CLASS ACTIONS BY DR PETER CASHMAN

FOREWORD

My association with class actions goes back thirty years. Dr Cashman's is not much shorter. In February 1977, the Hon R J Ellicott QC, Attorney-General in the first Fraser Government, signed a reference requiring the Australian Law Reform Commission ("ALRC") to report on "class actions" in federal courts in Australia, other courts whilst exercising federal jurisdiction and Territory courts. The reference was combined with a requirement to report on standing to sue in such courts.

Like the many other references received from that Attorney-General, it was forward looking and concerned with the way the law impinged on the administration of justice affecting ordinary citizens. Mr Ellicott was one of the creative spirits behind the new federal administrative law in Australia. His mind was always open to looking afresh at settled legal ways and considering how they could best be adapted so that the practice of law and the administration of justice would remain relevant to contemporary circumstances. The ALRC embarked upon the project with energy and enthusiasm. The first Commissioner to lead it was Mr (later Justice) Murray Wilcox.

The basic idea behind class actions was the self-evident need for legal procedures to adapt to a world in which the mass production of goods and services leads, when mistakes happen, to the creation of multiple legal entitlements and disputes. If such entitlements had to be proved singly, this would risk impediments of costs, over-burdening the courts with individual claims and the disinclination on the part of many victims of such wrongs to pursue their entitlements to remedies. In the United States, the answer to these and other difficulties had been the creation of a procedure known as the "class action" under the Federal Rules of Civil Procedure, r 23. However, both in the United States and during the ALRC inquiry in Australia, this procedure was to prove extremely controversial.

The controversies stemmed, in part, from the hostility of some members of the judiciary and legal profession to a new way of organising litigation before the courts. That hostility was not a new thing. It had emerged early in the twentieth century in England[1]. It had virtually killed off the effectiveness of old court rules that permitted representative procedures, designed to allow consolidation of proceedings containing common questions of law, common claims to relief and other elements making it desirable to combine the proceedings in the one suit. Australian courts, at first, reflected the English reluctance. This professional conservatism was strongly reinforced by opposition from powerful sectors of business, commerce and industry in Australia.

For proponents of class actions, such procedures were a means of organising little people into litigation for the vindication of legal rights that would probably otherwise not be pursued. For the opponents, this was the very vice which spelt the defect that made class actions fundamentally objectionable. Combining 'reluctant' parties and 'dragooning' them into proceedings which they would not otherwise have brought could inflict crippling losses which the pre-existing rules and practices had effectively accepted and avoided.

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

The outcry against class actions became ever-more vocal. The result was a significant slowing down in the ALRC work on the project. Prudence seemed to suggest that the idea should be allowed some time to germinate. Mr Ellicott had relinquished the office of Attorney-General. Sections of the federal Government made their hostility to the project known. Meanwhile, the ALRC had other important and more promising projects.

The report on class actions was not delivered until 1988[2]. By the time of its delivery, the Commissioners in charge of the project, who brought it to conclusion, were Mr John Basten (now a Judge of Appeal of the Supreme Court of New South Wales) and Dr Peter Cashman. They served as joint leaders of the project between 1986 and 1987.

Sensibly for the time, the ALRC report, as finally produced, avoided the by then inflammatory title of "Class Actions". Instead, the ALRC Report No 46 was titled *Group Proceedings in the Federal Court*. It represents a significant achievement on the part of the author of this book and his co-Commissioner, to bring the vexing, controversial project to a close. That achievement was rewarded, in 1991, by the enactment of amendments to the *Federal Court of Australia Act* to insert Pt IVA into that Act with provisions designed to permit grouped proceedings in the Federal Court.

The ALRC not only adopted a new title for the form of representative proceedings that it recommended. It also introduced a number of important safeguards, designed to respond to the concerns and fears expressed by the opponents of the proposed new procedures. Whilst the Parliament did not adopt all of the recommendations of the ALRC, and insisted on a further requirement that the common issue in the proceedings be "substantial", the genealogy of the reforms contained in the new procedures for the Federal Court was plain.

If I thought that my appointment in 1984 to the New South Wales Court of Appeal would help me escape the controversies that beset the class actions inquiry in the ALRC, I was quickly to be disabused. Cases arose in that court. No doubt they were stimulated by a healthy inter-jurisdictional rivalry that was occasioned by the new Federal procedures and also by a belated attempt to breathe new life into the representative proceeding rule that typically existed in common law courts but had been neglected during the earlier decades of professional hostility.

In *Esanda Finance Corporation Ltd v Carnie*[3], the majority of the Court of Appeal (Gleeson CJ and Meagher JA) over-ruled the refusal of a Master of the Court to strike out an attempted representative action brought under the old rule by a group of wheat farmers seeking common relief against a finance company. The majority took pains to say that the representative procedure did not authorise the conduct of a 'class action' in the State Supreme Court and that the new procedures, available in the Federal Court could not be copied in the State courts without new legislation or rules of court.

In the Court of Appeal, I favoured allowing the action, as brought, to proceed. So, on the appeal, did the High Court of Australia. Its decision in *Carnie v Esanda Finance Corporation Ltd*[4] (1995) reversed the strictness of eighty years of English law, that had been copied uncritically in Australia. The High Court adopted a test permitting representative proceedings for members of a class having a community of interest in the determination of some substantial issue of law or fact. It recognised that persons might have "the same interest" in proceedings

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2 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (ALRC 46, 1988).

3 (1992) 29 NSWLR 382.

4 (1995) 182 CLR 398.

although they had separate causes of action in contract or tort. In his reasons, Justice McHugh specifically acknowledged the need to update Australian legal procedures in this respect so as to take account of what he called "the Age of consumerism"[5].

On my appointment to the High Court of Australia in 1996, it did not take long for a case to arrive concerned with the construction of the new part of the Federal Court's statute. In *Wong v Silkfield Pty Ltd*[6] the Court, in a single opinion, affirmed that the new Federal Court provision could apply so long as there was a substantial common issue of law or fact. It reversed the Federal Court's conclusion that it was necessary to show that litigation of the common issue would be likely to resolve the claims of all group members, wholly or to any significant degree.

Most recently, in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[7] the High Court had to return to the issue of representative proceedings in State courts. This time the focus was upon both a constitutional objection to the very notion of such proceedings[8] and legal objections to the arrangements for litigation funding, a practical facility sometimes essential if the large enterprise of representative actions is to get off the ground.

No one could read the diverse opinions of the High Court in *Fostif's* case without appreciating the strong feelings that the subject matter of this book engender amongst Australian judges and lawyers. As I remarked in my reasons, for some "lawyers raised in the era before such multiple claims", it has to be admitted that "representative actions and litigation funding … seem unconventional or horrible"[9]. For others, "they are not at all unusual" and "the alternative is that very many persons, with distinctly arguable legal claims, repeatedly vindicated in other like cases, are unable to recover upon those claims in accordance with their legal rights".

This book will not, of course, settle the controversies that attend grouped and representative proceedings in Australian courts Those controversies lie deep in our notions of what courts are for, how their remedies should be enlivened and how actions within them should be funded. Dr Cashman is in a unique position to survey not only the history but the current state of the law in several jurisdictions; developments that are happening overseas; and the way such actions can be organised, funded and brought to a successful conclusion. For the opponents of class actions, this book is a devil's catechism. For supporters, it will be an indispensable "how to do it". In the end, lawyers can have their views about the wisdom or unwisdom of various forms of representative procedures. But where, as is increasingly the case, such procedures exist in legislation and court rules, they must be given effect according to their terms and so as to achieve the purposes for which they have been brought into existence.

Two things seem sure. The first is that representative proceedings will be much more important in the future than they have been in the past. And secondly, Dr Cashman will be one of the leading Australian experts in the field. He is to be praised for his uniquely devoted work on this subject and for his willingness to share his knowledge and experience in this useful text. A lesson of the legal profession, over the centuries has been that, as one door of professional activity closes, others open. Responding efficiently and justly to the problems of the "Age of

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5 (1995) 182 CLR 398 at 429.
6 (1999) 199 CLR 255.
7 *Campbell's Cash and Carry Pty Ltd v Fostif* (2006) 80 ALJR 1441.
8 *Fostif* (2006) 80 ALJR 1441 at 1481 [187]-[190].
9 (2006) 80 ALJR 1441 at 1467 [120].

consumerism" remains an important challenge facing the administration of justice in Australia. This book suggests some of the solutions that will be explored in the decades ahead.

High Court of Australia — Michael Kirby
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