## *The Australian Class Action, A 30-Year Perspective* edited by Michael Legg and James Metzger, The Federation Press

On 4 March 1992 Part IVA was introduced into the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act). Since that time representative proceedings have become an increasingly prominent feature of the Australian legal landscape. *The Australian Class Action: A 30-Year Perspective* is a collection of essays from individuals, highly experienced and esteemed within their discipline, which reflect upon the origins of, developments within, and contemporary issues facing, class action theory and practice in Australia.

The wealth of experience and considered analysis captured within this collection of essays is considerable. The effort which has gone into preparing and collating each paper is evident, and the volume provides an informative and enlightening read that is well worth the time for any practitioner working in the area. Although it is not possible, within the confines of this review, to do justice to the detailed research and analysis which permeate each of the essays, the brief summary set out below hopefully provides a useful overview to those who wish to know more about key issues facing class actions in Australia from authors at the cutting-edge of the field.

Chapter 1 comprises an essay by the editors which chronicles key developments in Australian class actions over the past 30 years: from the 1988 report of the Australian Law Reform Commission (*Grouped Proceedings in the Federal Court* (Report No 46, 1988) which preceded in the introduction of Part IVA into the Federal Court Act, to more recent developments concerning litigation funding (including an analysis of *BMW Australia Ltd v Brewster* [2019] HCA 45; 269 CLR 574) and the management of multiple class actions (including an analysis of *Wigmans v AMP Ltd* [2021] HCA 7; 270 CLR 623). The overview provides important insights into the development of fundamental principles which underpin modern class action practice, and provokes the reader to contemplate what trials and challenges might confront Part IVA over the next 30 years.

Chapter 2 is an essay by Professor Michael Legg concerning the role class actions play in providing access to justice. The essay references the important function class actions perform in assisting regulators to police existing laws, and notes recent empirical evidence identifying the significant sums received by group members as a result of class action proceedings. The essay considers practical challenges and issues concerning the compromise of class actions, the calculation and disbursement of damages, and the role of lawyers and litigation funders in facilitating access to justice through the class action mechanism.

The Honourable Justice Lee and Emerson Hynard are the authors of the third essay presented within the work. The essay addresses two concepts fundamental to class actions: access to justice and finality. While the authors identify that these concepts often move in parallel, they also note that the concepts can operate in tension in certain respects. The scope of the statutory estoppel achieved upon the judgment or settlement of a class action is explored, as are the procedural mechanisms by which such estoppels operate to finally resolve the claims of group

members. Key considerations relevant to determining an appropriate balance between access to justice and finality when effecting the resolution of class actions are examined in detail.

Chapter 4 provides a judicial perspective on open justice in class actions: the Honourable Justices Jagot and Murphy, along with Aaron Moss, explore several issues relevant to whether a proposed settlement of a class action ought to be approved under s 33V of the Federal Court Act. The authors provide detailed analysis for why public transparency and accountability is of "fundamental importance" when determining whether settlement approval should be granted, and identify numerous practical and theoretical issues which provide helpful guidance for any court or practitioner involved in such an application.

Professor Andrew Higgins studies the role of due process in class actions in chapter 5 of the work. The author explores the important and "inviolable" nature of such rights, before advocating for the development of a procedure (similar to that followed in the United States) whereby a class representative is formally appointed pursuant to a court process to ensure that representative (and his or her legal advisors) will each adequately represent the class. The extent to which class members should be permitted to meaningfully participate in class actions is also considered.

Dr Peter Cashman is the author of chapter 6, which explores the role of fee and funding mechanisms in the commencement and prosecution of class actions. The author sets out a wealth of personal reflections on the conduct of class actions over the past 40 years, and provides a rich set of perspectives from Dr Cashman's role as a law reformer, solicitor, barrister and researcher.

Chapter 7 comprises an essay by Emeritus Professor Peta Spender which outlines several insights from the intersection between class actions and regulatory and institutional theory. The author evaluates the role class actions perform as a regulator, and examines the issues which arise from the interplay between class actions (operating as a regulator of conduct) and the role of courts.

The law and economics of class actions is the subject of the eighth essay collated within the work, authored by Dr Ben Chen and Professor Michael Legg. The chapter details several economic principles which underpin class action funding, including an analysis of the impact externalities, transaction costs, moral hazard and agency costs have on the way such finance is provided. The merits of three alternative financing models (and the capacity of each to achieve access to justice, efficiency and deterrence of misconduct) are examined with reference to economic theory.

Chapter 9 is an essay by Dr James Metzger which addresses the role class actions play in a democratic society. The author explores the issues which arise from the *collective* dispute resolution process inherent in class actions, which distinguishes that process from the "usual rule" that litigation is conducted only between individual, named parties. After examining concepts of democratic law-making and adversary democracy, the essay concludes that class actions may be a form of litigation which reveals failures of the law (or its administration) to achieve democracy's promises.

The American experience of the politics of class action reform is the subject of the tenth essay, authored by Professor Mullenix. The essay explores the "often opaque political interests that spur investigation of class action practice" with particular reference to two American examples:

attempts of plaintiff interests to use the American Law Institute to drive procedural reform, and countervailing lobbying efforts by defence interests. The author concludes that an appreciation of contemporary procedural reform must account for the "politics enmeshed" in such efforts.

In the final chapter of the book, Professor Rachael Mulheron QC (Hon) addresses the role of third party funding in Australian and UK class action regimes, including the consequences of the High Court's decision in *BMW Australia Ltd v Brewster* [2019] HCA 45; 269 CLR 574 and the English Court of Appeal's decision in *Paccar Inc v Road Haulage Association Ltd* [2021] EWCA Civ 299 (which decision, since publication, has been overturned by the UK Supreme Court: see *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 299. The author conducts a thoughtful analysis of the relevant legislative regimes in Australia and the UK and posits that, in the absence of a government-seeded funding regime, opt-out class actions (and the objective of access to justice such actions were intended to achieve) may "wither on the vine".

Class actions, and the regulatory environment within which they are conducted, will each continue to evolve over the coming decades. The fact empirical research reveals that over $2 billion has been paid in gross settlement sums under the Australian class action regime (up to 2018) suggests that the process, as a vehicle for the collective vindication of rights, is unlikely to fade from view. As this impressive collection of essays demonstrates, however, periodic reflection on the history and development of the law in this area can provide useful insight as to the road ahead.

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