocutory disputes overlaps with the implementation of effective case management more generally. The legislative regimes each have corollary practice notes to govern how representative actions are managed and the Commission is of the opinion that a similar approach would work effectively in Western Australia.⁵⁰

Cy-prés regimes

4.61 A *cy-prés* or ‘next-best’ regime refers to a situation where:

[A] class is entitled (via either judgment or settlement) to a sum of damages, but distribution of these damages to the class members, individually or collectively, is impractical or infeasible. In that case the court [can] use *cy-prés* principles to distribute unclaimed funds ... for a purpose as near as possible to the legitimate objectives underlying the lawsuit, in the interests of class members, and the interests of those similarly situated.⁵¹

4.62 *Cy-prés* relief is part of the Canadian class action regime, which is discussed in detail below. While the ALRC did not recommend the introduction of the regime in 1988,⁵² the introduction of a *cy-prés* regime into the Victorian legislation was recommended by the Victorian Law Reform Commission as part of its civil justice review in May 2008.⁵³ To date, however, it has not been implemented.

4.63 In response to the VLRC recommendation in relation to *cy-prés* relief, Professor Morabito attributed the lack of support for the introduction of a *cy-prés* regime in Victoria to be partially a result of a philosophical approach that the introduction of a representative action regime should not penalise respondents any more than is currently foreshadowed by existing remedies to causes of action otherwise brought in tort, contract or pursuant to a statute.⁵⁴

4.64 The Commission is of the preliminary view that it does not recommend that *cy-prés* relief be introduced as part of a Western Australian legislative regime,

48. *Bright v Femcare Ltd* (2002) 195 ALR 574, 607–8.

49. Lindgren KE, ‘Some Current Practical Issues in Class Action Litigation’ (2009) 15(2) *University of New South Wales Law Journal Forum* 16.

50. For instance, the strategic conferencing system recently introduced into the Supreme Court is an example of a case management practice that could be adopted (successfully one might think) for representative actions commenced in that Court: see Western Australian Supreme Court Practice Direction [7020.1.2.9].

51. Mulerhon R, ‘Cy-Pres Damages Distributions in England: A new era for consumer redress’ (2009) 20 *European Business Law Review* 307, 309, as cited in Morabito V, ‘The Victorian Law Reform Commission’s Class Action Reform Strategy’ (2009) 15(2) *University of New South Wales Law Journal Forum* 107, 110.

52. There is a broad discussion about how one would dispose of aggregate funds, although the notion of *cy-prés* relief was not directly discussed: see ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [236]–[240].

53. Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 559.

54. Morabito V, ‘The Victorian Law Reform Commission’s Class Action Reform Strategy’ (2009) 15(2) *University of New South Wales Law Journal Forum* 107, 110.

for reasons as expressed in relation to the merits of introducing a certification procedure.

LITIGATION FUNDING

4.65 In the Commission's view issues, such as litigation funding (or arguably *cy-près* relief) do not directly fall within the terms of reference, which are primarily directed at the best framework within which representative actions ought to be conducted or concluded.

4.66 Further, the Commission's focus on the required reform at this point in Western Australia is what one might describe as a 'threshold' reform, to resolve the fundamental uncertainty created as a result of an absence of a legislative representative regime for representative proceedings.

4.67 Notwithstanding the above, it is important to recognise that the topic of litigation funding has gained prominence in recent years in relation to representative proceedings. Morabito has identified a total of 18 Part IVA proceedings that were funded during the first 17 years of Part IVA proceedings in the Federal Court.⁵⁵ IMF Australia, considered to be the largest litigation funding company in Australia, had no group actions in its portfolio upon listing. However, by 2009, IMF was of the view that 'multi-party litigation will remain a prominent component of its total claims portfolio'.⁵⁶

4.68 Given the inter-relationship between litigation funding and representative proceedings, the Commission felt it was appropriate to briefly discuss some of the key issues.

4.69 Litigation funding is a legally enforceable arrangement where a third party (the litigation funder) enters into an agreement with a plaintiff and/or claimants to an action. The substance of the agreement is usually an arrangement where the funder agrees to meet the costs of the litigation, indemnify the plaintiff in the event of an adverse costs order and if necessary, provide security for costs. In exchange, the plaintiff and/or the claimants usually agree to pay the funder a percentage of the damages they are awarded, which is usually between 25% and 40%.⁵⁷

4.70 Litigation funding is seen by its proponents as a 'means of providing access to justice, as well as a tool through which litigants can manage risk in litigation'.⁵⁸ However, there are also questions associated with matters funded through a litigation funder. For instance, what is the appropriate level of control that a litigation funder ought to have in relation to the strategic direction of litigation? Others include the fact that a litigation funder can essentially charge contingency fees, while such an arrangement is prohibited among the legal profession; as well as the extent to which the litigation funding industry ought to have additional prudential regulation attached to it.⁵⁹

55. Morabito V, *An Empirical Study of Australia's Class Action Regimes: Second report* (2010) 25, 37.

56. Walker J, Khouri S & Attrill W, 'Funding Criteria for Class Actions' (2009) 15(2) *University of New South Wales Law Journal Forum* 96.

57. Standing Committee of Attorney's-General, *Litigation Funding in Australia* (2006) 4, 7. See also Law Council of Australia, *Regulation of Third Party Litigation Finding in Australia*, Position Paper (2011).

58. Slater & Gordon 'Commercial Litigation Funding in Australia' (undated) <[http://www.nationalsecurity.gov.au/www/agd/rwpattach.nsf/VAP/\(8AB0BDE05570AAD0EF9C283AA8F533E3\)-Grech,+Andrew+-+Commercial+Litigation+Funding+in+Australia.PDF/\\$file/Grech,+Andrew+-+Commercial+Litigation+Funding+in+Australia.PDF](http://www.nationalsecurity.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)-Grech,+Andrew+-+Commercial+Litigation+Funding+in+Australia.PDF/$file/Grech,+Andrew+-+Commercial+Litigation+Funding+in+Australia.PDF)>.

59. See Law Council of Australia, *Regulation of Third Party Litigation Finding in Australia*, Position Paper (June 2011) 17–18.

4.71 As can be seen from the brief discussion above, the issue of litigation funding is a topic of sufficient complexity to warrant a discussion paper in its own right. However, the Commission does not presently consider that issues relevant to litigation funding fall directly within the terms of reference. Litigation funding also occurs outside multi-party litigation, and is therefore broader than the ambit of the Commission's terms of reference. Accordingly, it is not proposed that the issue of litigation funding be addressed in the Commission's Final Report.⁶⁰

60. This is not to discourage those interested parties from submitting suggestions in relation to litigation funding as a result of this Discussion Paper; however, it is put forward as an explanation as to why the issue of litigation funding is not directly covered in the course of the discussion below.

Chapter 5

Overseas Models



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Overseas representative proceedings models

5.1 In accordance with the terms of reference, the Commission investigated representative proceedings regimes operating internationally. An analysis of the frameworks in England and Wales, Canada, New Zealand, the United States of America and South Africa is set out below.

5.2 While it is commonly considered that the United States has the most well-developed body of law governing class actions, given that Western Australia currently has a regime based on the traditional rule developed by the English Court of Chancery, it is appropriate to commence with a review of the law in England and Wales.¹

ENGLAND AND WALES

5.3 Similar to the current position in Western Australia, the procedural rules of the courts in England and Wales traditionally incorporated some mechanisms for dealing with multiple party claims including representative actions, joinder of parties and consolidation of claims.² However, in 1996 Lord Woolf in his *Access to Justice Report* found that these mechanisms for managing group claims were inadequate and recommended that a group litigation system be created.³

5.4 As a result, the current group litigation regime was introduced by the insertion of Part 19.III into the *Civil Procedure Rules 1998* from 2 May 2000.⁴ It is acknowledged that the group litigation regime is not a representative proceeding regime in the traditional sense. However, it is worth examining its defining features as an example of an alternative model for representative proceedings. It is noted that there have been more recent proposals advocating the establishment by legislation of a ‘generic collective action’ in England and Wales.⁵

5.5 Although the British government has not passed such legislation, a Civil Justice Council working group produced draft rules designed to provide a procedural framework for collective actions created in sector-specific statutes.⁶ However, academics have been critical of the sectorial class action approach⁷ and as yet the draft rules have not been adopted.

1. The legal system of Britain comprises the law of England and Wales, the law of Scotland and the law of Northern Ireland. This Discussion Paper considers only the law of England and Wales, principally because it is the most frequently used British legal system, the most materials concerning its state and development are available, and because it is the predecessor of the law of Western Australia.
2. See *Rules of the Supreme Court* (UK) O 15 rr 4, 9(1), 12.
3. Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) ch 17.
4. *Civil Procedure (Amendment) Rules 2000* (SI 2000/221) r 9.
5. Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a more efficient and effective procedure for collective actions*, Final Report (2008) 21.
6. Civil Justice Council, *Draft Court Rules for Collective Proceedings* (2010) 1.
7. See Mulheron R, ‘Recent Milestones in Class Action Reform in England: A critique and some proposals’ (2011) 127 *Law Quarterly Review* 288, 314.

Group litigation regime

Current framework: group litigation orders

5.6 At present, the group litigation order (GLO) is the primary mode for dealing with representative proceedings in England. It might be most accurately described as a group case management framework. Where claims give rise to common or related issues of fact or law, English courts have the power to make GLOs that allow it to manage the claims in a coordinated way.⁸

5.7 There are a number of different ways GLOs can be case managed.⁹ These include use of a test claim,¹⁰ division of the group into sub-groups, identification of generic or common issues, use of a master pleading, trial of preliminary issues; or some investigation of a sample or all individual claims.¹¹ Irrespective of the case management method ultimately adopted, a GLO must:

- (a) contain directions about the establishment of a group register on which details of the claims to be managed under the GLO must be entered;
- (b) specify the GLO issues, which will identify the claims to be managed under the GLO; and
- (c) specify the ‘management court’ responsible for managing the claims on the group register.¹²

5.8 The GLO may also:

- (a) direct the entry onto the group register of claims or transfer to the management court of claims that raise one or more of the GLO issues;
- (b) direct that from a specified date claims which raise one or more of the GLO issues should be started in the management court and entered on the group register; and
- (c) give directions for publicising the GLO.¹³

Features of the regime

5.9 There are a number of criteria for the commencement of a GLO.

Number of claims requirement

5.10 For a GLO to be commenced there must be ‘a number of claims’.¹⁴ Early multi-party jurisprudence in England often mentioned the need for at least 10 claims.¹⁵ However, in the *Access to Justice Report* Lord Woolf suggested that it would be preferable to avoid setting a minimum number of claims required to commence

8. *Civil Procedure Rules 1998* (English) (SI 1998/3132) r 19.10.

9. *Civil Procedure Rules 1998* (English) r 19.13; Practice Direction 19B [12] (‘PD 19B’).

10. *Civil Procedure Rules 1998* (English) rr 19.13, 19.15; PD 19B [12.3].

11. *Supreme Court Practice (White Book Service)* (London: Sweet & Maxwell, digital ed, 2001) [19.15.1].

12. *Civil Procedure Rules 1998* (English) r 19.11(2).

13. *Civil Procedure Rules 1998* (English) r 19.11(3).

14. *Civil Procedure Rules 1998* (English) r 19.11(1).

15. See Mulheron R, ‘Some Difficulties with Group Litigation Orders – and Why a Class Action is Superior’ (2005) 24 *Civil Justice Quarterly* 40, 41.

a group litigation.¹⁶ In the absence of a definitive pronouncement on the minimum number of claims, this requirement is likely to be easily satisfied.

Commonality requirement

5.11 The claims that comprise a GLO must give rise to ‘common or related issues’ of fact or law.¹⁷ This formulation is broader than that used in relation to representative proceedings in Western Australia and will, therefore, allow for claims that are not identical. However, the requirement that all claims give rise to ‘GLO issues’ reinforces the need for commonality between them. Consequently, claims that require separate determinations of liability and quantum against a single defendant may not be appropriate for GLOs.¹⁸

Definition of the group/class

5.12 A claimant or defendant may make an application for a GLO.¹⁹ Such an application must include:

- (1) a summary of the nature of the litigation;
- (2) the number and nature of claims already issued;
- (3) the number of parties likely to be involved;
- (4) the common issues of fact or law (the ‘GLO issues’) that are likely to arise in the litigation; and
- (5) whether there are any matters that distinguish smaller groups of claims within the wider group.²⁰

5.13 By requiring GLO applicants to detail the number and nature of claims already issued, the court is able to determine the limits of the GLO and the requirements for additional claimants to be entered onto the group register.

Availability of alternative procedures

5.14 English courts do not commonly issue GLOs if alternative procedures are available to deal with the claims. Consequently, applicants are also required to consider whether any other order would be more appropriate and if the claims could be consolidated or form part of a representative proceeding.²¹

Consent of the Lord Chief Justice, Vice-Chancellor or Head of Civil Justice

5.15 GLOs may not be made in each of the courts in the English court hierarchy without the consent of the relevant head of jurisdiction.²² Where a court hears or intends to hear a GLO application and wishes to grant a GLO, that court must:

send to the Lord Chief Justice, the Vice-Chancellor or the Head of Civil Justice, as appropriate:

- (1) a copy of the application notice,
- (2) a copy of any relevant written evidence, and
- (3) a written statement as to why a GLO is considered to be desirable.²³

16. See Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) ch 17, [20].

17. *Civil Procedure Rules 199* (English) r 19.10.

18. See, eg, *Hobson v Ashton Morton Slack Solicitors* [2006] EWHC 1134 (QB).

19. PD 19B [3.1]. Alternatively, the court may make a GLO on its own initiative: see PD 19B [4], [3.3]–[3.4].

20. PD 19B [3.2].

21. PD 19B [2.3].

22. PD 19B [3.3].

23. PD 19B [3.4].

Consistency with the overriding objective of the Civil Procedure Rules

5.16 The stated objective of the *Civil Procedure Rules* is to enable the court ‘to deal with cases justly’.²⁴ As Part 19.III is part of the rules it must comply with this requirement.

Opt-in group litigation procedure

5.17 A GLO procedure is an opt-in multiple claims procedure in the sense that parties must elect to become part of the group litigation. Once a GLO is issued, a judge will be appointed to manage the GLO and the court will order that a register be established to record the claims that are subject to the GLO.²⁵ Both the *Civil Procedure Rules* and Practice Directions provide for the publication of the GLO but do not specify the appropriate form of publication or the party liable for publication costs.²⁶ However, any notice or publication will ordinarily include a cut-off date by which time claimants are required to join the group. Individual claimants must then issue their own claim form in order for their claim to be entered on the register.²⁷ The potential adverse impact of such a requirement has been tempered by the way in which it has been interpreted. Lord Woolf has held that ‘[i]n the context of a GLO, a claim form need be no more than the simplest of documents’.²⁸

Binding judgment

5.18 Unlike actions in some other jurisdictions, the claims that make up the group litigation remain ‘individual actions managed collectively’.²⁹ Therefore, the outcome of one case does not definitively determine liability in other claims. However, a judgment made on one or more of the GLO issues will be binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless a court orders otherwise.³⁰

Costs

5.19 The assessment of costs is a matter for the court’s discretion. As in Australia, the general rule is that the unsuccessful party bears the costs of the successful party.³¹

5.20 In addition, Rule 48.6A of the *Civil Procedure Rules* provides a framework for sharing costs between claims entered on the GLO group register. Each litigant must bear the costs of their individual claim.³² In addition, and unless the court makes an alternative order, any order for common costs against group litigants imposes on each group litigant several liability for an equal proportion of the common costs.³³ ‘Common costs’ are defined to include costs incurred in relation to the GLO issues, individual costs incurred in a claim while it is proceeding as a test claim, and the

24. *Civil Procedure Rules 1998* (English) r 1.1(1).

25. PD 19B [8], [6.1].

26. *Civil Procedure Rules 1998* (English) r 19.11(3)(c); PD 19B [11].

27. PD 19B [6.1A].

28. *Boake Allen Limited v Revenue and Customs Commissioners* [2007] HL 25, [33]. See also *Europcar English Ltd v Revenue and Customs Commissioners* [2008] EWHC 1363 (Ch).

29. Brown A & Dodds-Smith I, *Class and Group Actions: English* (International Comparative Legal Guide Series, 2013).

30. *Civil Procedure Rules 1998* (English) r 19.12(1)(a).

31. Brown A & Dodds-Smith I, *Class and Group Actions: English* (International Comparative Legal Guide Series, 2013).

32. *Civil Procedure Rules 1998* r 48.6A(2)(a). It is noted that in certain circumstances the costs associated with bringing lead actions or test cases may be considered generic costs in the sense that they raise issues common to many claims.

33. *Civil Procedure Rules 1998* (English) r 48.6A(3).

costs incurred by the lead solicitor in administering the group litigation.³⁴ Each claimant may be ordered to pay a share of any common costs incurred before he or she joined the group action, but not after he or she has concluded or compromised the claim and left the action.³⁵

5.21 The court may also make orders to manage costs incurred throughout the litigation. While such orders have been made in GLOs,³⁶ Lord Woolf has cautioned that the costs implications of any procedural order should always be considered to avoid unnecessary inflation in overall GLO costs.³⁷

Group litigation statistics and examples

Statistics

5.22 There are currently over 75 GLOs being managed by the Queen's Bench Division, only 11 of which have been commenced in the last five years.³⁸ There is no restriction on the types of legal claims that can be subject to a GLO or remedies available. To date GLOs have dealt with matters such as alleged child abuse or maltreatment in care,³⁹ the management of landfill sites,⁴⁰ the validity of provisions of corporate tax legislation,⁴¹ prisoner treatment⁴² and personal injury claims.⁴³

5.23 GLOs, like many court cases, can take years to come to trial.⁴⁴ However, the time it takes for a GLO to get to trial depends on the complexity of the case and the value of the claim.⁴⁵

Case examples

5.24 One example of a case where the court has refused to grant a GLO is *Hobson v Ashton Morton Slack Solicitors*.⁴⁶ In that case, a GLO was sought in relation to the claims of a group of miners and ex-miners concerned about the enforceability of their trade union agreements. The court refused to make a GLO on the basis that no GLO issues had been sufficiently identified. The court also severely criticised the applicants' solicitors for failing to consider the appropriateness of an alternative order. It held that there was a 'gross imbalance' between the existing and prospective costs of GLO litigation and the sums to be recovered, and suggested that consolidation of actions or the trial of selected cases were more appropriate and cost effective means of resolving the claims.⁴⁷

34. *Civil Procedure Rules 1998* (English) r 48.6A(2)(b).

35. *Civil Procedure Rules 1998* (English) r 48.6A(6)–(7).

36. See, eg, *AB v Leeds Teaching Hospitals NHS Trust and in the matter of the Nationwide Organ Group Litigation* [2003] Lloyd's Law Reports 355; *Multiple Claimants v Corby Borough Council* [2008] EWHC 619.

37. *Boake Allen Limited v Revenue and Customs Commissioners* [2007] HL 25.

38. For the full list of GLOs, see Her Majesty's Court Service, 'Group Litigation Orders' <<http://webarchive.nationalarchives.gov.uk/20110110161730/http://www.hmcourts-service.gov.uk/cms/150.htm>>.

39. See, eg, *West Kirby Residential School Group Litigation*, GLO ordered 27 June 2001; *Longcare Group Litigation*, GLO ordered 21 November 2001; *St Leonard's Group Litigation*, GLO ordered 12 June 2002; *South Wales Children's Homes Litigation (NCH)*, GLO ordered 28 November 2002; *Manchester Children's Home Group Litigation*, GLO ordered 27 July 2010.

40. *Nantygwyddon Group Litigation*, GLO ordered 15 August 2001; *Westmill Landfill Group Litigation*, GLO ordered 27 March 2009.

41. *Thin Cap Group Litigation*, GLO ordered 30 July 2003.

42. *Opiate Dependant Prisoners Litigation (No 2)*, GLO ordered 21 July 2009.

43. See, eg, *Miner's Knee Group Litigation*, GLO ordered 21 December 2006.

44. See, eg, *Oral Contraceptive Group Litigation*, *XYZ v Schering Health Care Limited* [2002] EWHC 1420 (QB) which spanned approximately 6.5 years from the issue of the first proceedings until judgment.

45. *Brown A & Dodds-Smith I*, *Class and Group Actions: English* (International Comparative Legal Guide Series, XXXX).

46. [2006] EWHC 1134 (QB).

47. *Ibid* [71].

5.25 One well known but ultimately unsuccessful GLO litigation is colloquially referred to as the ‘McDonalds Hot Drinks litigation’.⁴⁸ In that case, a number of parties brought claims for personal injuries caused by the spillage of hot drinks (in two cases hot water) served by McDonalds. The court was satisfied that common features between the claims justified the issue of a GLO on 21 February 2001.⁴⁹ At the time of the trial of the preliminary issues the group comprised 36 claimants, the majority of whom were children. Though many of the claimants suffered serious injury, the GLO failed as none of the generic preliminary issues relating to McDonalds’ negligence or breach of the *Consumer Protection Act 1987* were made out.⁵⁰

5.26 Among the 75 GLOs that are currently being managed in English courts, many relate to claims of alleged maltreatment or abuse of children in care.⁵¹ A large number of the claims in these cases have been settled before or during trial.⁵² One case that illustrates the limitations of the GLO procedure is *T (formerly H) v Nugent Care Society (formerly Catholic Social Services)*.⁵³ In this case, Mr Taylor sought to join a GLO known as the *North-West Child Abuse Cases* after the cut-off date that had been specified. He was not permitted to join the existing GLO. Subsequently, the defendant successfully had Mr Taylor’s individual claim struck out as an abuse of the court’s process.⁵⁴ The Court of Appeal overturned this decision holding that such claims could be initiated but should be stayed (even though they do not form part of the group action) until completion of the group action.⁵⁵ In other words, although a claimant need not join a GLO (whether through a failure to register before a cut-off date or due to other limitations), the claimant will not be entitled to redress until after the court has dealt with the larger group claims.

5.27 While this decision might be explained in light of the need to promote efficiency in the litigation process and the use of court resources, it is difficult to reconcile with access to justice principles.

Alternative avenues of class actions to be brought

Representative actions

5.28 Claims can also be pursued in a representative proceeding where one representative claimant or defendant acts on behalf of a class of legal persons having the ‘same interest’ in a single claim.⁵⁶

5.29 As with the Australian experience, the limitations of representative proceedings mean that the procedure is rarely used. Members of the class must share an interest in the claim and cannot have different defences or seek different remedies. Furthermore, English courts have been unwilling to extend the procedure to allow for proceedings to be pursued on behalf of persons who cannot be identified before judgment.⁵⁷ A judgment or order given in a representative claim will be binding on

48. *B (A Child) v McDonald’s Restaurants Ltd* [2002] EWHC 490 (QB). See Her Majesty’s Court Service, ‘Group Litigation Orders’ <<http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders>>.

49. *Ibid* [1].

50. *Ibid* [81].

51. See above n 39.

52. One Crown Office Row, ‘Child Abuse Compensation Law’ <<http://www.1cor.com/london/area/Child-Abuse-Compensation-Law>>.

53. [2004] 1 WLR 1129.

54. *Ibid* 1130.

55. *Ibid* 1135.

56. *Civil Procedure Rules 1998* r 19.6.

57. See *Emerald Supplies Ltd v British Airways plc* [2009] EWHC 741 (Ch).

all persons represented in the claim.⁵⁸ However, such judgments or orders can only be enforced by or against a person who is not a party to the claim with the court's permission.⁵⁹

Advantages and criticisms of the English framework

5.30 This discussion has concentrated primarily on the GLO procedure in England due to the contrast it offers to the existing Western Australian representative proceedings regime. The GLO procedure represents an attempt to find an alternative to joinder, consolidation and representative actions that is not as prescriptive as a United States style class action.

5.31 Some of the strengths of this procedural mechanism include:

- (a) ensuring consistency in the determination of common issues;
- (b) making judgments binding upon all the group claimants only to the extent of the GLO issues; and
- (c) specific costs sharing provisions between all claimants entered on the group register.

5.32 However, there are criticisms that can and have been made of the GLO procedure that operates in England.

5.33 Firstly, the GLO procedure demands substantial active participation by all group members. Claimants or defendants who wish to join a GLO must first issue a claim form in accordance with ordinary procedure. Each individual claim can then opt-in to the GLO and be added to the group register. These features of opt-in regimes have seen them labelled as 'permissive joinder device[s]' rather than true representative proceedings or class actions.⁶⁰ The choice between opt-in and opt-out regimes has been a source of controversy in class actions reforms around the world. For example, one well-recognised potential drawback in opt-out regimes is the initiation and progression of litigation without the consent of group members who may subsequently be bound by judgments issued. In spite of this, it seems that requiring claimants to have such a high level of involvement runs counter to the overarching access to justice objectives that have informed the development of representative proceedings.

5.34 Secondly, the *Civil Procedure Rules* and Practice Direction do not deal comprehensively with the issues likely to arise during GLO litigation.⁶¹ This may allow courts to respond flexibly to the peculiarities of each GLO.⁶² Indeed, Hodges suggests that the general principles of civil procedure and the sparse GLO procedural framework provided by the CPR and Practice Direction should provide sufficient guidance for judges.⁶³ However, allowing for substantial judicial discretion could have implications for the consistency and predictability of this area of law.

58. *Civil Procedure Rules 1998* r 19.6(4)(a).

59. *Civil Procedure Rules 1998* r 19.6(4)(b).

60. Mulheron R, 'Some Difficulties with Group Litigation Orders – and Why a Class Action is Superior' (2005) 24 *Civil Justice Quarterly* 40, 48.

61. *Ibid* 47–8.

62. See Hodges C, 'Global Class Action Project – Country Report: England and Wales' (2007) <http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf> 10, 12.

63. *Ibid* 10–11.

5.35 Thirdly, there are a number of potential concerns in respect of costs for GLO litigants. Claimants may have to outlay significant costs to simply have their claim added to a GLO, particularly if attempting to do so after the cut-off date has passed.⁶⁴ These initial costs are likely to perpetuate rather than alleviate the existing barriers facing claimants who do not have the requisite economic resources to approach the courts.

CANADA

5.36 Class action regimes exist in eight of Canada's provinces and at the federal level.⁶⁵ Although Quebec was the first Canadian jurisdiction to enact a class actions law, the Ontario *Class Proceedings Act 1992* ('the Ontario Act')⁶⁶ is generally regarded as the archetype for comparison with other common law countries.⁶⁷ Several salient features of this and other Canadian laws, especially points of contrast with Part IVA of the *Federal Court of Australia Act 1976* (Cth), are set out below.

Commencement and certification

5.37 Section 2 of the Ontario Act provides that one or more members of a class of persons may commence proceedings on behalf of the class, and apply for an order certifying the proceedings as 'class proceedings'. Section 5(1) further provides that the court must certify the proceedings if:

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

5.38 Rachel Mulheron comments that these provisions broadly reflect those of the *Federal Court of Australia Act*, especially insofar as there is no need to obtain the consent of class members (all Canadian jurisdictions employ an opt-out model).⁶⁸ In contrast to the approach of the Federal Court post-*Phillip Morris*, Canadian law regarding multi-defendant class actions does not require a single representative plaintiff to allege a cause of action against every defendant. In British Columbia, for

64. See *T (formerly H) v Nugent Care Society (formerly Catholic Social Services)* [2004] 1 WLR 1129.

65. See Law Reform Commission of Hong Kong, *Class Actions*, Report (May 2012) 85, [2.17].

66. *Class Proceedings Act*, SO 1992, c 6.

67. Mulheron R, *The Class Action in Common Law Legal Systems — A comparative perspective* (Oxford: Hart Publishing, 2004) 5; Law Reform Commission of Hong Kong, *Class Actions*, Report (May 2012), [2.17]; Bogart WA, Kalajdzic J & Matthews I, 'Class Actions in Canada: A national procedure in a multi-jurisdictional society' (Paper presented at the Globalization of Class Actions Conference, Oxford, 13–14 December 2007) 3.

68. Mulheron, *ibid* 93, table 4.2; Morabito V, 'Opt In or Opt Out? A Class Dilemma for New Zealand' (2011) 24 *New Zealand Universities Law Review* 421, 437.

example, it is sufficient that each defendant is the subject of a cause of action alleged by at least one plaintiff or class member.⁶⁹ This makes it substantially easier to join multiple defendants in a single ‘industry class action’.⁷⁰

5.39 Moreover, whereas s 33C(1)(a) of the *Federal Court of Australia Act* requires a class of seven or more, in Ontario there is no need for a minimum number of class members, save that there be ‘two or more’. Rather the class size is relevant to whether class proceedings are a ‘preferable procedure’.⁷¹ Mulheron considers that this approach recognises that class size is subsidiary to the ultimate question whether class proceedings are, in the final analysis, the best method for dealing with the matter.⁷²

5.40 On the other hand, she compares the Australian approach to defining classes favourably with the reluctance of Canadian courts to use terms denoting a state of mind or a legal wrong.⁷³ This can create particular difficulty where the class members are alleged to have relied on a misrepresentation, and can result in imprecise and overbroad class definitions.⁷⁴

Opting-out, opting-in

5.41 As noted above, all Canadian class actions regimes are opt-out. In Ontario, the certification order must identify the class, representative parties, claims or defences asserted on behalf of the class, the relief sought by or from the class, and the common issues.⁷⁵ As a general rule, class members must be notified of certification of a class proceeding, although the court may dispense with this requirement.⁷⁶ Those who do not opt-out before a deadline in the notice will be bound by judgment or settlement on the common issues, class claims and class relief in the certification order.⁷⁷ British Columbian law, however, contains an exception to the rule – class members in other provinces may opt-in to class proceedings commenced there.⁷⁸

National class actions and registration

5.42 This provision seeks to address one perennial issue in Canadian class actions, which is the difficulty of national class actions. The limited subject matter jurisdiction of the Federal Court of Canada leaves many class actions to be pursued in provincial forums, often in parallel. In one extreme case, settlement required approval from nine such courts.⁷⁹ In response, the Uniform Law Commission of Canada has drafted model legislation which would require courts considering whether to certify a ‘multi-jurisdictional class action’ to defer to the most appropriate forum for the dispute.⁸⁰

69. *Campbell v Flexiwatt Corp* (1997) 44 BCLR 3d 343, [42]–[43] (Cumming JA).

70. Bogart WA, Kalajdzic J & Matthews I, ‘Class Actions in Canada: A national procedure in a multi-jurisdictional society’ (Paper presented at the Globalization of Class Actions Conference, Oxford, 13–14 December 2007) 7.

71. *Griffith v Winter* (2002) 23 CPC (5th) 336, [33]–[34] (Cole J).

72. Mulheron R, *The Class Action in Common Law Legal Systems — A comparative perspective* (Oxford: Hart Publishing, 2004) 128–30.

73. Eg, ‘in reliance on’, ‘wrongfully’, ‘fraudulently’.

74. T Mulheron R, *The Class Action in Common Law Legal Systems — A comparative perspective* (Oxford: Hart Publishing, 2004) 324–5, 333–7, citing *Mouhteros v De Vry Canada Inc* (1999) 41 OR (3d) 63.

75. *Ontario Class Proceedings Act* s 8(1).

76. *Ontario Class Proceedings Act* s 17(1), (2).

77. *Ontario Class Proceedings Act* ss 27(2), (3), 29(3).

78. *Class Proceedings Act*, RSBC 1996, c 50, s 16(2)–(5).

79. Bogart WA, Kalajdzic J & Matthews I, ‘Class Actions in Canada: A national procedure in a multi-jurisdictional society’ (Paper presented at the Globalization of Class Actions Conference, Oxford, 13–14 December 2007) 13.

80. See Uniform Law Conference of Canada, ‘Uniform Class Proceedings Act (Amendment) 2006’ <<http://www.ulcc.ca/en/2006-edmonton-ab/243-civil-section-resolutions/62-civil-section-resolutions-2006>>.

5.43 Action on this proposal has been mixed — it is now operating in Saskatchewan, but not in British Columbia, Ontario or Quebec, which account for most Canadian class actions.⁸¹ However, another problem highlighted by the Law Commission of Canada — the lack of a central database on class actions — appears to have been rectified by the Canadian Bar Association’s National Class Action Database. Practice directions in most provinces require counsel for the representative plaintiff to file documents with the database.⁸²

Settlement and remedies

5.44 For the most part, remedies available in Ontario class actions differ little from those available in civil claims generally, although Canadian courts are notably reticent to certify class actions seeking declarations that legislation is unconstitutional.⁸³ In those cases that proceed to trial, common issues are determined together, and the court then has a broad discretion as to how it disposes of individual claims. The methods envisioned include, inter alia, further court hearings and reference to arbitration or expert investigation by a court officer or outside referee.⁸⁴

5.45 Notably, however, Ontario law explicitly provides for the award of *cy-prés* remedies. Under s 26 of the Ontario Act, all or part of an undistributed award can be applied in any manner that may reasonably be expected to benefit class members, even if it does not provide monetary relief to individuals, if it is satisfied that it would benefit a reasonable number of class members who would not otherwise receive monetary relief.

5.46 By explicitly setting out the main criteria for a *cy-prés* remedy, this provision largely disposes of the major issues which have vexed courts considering such remedies as discussed in Chapter 4, such as whether a windfall to non-class members must be avoided.⁸⁵ However, it still preserves a large measure of judicial discretion. For example, a court has considered factors such as the size of the class and individual claims, and the practicality of distribution in approving an agreement that a settlement sum should be applied to institutions conducting research and treatment of thyroid disease.⁸⁶

5.47 However, even though the vast majority of Canadian class actions are settled before trial,⁸⁷ the right to settle is not at large — any settlement of a class proceeding requires the approval of the court. This is intended to protect class members whose entitlements will, in practice, be negotiated by class counsel.⁸⁸ Where the court declines to approve a settlement, it will normally point out matters that must be addressed.⁸⁹

81. *Class Actions Act*, SS 2001, c C-12.01, ss 6(2), 6(3), 6.1.

82. Canadian Bar Association, ‘About the National Class Action Database’ <<http://www.cba.org/classactions/main/gate/index/about.aspx>>; See, eg, Supreme Court of British Columbia, *Practice Direction No 5 – Class Proceedings* (1 July 2010) [3].

83. Bogart WA, Kalajdzic J & Matthews I, ‘Class Actions in Canada: A national procedure in a multi-jurisdictional society’ (Paper presented at the Globalization of Class Actions Conference, Oxford, 13–14 December 2007) 4.

84. *Ontario Class Proceedings Act* ss 24–26.

85. Mulheron R, *The Class Action in Common Law Legal Systems: A comparative perspective* (Oxford: Hart Publishing, 2004) 430.

86. *Tesluk v Boots Pharmaceuticals plc* (2002) 21 CPC (5th) 196, [9] (520 000 class members claiming that the defendant misrepresented that a drug successfully treated a thyroid disease).

87. Bogart WA, Kalajdzic J & Matthews I, ‘Class Actions in Canada: A national procedure in a multi-jurisdictional society’ (Paper presented at the Globalization of Class Actions Conference, Oxford, 13–14 December 2007) 21.

88. See, eg, *Ontario Class Proceeding Act* s 29(1), (2).

89. Bogart WA, Kalajdzic J & Matthews I, ‘Class Actions in Canada: A national procedure in a multi-jurisdictional society’ (Paper presented at the Globalization of Class Actions Conference, Oxford, 13–14 December 2007) 22, referring to comments by a senior Ontario judicial officer.

Costs and funding

5.48 The common denominator in the funding of class actions in Canada is that private counsel bear most commercial risk through contingency fee agreements. This is, essentially, the intended outcome of the relevant legislation – in Ontario class actions were the first claims in which contingency fee agreements were permitted.⁹⁰ However, in recognition of the fact that class members are generally unable to negotiate with class counsel, the law subjects *all* cost agreements in class proceedings to court approval.⁹¹

5.49 Canadian law is otherwise marked by variety. The most common model is the ‘no way’ costs regime, under which party and party costs cannot be recovered except in a limited range of circumstances intended to deter vexatious litigation.⁹² Since it was first enacted in British Columbia, it has come to be viewed as the most effective and least cumbersome means to ensure access to justice.⁹³

5.50 Party and party costs can still be recovered in Ontario and Quebec,⁹⁴ where the main point of innovation is the availability of public litigation funding. In Ontario, a representative plaintiff may obtain financial support for disbursements from the Class Proceedings Fund (CPF), in return for which it levies 10% on any judgment or settlement sum.⁹⁵ However, Canadian lawyers apparently consider that the support available seldom justifies the onerous reporting requirements and inflexible levy.⁹⁶ It appears that the chief benefit is protection against adverse costs orders – a defendant’s only recourse for costs awarded against a funded plaintiff is to the CPF.⁹⁷

5.51 By contrast, the Quebec *Fonds d’aide aux recours collectifs* (‘the Fond’) appears to be highly regarded as an access to justice mechanism, providing much more generous support covering both fees and disbursements. In return, the Fond has a right of subrogation for repayment of grants out of settlement and judgment sums. Its reserves are also supported by a variable levy on the unclaimed residue of settlement or judgment sums in both funded and unfunded class actions in Quebec. Canadian lawyers comment that this removes any incentive not to apply for funding, but also gives individual awards priority over the levy.⁹⁸

90. Ibid 30.

91. See, eg, *Ontario Class Proceedings Act* s 32(2); *Mura v Archer Daniels Midland Co* (2003) 18 BCLR (4th) 194, [3].

92. *Class Proceedings Act*, RSBC, c 50, s 37.

93. British Columbia, *Parliamentary Debates*, Legislative Assembly, 13 June 1995, 15,387 (C Gabelmann, Attorney-General). See also Branch WK & Brasil L, “‘If It Ain’t Broke, Don’t Fix It! If It Is Broke, Fix It!’ Costs Regimes for Class Actions” <<http://www.branchmacmaster.com/storage/articles/broke-fix.pdf>> 6.

94. *Ontario Class Proceedings Act* s 31; *Code of Civil Procedure*, RSQ c C-25, arts 477, 1050.1 (costs to be assessed on the scale applicable to small claims).

95. *Law Society Act*, O Reg 771/92, reg 10(3)(b).

96. Branch WK & Brasil L, “‘If It Ain’t Broke, Don’t Fix It! If It Is Broke, Fix It!’ Costs Regimes for Class Actions” <<http://www.branchmacmaster.com/storage/articles/broke-fix.pdf>> 5.

97. *Law Society Act*, RSO 1990, c L 8, s 59.4; Mulheron R, *The Class Action in Common Law Legal Systems: A comparative perspective* (Oxford: Hart Publishing Ltd, 2004) 456–7.

98. Bogart WA, Kalajdzic J & Matthews I, ‘Class Actions in Canada: A national procedure in a multi-jurisdictional society’ (Paper presented at the Globalization of Class Actions Conference, Oxford, 13–14 December 2007) 30; Branch WK & Brasil L, “‘If It Ain’t Broke, Don’t Fix It! If It Is Broke, Fix It!’ Costs Regimes for Class Actions” <<http://www.branchmacmaster.com/storage/articles/broke-fix.pdf>> 6.

NEW ZEALAND

5.52 Rule 4.24 of the *High Court Rules* (NZ) provides that:

One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject of a proceeding—

- (a) with the consent of the other persons who have the same interest; or
- (b) as directed by the court on an application made by a party or intending party to the proceeding.⁹⁹

5.53 This provision hails from chancery rules codified in reforms to the English judicial system in the 19th century. It is comparable to the rule contained in Order 18 Rule 12 of the *Rules of the Supreme Court 1971* (WA). As with the Western Australian rule, it is not equivalent to representative actions regimes in other common law states.¹⁰⁰ However, courts confronted with representative proceedings may compensate for the lack of detailed rules by making orders for case management.¹⁰¹

5.54 According to the New Zealand Court of Appeal, a representative proceeding may be commenced where each member of the class represented is alleged to have a separate cause of action, provided that there is an interest shared in common by all class members, and the action is for the benefit of other class members. Furthermore, an order for a representative proceeding may not confer a right of action on a class member which they could not have asserted in a separate proceeding, and may not bar a defence which would have been available.¹⁰²

5.55 For these purposes, the ‘same interest’ is taken to mean ‘the same interest in the proceeding, not necessarily the same cause of action nor an entitlement to have or to share in the same relief’.¹⁰³ The court will also consider whether representative proceedings would prevent a defendant raising a defence to some of the claims.¹⁰⁴

Opt-out proceedings and proceedings ordered by the court

5.56 Rule 4.24(a) has been compared to an opt-in class action regime. In the long-running Feltex litigation, the plaintiff sought orders for an opt-out representative proceeding, but orders in opt-in form were granted instead.¹⁰⁵ The Court of Appeal did not discuss whether opt-out proceedings could be ordered under Rule 4.24(a).¹⁰⁶

5.57 Rule 4.24(b) also provides for the court to direct that representative proceedings be undertaken without the unanimous consent of class members. However, the use of this power to facilitate representative proceedings in an administrative law context was criticised in *Attorney-General (NZ) v Refugee Council of New Zealand*.¹⁰⁷ In that case, Blanchard, Tipping and Anderson JJ stated that the exercise of a discretionary power in specific cases should not be assessed on a ‘representative and global approach’, and representative proceedings were therefore inappropriate.¹⁰⁸

99. *Judicare Act 1908* (NZ) sch 2.

100. *Saunders v Houghton* [2009] NZCA 610 (*The Feltex Case*), [12], [15] (Glazebrook, O’Regan & Baragwanath JJ).

101. *Ibid* [63].

102. *Ibid* [13].

103. *Ibid* [18].

104. *Ibid* [13].

105. *Ibid* [44]–[45].

106. *Ibid* [12].

107. [2003] 2 NZLR 577.

108. *Ibid* [31]–[32], [42] (Blanchard, Tipping & Anderson JJ); see also [107] (Glazebrook J).

Claims for damages

5.58 It was once doubted that damages could be claimed in representative proceedings. However, in *RJ Flowers Ltd v Burns*,¹⁰⁹ it was held that damages could be awarded where the class represented covers all or virtually all of those wronged by the defendant, and those persons had consented to the total damages being paid to the representative plaintiff.¹¹⁰ Alternatively, the plaintiff may claim a declaration establishing liability, thus facilitating subsequent claims as to individual damage on the basis of *res judicata*.¹¹¹

Costs, litigation funding and security for costs

5.59 Class members may be jointly and severally liable for costs,¹¹² which may raise access to justice issues. Although the common law torts of maintenance and champerty persist in New Zealand, the Court of Appeal has ruled that litigation funding may be permitted where the court is satisfied that there is an arguable case for rights that warrant vindication and there is no abuse of process.¹¹³ It acknowledged that this could be oppressive for defendants, but noted that it could be met by ordering the litigation funder to provide security for costs.¹¹⁴ In such cases, applications for representative proceedings, litigation funding and security for costs would be appropriately assessed together as a single tranche of orders.¹¹⁵

Proposals for reform

5.60 The Rules Committee of the New Zealand High Court began investigating the introduction of a class actions regime in 2006.¹¹⁶ This led to a consultation paper in April 2007, and a follow up paper in October 2008.¹¹⁷ The second consultation paper was accompanied by a draft Class Actions Bill, and a draft Pt 34 for the *High Court Rules* (NZ).¹¹⁸ These were further revised by the Rules Committee in 2009, and forwarded to the New Zealand Ministry of Justice for consideration.¹¹⁹

Key features

5.61 A Ministry of Justice memorandum identified the following as the salient features of the draft Bill and Rules:

- (a) Provision made for class actions on an opt-in or opt-out basis;
- (b) The torts of maintenance and champerty to be eliminated, and litigation funding to be permitted, as regards class actions;

109. [1987] 1 NZLR 260.

110. Ibid 270–1 (McGechan J).

111. *Saunders v Houghton* [2009] NZCA 610 ('*The Feltex Case*'), [14] (Glazebrook, O'Regan & Baragwanath JJ).

112. LexisNexis NZ Ltd, *The Laws of Zealand* (Service 64) [72], citing *Hedley v Kiwi Co-Operative Dairies Ltd* (2000) 15 PRNZ 210.

113. *Saunders v Houghton* [2009] NZCA 610 ('*The Feltex Case*'), [79] (Glazebrook, O'Regan & Baragwanath JJ).

114. Ibid [31], [36].

115. Ibid [38].

116. Clark G, 'Official Information Act Request', letter, NZ Ministry of Justice (4 July 2012) <<http://fyi.org.nz/request/247/response/2606/attach/3/OIA%20Response%20Ben%20draft%20Class%20Actions%20Bill.pdf>> 3.

117. Rules Committee of the NZ High Court, *Class Actions for New Zealand*, Consultation Paper No 2 (October 2008) [1] <http://globalclassactions.stanford.edu/sites/default/files/documents/New_Zealand_Class_Actions_consultation_paper_Oct2008.pdf>.

118. See Global Class Actions Exchange, 'Class Actions Bill 2008' <http://globalclassactions.stanford.edu/sites/default/files/documents/New_Zealand_Class_Actions_Bill%5B1%5D.pdf>; Global Class Actions Exchange, 'High Court Amendment (Class Actions) Rules 2008' <http://globalclassactions.stanford.edu/sites/default/files/documents/New_Zealand_Class_Actions_Rules%5B1%5D.pdf>.

119. Note that the Rules Committee apparently declined to publicly release the final draft Bill and Rules forwarded to the Government: Rules Committee of the High Court (NZ), 'Rules Committee Note on Class Actions (30 July 2009)' <http://www.courtsofnz.govt.nz/about/system/rules_committee/projects/Rules-Committee-note-on-class-actions-30-7-09.pdf>.

- (c) Courts to receive additional case management powers in class actions, including the power to approve, terminate and vary litigation funding arrangements; and
- (d) The Commerce Commission and Securities Commission to be empowered to commence class actions for breaches of consumer protection and securities legislation.¹²⁰

5.62 Clause 6(1) of the draft Bill allows a class action to be commenced if:

- (a) 7 or more persons have claims against the same proposed defendant or defendants; and
- (b) the claims are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) all the claims give rise to at least one substantial common issue of law or fact.

5.63 This closely follows s 33C(1) of the *Federal Court of Australia Act*, and Part IVA of that Act provided the model for the Rules Committee's proposal.¹²¹

5.64 Nonetheless, as Morabito points out, the draft New Zealand Bill and Rules also contain significant additions.¹²² In particular, a judge hearing an application to certify a class action would have the discretion to make it opt-in or opt-out.¹²³ The Rules Committee considered this necessary to provide flexibility.¹²⁴ However, Morabito argues that by limiting opt-out class actions to cases where the prospective lead plaintiff can establish certain facts, the draft Rules would compel judges to certify class actions on an opt-in basis by default.¹²⁵ The draft Rules would also allow a class member to apply to have an arrangement with a litigation funder varied or terminated on the basis that it is 'oppressive or unjust'.¹²⁶ Morabito and Wayne, who are more supportive of this innovation, have suggested that this phrase is likely to be interpreted in the same way as similar terms in equity and consumer law.¹²⁷

Current status of proposals

5.65 The Ministry of Justice supported the proposal received from the Rules Committee, although certain outstanding issues listed in a covering letter from the Committee needed to be resolved.¹²⁸ These included, inter alia, the court's discretion to select an opt-in or opt-out procedure and litigation funding.¹²⁹ However, although

120. Clark G, 'Official Information Act Request', letter, NZ Ministry of Justice (4 July 2012) <<http://fyi.org.nz/request/247/response/2606/attach/3/OIA%20Response%20Ben%20draft%20Class%20Actions%20Bill.pdf>> 3.

121. Ibid 6.

122. Morabito V, 'Opt in or Opt Out? A Class Dilemma for New Zealand' (2011) 24 *New Zealand Universities Law Review* 42.

123. Global Class Actions Exchange, 'Class Actions Bill 2008' <http://globalclassactions.stanford.edu/sites/default/files/documents/New_Zealand_Class_Actions_Bill%5B1%5D.pdf> cl 6(5); Proposed Class Actions Rules, r 34.8(3)(c).

124. Rules Committee of the NZ High Court, *Class Actions for New Zealand*, Consultation Paper No 2 (October 2008) [1] <http://globalclassactions.stanford.edu/sites/default/files/documents/New_Zealand_Class_Actions_consultation_paper_Oct2008.pdf> [11]-[13].

125. Morabito V, 'Opt in or Opt Out? A Class Dilemma for New Zealand' (2011) 24 *New Zealand Universities Law Review* 421, 430. Morabito refers to the final draft of the Bill and Rules.

126. Global Class Actions Exchange, 'High Court Amendment (Class Actions) Rules 2008' <http://globalclassactions.stanford.edu/sites/default/files/documents/New_Zealand_Class_Actions_Rules%5B1%5D.pdf> r 34.23.

127. Morabito V & Wayne V, 'Reining in Litigation Entrepreneurs: A New Zealand Proposal' [2011] *New Zealand Law Review* 323, 358.

128. Clark G, 'Official Information Act Request', letter, NZ Ministry of Justice (4 July 2012) 3 <<http://fyi.org.nz/request/247/response/2606/attach/3/OIA%20Response%20Ben%20draft%20Class%20Actions%20Bill.pdf>> NZ Ministry of Justice OIA Response, 8.

129. Ibid 4.

it foreshadowed approval for legislative action from the Cabinet Committee on Domestic Policy, the proposal appears not to have progressed.¹³⁰

5.66 Many investor submissions to the parliamentary Inquiry into Finance Company Failures called for the introduction of class actions procedures and litigation funding. In its report, the Commerce Committee recommended that the Class Actions Bill be given priority in the 51st Parliament, along with provision for litigation funding and the regulation thereof.¹³¹ In its response to the Inquiry the New Zealand Government stated that the further policy analysis required would take place this year.¹³²

UNITED STATES OF AMERICA

5.67 While the class action originated in English courts of equity in the 18th century, the courts of the United States of America are generally considered the 'home of the class action'.¹³³ The *Federal Rules of Civil Procedure* (FRCP) provided a statutory basis for the institution of class actions under Rule 23 when they were first adopted in 1938.¹³⁴ The basic structure of the rule was significantly amended in 1966 and continues to provide the modern class action procedural framework. However, there have been a number of subsequent amendments including provisions relating to the award of attorney fees and non-taxable costs, and appointment of class counsel in 2003.¹³⁵

5.68 Rule 23 is not the only mechanism by which class actions can be brought in the United States. Similar to the Australian representative action landscape, American states also have their own class action rules. Though these rules are often similar to Rule 23, state courts have traditionally been more liberal in permitting class certification.¹³⁶ For the purpose of this Paper, the Commission will discuss the federal class action scheme created by Rule 23 of the FRCP.

The current federal class action framework: FRCP

5.69 Rule 23 of the FRCP creates the federal class action regime. Under Rule 23, class representatives may bring one of four types of class actions as set out in Rule 23(b). Each class action must fit within one of these categories and satisfy the prerequisites set out in Rule 23(a), explained below.¹³⁷

130. Ibid 6–9.

131. Commerce Committee, NZ Parliament, *Inquiry into Finance Company Failures* (2011) <http://www.parliament.nz/NR/rdonlyres/57E84344-829E-45EB-9F99-E1F8E38DF2C1/204528/DBSCH_SCR_5335_InquiryintofinancecompanyfailuresI1.pdf> 32–3.

132. NZ Parliament, 'Government Response to the Report of the Commerce Committee on its Inquiry into Finance Company Failures' <http://www.parliament.nz/NR/rdonlyres/CC9A0260-CFCA-4C69-9D60-A7031C04FC50/212716/DBHOH_PAP_22761_GovernmentResponseToReportoftheCom.pdf> 11; see also Clark G, 'Official Information Act Request', letter, NZ Ministry of Justice (4 July 2012) 3 <<http://fyi.org.nz/request/247/response/2606/attach/3/OIA%20Response%20Ben%20draft%20Class%20Actions%20Bill.pdf>> 1.

133. Mulheron R, *The Class Action in Common Law Legal Systems: A comparative perspective* (Oxford: Hart Publishing Ltd, 2004) 9.

134. Eble T, 'The Federal Class Action Practice Manual' (Class Action Litigation Information, 1999) <<http://www.classactionlitigation.com/fcapmanual/>> ch 1.

135. Rules Advisory Committee, Rule 23: Class Actions <http://www.law.cornell.edu/rules/frcp/rule_23> 'Committee Notes on Rules – 2003 Amendment'.

136. Benson PE & Olsen JL (eds), *International Comparative Legal Guide to Class & Group Actions* (International and Comparative Legal Guide Series, 5th ed, 2013) ch 27: see: <http://www.michaelbest.com/files/Uploads/Documents/12088557_ICLG_CLASS_GROUP_ACTIONS_2013_-_MICHAEL_BEST_FRIEDRICH.PDF>.

137. *Federal Rules of Civil Procedure* r 23(b). This requirement has reiterated in the courts. See, eg, *Georgine v Amchem Products Inc*, 83 F 3rd 610, 624 (3d Cir 1996).

5.70 There is no restriction on the remedies that can be sought in United States class actions. However, the desired remedy may dictate the appropriate Rule 23(b) category and the relevant certification requirements:

Rule 23(b)(1)

This category is in fact divided into two further categories.

(a) *'Incompatible standards' class action*

This class action category seeks to avoid holding defendants to incompatible standards in multiple proceedings. It permits certification of a class action where 'prosecuting separate actions by or against individual class members would create a risk of *inconsistent or varying adjudications* with respect to individual class members that would establish *incompatible standards of conduct* for the party opposing the class'.¹³⁸

(b) *'Limited fund' class action*

In this category a class may be certified where 'prosecuting separate actions by or against individual class members would create a risk of adjudications [that] as a practical matter, would be *dispositive of the interests of the other members* not parties to the individual adjudications or *would substantially impair or impede their ability to protect their interests*'.¹³⁹ In other words, this type of class action may be appropriate where early individual claims are likely to exhaust a defendant's funds.

Rule 23(b)(2): 'Injunctive' class action

In this category class actions may be brought where 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole'. In essence, the class action must be necessary to pursue injunctive or declarative relief for the class as a whole. This category is generally not used where damages are being sought.

Rule 23(b)(3)

This is the most general and commonly used form of class action that permits class members to seek damages. Under r 23(b)(3) class actions can be certified where:

- (a) the 'questions of law or fact common to class members predominate over any questions affecting only individual members'; and
- (b) a class action is 'superior to other available methods for fairly and efficiently adjudicating the controversy'.

5.71 The rule provides specific guidance as to how courts can make these findings. Matters that may be pertinent include:

- (a) The class members' interests in individually controlling the prosecution or defence of separate actions. The focus here is on whether the majority of class members wish to maintain separate actions. If there are only a small number

138. Emphasis added.

139. Emphasis added.

of class members that are opposed to the class action they can make use of the opt-out procedures considered below.

- (b) The extent and nature of any litigation concerning the controversy already begun by or against class members. On a number of occasions the absence of existing litigation on the class action issues has been a factor against certification.¹⁴⁰ However, as it cannot be assumed that an absence of litigation demonstrates a lack of interest in litigation, this factor has not often been determinative.
- (c) The desirability or undesirability of concentrating the litigation of the claims in the particular forum. For example, where an appropriate, cheaper administrative remedy exists certification may be denied.¹⁴¹
- (d) The likely difficulties in managing a class action. This factor has been the frequent ground for denying the superiority of a class action.¹⁴² However, the courts have noted that the factor should only become significant if a class action's unmanageability makes it a less 'fair and efficient' method of adjudication than other available techniques.¹⁴³

Certification order

5.72 The primary role of United States courts in the class action regime is the certification of the class action – it is the 'chief battle of the litigation'.¹⁴⁴ The Australian framework contains no such battleground.

5.73 Court certification is required once a class has sought to invoke one of the class action categories provided for under Rule 23(b).¹⁴⁵ Where the court decides to certify the class action a certification order must be made that defines the class and class claims, issues or defences and appoints class counsel.¹⁴⁶ Orders granting or denying certification of a class action may be appealed by entering an appeal petition within 14 days of the order being entered.¹⁴⁷ Further, certification orders may be altered or amended before final judgment.¹⁴⁸

Features of the regime

Prerequisites

5.74 Irrespective of the type of class action invoked, there are a number of criteria that must be satisfied for one or more members of a class to sue or be sued as representative parties under Rule 23.¹⁴⁹

Number of claims requirement

5.75 For a class action to be commenced the class must be 'so numerous that joinder of all members is impracticable'.¹⁵⁰ The formulation of this prerequisite has

140. See, eg, *Bentkowski v Marfuorza Compania Maritima SA*, 70 FRD 401, 404 (ED Pa 1976).

141. See *Chin v Chrysler Corporation*, 182 FRD 448, 464 (DNJ 1998).

142. *Buford v H&R Block Inc*, 168 FRD 340, 363 (SD Ga 1996).

143. *In re Antibiotic Antitrust Actions* 333 F Supp 278, 282 (SD NY 1971).

144. Mulheron R, *The Class Action in Common Law Legal Systems: A comparative perspective* (Oxford: Hart Publishing Ltd, 2004) 25.

145. *Federal Rules of Civil Procedure* r 23(c)(1)(A).

146. *Federal Rules of Civil Procedure* r 23(c)(1)(B). The appointment of class counsel must comply with the requirements of r 23(g).

147. *Federal Rules of Civil Procedure* r 23(f).

148. *Federal Rules of Civil Procedure* r 23(c)(1)(C).

149. *Federal Rules of Civil Procedure* r 23(a).

150. *Federal Rules of Civil Procedure* r 23(a)(1).

been somewhat problematic. Courts have placed varying emphases on the joinder qualification and have considered the requirement satisfied in large claims by virtue of their size alone.¹⁵¹ Where joinder has been considered, it has been held that joinder need not be impossible for this requirement to be satisfied. Rather, the number of claims must make joinder inconvenient or cause significant litigation hardship for the plaintiff.¹⁵² Though there is no ‘magic number’¹⁵³ for satisfaction of this requirement, it seems that joinder of more than 30 members will be considered impractical without further inquiry.¹⁵⁴

Commonality requirement

5.76 The class action must contain ‘questions of law or fact common to the class’.¹⁵⁵ The courts have held that a single common issue will be sufficient to satisfy this requirement.¹⁵⁶ However, in the case of Rule 23(b)(3) class actions there is an additional requirement that class issues ‘predominate’ over individual issues. This predominance should not preclude actions where separate damages determinations for individuals within the class will be required.¹⁵⁷ Further, courts have certified class actions where elements of the cause of action or a defendant’s defence were individual issues.¹⁵⁸

Typicality requirement

5.77 This prerequisite aims at ensuring that the representative will appropriately represent the interest of all class members. It requires that ‘the claims or defences of the representative parties are typical of the claims or defences of the class’.¹⁵⁹ Questions have been raised as to the necessity of this requirement in light of the commonality and adequacy of representation requirements. As such, it is absent from the class action regimes in a number of common law jurisdictions.¹⁶⁰ The United States Supreme Court has itself noted that commonality and typicality requirements ‘tend to merge’.¹⁶¹

Adequacy of representation requirement

5.78 Generally, the class representative must be a member of the class that they seek to represent.¹⁶² Alternatively, organisations held to have representative standing might be entitled to act as a class representative.¹⁶³ In all cases, it must be demonstrated that the representative parties will ‘fairly and adequately protect the interests of the class’.¹⁶⁴ United States courts have interpreted this to mean that the representative should not have interests antagonistic to or in conflict with those of the class.¹⁶⁵

151. See *In re American Med Systems Inc*, 75 F 3d 1069, 1079 (6th Cir 1996).

152. See, eg, *Boggs v Divested Atomic Corp*, 141 FRD 58, 63 (SD Ohio, 1991).

153. *Hum v Dericks*, 162 FRD 628, 634 (D Haw 1995).

154. *Rodger v Electronic Data Systems Corp*, 160 FRD 532, 535 (ED NC 1995).

155. *Federal Rules of Civil Procedure* r 23(a)(2).

156. *Buford v H&R Block Inc*, 168 FRD 340, 348 (SD Ga 1996).

157. Rules Advisory Committee, ‘Notes to 1966 Amendments to Rule 23’ (1996) 39 FRD 69, 103.

158. *Eisenborg v Gagnon*, 766 F 2d 770, 779 (3rd Cir 1985); *Gunter v Ridgewood Energy Corp*, 164 FRD 391 (DNJ 1996).

159. *Federal Rules of Civil Procedure* r 23(a)(3).

160. Mulheron R, *The Class Action in Common Law Legal Systems: A comparative perspective* (Oxford: Hart Publishing Ltd, 2004) 311–12.

161. *General Telephone Co of Southwest v Falcon*, 457 US 147, 157 (1982).

162. *Ibid* 156.

163. See Mulheron R, *The Class Action in Common Law Legal Systems: A comparative perspective* (Oxford: Hart Publishing Ltd, 2004) 305.

164. *Federal Rules of Civil Procedure* r 23(a)(4).

165. *General Telephone Co of Southwest v Falcon*, 457 US 147, 158 (1982).

Opt-out and notice

5.79 Where a class action is brought under Rule 23(b)(1) or (2) there is no express right for class members to opt out of the litigation. Rather, class membership is compulsory. However, the court will retain the discretion to direct that appropriate notice be given following certification.¹⁶⁶

5.80 By contrast, class actions initiated under Rule 23(b)(3) are opt-out actions. The court is required to order that class members receive the ‘best notice that is practicable under the circumstances’ which includes individual notice to members who can be identified with reasonable effort.¹⁶⁷ The rule further requires that the notice state (in clear, concise and easily understood language):

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting such exclusion; and
- (vii) the binding effect of a class judgment on members...¹⁶⁸

5.81 There were initially some doubts as to whether opt-out class actions complied with the due process amendment in the United States Constitution.¹⁶⁹ However, the Supreme Court has recognised the potential for opt-in mechanisms to undermine the very purpose of a class action.¹⁷⁰ Therefore, the court has held that ‘a fully descriptive notice ... sent first-class mail to each class member, with an explanation of the right to “opt out”, [will satisfy] due process’.¹⁷¹

Binding judgment

5.82 In class actions, the judgment given on the class representative’s case will bind all class members in subsequent litigation.¹⁷² For Rule 23(b)(1) or (2) actions any judgment must include and describe those persons whom the court finds to be class members.¹⁷³ Similarly, for Rule 23(b)(3) class actions the court must specify or describe those to whom notice was directed and who have not opted out of the litigation.¹⁷⁴

Costs

5.83 Unlike the position in Australia, in the United States ‘costs’ refer to the costs of discovery and other disbursements but do not generally include attorney fees. Discovery and disbursements costs are only awarded to the successful party in limited circumstances.¹⁷⁵

166. *Federal Rules of Civil Procedure* r 23(c)(2)(A).

167. *Federal Rules of Civil Procedure* r 23(c)(2)(B).

168. *Federal Rules of Civil Procedure* r 23(c)(2)(B).

169. Stiggelbout M, ‘The Recognition in England and Wales of United States Judgments in Class Actions’ (2011) 52 *Harvard International Law Journal* 433, 442.

170. See, eg, *Phillips Petroleum Co v Shutts*, 472 US 797, 812–13 (1985).

171. *Ibid.*

172. *Cooper v Federal Reserve Bank of Richmond*, 467 US 867, 874 (1984)

173. *Federal Rules of Civil Procedure* r 23(c)(3)(A).

174. *Federal Rules of Civil Procedure* r 23(c)(2)(B).

175. *Federal Rules of Civil Procedure* r 54(d)(1).

5.84 Although it is not expressly stated in Rule 23, courts in the United States have held that absent class members in class actions will have no liability for attorney fees or other costs where an action fails.¹⁷⁶ In these circumstances the costs burden is borne entirely by the class representative. This burden can be shifted to the attorney through the operation of a contingency fee agreement. Such agreements prevent attorneys from recovering any fees where a case fails. However, where a case is successful, a percentage of the damages (or other relief) recovered by the claimants will be paid to the attorney.

5.85 Irrespective of the attorney fee arrangement, where an action succeeds, the successful party cannot ordinarily recover attorney fees from the loser.¹⁷⁷ This principle will usually operate in class actions unless the successful party can make out a 'common benefit' exception. This exception permits a court to order that a party (recovering for the benefit of others in addition to himself) recover the costs and attorney's fees from the common fund or property or from those directly enjoying the benefit.¹⁷⁸ Thus, where lawyers recover for the benefit of a class in a class action, they may be entitled to have their costs reimbursed from the common fund.¹⁷⁹

5.86 In 2003, amendments were made to Rule 23. One of these amendments was Rule 23(h). This sub-rule empowers the court to award 'reasonable' attorney's fees and costs that are authorised by law or by the parties' agreement in certified class actions.¹⁸⁰ The Rules Advisory Committee, in their notes on the amendment, recognised that attorney fees are a powerful motivator for the way in which attorneys initiate, develop and conclude class actions.¹⁸¹ Consequently, Rule 23(h) was designed to provide an opportunity for the court to develop an early framework for the attorney fee award and monitor the work of class counsel.¹⁸²

Class counsel

5.87 In 2003, Rule 23 of the FRCP was amended to include a provision outlining procedure for the court appointment of class counsel following certification of a class action.¹⁸³ Under this provision the counsel must 'fairly and adequately' represent the interests of the class.¹⁸⁴

5.88 The factors the court must consider in making the appointment include the work counsel has already done in identifying or investigating potential claims in the action and the resources they will commit to representing the class.¹⁸⁵ The court must also consider counsel's knowledge of the relevant law and experience in handling class actions, other complex litigation, and the types of claims asserted

176. *Lamb v United Security Life Co*, 59 FRD 44, 48 (SD Iowa 1973).

177. *Alyeska Pipeline Co v Wilderness Society*, 421 US 240, 247 (1975).

178. *Ibid* 257.

179. Court Awarded Attorney Fees, 'Report of the Third Circuit Task Force' (1985) 108 FRD 237, 241, cited in Mulheron R, *The Class Action in Common Law Legal Systems: A comparative perspective* (Oxford: Hart Publishing Ltd, 2004) 440.

180. The term 'reasonable' is explained in the notes to the amendment. It is the 'customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes': see Rules Advisory Committee, Rule 23: Class Actions <http://www.law.cornell.edu/rules/frcp/rule_23> 'Committee Notes on Rules – 2007 Amendment'. It is also noted that the subrule does not create novel grounds for the award of costs and attorney fees.

181. *Ibid*.

182. *Ibid*.

183. It is noted that the court is also empowered to appoint interim counsel prior to the certification of a class action under *Federal Rules of Civil Procedure* r 23(g)(3).

184. *Federal Rules of Civil Procedure* r 23(g)(4).

185. *Federal Rules of Civil Procedure* r 23(g)(1)(A).

in the action.¹⁸⁶ The court has a broad discretion to consider any other matters or order other information pertinent to counsel's ability to adequately represent the interest of the class,¹⁸⁷ and may make orders about attorney fees or non-taxable costs.¹⁸⁸ Failing to move promptly for class certification may be evidence of a lack of adequate class representation.¹⁸⁹

Settlement

5.89 Very few cases that are filed as class actions proceed to trial. Instead, following certification as a class action, defendants will usually try to settle where there is even a small risk that they might lose.¹⁹⁰ As a result of this, it can be years before a certified class action comes to trial on the merits.¹⁹¹

5.90 Even where a class action settles, the court will continue to play a role in the proceedings. In particular, settlements that will bind class members require court approval and must be 'fair, adequate and reasonable'.¹⁹² For class actions certified under Rule 23(b)(3) the court may refuse to approve a settlement unless it affords a new opportunity for individual class members to request exclusion.¹⁹³

Alternative avenues of class actions to be brought

5.91 Aside from state specific class action regimes there are also a number of statutes that provide mechanisms for collective actions to be brought before the courts. For example, the *Fair Labor Standards Act* permits 'one or more employees for and on behalf of himself or themselves and other employees similarly situated' to bring actions against employers under the statute.¹⁹⁴

5.92 Collective actions can also be brought before the courts by means of consolidation or joinder.¹⁹⁵ Courts presiding over multiple, related cases not certified as class actions may use 'test' or 'bellwether' trials to help determine how litigation should evolve. Unlike class actions certified under Rule 23 judgments, these 'test' cases will not be binding on all members of an intended class.

Group litigation statistics and examples

Statistics

5.93 Comprehensive class action data is rare.¹⁹⁶ One explanation for this absence is that there is no restriction on the subject matter than can be dealt with under Rule 23 class actions. In filing a federal class action a representative must specify the 'nature' of the claim from one of 95 possible options.¹⁹⁷ Comprehensive statistics would require the collection of state and federal data from all of these areas. Nonetheless, in 2008 the United States Federal Judicial Centre published a study

186. *Federal Rules of Civil Procedure* r 23(g)(1)(A).

187. *Federal Rules of Civil Procedure* r 23(g)(1)(B)–(C).

188. *Federal Rules of Civil Procedure* r 23(g)(1)(D).

189. *E Tex Motor Freight Sys v Rodriguez*, 431 US 395, 405 (1977).

190. Stiggelbout M, 'The Recognition in England and Wales of United States Judgments in Class Actions' (2011) 52 *Harvard International Law Journal* 433, 440.

191. Dodds-Smith I & Brown A (eds), *Class and Group Actions* (International Comparative Legal Guide, 5th ed, 2013).

192. *Federal Rules of Civil Procedure* r 23(e)(2).

193. *Federal Rules of Civil Procedure* r 23(e)(4).

194. *Fair Labor Standards Act* 29 USC §201, s 216(b).

195. See, eg, *Federal Rules of Civil Procedure* r 20 which provides for permissive joinder of multiple plaintiffs or multiple defendants where there are common questions of law or fact between them.

196. Dodds-Smith I & Brown A (eds), *Class and Group Actions* (International Comparative Legal Guide, 5th ed, 2013).

197. These options are first divided into areas of law (ie, contract, torts, property rights and bankruptcy) and then into specific subject matter (eg, insurance, marine).

to assess the impact of the *Class Action Fairness Act 2005*.¹⁹⁸ As part of this study, data was collected on the class action filings and removals occurring in 88 federal district courts between 2001 and 2007.¹⁹⁹ In the first period (July–December 2001) 1370 class actions had been filed in or removed to federal courts and in the final period (January–June 2007) this number had increased by 72% to 2354.²⁰⁰ These figures are dated and obviously do not reflect the total number of class actions suits being filed across the United States; however, they do give some indication of the prevalence of class action litigation in that country.

Case examples

5.94 As the United States has a long, extensive class action history, there are thousands of actions that could illustrate the operation, interpretation and limitations of the regime. A number of significant recent Supreme Court decisions are briefly outlined.

5.95 *Wal-Mart Stores, Inc v Dukes*²⁰¹ has attracted considerable attention and commentary due to the potential impact it will have on federal class actions. This case was an employment class action where 1.5 million women alleged sex discrimination against Wal-Mart. In reversing the original certification of the class action the United States Supreme Court considered the facts required to satisfy the Rule 23(a) commonality requirement and defined the scope of Rule 23(b)(2) class actions. In relation to Rule 23(a)(2) claims, the court held that the requirement for common ‘questions of law or fact’ necessitated that their claim must

depend upon a common contention ... that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.²⁰²

5.96 The court found that the plaintiffs failed to provide ‘significant proof’ that Wal-Mart operated under a general policy of discrimination, particularly in light of its express anti-discrimination policy and penalties.²⁰³ There was an impermissible overlap between the proof of commonality for certification and the merits contention that Wal-Mart did in fact engage in a practice of discrimination.²⁰⁴ The court also found that the claim had been improperly certified as a Rule 23(b)(2) class action. It held that claims for monetary relief (here the class members were claiming back pay) could not be certified under Rule 23(b)(2) unless that relief was incidental to injunctive or declarative relief. This category of action could apply only where a single, indivisible remedy would provide relief to each class member and not where injunctive or declarative relief simply predominated over monetary relief.²⁰⁵ The restrictive reading of these core certification requirements creates ‘major hurdles’ for claimants seeking class certification.²⁰⁶ In turn, this may curb the number of class actions brought in the United States.²⁰⁷

198. Lee EG & Willging TE, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* (Federal Justice Center, 2008) <[http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf)>.

199. *Ibid* 3, 19 (Figure 1).

200. *Ibid* 3.

201. 131 S Ct 2541 (2011).

202. *Ibid*, Syllabus, 9.

203. *Ibid*, Syllabus, 8–14.

204. *Ibid*, Syllabus, 11.

205. *Ibid*, Syllabus, 20–23.

206. Brown J & Chang I, ‘Has the US Class Action Well Run Dry? - Evaluating the Impact of Recent Supreme Court Opinions on Toxic Tort Litigation’ (International Comparative Legal Guide Series, 2012) ch 3 <<http://www.shb.com/attorneys/BrownJennifer/HasTheUSClassActionWellRunDry.pdf>>.

207. *Ibid*.

5.97 In *Smith v Bayer Corp*,²⁰⁸ the Supreme Court considered the extent of a federal court's power to enjoin a subsequent state court action to avoid re-litigation of a federal certification determination. In this case, following a failed federal court certification, a different plaintiff (but a member of the original class) sought to have the same claim certified in the relevant state court under the state class action regime. The Supreme Court held that after denying certification a federal court could not enjoin a state court from adjudicating a putative class action on the same issue unless:

- (a) the issue the federal court decided is 'the same as' the one presented in the state tribunal; and
- (b) the party in the latter case was a party to the federal suit, or else falls within one of a few discrete exceptions to the general rule against binding non-parties.²⁰⁹

5.98 Here, differences between the state and federal class action regimes meant that the two cases were not 'the same'.²¹⁰ Further, as the federal class action was not certified the second plaintiff never became party to the action.²¹¹ This decision leaves open the possibility of repetitive class action litigation in state courts. However, the impact of this decision is likely to be mitigated by the *Class Action Fairness Act* referred to above.

Advantages and criticisms

5.99 This discussion has outlined the federal class action in the US under Rule 23 of the FRCP. Some of the strengths of this procedural mechanism include:

- (a) the detailed procedural framework outlined in Rule 23 for the certification and court management of class actions;
- (b) extensive provisions relating to court appointment of class counsel (including the award of attorney fees and non-taxable costs); and
- (c) the requirement that the court approve settlements that will bind all class members.²¹²

5.100 Further, widespread use of the class action mechanism has provided ample opportunity for the judiciary to offer guidance on the class action framework. As a result, the United States enjoys an extensive body of judicial thought as to the effective implementation and management of class actions.

5.101 However, there are criticisms that can and have been made of the Rule 23 class action procedure in the United States. Some of these criticisms are briefly canvassed as follows.

Certification

5.102 The Rule 23 class action regime provides considerable guidance on the certification procedure. The rationale for focusing on certification is that by scrutinising the eligibility of class actions at the earliest opportunity the court

208. 131 S Ct 2368 (2011).

209. *Ibid*, Syllabus, 5–7.

210. *Ibid*, Syllabus, 9–10. It was noted, however, that 'minor variations' in what is essentially the same legal standard would not preclude an injunction.

211. *Ibid*, Syllabus, 15.

212. For an analysis of the difficulties confronting judges when exercising their powers of counsel appointment, fee awards and supervision of settlement, see Marcus R, 'Reviving Judicial Gatekeeping of Class Aggregation: Scrutinising the merits of class certification' (2011) 79 *George Washington Law Review* 324, 343–9.

protects absent class members and the defendant against large vexatious litigations. It also attempts to guarantee efficient and affordable justice by ensuring that court resources are not wasted on unwarranted class actions. However, certification procedures can also undermine the very principles they seek to uphold. Extensive certification procedures can mean that much of the court's time is taken up with preliminary matters rather than the substantive issues or merits of a claim. In addition, class action claimants may face substantial extra costs. The difficulty in developing reform proposals lies in identifying viable alternatives. Even a regime that does not formally require certification may experience the same limitations if the courts become inundated with preliminary interlocutory hearings in class action proceedings. In light of this, it may be preferable to develop a clear certification procedure so that potential applicants can feel confident in the consistency of class action justice.

Fourfold categorisation system for class actions under Rule 23(b)

5.103 As outlined above, class action claimants must elect an appropriate category of class action under which their claim should be certified. The remedies the claimants are seeking will usually govern this choice and dictate the certification requirements. Other jurisdictions have not considered the categorisation system to be helpful and have not adopted it. In particular, in its 1988 report the Australian Law Reform Commission (ALRC) rejected the fourfold categorisation on the grounds that the categories were overlapping and lacking a coherent conceptual basis.²¹³

Additional and overlapping certification criterion

5.104 Owing to the overlap between the class action categories, it is arguable that the Rule 23(b)(3) certification requirements for superiority and predominance should be common to all class actions. However, if uniform certification procedures were to be developed, care must be taken to avoid repetition. As already stated, the need for a typicality requirement under Rule 23(a) has been questioned given the existence of the commonality and adequate representation requirements. In light of this, if certification criterion were developed as part of Western Australian reform proposals these requirements should avoid overlapping inquiries.

Risk of abuse of the class action mechanism

5.105 A combination of factors has made the Rule 23 class action regime susceptible to abuse. First, parties to class action litigation are only responsible for their own costs. Second, representative plaintiffs may be able to enter into contingency fee agreements that require no payment unless an action succeeds. In effect this may make class action litigation an attractive 'no lose' proposition for potential claimants. However, access to justice principles makes it essential that a mechanism be developed to mitigate the costs burden facing representative claimants. Putting aside the motivations of class representatives, permitting court supervision of attorney fee arrangements under Rule 23(h) may go some way to preventing opportunistic lawyers from taking advantage of the class action mechanism. However, United States court resources may still be unnecessarily expended in the preliminary procedures required of all potential class actions. Western Australian reform proposals should focus on developing mechanisms that balance the principles of affordable, efficient justice with the needs of class representatives and their solicitors to avoid similar abuse.

213. ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 194.

5.106 Given the level of prominence the United States class action system has upon any discussion of large scale group litigation, it would be remiss not to discuss key features of the US regime within the context of a discussion involving international class action frameworks.

5.107 However, even leaving procedural differences aside, the enshrined constitutional right of a claimant to a jury trial in the United States, the absence of a rule in which a claimant is exposed to adverse costs if unsuccessful, the presence of contingency fees and the propensity of juries to award exemplary or punitive damages, are all characteristics of the US class action system that are not shared by its Australian equivalent.

5.108 The United States of America has a class action framework so unique to its own jurisdiction that while a discussion around some aspects of their regime is useful (such as the effect of certification upon how class actions proceed), we are limited in the context of the terms of reference as to how much of the system in the United States has direct application to whether a case can be made for modifying the current procedure in Western Australia.

5.109 The fundamental differences between the US system as set out above and the various Australian representative proceedings regimes make any meaningful comparison of the jurisdictions difficult, if not impossible.

SOUTH AFRICA

5.110 Like many Australian jurisdictions, South Africa has no class action legislation that defines and governs the class actions brought in South African courts. Furthermore, class actions have a relatively recent history in South Africa. Prior to 1994, class actions were not part of the South African law and no actions analogous to United States product liability class actions had been commenced.²¹⁴

5.111 As part of its 1998 report on class actions the South African Law Commission proposed a draft Bill for a Public Interest and Class Actions Act in an attempt to create a procedural framework for class actions. However, this bill has never been enacted. In the absence of a statutory class action framework, the South African High Court Rules and the Constitution of the Republic of South Africa of 1996 govern class actions in South Africa.²¹⁵ Since recently coming into operation the *Companies Act 2008* and *Consumer Protection Act 2008* may provide additional avenues for class actions to be commenced in South African courts.

Current class action framework

5.112 The Constitution of the Republic of South Africa, in s 38, laid the foundation for class actions in South Africa.²¹⁶ Section 38 of the Constitution reads:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court

214. South African Law Commission, *Report on the Recognition of Class Actions and Public Interest Actions in South African Law*, Project No 88 (1998) [1.2].

215. The South African court hierarchy includes a number of provincial High Courts, a Court of Appeal that is the highest court in non-constitutional matters and a Constitutional Court that is the highest court in constitutional matters.

216. It is noted that this section was preceded by s 7(4)(b). This was a largely equivalent section in the Interim Constitution of the Republic of South Africa 1993.

may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) *anyone acting as a member of, or in the interest of, a group or class of persons;*
- (d) anyone acting in the public interest;
- (e) an association acting in the interest of its members.²¹⁷

5.113 However, s 38 does not set out the procedures by which class actions are to be conducted. Consequently, the features of the South African class action regime have been the product of judicial development.

Features of the regime

Commencement of the action

5.114 As a preliminary requirement an applicant in a class action must show that a constitutional right has been infringed or threatened.²¹⁸ Some judges have considered whether the common law should be developed to make class actions available in non-Bill of Rights matters particularly those involving damages claims.²¹⁹ However, to date the constitutional mechanism provided for in s 38 has not been extended in this way.

5.115 In recognition of the potential adverse impact of class actions, when the court gives procedural directions it must give directions as to whether notice should be given to members of the class to enable them either to opt in or opt out as members.²²⁰

Identifying parties and their common interests

5.116 As noted above, parties should be able to point to a ‘common interest’ between all class members. The South African Court of Appeal has held that the quintessential requisites of a class action are that:

- (a) the class is so numerous that joinder of all its members is impracticable;
- (b) there are questions of law and fact common to the class;
- (c) the claims of the applicants representing the class are typical of the claims of the rest; and
- (d) the applicants through their legal representatives ... will fairly and adequately protect the interests of the class.²²¹

5.117 The generality of these requirements suggests that class members need not have identical interests in a matter. Rather, a degree of commonality between the legal and factual claims of class members is likely to be sufficient to launch a class action.

217. Emphasis added.

218. *First Rand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (C), [24].

219. See *The Trustees for the Time Being for the Children’s Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* (25302/10, 25353/10) [2011] ZAWCHC 102, [82].

220. See eg, the order granted in *Ngxuzza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E), 630C-J.

221. *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 (4) SA 1184 (SCA), [17].

Binding judgment

5.118 All class members automatically benefit from and are bound by orders and judgments in class actions unless they opt out of proceedings.²²² However, unnamed members in a class action need not consent to the institution of proceedings on their behalf.

Costs

5.119 In South Africa the successful party will generally be awarded costs.²²³ While there is no procedural framework governing class action litigation brought under s 38, this practice is likely to apply to class actions. However, judicial discretion may alleviate the potential impact of adverse costs orders in cases involving particularly serious breaches of fundamental rights.²²⁴

Advantages and criticisms

5.120 The South African class action regime shares some of the same advantages as more-defined legislative class action regimes. These include:

- (a) promoting efficiency in the litigation process and the use of court resources;
- (b) increasing access to legal remedies particularly for claimants that have 'low income, lack of legal knowledge, lack of funds for legal assistance and nominal pecuniary claims that prevent [them] from vindicating their rights and approaching the courts single handedly';²²⁵
- (c) ensuring consistency in the determination of common issues; and
- (d) increasing the effectiveness and enforceability of the law.

5.121 Criticisms include:

- (a) There is no clear procedural framework to look to as a model for reform.
- (b) The Constitution provides for the use of class actions only in the context of the violation of rights recognised in the Bill of Rights. Although the *Companies Act 2008* and *Consumer Protection Act 2008* may broaden the kinds of matters in which class actions are available, there will remain circumstances where class actions will be beyond the reach of potential applicants. That class actions are so confined in their operation is inconsistent with the underlying rationale for class actions, namely, that whenever numerous plaintiffs (or defendants) share a common interest arising out of common facts, civil procedure should facilitate such claims being heard and determined together.

5.122 South Africa has a well developed system to deal with litigation involving numerous claimants, but it is confined to a limited set of circumstances.

222. Ibid [4].

223. Conradie P, 'Class and Group Actions 2011: A practical cross border insight into class and group actions work: South Africa' (International and Comparative Legal Guide Series, 2011) 136 <<http://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2011/dispute/downloads/Class-and-Group-Actions-South-Africa-2011.pdf>>.

224. *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), [12]–[13] (Sachs J).

225. Sita van Wyk J, 'The Need and Requirements for Cass Action in South African Law with Specific Reference to the Pre-requisites for *locus standi in iudicio*' (Thesis, University of Pretoria, 2010) 48.

SUMMARY

5.123 What can we draw from the overview of international frameworks above?

5.124 The absence of clarity in the expression ‘same interest’ arises in each of the jurisdictions considered. Those jurisdictions have either solved this problem by a comprehensive regime concerning litigation by claimants arising from common circumstances or they have recognised the difficulty and are seeking to overcome it by legislative or rule-based reforms. That is, the issue arising in Western Australia is not unique, and there is wide agreement that the ‘same interest’ requirement is inadequate.

5.125 The operation of civil litigation in jurisdictions within the United States is, by reason of the matters identified above, very different from those jurisdictions in our common law world. Accordingly, comparison with the United States regime is of limited benefit in providing a model for Western Australian reform.

5.126 Overall, while an analysis of overseas models relating to representative actions is helpful to inform the debate, the Commission does not consider that the other common law models provide any better or more suitable legislative solution than those models provided by federal, New South Wales and Victorian legislation.

5.127 The legislative scheme that began with amendment to the *Federal Court Act* some 21 years ago has been adopted in two other states without significant dissent from stakeholders.

5.128 The model proposed in New Zealand, which expressly provides for a regime to deal with opt-in or opt-out arrangements, has not yet been adopted in New Zealand nor anywhere else. How that proposal would operate in practice is therefore unknown and there is, obviously, no case authority on its operation (and if the proposal is not adopted there may never be). The Commission considers it preferable to model any reformed provisions on a group proceedings regime which has been tested by experience in circumstances comparable to those in Western Australia. The Federal regime contained in Part IVA of the *Federal Court Act* (now 21 years old) and also adopted in large part in New South Wales and Victoria provides a tested solution.

5.129 This is not to suggest the Commission ought to adopt a model simply by virtue of the fact that it has been adopted in another Australian jurisdiction. However, given the relative success of the adoption of the Federal Court model, absence of any compelling reasons to instead adopt an overseas model and the desirability that legislative reform promote efficiency and consistency between jurisdictions in Australia, the Commission considers it preferable to adopt a model based on Part IVA of the *Federal Court of Australia Act* rather than an overseas regime.

Chapter 6

Proposed Reform

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The shape of reform

6.1 The Commission has already expressed its conclusion that the current rule relating to representative proceedings in Western Australia is unsatisfactory and requires amendment. Having reached that conclusion, this chapter focuses on the discussion of proposed reforms that will provide an effective and efficient framework for representative proceedings in this state.¹

6.2 The choice in regard to the shape of reform is essentially the same that confronted Victoria, New South Wales and South Australia which have each undertaken significant amendment to their respective representative proceeding frameworks: change the court rules or change the legislation upon which the court rules derive their power.

6.3 It has been mentioned that Order 18 Rule 12 of the *Rules of the Supreme Court 1971* (WA), as currently formulated, lacks detailed procedural provisions and fails to set out the manner in which representative proceedings are to be conducted or concluded. While this is something a court can address with appropriate directions, ‘this has proved somewhat more difficult in practice’.²

6.4 The Australian Law Reform Commission (ALRC) recommended in 1988 that ‘[t]he existing representative procedure should ... be retained to enable defendant representative actions to be brought in appropriate circumstances’.³ As previously discussed, this is the position which has been adopted in the Commonwealth and Victoria which have both legislative and rules-based representative proceedings regimes.⁴ Cashman commented of the federal dual structure that:

In some cases, there may be utility in formulating and pleading claims under both the representative action rule and the statutory class action provisions. This may, in some circumstances, overcome constraints on the ambit of the statutory provisions.⁵

6.5 Similarly, South Australia has two separate procedures, although both are provided for in the rules. In *Abrook v Paterson*,⁶ Burley J in the Supreme Court of South Australia commented on that state’s dual structure:

The rule provides for two categories of representative action: SCR34.01 to 34.06 deal with what may have been described as ‘class actions’ and SCR34.08 is the equivalent of the former O.16, R9 of the 1947 Rules of Court. The latter deals with ‘representative actions’. The terms ‘class action’ and ‘representative action’ are probably confusing when dealing with SCR34 as a whole and in light of current authority. There will,

1. The bulk of this chapter has been modified from Philip Jamieson’s memorandum, written in his capacity as a Senior Legal Research Officer for the Chief Justice, Supreme Court of Western Australia: Jamieson P, ‘Representative Proceedings – Need for Reform of Supreme Court Rules (WA) O18 R12’, memorandum, 30 March 2011.
2. Clark S & Harris C, ‘Class Actions in Australia: (Still) a work in progress’ (2008) 31 *Australian Bar Review* 63, 66.
3. ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [6]. A brief discussion appears in Mulheron R, *The Class Action in Common Law Systems: A comparative perspective* (Oxford: Hart Publishing, 2004) 44–5.
4. See *Federal Court Rules* O 6 r 13 and *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 18.
5. Cashman P, *Class Action Law and Practice* (Sydney: Federation Press, 2007) 41.
6. (1995) 181 LSJS 24.

inevitably, be overlap between the two sets of provisions, and a litigant will choose one or the other, or both, according to the particular circumstances of the case.

...

As far as I am aware, there are no decided cases on the scope and operation of SCR34.01. If it provides for 'class actions', its lack of detail is in marked contrast to the provisions contained in Pt IVA of the *Federal Court of Australia Act 1976*.⁷

6.6 While New South Wales does not have a dual structure (its rules were repealed at the time the statutory regime was enacted), those rules were in any event by the time of their repeal 'similar to the requirements for representative proceedings in Part IVA'⁸ of the *Federal Court of Australia Act 1976* (Cth), upon which the statutory regime has also been substantially modelled.

COURT RULES AS AN APPROPRIATE VEHICLE FOR REFORM?

6.7 Whether or not the traditional procedures are retained as part of any reform, the question arises whether there is power to make court rules embodying the more detailed provisions found in the statutory regimes. The Class Actions Sub-Committee of the Law Reform Commission of Hong Kong in its November 2009 Consultation Paper on class actions noted that:

The Ontario [Law Reform] Commission⁹ acknowledged that subordinate legislation provides greater flexibility and easier amendment but, for two reasons, it recommended primary legislation. The first reason was that it was often difficult to determine whether a provision was substantive or procedural and if a provision contained in a rule were held to be substantive it would be liable to be struck down as being *ultra vires*. Primary legislation might be necessary if it was desired to confer new power on the court.¹⁰

6.8 Just prior to the enactment of Victoria's statutory regime, court rules had been made on 9 December 1999 (with effect from 1 January 2000) very closely following the then terms of Part IVA of the *Federal Court of Australia Act*.¹¹ As previously discussed, a challenge to the validity of these rules failed (by majority 3:2) in the Victorian Court of Appeal in *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd*.¹² An application for special leave to appeal to the High Court was overtaken by the substantial¹³ re-enactment of the provisions in Victoria's current statutory regime,¹⁴ 'no doubt in order to remove any question that might arise following the division of opinion in the Court of Appeal with respect to the validity of the measures the subject of the rules of court and, substantially now, therefore of an enactment'.¹⁵

7. Ibid 30.

8. Legg M & Dowler J, 'The Class Actions Juggling Act' [July 2010] *Law Society Journal* 59, 59.

9. Ontario Law Reform Commission, *Report on Class Actions* (1982) 305-6.

10. Law Reform Commission of Hong Kong, *Class Actions*, Consultation Paper (2009) [9.10]. The second reason is set out below at [6.16].

11. As noted by Ormiston & Brooking JA (though dissenting in the result) in *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545, 549, 561.

12. Ibid. A discussion appears in Cashman P, *Class Action Law and Practice* (Sydney: Federation Press, 2007) 30ff.

13. See, eg, *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 20 (Gleeson CJ); also 'materially similar' 66 (Callinan J).

14. See ibid 28-9 (Gaudron, Gummow & Hayne JJ), 40-1 (Kirby J).

15. Ibid 66 (Callinan J). See also Victoria, *Parliamentary Debates*, Legislative Council (4 October 2000) 431 (R Thomson).

6.9 Notwithstanding the decision in *Schutt*, it has been argued that at least certain aspects of the Part IVA regime may require legislation, as involving amendment of the substantive law rather than merely being issues of practice and procedure.¹⁶

6.10 While there is disagreement over which matters might require legislative foundation, it has been recently suggested that (under an opt-out model) it is ‘common ground that [at least] some primary legislative intervention will, in any event, be necessary’.¹⁷ One such aspect there identified as a matter of substantive law, and therefore requiring legislation and not merely rules of court, was the tolling/suspension of limitation periods (discussed in Chapter 4).

A prudent approach

6.11 Of the legislative approach adopted in Ontario, it has recently been observed:

Whether or not it was strictly necessary to introduce class actions through legislation, it appears in hindsight to have been a prudent approach in view of the experience with the introduction of class actions in the Australian State of Victoria.¹⁸

6.12 Recent international consideration of the issue has consistently advocated a prudent approach. The Class Actions Sub-Committee of the Law Reform Commission of Hong Kong concluded that ‘[o]verseas experience shows that it may be preferable to introduce reform through statutory enactment rather than subsidiary legislation’.¹⁹ The New Zealand Rules Committee has also recently concluded that ‘[a] class action regime necessarily has some features going beyond rules of practice and procedure. This makes it necessary to seek primary legislation’.²⁰

6.13 Similarly, in England, the Civil Justice Council recently recommended that:

While there is considerable scope for reform of CPR 19.6, the Civil Justice Council recommends that it is preferable that reform be taken forward by primary legislation. This will enable those elements of reform which effective [sic] substantive law to be debated fully and implemented in a way that would preclude vires challenges.²¹

6.14 Quite apart from any potential for subsequent challenge in the court to the validity of such rules, it is likely that the Joint Standing Committee on Delegated Legislation would consider carefully any amendment to the rules of the Supreme Court which sought to introduce a new representative proceedings regime by means of amendment to rules only. Even if a suitably detailed treatment could be provided in the court’s rules, at least two other issues require consideration.

16. As set out in Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a more efficient and effective procedure for collective actions* (2008) 103ff. See also Haylock J, ‘National Class of Extraterritorial Legislation’ (2009) 32 *Dalhousie Law Journal* 253, 264ff.

17. ‘Conclusions of the Civil Justice Council’s Comparative Law Committee Collective Redress Working Party on the Question of Whether the Implementation of an Opt-Out Collective Action Regime Requires the Enactment of Substantive Legislation or May Be Achieved by Changes to the Civil Procedure Rules’: Civil Justice Council, *ibid.*

18. Walker J, ‘Are National Class Actions Constitutional?—A Reply to Hogg and McKee’ (2010) 48 *Osgoode Hall Law Journal* 95, 111.

19. Law Reform Commission of Hong Kong, *Class Actions*, Consultation Paper (2009) [9.12].

20. NZ Rules Committee, *Class Actions for New Zealand*, Second Consultation Paper (2008) [2].

21. Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a more efficient and effective procedure for collective actions* (2008) 183.

6.15 Firstly, one must consider the appropriateness of such an amendment from a policy perspective. In the *Dutton* case,²² the Canadian Supreme Court provided an explanation for the introduction of class actions by way of legislation in that country: class actions procedure is complex and it warranted comprehensive treatment in a statute, rather than piecemeal introduction through discrete rulings in specific cases.²³ But beyond this ‘practical’²⁴ assessment of the benefit of legislation, it has been suggested that [i]t might be argued that any decision to adopt a comprehensive class action regime should be made by Parliament, after appropriate consultation, given the multitude of policy issues involved’.²⁵ In 1996, Charles JA (of the Victorian Court of Appeal) commented extra-curially, that the resolution of the issues raised in the elaboration of appropriate procedures properly requires ‘a decision by the community represented in Parliament, rather than by judicial activism’.²⁶

6.16 The Class Actions Sub-Committee of the Law Reform Commission of Hong Kong in its November 2009 Consultation Paper similarly noted that:

The Ontario [Law Reform] Commission²⁷ ... for two reasons ... recommended primary legislation.... The second reason was that the potential impact of the introduction of a class action on the courts, the parties and the public raised important and controversial issues that deserved to be debated fully in the legislative assembly, rather than passed by way of regulation.²⁸

6.17 Similarly, the view has been recently expressed in England by the Civil Justice Council’s Comparative Law Committee Collective Redress Working Party that:

The same view may therefore be taken as the Ontario Law Reform Commission ... that such an important reform, deserved to be debated fully in the Legislative Assembly, rather than passed by way of regulation pursuant to the *Judicature Act*.²⁹

6.18 Secondly, as previously discussed,³⁰ the implementation of a rules-based reform has the potential to create real problems in relation to issues that, while they may be considered procedural, clearly affect substantive legal rights (such as limitation periods).

Effectiveness of more-detailed rules provision?

6.19 Following a number of amendments, the *Uniform Civil Procedure Rules* (NSW) Rule 7.4 (now repealed) provided a representative procedure ‘similar to the requirements for representative proceedings in Part IVA’³¹ of the *Federal Court of Australia Act*. They were the most detailed rules among the Australian jurisdictions

22. *Dutton v Western Canadian Shopping Centres Inc v Dutton* [2001] 2 SCR 534.

23. Walker J, ‘Are National Class Actions Constitutional? – A Reply to Hogg and McKee’ (2010) 48 *Osgoode Hall Law Journal* 95.

24. Characterisation adopted by Walker, *ibid* 112.

25. Legg M, ‘The New South Wales Representative Proceeding: A class action half-way house’ (2008) 12 *University of Western Sydney Law Review* 176, 202.

26. Charles SP, ‘Class Actions in Australia (Paper presented at the Australian Bar Association Conference, San Francisco, 18–21 August 1996) 91, quoted in Grave D & Adams K., *Class Actions in Australia* (Sydney: Lawbook Co, 2005) 1.270.

27. Ontario Law Reform Commission, *Report on Class Actions* (1982) 305–6.

28. Law Reform Commission of Hong Kong, *Class Actions*, Consultation Paper (2009) [9.10] (footnote omitted). The first reason is set out above at [6.7]

29. ‘Conclusions of the Civil Justice Council’s Comparative Law Committee Collective Redress Working Party on the Question of Whether the Implementation of an Opt-Out Collective Action Regime Requires the Enactment of Substantive Legislation or May Be Achieved by Changes to the Civil Procedure Rules’ in Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a more efficient and effective procedure for collective actions* (2008) 123 (footnote omitted).

30. See above [4.2]–[4.9].

31. As noted in Legg M & Dowler J, ‘The Class Actions Juggling Act’ (2010) 48 *Law Society Journal* 59, 59.

in attempting to embrace the procedural framework characterising the statutory regimes.

6.20 Nevertheless, they were very recently repealed in favour of a statutory regime.³² As appears from the second reading speech upon the Bill,³³ one of the objectives of this legislative reform was to redress the lack of procedural clarity under the existing (albeit already enhanced) rules:

In New South Wales, rules 7.4 and 7.5 of the Uniform Civil Procedure Rules 2005 make some provision for representative proceedings. However, these rules lack procedural clarity. The regime that is proposed by these amendments will provide a greater level of certainty for both litigants and the court, and will enhance the community's access to justice.³⁴

6.21 For this reason, the Commission does not consider the (now repealed) New South Wales rules to be an appropriate model for consideration in seeking to enhance the effectiveness of the Western Australian rules.

6.22 South Australia's *Supreme Court Civil Rules 2006* have also moved in some respects towards the statutory regimes, providing an alternative procedure under Rule 81(1) with a more liberal test of commonality as opposed to the same interest test found in the traditional rule. This is coupled with a requirement that the representative parties must apply to the court for an order authorising the action to be maintained as a representative action. This continues the procedures that first appeared in Rule 34 of the *Supreme Court Rules 1987* (SA). Although 'embryonic', '[a]n attempt was also made to include in the rules some machinery provisions such as those which are now embodied in statutory class action provisions'.³⁵ However, the South Australian model has been rarely utilised in the years since its introduction. Indeed, *Cook v Pasmenco Ltd* (2000)³⁶ has been interpreted as an example of South Australian residents seeking to use 'the federal jurisdiction to take advantage of the class action rules, which do not exist in South Australia'.³⁷

Conclusion

6.23 While the Supreme Court of Western Australia may undertake its own amendment to Order 18 Rule 12 through its delegated powers, it is submitted that such an exercise must face the difficulties identified above. Further, it would be at odds with the approach to reform taken in the federal jurisdiction and states that have adopted the federal model.

6.24 Having regard to the above, the Commission considers that any amendment to the Western Australian rule relating to representative proceedings should be undertaken by way of legislative amendment and the creation of a procedure similar to Part IVA of the *Federal Court of Australia Act*.

32. Their form, as at 2008, was considered to provide inadequate procedural guidance: Legg & Dowler, *ibid* 176.

33. Courts and Crimes Legislation Further Amendment Bill 2010 (Second Reading Speech), NSW, *Parliamentary Debates*, Legislative Council, 24 November 2010 (Hon J Hatzistergos, Attorney-General, Minister for Citizenship, Minister for Regulatory Reform and Vice-President of the Executive Council).

34. *Ibid* 28067.

35. Noted in Cashman P, *Class Action Law and Practice* (Sydney: Federation Press, 2007) 45.

36. (2000) 99 FCR 548.

37. Briggs P, Taberner J & Bick D, *A Gold Mine for Environmental Class Actions in Australia?* (Freehills, 10 November 2010) <<http://www.lexology.com/library/detail.aspx?g=b5b61086-6958-40ff-91da-bb776c6ef380>>.

The Commission's preliminary view

6.25 Complex and high-value representative proceedings are now an integral part of Australian litigation. The problem for Western Australia is that Order 18 Rule 12 of the *Rules of the Supreme Court 1971* (WA) provides that a proceeding is only properly begun as a representative proceeding where 'numerous persons' have the 'same interest' in any proceeding. Whether parties have the same interest is the subject of few cases,³⁸ and some controversy. If there is not the relevant same interest, there is a risk that only the named representative has begun proceedings in compliance with the rule. The statute of limitations will, in that circumstance, continue to run against those parties who are represented with the consequence that they may not be entitled to relief at the end of the proceedings. Consequently, the current rule creates an unacceptable degree of uncertainty for litigants and they and their advisors generally choose not to commence proceedings under Order 18 Rule 12.

6.26 While this risk remains, the uncertainty will persist and large-scale cases, otherwise suited to being brought as representative actions in Western Australia, will not be conducted under the rule. Consequently, they will either not be litigated efficiently and in a cost-effective manner; not be brought in Western Australian state courts; or not be brought at all.

6.27 The Commission is of the view that parties who must or may litigate in Western Australia are entitled to a civil procedure (including for multi-party proceedings) that does not create unnecessary risks that are avoidable products of the current rule. The statutory regime that has been adopted federally, and thereafter in Victoria and New South Wales, appears to address the fundamental problem identified. The Commission sees good reason to adopt that solution, and no compelling reasons to depart in substance from those regimes.

6.28 There are a number of incidental questions that arise in relation to representative proceedings and these have been considered in Australian jurisdictions where established legislative regimes for representative proceedings have existed for some time. They are discussed, in part, in Chapter 4. However, they are not questions that require determination in order for the Commission to reach the conclusion that Order 18 Rule 12 of the *Rules of the Supreme Court* should be replaced with a legislative regime which is substantially similar in nature to the existing federal regime found in Part IVA of the *Federal Court of Australia Act 1976* (Cth).

38. *Duke of Bedford v Ellis* [1901] AC 1 being the most significant.

PROPOSAL FOR A LEGISLATIVE SCHEME IN WESTERN AUSTRALIA

6.29 Subject to consideration of submissions from interested parties, the Commission proposes that:

- (a) Western Australia should adopt legislation to create a scheme allowing representative actions in substantially similar terms to Part IVA of the *Federal Court of Australia Act 1976* (Cth); and
- (b) Order 18 Rule 12 should be retained in its current form as a surviving alternative.

ISSUES UPON WHICH THE COMMISSION SPECIFICALLY INVITES COMMENT

6.30 Submissions are sought in relation to the terms of reference; either as a whole or in part; or on any aspect of the present conclusions or reasoning of the Commission. There are, however, three key issues upon which the Commission seeks specific comment.

1 If a new regime facilitating actions in which a class of plaintiffs (or defendants) is appropriate the Commission invites submissions as to whether such amendment can or should be effected by amendment of the rules of the Supreme and or District Courts only, or by the passage of legislation?

2 Should Western Australia adopt a legislative representative proceedings regime substantively similar to that existing in Part IVA of the *Federal Court of Australia Act 1976* (Cth)? The Commission recognises that there are two fundamental points of difference between Part IVA and Part 10 of the recently introduced New South Wales legislation.

The first is the extent to which the legislation should allow representative actions to automatically proceed on a ‘closed class’ basis, as prescribed by s 166(2) of Part 10.³⁹ While such a provision does not exist in either the federal or the Victorian legislation, the Commission is aware that closed class representative actions are relatively common in both federal and New South Wales proceedings. The Commission therefore invites submissions on whether any legislative amendment in Western Australia should include an equivalent provision to s 166(2) of Part 10.

3 The other key difference in the New South Wales legislation is the extent to which there is an express permission to issue a representative action against multiple defendants, irrespective of whether or not the persons affected have a claim against every defendant in the action (‘the *Phillip Morris* issue’).⁴⁰

The Commission understands that in circumstances where the *Phillip Morris* issue presents in the federal and Victorian jurisdictions, the practice routinely adopted is that multiple actions are issued and thereafter consolidated. The Commission specifically invites comment on whether a provision equivalent to s 158(2) of Part 10 should be included in any final recommendation for legislative reform in Western Australia.

39. For a discussion of this issue, see Chapter 3, ‘Plaintiff Groups – Open Classes and Closed Classes’.

40. For a discussion of this issue, see Chapter 3, ‘Proceeding with a Claim against Multiple Respondents’.

OTHER ISSUES

6.31 The Commission has noted a number of areas that may be the subject of submissions, or may be desirable improvements on Part IVA. Issues upon which the Commission invites interested parties to comment upon include:

A The possible need for codification of the role of the representative plaintiff and requirements for removal of a representative plaintiff: see [3.25]–[3.28].

B The suspension of limitation periods and the status of class members' claims in the event a class is disbanded by order of the court: see [4.4].

C Whether there should be a more prescriptive legislative framework in relation to security for costs in representative proceedings: see [3.48]–[3.54].

D Whether the impact of proportionate liability legislation as enshrined in the *Civil Liability Act* (WA) could produce anomalous results in relation to the issue of whether every group member must have a claim against each named respondent: see [3.37]–[3.40] and [4.15]–[4.17].

E In relation to notification to claimants giving them the ability to opt out of a representative proceeding, are more prescriptive provisions required in order to ensure class members are aware of their right to opt out of a representative proceeding?: see [4.29]–[4.40].

F Section 33V in its current form contains no statutory guidance or criteria that a court should take into account when considering whether to approve the settlement or discontinuance of an action: see [4.41]–[4.47]. Should the provision in its present form be amended to include formal criteria a court should take into account when deciding to approve the finalisation of a representative proceeding?

Should interested parties feel that other issues relating to the current composition of Part IVA proceedings be brought to the attention of the Commission, they are encouraged to make submissions in relation to same.

SUBMISSIONS TO THE LAW REFORM COMMISSION

6.32 Submissions may be made by telephone, fax, letter or email to the address below. Those who wish to request a meeting with the Commission may telephone for an appointment.

Law Reform Commission of Western Australia
Level 3, BGC Centre
28 The Esplanade, Perth WA 6000

Telephone: (08) 9321 4833
Facsimile: (08) 9321 5833
Email: lrcwa@justice.wa.gov.au

Submissions received by **31 May 2013** will be considered by the Commission in the preparation of its Final Report.

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Appendix 1: Representative proceeding provisions

FEDERAL COURT OF AUSTRALIA ACT 1976

Part IVA—Representative proceedings

Division 1—Preliminary

33A Interpretation

In this Part, unless the contrary intention appears:

group member means a member of a group of persons on whose behalf a representative proceeding has been commenced.

representative party means a person who commences a representative proceeding.

representative proceeding means a proceeding commenced under section 33C.

respondent means a person against whom relief is sought in a representative proceeding.

sub-group member means a person included in a sub-group established under section 33Q.

sub-group representative party means a person appointed to be a sub-group representative party under section 33Q.

33B Application

A proceeding may only be brought under this Part in respect of a cause of action arising after the commencement of the *Federal Court of Australia Amendment Act 1991*.

Division 2—Commencement of representative proceeding

33C Commencement of proceeding

- (1) Subject to this Part, where:
 - (a) 7 or more persons have claims against the same person; and
 - (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
 - (c) the claims of all those persons give rise to a substantial common issue of law or fact;a proceeding may be commenced by one or more of those persons as representing some or all of them.
- (2) A representative proceeding may be commenced:
 - (a) whether or not the relief sought:
 - (i) is, or includes, equitable relief; or

- (ii) consists of, or includes, damages; or
 - (iii) includes claims for damages that would require individual assessment; or
 - (iv) is the same for each person represented; and
- (b) whether or not the proceeding:
- (i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or
 - (ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

33D Standing

- (1) A person referred to in paragraph 33C(1)(a) who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding against that other person on behalf of other persons referred to in that paragraph.
- (2) Where a person has commenced a representative proceeding, the person retains a sufficient interest:
- (a) to continue that proceeding; and
 - (b) to bring an appeal from a judgment in that proceeding;
- even though the person ceases to have a claim against the respondent.

33E Is consent required to be a group member?

- (1) The consent of a person to be a group member in a representative proceeding is not required unless subsection (2) applies to the person.
- (2) None of the following persons is a group member in a representative proceeding unless the person gives written consent to being so:
- (a) the Commonwealth, a State or a Territory;
 - (b) a Minister or a Minister of a State or Territory;
 - (c) a body corporate established for a public purpose by a law of the Commonwealth, of a State or of a Territory, other than an incorporated company or association; or
 - (d) an officer of the Commonwealth, of a State or of a Territory, in his or her capacity as such an officer.

33F Persons under disability

- (1) It is not necessary for a person under disability to have a next friend or committee merely in order to be a group member.
- (2) A group member who is under disability may only take a step in the representative proceeding, or conduct part of the proceeding, by his or her next friend or committee, as the case requires.

33G Representative proceeding not to be commenced in certain circumstances

A representative proceeding may not be commenced if the proceeding would be concerned only with claims in respect of which the Court has jurisdiction solely by virtue of the *Jurisdiction of Courts (Cross-vesting) Act 1987* or a corresponding law of a State or Territory.

33H Originating process

- (1) An application commencing a representative proceeding, or a document filed in support of such an application, must, in addition to any other matters required to be included:
 - (a) describe or otherwise identify the group members to whom the proceeding relates; and
 - (b) specify the nature of the claims made on behalf of the group members and the relief claimed; and
 - (c) specify the questions of law or fact common to the claims of the group members.
- (2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members.

33J Right of group member to opt out

- (1) The Court must fix a date before which a group member may opt out of a representative proceeding.
- (2) A group member may opt out of the representative proceeding by written notice given under the Rules of Court before the date so fixed.
- (3) The Court, on the application of a group member, the representative party or the respondent in the proceeding, may fix another date so as to extend the period during which a group member may opt out of the representative proceeding.
- (4) Except with the leave of the Court, the hearing of a representative proceeding must not commence earlier than the date before which a group member may opt out of the proceeding.

33K Causes of action accruing after commencement of representative proceeding

- (1) The Court may at any stage of a representative proceeding, on application made by the representative party, give leave to amend the application commencing the representative proceeding so as to alter the description of the group.
- (2) The description of the group may be altered so as to include a person:
 - (a) whose cause of action accrued after the commencement of the representative proceeding but before such date as the Court fixes when giving leave; and
 - (b) who would have been included in the group, or, with the consent of the person would have been included in the group, if the cause of action had accrued before the commencement of the proceeding.
- (3) The date mentioned in paragraph (2)(a) may be the date on which leave is given or another date before or after that date.
- (4) Where the Court gives leave under subsection (1), it may also make any other orders it thinks just, including an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceeding.

33L Situation where fewer than 7 group members

If, at any stage of a representative proceeding, it appears likely to the Court that there are fewer than 7 group members, the Court may, on such conditions (if any) as it thinks fit:

- (a) order that the proceeding continue under this Part; or
- (b) order that the proceeding no longer continue under this Part.

33M Cost of distributing money etc. excessive

Where:

- (a) the relief claimed in a representative proceeding is or includes payment of money to group members (otherwise than in respect of costs); and
- (b) on application by the respondent, the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts;

the Court may, by order:

- (c) direct that the proceeding no longer continue under this Part; or
- (d) stay the proceeding so far as it relates to relief of the kind mentioned in paragraph (a).

33N Order that proceeding not continue as representative proceeding where costs excessive etc.

- (1) The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:
 - (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
 - (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
 - (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
 - (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.
- (2) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the respondent except with the leave of the Court.
- (3) Leave for the purposes of subsection (2) may be granted subject to such conditions as to costs as the Court considers just.

33P Consequences of order that proceeding not continue under this Part

Where the Court makes an order under section 33L, 33M or 33N that a proceeding no longer continue under this Part:

- (a) the proceeding may be continued as a proceeding by the representative party on his or her own behalf against the respondent; and
- (b) on the application of a person who was a group member for the purposes of the proceeding, the Court may order that the person be joined as an applicant in the proceeding.

33Q Determination of issues where not all issues are common

- (1) If it appears to the Court that determination of the issue or issues common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining issues.
- (2) In the case of issues common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person to be the sub-group representative party on behalf of the sub-group members.
- (3) Where the Court appoints a person other than the representative party to be a sub-group representative party, that person, and not the representative party, is liable for costs associated with the determination of the issue or issues common to the sub-group members.

33R Individual issues

- (1) In giving directions under section 33Q, the Court may permit an individual group member to appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member.
- (2) In such a case, the individual group member, and not the representative party, is liable for costs associated with the determination of the issue.

33S Directions relating to commencement of further proceedings

Where an issue cannot properly or conveniently be dealt with under section 33Q or 33R, the Court may:

- (a) if the issue concerns only the claim of a particular member—give directions relating to the commencement and conduct of a separate proceeding by that member; or
- (b) if the issue is common to the claims of all members of a sub-group—give directions relating to the commencement and conduct of a representative proceeding in relation to the claims of those members.

33T Adequacy of representation

- (1) If, on an application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and may make such other orders as it thinks fit.
- (2) If, on an application by a sub-group member, it appears to the Court that a sub-group representative party is not able adequately to represent the interests of the sub-group members, the Court may substitute another person as sub-group representative party and may make such other orders as it thinks fit.

33U Stay of execution in certain circumstances

Where a respondent in a representative proceeding commences a proceeding in the Court against a group member, the Court may order a stay of execution in respect of any relief awarded to the group member in the representative proceeding until the other proceeding is determined.

33V Settlement and discontinuance—representative proceeding

- (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
- (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

33W Settlement of individual claim of representative party

- (1) A representative party may, with leave of the Court, settle his or her individual claim in whole or in part at any stage of the representative proceeding.
- (2) A representative party who is seeking leave to settle, or who has settled, his or her individual claim may, with leave of the Court, withdraw as representative party.
- (3) Where a person has sought leave to withdraw as representative party under subsection (2), the Court may, on the application of a group member, make an order for the substitution of another group member as representative party and may make such other orders as it thinks fit.
- (4) Before granting a person leave to withdraw as a representative party:
 - (a) the Court must be satisfied that notice of the application has been given to group members in accordance with subsection 33X(1) and in sufficient time for them to apply to have another person substituted as the representative party; and
 - (b) any application for the substitution of another group member as a representative party has been determined.
- (5) The Court may grant leave to a person to withdraw as representative party subject to such conditions as to costs as the Court considers just.

Division 3—Notices

33X Notice to be given of certain matters

- (1) Notice must be given to group members of the following matters in relation to a representative proceeding:
 - (a) the commencement of the proceeding and the right of the group members to opt out of the proceeding before a specified date, being the date fixed under subsection 33J(1);
 - (b) an application by the respondent in the proceeding for the dismissal of the proceeding on the ground of want of prosecution;
 - (c) an application by a representative party seeking leave to withdraw under section 33W as representative party.
- (2) The Court may dispense with compliance with any or all of the requirements of subsection (1) where the relief sought in a proceeding does not include any claim for damages.

- (3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceeding is founded.
- (4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 33V must not be determined unless notice has been given to group members.
- (5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.
- (6) Notice under this section must be given as soon as practicable after the happening of the event to which the notice relates.

33Y Notices—ancillary provisions

- (1) This section is concerned with notices under section 33X.
- (2) The form and content of a notice must be as approved by the Court.
- (3) The Court must, by order, specify:
 - (a) who is to give the notice; and
 - (b) the way in which the notice is to be given;and the order may include provision:
 - (c) directing a party to provide information relevant to the giving of the notice; and
 - (d) relating to the costs of notice.
- (4) An order under subsection (3) may require that notice be given by means of press advertisement, radio or television broadcast, or by any other means.
- (5) The Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.
- (6) A notice that concerns a matter for which the Court's leave or approval is required must specify the period within which a group member or other person may apply to the Court, or take some other step, in relation to the matter.
- (7) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.
- (8) The failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in a proceeding.

Division 4—Judgment etc.

33Z Judgment—powers of the Court

- (1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:
 - (a) determine an issue of law;
 - (b) determine an issue of fact;
 - (c) make a declaration of liability;
 - (d) grant any equitable relief;
 - (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified

- amounts or amounts worked out in such manner as the Court specifies;
- (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;
 - (g) make such other order as the Court thinks just.
- (2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.
 - (3) Subject to section 33V, the Court is not to make an award of damages under paragraph (1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.
 - (4) Where the Court has made an order for the award of damages, the Court may give such directions (if any) as it thinks just in relation to:
 - (a) the manner in which a group member is to establish his or her entitlement to share in the damages; and
 - (b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.

33ZA Constitution etc. of fund

- (1) Without limiting the operation of subsection 33Z(2), in making provision for the distribution of money to group members, the Court may provide for:
 - (a) the constitution and administration of a fund consisting of the money to be distributed; and
 - (b) either:
 - (i) the payment by the respondent of a fixed sum of money into the fund; or
 - (ii) the payment by the respondent into the fund of such instalments, on such terms, as the Court directs to meet the claims of group members; and
 - (c) entitlements to interest earned on the money in the fund.
- (2) The costs of administering a fund are to be borne by the fund, or by the respondent in the representative proceeding, as the Court directs.
- (3) Where the Court orders the constitution of a fund mentioned in subsection (1), the order must:
 - (a) require notice to be given to group members in such manner as is specified in the order; and
 - (b) specify the manner in which a group member is to make a claim for payment out of the fund and establish his or her entitlement to the payment; and
 - (c) specify a day (which is 6 months or more after the day on which the order is made) on or before which the group members are to make a claim for payment out of the fund; and
 - (d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.

- (4) The Court may allow a group member to make a claim after the day fixed under paragraph (3)(c) if:
 - (a) the fund has not already been fully distributed; and
 - (b) it is just to do so.
- (5) On application by the respondent in the representative proceeding after the day fixed under paragraph (3)(d), the Court may make such orders as are just for the payment from the fund to the respondent of the money remaining in the fund.

33ZB Effect of judgment

A judgment given in a representative proceeding:

- (a) must describe or otherwise identify the group members who will be affected by it; and
- (b) binds all such persons other than any person who has opted out of the proceeding under section 33J.

Division 5—Appeals

33ZC Appeals to the Court

- (1) The following appeals under Division 2 of Part III from a judgment of the Court in a representative proceeding may themselves be brought as representative proceedings:
 - (a) an appeal by the representative party on behalf of group members and in respect of the judgment to the extent that it relates to issues common to the claims of group members;
 - (b) an appeal by a sub-group representative party on behalf of sub-group members in respect of the judgment to the extent that it relates to issues common to the claims of sub-group members.
- (2) The parties to an appeal referred to in paragraph (1)(a) are the representative party, as the representative of the group members, and the respondent.
- (3) The parties to an appeal referred to in paragraph (1)(b) are the sub-group representative party, as the representative of the sub-group members, and the respondent.
- (4) On an appeal by the respondent in a representative proceeding, other than an appeal referred to in subsection (5), the parties to the appeal are:
 - (a) in the case of an appeal in respect of the judgment generally—the respondent and the representative party as the representative of the group members; and
 - (b) in the case of an appeal in respect of the judgment to the extent that it relates to issues common to the claims of sub-group members—the respondent and the sub-group representative party as the representative of the sub-group members.
- (5) The parties to an appeal in respect of the determination of an issue that relates only to a claim of an individual group member are that group member and the respondent.
- (6) If the representative party or the sub-group representative party does not bring an appeal within the time provided for instituting appeals, another member

- of the group or sub-group may, within a further 21 days, bring an appeal as representing the group members or sub-group members, as the case may be.
- (7) Where an appeal is brought from a judgment of the Court in a representative proceeding, the Court may direct that notice of the appeal be given to such person or persons, and in such manner, as the Court thinks appropriate.
 - (8) Section 33J does not apply to an appeal proceeding.
 - (9) The notice instituting an appeal in relation to issues that are common to the claims of group members or sub-group members must describe or otherwise identify the group members or sub-group members, as the case may be, but need not specify the names or number of those members.

33ZD Appeals to the High Court—extended operation of sections 33ZC and 33ZF

- (1) Sections 33ZC and 33ZF apply in relation to appeals to the High Court from judgments of the Court in representative proceedings in the same way as they apply to appeals to the Court from such judgments.
- (2) Nothing in subsection (1) limits the operation of section 33 whether in relation to appeals from judgments of the Court in representative proceedings or otherwise.

Division 6—Miscellaneous

33ZE Suspension of limitation periods

- (1) Upon the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended.
- (2) The limitation period does not begin to run again unless either the member opts out of the proceeding under section 33J or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim.

33ZF General power of Court to make orders

- (1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.
- (2) Subsection (1) does not limit the operation of section 22.

33ZG Saving of rights, powers etc.

Except as otherwise provided by this Part, nothing in this Part affects:

- (a) the commencement or continuance of any action of a representative character commenced otherwise than under this Part; or
- (b) the Court's powers under provisions other than this Part, for example, its powers in relation to a proceeding in which no reasonable cause of action is disclosed or that is oppressive, vexatious, frivolous or an abuse of the process of the Court; or
- (c) the operation of any law relating to:

- (i) vexatious litigants (however described); or
- (ii) proceedings of a representative character; or
- (iii) joinder of parties; or
- (iv) consolidation of proceedings; or
- (v) security for costs.

33ZH Special provision relating to claims under Part VI of the *Competition and Consumer Act 2010* etc.

- (1) For the purposes of the following provisions, a group member in a representative proceeding is to be taken to be a party to the proceeding:
 - (a) subsection 87(1) of the *Competition and Consumer Act 2010*;
 - (b) subsection 238(1) of Schedule 2 to that Act, as that subsection applies as a law of the Commonwealth.
- (2) An application by a representative party in a representative proceeding under:
 - (a) subsection 87(1A) of the *Competition and Consumer Act 2010*; or
 - (b) subsection 237(1) of Schedule 2 to that Act, as that subsection applies as a law of the Commonwealth;is to be taken to be an application by the representative party and all the group members.

33ZJ Reimbursement of representative party's costs

- (1) Where the Court has made an award of damages in a representative proceeding, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.
- (2) If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the representative proceeding by the person making the application are likely to exceed the costs recoverable by the person from the respondent, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.
- (3) On an application under this section, the Court may also make any other order it thinks just.

SUPREME COURT ACT 1986 (VIC)

Part 4A—Group Proceeding

Division 1—Preliminary

33A Definitions

In this Part—

Chapter I of the Rules means the Supreme Court (General Civil Procedure) Rules 2005;

defendant means a person against whom relief is sought in a group proceeding;

group member means a member of a group of persons on whose behalf a group proceeding has been commenced;

group proceeding means a proceeding commenced under this Part;

handicapped person means a person who is incapable by reason of injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to the proceeding;

person under disability means a minor or handicapped person;

plaintiff means a person who commences a group proceeding as a representative party or a person who is substituted under section 33T(1) or 33W(3);

sub-group member means a person included in a sub-group established under section 33Q;

sub-group representative party means a person appointed to be a sub-group representative party under section 33Q.

33B Application

- (1) This Part applies to a cause of action whether arising before or on or after 1 January 2000.
- (2) This Part does not apply to—
 - (a) a proceeding under sections 34 and 35 of the Act; or
 - (b) a proceeding concerning—
 - (i) the administration of the estate of a deceased person; or
 - (ii) property subject to a trust; or
 - (c) a proceeding commenced under Order 18 of Chapter I of the Rules.

Division 2—Commencement of group proceeding

33C Commencement of proceeding

- (1) Subject to this Part, if—
 - (a) seven or more persons have claims against the same person; and
 - (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(c) the claims of all those persons give rise to a substantial common question of law or fact—

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

(2) A group proceeding may be commenced—

(a) whether or not the relief sought—

(i) is, or includes, equitable relief; or

(ii) consists of, or includes, damages; or

(iii) includes claims for damages that would require individual assessment; or

(iv) is the same for each person represented; and

(b) whether or not the proceeding—

(i) is concerned with separate contracts or transactions between the defendant and individual group members; or

(ii) involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

33D Standing

(1) A person referred to in paragraph (a) of section 33C(1) who has a sufficient interest to commence a proceeding on the person's own behalf against another person has a sufficient interest to commence a group proceeding against that other person on behalf of other persons referred to in that paragraph.

(2) If a person has commenced a group proceeding, that person retains a sufficient interest—

(a) to continue the proceeding; and

(b) to bring an appeal from a judgment in the proceeding—

even though the person ceases to have a claim against the defendant.

33E Consent of group member

(1) Subject to subsection (2), the consent of a person to be a group member is not required.

(2) None of the following persons is a group member unless the person gives consent in writing to being so—

(a) the Commonwealth, a State or a Territory; or

(b) a Minister of the Commonwealth, a State or a Territory; or

(c) a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an incorporated company or association; or

(d) any judge, magistrate or other judicial officer of the Commonwealth, a State or a Territory; or

(e) any other officer of the Commonwealth, a State or a Territory, in his or her capacity as an officer.

33F Persons under disability

- (1) It is not necessary for a person under disability to have a litigation guardian merely in order to be a group member.
- (2) A group member who is a person under disability may only take a step in the group proceeding, or conduct part of the proceeding, by the group member's litigation guardian.

33G Group proceeding not to be commenced in certain circumstances

A group proceeding may not be commenced if the proceeding would be concerned only with claims in respect of which the Court has jurisdiction solely by virtue of the *Jurisdiction of Courts (Cross-vesting) Act 1987* or a corresponding law of the Commonwealth or another State or a Territory.

33H Originating process

- (1) A group proceeding must be commenced by writ.
- (2) The indorsement on the writ must, in addition to any other matters required by the Rules to be included—
 - (a) describe or otherwise identify the group members to whom the proceeding relates; and
 - (b) specify the nature of the claims made on behalf of the group members and the relief claimed; and
 - (c) specify the questions of law or fact common to the claims of the group members.
- (3) In describing or otherwise identifying group members for the purposes of subsection (2), it is not necessary to name, or specify the number of, the group members.

33J Right of group member to opt out

- (1) The Court must fix a date before which a group member may opt out of a group proceeding.
- (2) A group member may opt out of the group proceeding by notice in writing before the date so fixed.
- (3) The Court, on the application of a group member, the plaintiff or the defendant, may extend the period within which a group member may opt out of the group proceeding.
- (4) Except with the leave of the Court, the trial of a group proceeding must not commence earlier than the date before which a group member may opt out of the proceeding.
- (5) Unless the Court otherwise orders, a person who has opted out of a group proceeding must be taken never to have been a group member.
- (6) The Court, on the application of a person who has opted out of a group proceeding, may reinstate that person as a group member on such terms as the Court thinks fit.

33K Causes of action accruing after commencement

- (1) The Court may, at any stage of a group proceeding on application made by the plaintiff, give leave to amend the writ commencing the group proceeding so as to alter the description of the group.
- (2) The description of the group may be altered so as to include a person—
 - (a) whose cause of action accrued after the commencement of the group proceeding but before such date as the Court fixes when giving leave; and
 - (b) who would have been included in the group or, with the consent of the person would have been included in the group, if the cause of action had accrued before the commencement of the proceeding.
- (3) The date mentioned in subsection (2)(a) may be the date on which leave is given or another date before or after that date.
- (4) If the Court gives leave under subsection (1), it may also make any other orders it thinks just, including an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceeding.

33KA Court powers concerning group membership

- (1) On the application of a party to a group proceeding or of its own motion, the Court may at any time, whether before or after judgment, order—
 - (a) that a person cease to be a group member;
 - (b) that a person not become a group member.
- (2) The Court may make an order under subsection (1) if of the opinion that—
 - (a) the person does not have sufficient connection with Australia to justify inclusion as a group member; or
 - (b) for any other reason it is just or expedient that the person should not be or should not become a group member.
- (3) If the Court orders that a person cease to be a group member, then, if the Court so orders, the person must be taken never to have been a group member.

33L Fewer than seven group members

If, at any stage of a group proceeding, it appears likely to the Court that there are fewer than 7 group members, the Court may order, on such conditions (if any) as it thinks fit—

- (a) that the proceeding continue under this Part; or
- (b) that the proceeding no longer continue under this Part.

33M Distribution costs excessive

If—

- (a) the relief claimed in a group proceeding is or includes payment of money to group members (otherwise than in respect of costs); and
- (b) on application by the defendant, the Court concludes that it is likely that, if judgment were to be given in favour of the plaintiff, the cost

to the defendant of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts—

the Court may, by order—

- (c) direct that the proceeding no longer continue under this Part; or
- (d) stay the proceeding so far as it relates to relief of the kind mentioned in paragraph (a).

33N Proceeding not to continue under this Part

- (1) The Court may, on application by the defendant, order that a proceeding no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because—
 - (a) the costs that would be incurred if the proceeding were to continue as a group proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
 - (b) all the relief sought can be obtained by means of a proceeding other than a group proceeding; or
 - (c) the group proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
 - (d) it is otherwise inappropriate that the claims be pursued by means of a group proceeding.
- (2) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the defendant except with the leave of the Court.
- (3) Leave for the purposes of subsection (2) may be granted subject to such conditions as to costs as the Court thinks fit.

33P Consequences of proceeding not continuing under this Part

If the Court makes an order under section 33L, 33M or 33N that a proceeding no longer continue under this Part—

- (a) the proceeding may be continued as a proceeding by the plaintiff on the plaintiff's own behalf against the defendant; and
- (b) on the application of a person who was a group member, the Court may order that the person be joined as a plaintiff in the proceeding.

33Q Where not all questions common

- (1) If it appears to the Court that determination of the question or questions common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining questions.
- (2) In the case of questions common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person who consents to the appointment to be the sub-group representative party on behalf of the sub-group members.

- (3) If the Court appoints a person other than the plaintiff to be a sub-group representative party, that person, and not the plaintiff, is liable for costs associated with the determination of the question or questions common to the sub-group members.

33R Individual questions

- (1) In giving directions under section 33Q, the Court may permit an individual group member to take part in the proceeding for the purpose of determining a question that relates only to the claim of that member.
- (2) In such a case, the individual group member, and not the plaintiff, is liable for costs associated with the determination of the question.

33S Directions for further proceedings

If a question cannot properly or conveniently be dealt with under section 33Q or 33R, the Court may give directions for the commencement and conduct of another proceeding, whether or not a group proceeding.

33T Adequacy of representation

- (1) If, on an application by a group member, it appears to the Court that the plaintiff is not able adequately to represent the interests of the group members, the Court may substitute another group member as plaintiff and may make such other orders as it thinks fit.
- (2) If, on an application by a sub-group member, it appears to the Court that the sub-group representative party is not able adequately to represent the interests of the sub-group members, the Court may substitute another person as sub-group representative party and may make such other orders as it thinks fit.

33U Stay of execution

If a defendant commences a proceeding in the Court against a group member, the Court may order a stay of execution in respect of any relief awarded to the group member in the group proceeding until the other proceeding is determined.

33V Settlement and discontinuance

- (1) A group proceeding may not be settled or discontinued without the approval of the Court.
- (2) If the Court gives such approval, it may make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into court.

33W Settlement of individual claim

- (1) The plaintiff may, with the leave of the Court, settle the plaintiff's individual claim in whole or in part at any stage of the group proceeding.
- (2) The Court may order that a person who has settled the person's individual claim in whole or in part cease to be plaintiff.
- (3) If an order is sought under subsection (2), the Court may, on the application of a group member, make an order substituting as plaintiff a group member who consents to that substitution.

- (4) An order must not be made under subsection (2) unless the Court is satisfied that—
 - (a) notice of application for the order has been given to group members in accordance with section 33X(1); and
 - (b) such notice was given in sufficient time for an application to be made for an order under subsection (3); and
 - (c) an order under subsection (3) has been or will be made.
- (5) The Court may make an order under subsection (2) or (3) on such terms and conditions, as to costs or otherwise, as the Court thinks fit.

Division 3—Notices

33X When notice to be given

- (1) Notice must be given to group members of the following matters in relation to a group proceeding—
 - (a) the commencement of the proceeding and the right of the group members to opt out of the proceeding before a specified date, being the date fixed under section 33J(1);
 - (b) an application by the defendant for the dismissal of the proceeding on the ground of want of prosecution;
 - (c) an application by the plaintiff seeking leave under section 33W.
- (2) The Court may dispense with compliance with any or all of the requirements of subsection (1) if the relief sought in a proceeding does not include any claim for damages.
- (3) If the Court so orders, notice must be given to group members of any offer to compromise the proceeding.
- (4) Unless the Court is satisfied that it is just to do so, an application for approval under section 33V must not be determined unless notice has been given to group members.
- (5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.
- (6) Notice under this section must be given as soon as practicable after the happening of the event to which the notice relates.

33Y Notices under section 33X

- (1) The form and content of a notice under section 33X must be approved by the Court.
- (2) The Court must, by order, specify—
 - (a) who is to give the notice; and
 - (b) the manner in which the notice is to be given—
and the order may include provision—
 - (c) directing a party to provide information relevant to the giving of the notice; and
 - (d) relating to the costs of notice.
- (3) An order under subsection (2) may require that notice be given by means of press advertisement, radio or television broadcast, or by any other means.

- (4) The Court must not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.
- (5) A notice that concerns a matter for which the Court's leave is required must specify the period within which a group member or other person may apply to the Court, or take some other step, in relation to the matter.
- (6) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.
- (7) The failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in a proceeding.

Division 4—Judgment, etc.

33Z Judgment of the Court

- (1) The Court may, in determining a matter in a group proceeding—
 - (a) determine a question of law;
 - (b) determine a question of fact;
 - (c) make a declaration of liability;
 - (d) grant any equitable relief;
 - (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;
 - (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;
 - (g) make such other order as is just, including, but not restricted to, an order for monetary relief other than for damages and an order for non-pecuniary damages.
- (2) In making an order for an award of damages, or monetary relief the Court must make provision for the payment or distribution of the money to the group members entitled.
- (3) Subject to section 33V, the Court must not make an award of damages under subsection (1)(f) or monetary relief under subsection (1)(g) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.
- (4) If the Court has made an award of damages, the Court may give directions in relation to—
 - (a) the manner in which a group member or sub-group member is to establish the member's entitlement to share in the damages; and
 - (b) the manner in which any dispute regarding the entitlement of a group member or sub-group member to share in the damages is to be determined.

33ZA Constitution etc. of fund

- (1) Without limiting the operation of section 33Z(2), in making provision for the distribution of money to group members, the Court may provide for—

- (a) the constitution and administration of a fund consisting of the money to be distributed; and
 - (b) either—
 - (i) the payment by the defendant of a fixed sum of money into the fund; or
 - (ii) the payment by the defendant into the fund of such instalments, on such terms, as the Court directs to meet the claims of group members; and
 - (c) entitlements to interest earned on the money in the fund.
- (2) The costs of administering a fund are to be borne by the fund or the defendant, or by both, as the Court directs.
- (3) If the Court orders the constitution of a fund mentioned in subsection (1), the order must—
- (a) require notice to be given to group members in such manner as is specified in the order; and
 - (b) specify the manner in which a group member is to make a claim for payment out of the fund and establish the group member's entitlement to the payment; and
 - (c) specify a day (which is 6 months or more after the day on which the order is made) on or before which the group members are to make a claim for payment out of the fund; and
 - (d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.
- (4) The Court may, if it is just, allow a group member to make a claim after the day fixed under subsection (3)(c) if the fund has not already been fully distributed.
- (5) On application by the defendant after the day fixed under subsection (3)(d), the Court may make such orders as it thinks fit for the payment from the fund to the defendant of the money remaining in the fund.

33ZB Effect of judgment

A judgment given in a group proceeding—

- (a) must describe or otherwise identify the group members who will be affected by it; and
- (b) subject to section 33KA, binds all persons who are such group members at the time the judgment is given.

Division 5—Appeals

33ZC Appeals

- (1) On an appeal by the plaintiff on behalf of group members and in respect of the judgment to the extent that it relates to questions common to the claims of group members, the parties to the appeal are the plaintiff, as the representative of the group members, and the defendant.
- (2) On an appeal by a sub-group representative party on behalf of sub-group members in respect of the judgment to the extent that it relates to questions

common to the claims of sub-group members, the parties to the appeal are the sub-group representative party, as the representative of the sub-group members, and the defendant.

- (3) On an appeal by the defendant in a group proceeding, other than an appeal referred to in subsection (4), the parties to the appeal are—
 - (a) in the case of an appeal in respect of the judgment generally—the defendant and the plaintiff as the representative of the group members; and
 - (b) in the case of an appeal in respect of the judgment to the extent that it relates to questions common to the claims of sub-group members—the defendant and the sub-group representative party as the representative of the sub-group members.
- (4) The parties to an appeal in respect of the determination of a question that relates only to a claim of an individual group member are that group member and the defendant.
- (5) If the plaintiff or the sub-group representative party does not commence an appeal within the time provided, another member of the group or sub-group may, within a further 21 days, commence an appeal as representing the group members or sub-group members, as the case may be.
- (6) If an appeal is brought from a judgment of the Trial Division in a group proceeding, the Court of Appeal may direct that notice of the appeal be given to such person or persons, and in such manner, as that court thinks fit.
- (7) Section 33J does not apply to an appeal.
- (8) The notice of appeal must describe or otherwise identify the group members or sub-group members, as the case may be, but need not specify the names or number of those members.

Division 6—Miscellaneous

33ZD Costs

In a group proceeding, the Court—

- (a) may order the plaintiff or the defendant to pay costs;
- (b) except as authorised by section 33Q or 33R, may not order a group member or a sub-group member to pay costs.

33ZE Suspension of limitation periods

- (1) Upon the commencement of a group proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended.
- (2) The limitation period does not begin to run again unless either the member opts out of the proceeding under section 33J or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim.

33ZF General power of court to make orders

In any proceeding (including an appeal) conducted under this Part the Court may, of its own motion or on application by a party, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

33ZG Order may specify a date by which group members must take a step

Without limiting the operation of section 33ZF, an order made under that section may—

- (a) set out a step that group members or a specified class of group members must take to be entitled to—
 - (i) any relief under section 33Z; or
 - (ii) any payment out of a fund constituted under section 33ZA; or
 - (iii) obtain any other benefit arising out of the proceeding—
irrespective of whether the Court has made a decision on liability or there has been an admission by the defendant on liability;
- (b) specify a date after which, if the step referred to in paragraph (a) has not been taken by a group member to whom the order applies, the group member is not entitled to any relief or payment or to obtain any other benefit referred to in that paragraph.

33ZH Order in event of decision or admission on liability

- (1) Without limiting the operation of sections 33ZF and 33ZG, if the Court has made a decision on liability or there has been an admission by the defendant on liability, an order made under section 33ZF may require notice of that decision or admission to be given to group members or a specified class of group members.
- (2) Subject to subsection (3), the form and content of the notice must be approved by the Court.
- (3) If the Court has made an order of a kind referred to in section 33ZG, the notice must set out the effect of the order.
- (4) An order under section 33ZF may require that a notice referred to in this section be given by means of press advertisement, radio or television broadcast, or by any other means.

33ZJ Reimbursement of plaintiff's costs

- (1) If the Court has made an award of damages in a group proceeding, the plaintiff or a sub-group representative party, or a person who has been a plaintiff or such a party, may apply to the Court for an order under this section.
- (2) If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the group proceeding by the person making the application are likely to exceed the costs recoverable by the person from the defendant, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.

33ZK Transitional provisions

A proceeding commenced under Rule 18A.03 of the Supreme Court (General Civil Procedure) Rules 1996 on or after 1 January 2000 and before the passing of the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* must be taken for all purposes to have been commenced under this Part on the day on which it was commenced under that Rule.

CIVIL PROCEDURE ACT 2005 (NSW)

Part 10—Representative proceedings in Supreme Court

Division 1—Preliminary

155 Definitions

(cf s33A FCA)

In this Part:

Court means the Supreme Court.

defendant means a person against whom relief is sought in representative proceedings.

group member means a member of a group of persons on whose behalf representative proceedings have been commenced.

proceedings means proceedings in the Court other than criminal proceedings.

representative party means a person who commences representative proceedings.

representative proceedings—see section 157.

sub-group member means a person included in a sub-group established under section 168.

sub-group representative party means a person appointed to be a sub-group representative party under section 168.

Note. For the purposes of comparison, a number of provisions of this Part contain bracketed notes in headings drawing attention (“cf”) to equivalent or comparable (though not necessarily identical) provisions of Part IVA of the *Federal Court of Australia Act 1976* (‘FCA’) of the Commonwealth as in force immediately before the commencement of this Part.

156 Application

This Part applies to proceedings commenced after the commencement of this section, whether the cause of action arose before or arises after that commencement.

Division 2—Commencement of representative proceedings

157 Commencement of representative proceedings

(cf s33C FCA)

(1) Subject to this Part, where:

- (a) 7 or more persons have claims against the same person, and
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and
- (c) the claims of all those persons give rise to a substantial common question of law or fact,

proceedings may be commenced by one or more of those persons as representing some or all of them.

(2) Representative proceedings may be commenced:

- (a) whether or not the relief sought:
 - (i) is, or includes, equitable relief, or
 - (ii) consists of, or includes, damages, or
 - (iii) includes claims for damages that would require individual assessment, or
 - (iv) is the same for each person represented, and
- (b) whether or not the proceedings:
 - (i) are concerned with separate contracts or transactions between the defendant in the proceedings and individual group members, or
 - (ii) involve separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

158 Standing

(cf s33D FCA)

- (1) For the purposes of section 157(1)(a), a person has a sufficient interest to commence representative proceedings against another person on behalf of other persons if the person has standing to commence proceedings on the person's own behalf against that other person.
- (2) The person may commence representative proceedings on behalf of other persons against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings.
- (3) If a person has commenced representative proceedings, that person retains standing:
 - (a) to continue the proceedings, and
 - (b) to bring an appeal from a judgment in the proceedings, even though the person ceases to have a claim against any defendant.

159 Is consent required to be a group member?

(cf s33E FCA)

- (1) Subject to subsection (2), the consent of a person to be a group member is not required.
- (2) None of the following is a group member in representative proceedings unless the person gives consent in writing to being so:
 - (a) the Commonwealth, a State or a Territory,
 - (b) a Minister of the Commonwealth, a State or a Territory,
 - (c) a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an incorporated company or association,
 - (d) an officer of the Commonwealth, a State or a Territory, in his or her capacity as an officer.

160 Persons under legal incapacity

(cf s33F FCA)

- (1) It is not necessary for a person under legal incapacity to have a tutor merely in order to be a group member.
- (2) A group member who is a person under legal incapacity may only take a step in representative proceedings, or conduct part of the proceedings, by the member's tutor.

161 Originating process

(cf s33H FCA)

- (1) The originating process in representative proceedings, or a document filed in support of the originating process, must, in addition to any other matters required to be included:
 - (a) describe or otherwise identify the group members to whom the proceedings relate, and
 - (b) specify the nature of the claims made on behalf of the group members and the relief claimed, and
 - (c) specify the question of law or facts common to the claims of the group members.
- (2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members.

162 Right of group member to opt out

(cf s33J FCA)

- (1) The Court must fix a date before which a group member may opt out of representative proceedings in the Court.
- (2) A group member may opt out of the representative proceedings by written notice given under the local rules before the date so fixed.
- (3) The Court may, on application by a group member, the representative party or the defendant in the proceedings, fix another date so as to extend the period during which a group member may opt out of the representative proceedings.
- (4) Except with the leave of the Court, the hearing of representative proceedings must not commence earlier than the date before which a group member may opt out of the proceedings.

163 Causes of action accruing after commencement of representative proceedings

(cf s33K FCA)

- (1) The Court may at any stage of representative proceedings, on application by the representative party, give leave to amend the originating process commencing the representative proceedings so as to alter the description of the group.

- (2) The description of the group may be altered so as to include a person:
 - (a) whose cause of action accrued after the commencement of the representative proceedings but before such date as the Court fixes when giving leave, and
 - (b) who would have been included in the group, or, with the consent of the person would have been included in the group, if the cause of action had accrued before the commencement of the proceedings.
- (3) The date fixed under subsection (2)(a) may be the date on which leave is given or another date before or after that date.
- (4) If the Court gives leave under subsection (1), it may also make any other orders it thinks just, including an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceedings.

164 Situation where fewer than 7 group members

(cf s33L FCA)

If, at any stage of representative proceedings, it appears likely to the Court that there are fewer than 7 group members, the Court may, on such conditions (if any) as it thinks fit:

- (a) order that the proceedings continue under this Part, or
- (b) order that the proceedings no longer continue under this Part.

165 Distribution costs excessive

(cf s33M FCA)

If:

- (a) the relief claimed in representative proceedings is or includes payment of money to group members (otherwise than in respect of costs), and
- (b) on application by the defendant, the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the defendant of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts,

the Court may, by order:

- (c) direct that the proceedings no longer continue under this Part, or
- (d) stay the proceedings so far as it relates to relief of the kind mentioned in paragraph (a).

166 Court may order discontinuance of proceedings in certain circumstances

(cf s33N FCA)

- (1) The Court may, on application by the defendant or of its own motion, order that proceedings no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because:

- (a) the costs that would be incurred if the proceedings were to continue as representative proceedings are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding, or
 - (b) all the relief sought can be obtained by means of proceedings other than representative proceedings under this Part, or
 - (c) the representative proceedings will not provide an efficient and effective means of dealing with the claims of group members, or
 - (d) a representative party is not able to adequately represent the interests of the group members, or
 - (e) it is otherwise inappropriate that the claims be pursued by means of representative proceedings.
- (2) It is not, for the purposes of subsection (1)(e), inappropriate for claims to be pursued by means of representative proceedings merely because the persons identified as group members in relation to the proceedings:
- (a) do not include all persons on whose behalf those proceedings might have been brought, or
 - (b) are aggregated together for a particular purpose such as a litigation funding arrangement.
- (3) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the defendant except with the leave of the Court.
- (4) Leave for the purposes of subsection (3) may be granted subject to such conditions as to costs as the Court considers just.

167 Effect of discontinuance order under this Part

(cf s33P FCA)

- (1) If the Court makes an order under section 164, 165 or 166 that proceedings no longer continue under this Part:
- (a) the proceedings may be continued as proceedings by the representative party on the party's own behalf against the defendant, and
 - (b) on the application of a person who was a group member for the purposes of the proceedings, the Court may order that the person be joined as an applicant in the proceedings.
- (2) In this section:
- applicant, in relation to proceedings, includes a claimant or plaintiff (as the case may be) in the proceedings.

168 Determination of questions where not all common

(cf s33Q FCA)

- (1) If it appears to the Court that determination of the question or questions common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining questions.
- (2) In the case of questions common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person to be the sub-group representative party on behalf of the sub-group members.

169 Individual questions

(cf s33R FCA)

- (1) In giving directions under section 168, the Court may permit an individual group member to appear in the proceedings for the purpose of determining a question that relates only to the claims of that member.
- (2) In such a case, the individual group member, and not the representative party, is liable for costs associated with the determination of the question.

170 Directions relating to commencement of further proceedings

(cf s33S FCA)

If a question cannot properly or conveniently be dealt with by the Court under section 168 or 169, the Court may give directions for the commencement and conduct of other proceedings, whether or not group proceedings.

171 Adequacy of representation

(cf s33T FCA)

- (1) If, on application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and make such other orders as it thinks fit.
- (2) If, on application by a sub-group member, it appears to the Court that a sub-group representative party is not able adequately to represent the interests of the sub-group members, the Court may substitute another person as sub-group representative party and may make such other orders as it thinks fit.

172 Stay of execution in certain circumstances

(cf s33U FCA)

If a defendant in representative proceedings commences proceedings in the Court against a group member, the Court may order a stay of execution in respect of any relief awarded to the group member in the representative proceedings until the other proceedings are determined.

173 Approval of Court required for settlement and discontinuance

(cf s33V FCA)

- (1) Representative proceedings may not be settled or discontinued without the approval of the Court.
- (2) If the Court gives such approval, it may make such orders as are just with respect to the distribution of any money, including interest, paid under a settlement or paid into the Court.

174 Settlement of individual claim of representative party

(cf s33W FCA)

- (1) A representative party may, with the leave of the Court, settle the party's individual claim in whole or in part at any stage of the representative proceedings.
- (2) A representative party who is seeking leave to settle, or who has settled, the party's individual claim may, with the leave of the Court, withdraw as representative party.
- (3) If a person has sought leave to withdraw as representative party under subsection (2), the Court may, on application by a group member, make an order for the substitution of another group member as representative party and may make such other orders as it thinks fit.
- (4) Before granting a person leave to withdraw as a representative party:
 - (a) the Court must be satisfied that notice of the application has been given to group members in accordance with section 175(1) and in sufficient time for them to apply to have another person substituted as the representative party, and
 - (b) any application for the substitution of another group member as a representative party must have been determined.

Division 3—Notices

175 Notice to be given of certain matters

(cf s33X FCA)

- (1) Notice must be given to group members of the following matters in relation to representative proceedings:
 - (a) the commencement of the proceedings and the right of the group members to opt out of the proceedings before a specified date, being the date fixed under section 162(1),
 - (b) an application by the defendant in the proceedings for the dismissal of the proceedings on the ground of want of prosecution,
 - (c) an application by a representative party seeking leave to withdraw under section 174 as representative party.
- (2) The Court may dispense with compliance with any or all of the requirements of subsection (1) if the relief sought in the proceedings does not include any claim for damages.
- (3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceedings is founded.
- (4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 173 must not be determined unless notice has been given to group members.
- (5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.
- (6) Notice under this section must be given as soon as practicable after the happening of the event to which it relates.

176 Notices under section 175

(cf s33Y FCA)

- (1) The form and content of a notice under section 175 must be approved by the Court.
- (2) The Court must, by order, specify:
 - (a) who is to give the notice, and
 - (b) the way in which the notice is to be given.
- (3) An order under subsection (2) may also include provision:
 - (a) directing a party to provide information relevant to the giving of the notice, and
 - (b) relating to the costs of giving notice.
- (4) An order under subsection (2) may require that notice be given by means of press advertisement, radio or television broadcast, or by any other means.
- (5) The Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.
- (6) A notice that concerns a matter for which the Court's leave or approval is required must specify the period within which a group member or other person may apply to the Court, or take some other step, in relation to the matter.
- (7) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.
- (8) The failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in any proceedings.

Division 4—Powers of the Court

177 Judgment—powers of the Court

(cf s33Z FCA)

- (1) The Court may, in determining a matter in representative proceedings, do any one or more of the following:
 - (a) determine a question of law,
 - (b) determine a question of fact,
 - (c) make a declaration of liability,
 - (d) grant any equitable relief,
 - (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies,
 - (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members.
- (2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.

- (3) Subject to section 173, the Court is not to make an award of damages under subsection (1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.
- (4) If the Court has made an award of damages, the Court may give such directions (if any) as it thinks just in relation to:
 - (a) the manner in which a group member is to establish the member's entitlement to share in the damages, and
 - (b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.

178 Constitution etc of fund

(cf s33ZA FCA)

- (1) Without limiting the operation of section 177(2), in making provision for the distribution of money to group members, the Court may provide for:
 - (a) the constitution and administration of a fund consisting of the money to be distributed, and
 - (b) either:
 - (i) the payment by the defendant of a fixed sum of money into the fund, or
 - (ii) the payment by the defendant into the fund of such instalments, on such terms, as the Court directs to meet the claims of group members, and
 - (c) entitlements to interest earned on the money in the fund.
- (2) The costs of administering a fund are to be borne by the fund, or by the defendant in the representative proceedings, or by both, as the Court directs.
- (3) If the Court orders the constitution of a fund under subsection (1), the order must:
 - (a) require notice to be given to group members in such manner as is specified in the order, and
 - (b) specify the manner in which a group member is to make a claim for payment out of the fund and establish the group member's entitlement to payment, and
 - (c) specify a day (which is 6 months or more after the day on which the order is made) on or before which the group members are to make a claim for payment out of the fund, and
 - (d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.
- (4) The Court may allow a group member to make a claim after the day fixed under subsection (3)(c) if:
 - (a) the fund has not already been fully distributed or applied in accordance with an order under subsection (5), and
 - (b) it is just to do so.
- (5) On application by the defendant after the day fixed under subsection (3)(d), the Court may make such orders as it thinks fit for the payment from the fund to the defendant of the money remaining in the fund.

179 Effect of judgment

(cf s 33ZB FCA)

A judgment given in representative proceedings:

- (a) must describe or otherwise identify the group members who will be affected by it, and
- (b) binds all such persons other than any person who has opted out of the proceedings under section 162.

Division 5—Appeals

180 Appeals

(cf s 33ZC FCA)

- (1) The following appeals from a judgment of the Supreme Court in representative proceedings may (subject to the rules of court) themselves be brought in the Court of Appeal under section 101 of the *Supreme Court Act 1970* as representative proceedings:
 - (a) an appeal by the representative party on behalf of group members and in respect of the judgment to the extent that it relates to questions common to the claims of group members,
 - (b) an appeal by a sub-group representative party on behalf of sub-group members in respect of judgment to the extent that it relates to questions common to the claims of sub-group members.
- (2) The parties to an appeal in respect of the determination of a question that relates only to the claim of an individual group member are that group member and the defendant.
- (3) If the representative party or the sub-group representative party does not bring an appeal within the time provided for instituting appeals, another member of the group or sub-group may, within a further 21 days, bring an appeal as representing the group members or sub-group members, as the case may be.
- (4) If an appeal is brought from the judgment of the Court in representative proceedings, the Court of Appeal may direct that notice of the appeal be given to such person or persons, and in such manner, as it considers appropriate.
- (5) This Part (other than section 162) applies to any such appeal proceedings despite the provisions of any other Act or law.
- (6) The notice instituting an appeal in relation to questions that are common to the claims of group members or sub-group members must describe or otherwise identify the group members or sub-group members, as the case may be, but need not specify the names or number of those members.

Division 6—Miscellaneous

181 Costs

(cf s43 (1A) FCA)

Despite section 98, in any representative proceedings, the Court may not award costs against a person on whose behalf the proceedings have been commenced (other than a representative party) except as authorised by sections 168 and 169.

182 Suspension of limitation periods

(cf s33ZE FCA)

- (1) On the commencement of any representative proceedings, the running of the limitation period that applies to the claim of a group member to which the proceedings relate is suspended.
- (2) The limitation period does not begin to run again unless either the member opts out of the proceedings under section 162 or the proceedings, and any appeals arising from the proceedings, are determined without finally disposing of the group member's claim.
- (3) However, nothing in this section affects the running of a limitation period in respect of a group member who, immediately before the commencement of the representative proceedings, was barred by the expiration of that period from commencing proceedings in the member's own right in respect of a claim in the representative proceedings.
- (4) This section applies despite anything in the *Limitation Act 1969* or any other law.

183 General power of Court to make orders

(cf s33ZF FCA)

In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

184 Reimbursement of representative party's costs

(cf s33ZJ FCA)

- (1) If the Court has made an award of damages in representative proceedings, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.
- (2) If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the representative proceedings by the person making the application are likely to exceed the costs recoverable by the person from the defendant, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.
- (3) On an application under this section, the Court may also make any other order that it thinks just.

Appendix 2: Representative action provisions

COMMONWEALTH

High Court Rules 2004 (Cth) – Rule 21.09

21.09 Representative proceedings

- 21.09.1 Where numerous persons have the same interest in any proceeding the proceeding may be commenced and, unless the Court or a Justice otherwise orders, may be continued by or against any one or more persons having the same interest as representing some or all of them.
- 21.09.2 A judgment given or order made in a proceeding to which rule 21.09.1 applies shall bind the parties and those whom the parties represent.
- 21.09.3 A judgment or order shall not be enforced against a person who is not a party except by leave of the Court or a Justice.
- 21.09.4 An application for leave shall be made by summons served personally on the person against whom enforcement of the judgment or order is sought.

Federal Court Rules 2011 – Divisions 9.2 & 9.3

Division 9.2—Representative proceedings

9.21 Representative party—general

- (1) A proceeding may be started and continued by or against one or more persons who have the same interest in the proceeding, as representing all or some of the persons who have the same interest and could have been parties to the proceeding.
- (2) The applicant may apply to the Court for an order appointing one or more of the respondents or other persons to represent all or some of the persons against whom the proceeding is brought.
- (3) If the Court makes an order appointing a person who is not a respondent, the order has the effect of joining the person as a respondent to the proceeding.
- (4) This rule does not apply to a proceeding dealing with property that is subject to a trust or included in a deceased estate.

Note: For the representation of beneficiaries in a proceeding dealing with property that is subject to a trust or included in a deceased estate, see rule 9.23.

9.22 Enforcement of order for or against representative party

- (1) An order made in a proceeding for or against a representative party is binding on each person represented by the representative party.
- (2) However, the order can be enforced against a person who is not a party only if the Court gives leave.
- (3) An application for leave under subrule (2) must be served personally on the person against whom it is sought to enforce the order.

- (4) A person who is served with a notice under subrule (3) may dispute liability to have the order to which the notice relates enforced against the person on the ground that facts and matters particular to the person entitle the person to be exempt from liability.

9.23: Representative party—beneficiaries

- (1) A proceeding dealing with property that is subject to a trust or included in a deceased estate may be started by or against a trustee or personal representative without joining as a party a person who has a beneficial interest in the trust or estate (a beneficiary).
- (2) However, a person may apply to the Court for an order that a beneficiary be joined as a party to the proceeding.

9.24 Deceased persons

- (1) If:
 - (a) a deceased person was interested in, or the estate of a deceased person is interested in, any matter or question in a proceeding; and
 - (b) the deceased person has no personal representative;a party may apply to the Court for an order:
 - (c) that the proceeding continue in the absence of a person representing the deceased person; or
 - (d) that a person who has consented in writing represent the deceased person's estate for the purpose of the proceeding.
- (2) An order under subrule (1) and any subsequent order made in the proceeding binds the estate of the deceased person as the estate would have been bound if the deceased person's personal representative had been a party to the proceeding.

Note Before making an order under this rule, the Court may require the application to be served on persons having an interest in the estate, as the Court considers appropriate.

9.25 Conduct of proceeding by particular party

A person may apply to the Court for an order that the whole, or any part, of a proceeding be conducted by the person or a particular party.

Division 9.3—Grouped proceedings under Part IVA of the Act

9.31 Interpretation for Division 9.3

A word or expression that is used in this Division and in Part IVA of the Act has the same meaning in this Division as it has in that Part.

Note: Group member, representative party and representative proceeding are defined in section 33A of Part IVA of the Act. Part IVA of the Act provides for the procedure that must be adopted in representative proceedings.

9.32 Starting a representative proceeding

A person who wants to start a representative proceeding under Part IVA of the Act must file an originating application, in accordance with Form 19.

Note: For the contents of an application starting a representative proceeding, or a document filed in support of such an application, see section 33H of the Act.

9.33 Person may give consent to be a group member

A person mentioned in section 33E (2) of the Act may give consent to be a group member, in accordance with Form 20.

9.34 Opt out notices

An opt out notice under section 33J (2) of the Act must be in accordance with Form 21.

Note: A group member may opt out in accordance with section 33J of the Act.

9.35 Application for order relating to the procedure to be followed in a representative proceeding

- (1) A party may apply to the Court for an order under section 33K, 33W, 33X or 33ZA of the Act, in accordance with Form 22.
- (2) An application for an order under subrule (1) must be accompanied by an affidavit stating:
 - (a) the identity of the group members; and
 - (b) the whereabouts of the group members; and
 - (c) the means by which a notice is most likely to come to the attention of the group members.

VICTORIA

Supreme Court (General Civil Procedure) Rules 2005 (Vic) – Order 18

Order 18—Representative proceeding

18.01 Application

This Order applies where numerous persons have the same interest in any proceeding, but does not apply to—

- (a) a proceeding under Part 4A of the Act;
- (b) a proceeding concerning—
 - (i) the administration of the estate of a deceased person; or
 - (ii) property subject to a trust.

18.02 Proceeding by or against representative

A proceeding may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more persons having the same interest as representing some or all of them.

18.03 Order for representation by defendant

- (1) At any stage of a proceeding under Rule 18.02 against one or more persons having the same interest, the Court may appoint any one or more of the defendants or the persons as representing whom the defendants are sued to represent some or all of those persons in the proceeding.
- (2) Where the Court appoints a person who is not a defendant, the Court shall make an order under Rule 9.06 adding that person as a defendant.

18.04 Effect of judgment

- (1) A judgment given or order made in a proceeding to which this Order applies shall bind the parties and all persons as representing whom the parties sue or are sued, as the case may be.
- (2) The judgment or order shall not be enforced against a person not a party except by leave of the Court.
- (3) An application for leave shall be made by summons served personally on the person against whom enforcement of the judgment or order is sought.

SOUTH AUSTRALIA

Supreme Court Rules 1987 (SA) – Rule 34

34. Representative actions

Representative actions

- 34.01 (1) Where numerous persons have common questions of fact or law requiring adjudication, one or more members of that group of persons may commence an action as representative parties on behalf of all or some of the group.
- (2) Without derogating from the general words of subrule (1), in actions for the protection of property including actions by remaindermen or reversioners, and in actions in the nature of waste or a devastavit, one person may sue on behalf of himself and of all persons having the same interest.

Application to be made to allow action to continue as a representative action

- 34.02 The representative parties must within twenty-eight days after the day upon which the defendant filed a notice of address for service, or after the date of the defendant's default in doing so, apply to the Court for:
- (a) an order authorising the action to be maintained as a representative action;
 - (b) directions as to the conduct of the action.

Individual assessments of damages and separate contracts or transactions are not to preclude a representative action

- 34.03 Authorisation shall not be refused on the ground:
- (a) that the relief claimed includes claims for damages that would require individual assessment;
 - (b) that separate contracts or transactions made with or entered into between the members of the group represented and the defendant are involved.

Order to define group represented, the nature of the claims, the relief claimed and the common questions of law or fact

- 34.04 An order that an action is to be maintained as a representative action shall:
- (a) define the group on whose behalf the action is brought;

- (b) define the nature of the claim or claims made on behalf of members of the group and specify the relief claimed;
- (c) define the questions of law or fact common to the claims of members of the group

and make such other orders and give such directions as the nature of the proceedings may require.

Court may vary the order

- 34.05 An order that an action be maintained as a representative action may be varied upon the application of any party at any time before judgment in the action.

Common questions to be determined in the common proceedings and individual questions as directed in separate hearings

- 34.06 Questions which are common to the group shall be determined in common proceedings, and questions that require the participation of individual members of the group may be directed to be dealt with either in separate actions or by separate trials within the action.

Derivative actions not affected

- 34.07 Nothing in this Rule affects the bringing of derivative actions in relation to bodies corporate.

General power to allow representatives for parties

- 34.08 In addition to the rights and remedies given by the preceding subrules, where numerous persons have the same interest in any proceedings, the proceedings may be brought, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

In proceedings under 34.08 power to appoint a representative for the defendants

- 34.09 At any stage of proceedings under Rule 34.08 the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing the defendants who are sued, to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this Rule, the Court appoints a person not named as a defendant, it shall make an order adding that person as a defendant.

Judgment in proceedings under 34.08 binding on all parties but not to be enforced against a person not a party without leave

- 34.10 A judgment or order given in proceedings under Rule 34.08 shall be binding on all the persons as representing whom the plaintiffs sue, or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

Application for leave under 34.10 to be served personally

34.11 An application for leave under Rule 34.10 shall be served personally on the person or persons against whom it is sought to enforce the judgment or order.

Rights of person served under 34.11 to dispute liability

- 34.12 (1) Any person served with an application under Rule 34.11 may, notwithstanding the binding nature of any order made under Rule 34.10, dispute his liability to have the judgment or order enforced against him on the ground that by reason of facts or matters particular to his case, he is entitled to be exempted from liability.
- (2) Any question which arises as to whether a judgment or order made or sought to be made under Rule 34.10 is or ought to be enforceable against the person, or any of the persons, against whom the application is made, may be tried and determined in any manner in which an issue or question in an action may be tried or determined.

Supreme Court Civil Rules 2006 (SA) – Chapter V, Part 1, Division 3, Rules 80–84

80—Bringing of representative action where common interest exists

- (1) If a group of persons has a common interest in the subject matter of an action or proposed action and a member of the group is authorised in writing by the other members of the group to bring or defend the action as representative of the group, the person may bring or defend the action as representative of the group.
- (2) A person who brings an action as representative of a group under this rule must file in the Court the written authorisation to represent the group when filing originating process.
- (3) A person who defends an action under this rule as representative of a group must file in the Court the written authorisation to represent the group as soon as practicable after the authorisation is given.
- (4) The written authorisation must contain a list of the names and addresses of the persons authorising the person bringing or defending the action to act on their behalf.
- (5) The Court may, at any time, terminate the right of a representative plaintiff or defendant under this rule to represent the relevant group of plaintiffs or defendants.

81—Court's power to authorise representative actions

- (1) The Court may authorise a plaintiff to bring an action as representative of a group with a common interest in questions of law or fact to which the action relates.
- (2) If a plaintiff intends to apply for an authorisation under this rule, the action may be commenced in the ordinary way but the originating process must bear an endorsement in the approved form stating that the plaintiff proposes to apply for the authorisation.
- (3) An application for an authorisation under this rule must be made within 28 days after the time allowed for the defendant to file a defence.
- (4) An authorisation under this rule is not to be refused on the ground that—

- (a) damages which would require individual assessment are sought by way of remedy; or
 - (b) the action is based on separate contracts or transactions between individual members of the group and the defendant.
- (5) An order authorising a plaintiff to proceed with an action as a representative action under this rule must—
- (a) define the group on whose behalf the action is brought; and
 - (b) define the nature of the claim or claims made on behalf of the members of the group and specify the remedy sought; and
 - (c) define the common questions of law or fact that are to be determined in the action; and
 - (d) give directions about the determination of other issues raised in the action that are not common to all members of the group.
- (6) The Court may vary the order at any time before the Court gives final judgment in the action.

82—Appointment of representative party in case of multiple parties

- (1) If an action is commenced by or against two or more plaintiffs or defendants who have a common interest in the action, the Court may appoint one or more of the plaintiffs or defendants to represent the whole body of plaintiffs or defendants (as the case may require).
- (2) The Court may, at any time, terminate an appointment under this rule.

83—Representative actions by or against executors, administrators and trustees

- (1) An action may be brought by or against the executors or administrators of the estate of a deceased person as representatives of all persons interested in the estate.
- (2) An action may be brought by or against trustees as representatives of all persons interested in a trust.
- (3) However, the Court may, on its own initiative or on application, join a person with a beneficial interest or potential beneficial interest as a party to such an action.
- (4) The Court may appoint a person to represent the estate of a deceased person in an action.

84—Appointment of representative parties for class of beneficiaries etc

- (1) This rule applies to an action about—
 - (a) the administration of the estate of a deceased person; or
 - (b) the administration of a trust; or
 - (c) the construction of a written instrument.
- (2) The Court may appoint a person to represent the interests of a class of persons in the action if—
 - (a) the class cannot be readily ascertained; or

- (b) the class can be ascertained but its members, or some of its members, cannot be found; or
 - (c) the appointment should be made in order to minimise costs.
- (3) A person appointed under subrule (2) becomes a party to the action.

NEW SOUTH WALES

Uniform Civil Procedure Rules 2005 (NSW) – Rules 7.4–7.5

Division 2—Representation

7.4 Representation of concurrent interests

(cf SCR Part 8, rule 13; DCR Part 7, rule 15)

- (1) Subject to subrule (5), this rule applies to any proceedings concerning:
- (a) any matter in which:
 - (i) numerous persons have claims against the same person, and
 - (ii) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and
 - (iii) the claims of all those persons give rise to a substantial common issue of law or fact, or
 - (b) any matter in which numerous persons have the same liability.
- (2) Proceedings to which this rule applies may be commenced and, unless the court orders otherwise, carried on by or against any one or more persons as representing any one or more of them.
- (2A) Any such proceedings may be commenced:
- (a) whether or not the relief sought:
 - (i) is, or includes, equitable relief, or
 - (ii) consists of, or includes, damages, or
 - (iii) includes claims for damages that would require individual assessment, or
 - (iv) is the same for each represented person, and
 - (b) whether or not the proceedings:
 - (i) are concerned with separate contracts or transactions between the defendant in the proceedings and individual represented persons, or
 - (ii) involve separate acts or omissions of the defendant done or omitted to be done in relation to individual represented persons.
- (3) At any stage of the proceedings, the plaintiff may apply to the court for an order appointing one or more of the defendants or one or more of the other persons to represent any one or more of them.
- (4) If a person who is not a party to the proceedings is appointed as referred to in subrule (3), that person must be joined as a party under rule 6.24.

- (4A) If it appears to the court that determination of the issue or issues common to all the represented persons will not finally determine the claims of all the represented persons, the court may give directions in relation to the determination of the remaining issues.
- (4B) Without limiting subrule (4A), the court may direct that notice be given to some or all of the represented persons in the proceedings in respect of any matter.
- (4C) A represented person, whether or not joined as a party, is taken to have brought proceedings on the day on which the person became a represented person on all of the person's causes of action that may be determined by judgment in the proceedings.
- (4D) Without limiting subrule (2), the court may, on application by the defendant or of its own motion, order that proceedings no longer continue under this rule where it is satisfied that it is in the interests of justice to do so because:
 - (a) the costs that would be incurred if the proceedings were to continue are likely to exceed the costs that would be incurred if each represented person conducted separate proceedings or
 - (b) where the relief sought is the payment of money, the cost to the defendant of identifying the represented persons and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts, or
 - (c) all the relief sought can be obtained by means of proceedings other than proceedings under this rule, or
 - (d) the proceedings will not provide an efficient and effective means of dealing with the claims of all represented persons, or
 - (e) a representative party is not able to adequately represent the interests of the represented persons.
- (2) This rule does not apply to proceedings concerning:
 - (a) the administration of a deceased person's estate, or
 - (b) property the subject of a trust.

7.5 Judgments and orders in proceedings bind represented persons

(cf SCR Part 8, rule 13; DCR Part 7, rule 15)

- (1) A judgment or order made in proceedings in which a party has, pursuant to rule 7.4, represented a number of persons binds all of those persons, but is not enforceable against any of those persons who is not a party except by leave of the court.
- (2) Notice of motion for an application for leave under subrule (1) must be personally served on the person against whom the judgment or order is sought to be enforced.
- (3) Subrule (1) does not prevent a person against whom the judgment or order is sought to be enforced from disputing liability by reference to circumstances peculiar to his or her case.

QUEENSLAND

Uniform Civil Procedure Rules 1999 (Qld) – Rules 75–77

Division 4—Representative party

A proceeding may be started and continued by or against 1 or more persons who have the same interest in the subject matter of the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding.

Order for representation

- (1) At any stage of a proceeding brought by or against a number of persons who have the same interest under rule 75, the court may appoint 1 or more parties named in the proceeding, or another person, to represent, for the proceeding, the persons having the same interest.
- (2) However, when making an order appointing a person who is not a party, the court must also make an order under rule 62 including the person as a party.

Enforcement of order against representative party

- (1) An order made in a proceeding against a representative party under this division may be enforced against a person not named as a party only with the court's leave.

Note: See also the Supreme Court of Queensland Act 1991, section 82 (Order binds persons who are represented).

- (2) An application for leave to enforce an order must be served on the person against whom enforcement of the order is sought as if the application were an originating process.

Supreme Court of Queensland Act 1991 (Qld) – s 82

82. Order binds persons who are represented

- (1) This section applies to an order made in a proceeding started and continued by or against 1 or more persons (the representative party) who have the same interest in the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding.
- (2) Unless the court orders otherwise, in addition to binding the parties to the proceeding, the order binds the persons who have the same interest as the representative party and could have been parties in the proceeding.
- (3) The order may be enforced against a person not named as a party only with the court's leave.

TASMANIA

Supreme Court Rules 2000 (Tas) – Division 5, Rules 335–336

Division 5—Representative proceedings

335 Numerous plaintiffs

In any proceeding in which 7 or more persons –

- (a) have the same or a common right against another person; or
- (b) have the same or a common interest or the same rights in, to or in respect of a fund or other property; or
- (c) otherwise have a common interest in any matter –

one or more of the persons may sue or apply on behalf, or for the benefit, of all persons having the right or interest.

336 Numerous defendants

In any proceeding in which 7 or more persons –

- (a) are subject to the same or a common obligation; or
- (b) have the same or a common interest in or in respect of, or are under the like obligations in respect of, a fund or other property; or
- (c) otherwise have a common interest in any matter –

one or more of those persons may be sued or made respondent or may be authorised by the Court or a judge to defend the proceeding with respect to the obligation or interest on behalf, or for the benefit, of all persons subject to the obligation or having the interest.

Magistrates Court (Civil Division) Rules 1998 (Tas) – Rules 16–17

16 Representation order

- (1) If 3 or more persons have a cause of action or defence arising out of similar circumstances, the Court, by consent of the persons, may make an order appointing one or more of those persons to sue or defend on behalf of, or for the benefit of, any other person who consents to the order.
- (2) Unless the Court orders otherwise, a representation order confers on a person the authority and power to conduct, settle or otherwise dispose of the whole or any part of an action.
- (3) A representation order may be made irrespective of whether the remedies or relief sought by the persons are identical.
- (4) Any person represented under this rule may be entitled to, or liable for, costs in any proportion or amount the Court determines.

17 Consent to representation order

A consent to a representation order –

- (a) is to be in writing, signed by all persons consenting to the order and filed; and
- (b) may be withdrawn with the leave of the Court not less than 21 days before the date fixed for the trial of the action.

AUSTRALIAN CAPITAL TERRITORY

Supreme Court Rules 1937 (ACT) – Order 19, Rule 10

10 Where parties are numerous

Where there are numerous persons having the same interest in the same cause or matter, any of those persons may sue or be sued, or may be authorised by the court to defend, in such cause or matter on behalf or for the benefit of all persons so interested.

Magistrates Court (Civil Jurisdiction) Act 1982 – Rule 152

152 Representatives re concurrent interests

- (1) If numerous persons have the same interest in any proceedings, the proceedings may be instituted and, unless the court otherwise orders, continued by or against any 1 or more of those persons as representing all or as representing all except any 1 or more of those persons.
- (2) At any stage of proceedings under this section, the court may, on the application of the plaintiff, appoint any 1 or more of the defendants or other persons whom the defendants represent in the proceedings to represent all, or all except 1 or more, of those persons in the proceedings.
- (3) If the court appoints a person under subsection (2) who is not a defendant in the proceedings, the court shall make an order under section 147 joining him or her as a defendant.
- (4) A judgment entered or an order made in proceedings under this section shall be binding on all the persons whom the plaintiffs or the defendants, as the case may be, represent in the proceedings, but shall not be enforced against any person not a party to the proceedings except with the leave of the court.
- (5) An application for leave under subsection (4) shall be served personally on the person against whom it is sought to enforce the judgment or order.
- (6) Notwithstanding that a judgment or order to which an application under subsection (5) relates is binding on the person against whom the application is made, that person may dispute his or her liability to have the judgment or order enforced against him or her on the ground that because of facts and matters relevant to his or her case he or she is entitled to be exempted from the liability.
- (7) This section does not apply in relation to proceedings about property subject to a trust or included in a deceased estate.

Court Procedures Rules 2006 (ACT) – Rules 265–267, 270

Division 2.4.7 Representation—numerous concurrent interests

265 Application—div 2.4.7

This division does not apply to a proceeding to which either of the following divisions applies:

- (a) division 2.4.5 (Proceedings under Civil Law (Wrongs) Act 2002, pt 3.1);
- (b) division 2.4.6 (Representation—trustees and personal representatives).

266 Representation—numerous concurrent interests

- (1) If numerous people have the same interest or liability in a proceeding, the proceeding may be started and, unless the court otherwise orders, continued by or against any 1 or more of them as representing all of them.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (2) At any stage in the proceeding, the plaintiff may apply to the court for an order appointing any 1 or more of numerous defendants, or other people whom the defendants represent in the proceeding, to represent all defendants in the proceeding.
- (3) If the court appoints a person under subrule (2) who is not a defendant in the proceeding, it must include the person as a defendant in the proceeding under rule 220 (Court may include party if appropriate or necessary).
- (4) If the court appoints 2 or more people under subrule (2), it may give the conduct of the proceeding, or any part of the proceeding, to the person it considers appropriate.

267 Orders in div 2.4.7 proceeding bind represented people

- (1) An order made in a proceeding against or in favour of a party who represents others under this division—
 - (a) is binding on everyone represented by the party in the proceeding; but
 - (b) is not enforceable against or by a person who is not a party to the proceeding without the court's leave.
- (2) An application for leave under subrule (1)(b) must be served on the person against whom the enforcement of the order is sought as if the application were an originating process.

Note 1: Pt 6.2 (Applications in proceedings) applies to an application for leave.

Note 2: Rule 6902 (Leave may be given on conditions) provides that, if the court gives leave under these rules, it may give the leave on the conditions it considers appropriate.

- (3) This rule does not prevent a person against whom an order is sought to be enforced from disputing liability because of circumstances peculiar to the person.

Division 2.4.8 Multiple proceedings

270 Consolidation etc of proceedings

- (1) This rule applies if, in relation to 2 or more proceedings, it appears to the court that—
 - (a) a common issue of law or fact arises; or
 - (b) the relief sought in each of the proceedings is in relation to, or arises out of, the same transaction or event or series of transactions or events; or
 - (c) a decision in a proceeding will decide or affect the other proceeding or proceedings; or
 - (d) it is otherwise desirable to make an order under this rule.
- (2) The court may order that—
 - (a) the proceedings be consolidated; or
 - (b) the proceedings be heard together or in a particular sequence; or

- (c) any of the proceedings be stayed until any other of the proceedings have been decided.

Note: Consolidation results in the proceedings becoming a single proceeding and, for example, only 1 judgment is given in the consolidated proceeding.

- (3) The court may make an order under this rule on application by a party to any of the proceedings or on its own initiative.

Note 1: Pt 6.2 (Applications in proceedings) applies to an application for an order or direction under this rule.

Note 2: Rule 6901 (Orders may be made on conditions) provides that the court may make an order under these rules on any conditions it considers appropriate.

- (4) If the court orders that proceedings be consolidated or heard together or in a particular sequence, it may give the directions it considers appropriate for the conduct of the proceeding or proceedings.
- (5) Before or during the hearing of a consolidated hearing or of hearings ordered to be heard together or in a particular sequence, the court may order that the proceedings be separated or heard in another sequence.

NORTHERN TERRITORY

Supreme Court Rules [NT] – Rules 18.01 – 18.04

18.01 Application

This Order applies where numerous persons have the same interest in a proceeding, but does not apply to a proceeding concerning:

- (a) the administration of the estate of a deceased person; or
- (b) property subject to a trust.

18.02 Proceeding by or against representative

A proceeding may be commenced and, unless the Court otherwise orders, continued by or against one or more persons having the same interest as representing some or all of them.

18.03 Order for representation by defendant

- (1) At any stage of a proceeding under rule 18.02 against one or more persons having the same interest, the Court may appoint one or more of:
 - (a) the defendants; or
 - (b) the persons as representing whom the defendants are sued, to represent some or all of those persons in the proceeding.
- (2) Where the Court appoints a person who is not a defendant, it shall make an order under rule 9.06 adding the person as a defendant.

18.04 Effect of judgment

- (1) A judgment given or order made in a proceeding to which this Order applies binds the parties and all persons as representing whom the parties sue or are sued, as the case may be.
- (2) The judgment or order shall not be enforced against a person who is not a party, except by leave of the Court.
- (3) An application for leave shall be made by summons served personally on the person against whom enforcement of the judgment or order is sought.

Appendix 3: Stakeholders consulted

The Commission notified many potential stakeholders that it was drafting this Discussion Paper. The list of stakeholders is set out below. While many of those stakeholders indicated a preference to respond once the Paper was published, the Commission is grateful for the views of those listed below, all of whom discussed general matters relating to representative proceedings and representative actions with Mr Hammond.

Mr Gary Berson, Partner, Clayton Utz

Dr Peter Cashman, Barrister, Kim Santow Chair in Law and Social Justice, University of Sydney

Mr Malcolm Cooke, Partner, Freehills

Mr James Higgins, General Manager Melbourne, Commercial and Project Litigation Claims, Slater & Gordon

Mr Rod Hogdson, Partner, Maurice Blackburn (Qld)

Justice Anna Katzman, Federal Court of Australia

Chief Justice Wayne Martin, Supreme Court of Western Australia

Mr Hugh McLernon, Managing Director, IMF Limited

Professor Vincent Morabito, Department of Business Law and Taxation, Monash University. Justice Bernard Murphy, Justice of the Federal Court of Australia

Mr Andrew Watson, Partner, Maurice Blackburn

