A. Introduction: Class actions reform, a quarter of a century apart

★ a ‘second generation’ class actions statute — interposed between the ‘first generation’ US federal rule, and the UK’s ‘third generation’ regime

1 Jul 1966 — FRCP 23 adopted, by order of the US Supreme Court, acting pursuant to the Rules Enabling Act (Justice Black dissenting), following a draft prepared by the Advisory Committee in March 1964

Feb 1977 — Referral by A-G (Aust) to the ALRC, ‘to review the laws ... relating to ... class actions ... ; and to report upon (a) the adequacy thereof; (b) any desirable changes to the existing law in relation thereto ... ; and (c) any related matter’

13 Dec 1988 — ALRC, Grouped Proceedings in the Federal Court (Rep 46), tabled

11 Dec 1989 — Federal Court (Grouped Proceedings) Bill 1989 (a private member’s Bill) introduced by Senator Haines of the Australian Democrats, which lapsed

12 Sep 1991 — Federal Court of Australia Amendment Bill 1991 introduced by Senator Tate, Minister for Justice and Consumer Affairs, for its First Reading


considerably divided opinion abounded at the time, in the Australian Parliamentary debates:

**THE OPPONENTS:**

... this legislation ... has had a long gestation. Many had hoped that it would have been stillborn and would not have been brought into the Senate. A number of people would even go so far as to say that it is a monstrosity: Senator Durack (*Hansard*, 13 Nov 1991, 3019).

Let us not mince words about it. It is a question of whether we are having a class action along the lines of the American system or whether we will seek to improve the existing representative action that has long standing and experience in our legal system: Senator Durack again (at 3019).

**THE PROPONENTS:**

The only likely costs to business of the reforms in the Bill will be through people being able to enforce existing substantive rights which claimants could not previously afford to enforce, even though the liabilities existed. This is to the benefit of ethical businesses which honour their legal obligations without having to be forced to do so by legal action: Mr Duffy, MP and A-G (*Hansard*, 14 Nov 1991, 3175).

... the public interest demands that access to the courts be made easier and less costly for those with limited means. Grouped proceedings are a step in that direction: Senator Spindler (*Hansard*, 13 Nov 1991, 3022).

I do not believe this particular proposal will lead Australian to go down the United States road ... and to become an overly litigious society, such as in the film Class Action ... [Also] this proposal is not inseparably, inevitably linked with ... product liability. One of the great benefits of this piece of legislation will be that it will probably be a means by which actions by shareholders and others in contravention of corporations law might take place: Senator Tate (*Hansard*, 13 Nov 1991, 3025).

... this legislation ... will introduce new and uncertain burdens on our court system. ... it is a revolutionary proposal. It will encourage more litigation.... it will be a bonanza for lawyers: Senator Durack again (at 3021).
B. The Political and Legal Climate for Class Actions Reform: Insights from the Australian Experience

when the breeze of ‘law reform’ and the wind of ‘political will’ collide

civil justice reform of this scale requires a juxtaposition of circumstances — and the lessons from Australia’s political and legal climate, leading up to the 1992 reforms, were replicated, almost eerily, in the UK — much to the attention of UK law reformers!

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<tr>
<th>The factor: ...</th>
<th>... in Australia</th>
<th>... and in the UK</th>
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<tr>
<td>1. A bell-weather case showing what is wrong with the existing legal landscape</td>
<td><em>E v Australian Red Cross Socy</em> (1991, Fed Ct); and <em>Esanda Finance Corp v Carnie</em> (1992, NSWCA; 1995, HCA)</td>
<td><em>Emerald Supplies Ltd v British Airways plc</em> (2009, Ch; 2010, CA)</td>
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<td>2. The ‘missing cases’, and those issued <em>en masse</em> with inevitable inconsistencies and/or duplication</td>
<td><em>ALRC Report</em> (1988); re cases arising from bushfire loss and damage, asbestos exposure, and educational facilities</td>
<td>CJC, <em>Reform of Collective Redress: A Perspective of Need</em> (2008); and the bank charges litigation (2006–7)</td>
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<td>3. A leading judicial proponent of the reform</td>
<td>Wilcox J (in <em>E</em>); Kirby J in <em>Esanda</em> and in the ALRC</td>
<td>Sir Gerald Barling, then-President of the Competition Appeal Tribunal</td>
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<td>4. Being pragmatic – it doesn’t all translate to reality – political decisions are made</td>
<td>- grouped proceedings; - contingency fees; - special public assistance fund; - judicial approval of fee agreements</td>
<td>- generic, not sectoral, implementation; - undistributed residue of damages (which is different for settlements and for judgments)</td>
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<td>5. Previous legislative reform has had its limitations</td>
<td>Supreme Court Rules (South Australia) (1987)</td>
<td>Competition Act 1998, s 47B (the Which? action)</td>
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8. Looking for assistance in another ‘legal backyard’

**Corrigan v Bjork-Shiley Corp**
182 Cal App 3d 166 (June 9, 1986) (re heart valve); *In re Silicone Gel Breast Implant Prods Liab Litig* (MDL 926) Heidi Lindsey v Dow Corning Corp (ND Alabama, 1 Sep 1994)


9. The ‘human element’ – as to why litigants will not sue individually, or opt in

**ALRC Report** (1988)

**CJC, Reform of Collective Redress in England and Wales: A Perspective of Need** (2008)

**What happens to undistributed residues?** A very political decision ...

- Reversion to D – the Australian statutory preference, per s 33ZA(5)
- *Cy-près* distributions — not under Pt IVA; but allowed under the UK’s Sch 8 for settlements
- Escheat distribution to the Government
- Public fund — mandated in the case of judgments, under the UK’s Sch 8, s 47C(5) (in favour of the ‘Access to Justice Foundation’)
- Apply surplus monies to the cost of the class action
- *Pro rata* distribution among the claiming class members

**How wide is the regime’s operation?**

The possibilities:

- Generic — Australia
- Sectoral — the UK — and against the Civil Justice Council’s strong recommendation

These reforms are a significant part of the Government’s equity and access policies embodied in its social justice program. There is considerable community concern about the cost of, and access to, justice ... The measures contained in this Bill will remove at least some of the barriers for persons who seek redress before the courts: Mr Duffy, MP and A-G (*Hansard*, 14 Nov 1991, 3175)
C. Specific ‘Design Issues’ of the Australian Class Action: What was Adopted ... and Avoided

★ To certify or not to certify? That was the question ...

NO — per the Australian regime — a ‘de facto’-type certification — the representative C commences the proceeding, per s 33C; and then D may apply for an order that the proceeding no longer continue as a class action, per ss 33L, 33M or 33N), or that the requirements of s 33C have not been met

The possibilities:

YES — per the UK regime — implemented a strict certification regime, ‘with brakes’ (below)

- the reasons for the UK’s departure from the Australian position
- the two cases ‘waiting in the wings’:

★ Specific certification criteria

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<th>The UK certification criteria ...</th>
<th>... and the Australian influence ...</th>
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<td>commonality class members must have claims that ‘raise common issues’, where ‘common issues’ means ‘the same, similar or related issues of fact or law’</td>
<td>✓ ‘relatedness’, per s 33C(1)(b), and Zhang v Minister for Immigration, Local Govt and Ethnic Affairs (1993)</td>
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<td>superiorit</td>
<td>✓ no ‘substantial’ requirement, per s 33C(1)(c), and Wong v Silkfield Pty Ltd (1999)</td>
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<td>it must be ‘an appropriate means for the fair and efficient resolution of the common issues’; and</td>
<td>✓ the criteria in s 33N(1)(a) and (b), and their interpretation in, e.g.: Murphy v Overton Investments Pty Ltd (1999); ACCC v Giraffe World (1998); and Bright v Femcare Ltd (2002)</td>
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<td>the CAT must consider ‘the availability of ADR and any other means of resolving the dispute’</td>
<td>✓ but s 33N(1)(c) closely adopted</td>
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© Rachael Mulheron 2017  (Please note that an expanded version of this lecture will be published in 2017).
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<td><strong>minimum numerosity</strong></td>
<td>• there must be ‘an identifiable class of persons’; and&lt;br&gt;• the CAT is also required to consider ‘the size of the class’&lt;br&gt;✓ Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd (1993); and Gold Coast CC v Pioneer Concrete (Qld) Pty Ltd (1997)</td>
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<td><strong>preliminary merits</strong></td>
<td>• the representative C ‘believes that the claims ... have a real prospect of success’; and&lt;br&gt;• more indirectly, when selecting opt-in or opt-out, the CAT shall consider ‘the strength of the claims’&lt;br&gt;✓ the effect of s 33M and s 33N, having regard to: Bray v F Hoffman-La Roche Ltd (2002); Gold Coast CC v Pioneer Concrete (Qld) Pty Ltd (1997); and Blairgowrie Trading Ltd v Alco Finance Group Ltd (in liq) (2015)</td>
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<td><strong>costs–benefit analysis</strong></td>
<td>• the CAT will take into account ‘the costs and the benefits of continuing the collective proceedings’; and&lt;br&gt;• more indirectly, when deciding between opt-in and opt-out, the CAT shall consider ‘the estimated amount of damages that individual class members may recover’&lt;br&gt;✓ Bray v F Hoffman-La Roche Ltd (2003); and Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (sub nom Bray) (2006)</td>
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<td><strong>an adequate class definition</strong></td>
<td>the claims sought to be included in the collective proceedings ‘are brought on behalf of an identifiable class of persons’&lt;br&gt;✓ Bray v F Hoffman-La Roche Ltd (1997)</td>
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<td><strong>need</strong></td>
<td>the CAT must consider ‘whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class’&lt;br&gt;✓ Gold Coast CC v Pioneer Concrete (1997)</td>
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<td><strong>general suitability</strong></td>
<td>• class members’ claims must be ‘suitable to be brought in collective proceedings’;&lt;br&gt;• the CAT must consider ‘whether it is possible to determine for any person whether he is or is not a member of the class’; and&lt;br&gt;• the CAT must take into account ‘whether the claims are suitable for an aggregate award of damages’&lt;br&gt;–</td>
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The representative claimant

At the widest: either any class member or a so-called ‘ideological claimant’

The possibilities:

Mid-spectrum: any class member

At the narrowest: only an ‘ideological claimant’

The UK legislative response to this conundrum:

**Competition Act 1998, s 47B(8):**

The Tribunal may authorise a person to act as the representative in collective proceedings —

(a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a ‘class member’), but

(b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.

and descending to the detail of the representative claimant’s requirements:

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<td>• general adequacy, it must be ‘just and reasonable’ that the person acts as a representative, and that the representative would ‘fairly and adequately act in the interests of the class members’;</td>
<td>♦ early controversy, that ‘the representative party is necessarily one of the group of seven or more persons on whose behalf a representative proceeding is commenced’: per ACCC v Giraffe World Aust Pty Ltd (1998);</td>
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<td>• financial adequacy, the representative must be ‘able to pay the defendant’s recoverable costs if ordered’, or satisfy any undertaking as to damages re injunctive relief;</td>
<td>♦ but early cases of ACCC v Golden Sphere International Inc (1998); and ACCC v Chats House Investment Pty Ltd (1996) also showed the use of the ‘ideological claimant’;</td>
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<td>• no conflicts of ‘material interests’ between the representative and the class members;</td>
<td>♦ and the absence of a conflict of interest should be expressly required: in light of ACCC v Golden Sphere (1998).</td>
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<td>• if the representative is a class member, his ‘suitability to manage the proceedings’;</td>
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<td>• if the representative is not a class member, then ‘whether it is a pre-existing body and the nature and functions of that body’; <strong>and</strong></td>
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<td>• having a plan for the collective proceedings which is satisfactory.</td>
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Multiple defendants

- a potential problem in competition law cases — hence, the importance of the point to UK law reformers
- whether every representative C and every class member has to have a pleadable cause of action against every D sued in the action

*Philip Morris (Australia) Ltd v Nixon* (2000) – and then, of even more significance: *Bray v Hoffmann-La Roche* (2003)

**The possibilities:**

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<td>C2</td>
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<td>D3</td>
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- the view of the Australian Full Federal Court in *Bray*, by majority (Carr and Finkelstein JJ, Branson J dissenting) — softened by three caveats:
  - not all *class members* had to have a claim against every D
  - a ‘claim’ in s 33C(1)(a) could include a claim for injunctive relief against every D, it did not necessarily mean a ‘cause of action’
  - the effect of collective conduct or a conspiracy

- leave sought to the HCA: *BASF Australia Ltd v Bray* [2004] HCA Trans 206, per Mr Archibald QC (for BASF):

  ‘what remains is a monolithic class, still containing the essential vice that not all of the group members of the class are capable of having claims against all respondents, primarily for the reason that some of the respondents were not in existence for the totality of the period to which the claims of the group are directed. Therefore, of necessity, some of the group members are incapable of having claims against some of the respondents, or their activities would be confined to a period during which those respondents did not exist, could not have supplied vitamins during that period, could not have been parties to a cartel, and could not have implemented a cartel.’

- the UK legislative response to this conundrum:

  **Competition Act 1998, s 47B(3)(a):**

  The following points apply in relation to claims in collective proceedings —

  (a) it is not a requirement that all of the claims should be against all of the defendants to the proceedings
**Foreign class members**

**Option #1**: to exclude all foreign class members, i.e., not domiciled in the UK at the relevant time

**Option #2**: to include ‘all-comers’ to the class action, both domestic and foreign, over whom the UK courts could properly assert jurisdiction

**The possibilities:**

**Option #3**: to include only those foreign class members who proactively opted into the UK class action

**Option #4**: to leave the decision entirely to the certifying court as to whether to frame the class of foreign class members on an opt-out or an opt-in basis

Pt IVA left the issue open — but some case law arose under the earlier Victorian regimes:

*Schutt Flying Academy Australia Pty Ltd v Mobil Oil Australia Ltd* (2000, CA)
*Dagi v Broken Hill plc; Gagarimabu v Broken Hill plc* (2000, SC)
*Gagarimabu v BHP and Ok Tedi* (2001, SC)

the UK legislative response to this conundrum:

**Competition Act 1998, s 47B(11)(b):**

“Opt-out collective proceedings” are collective proceedings which are brought on behalf of each class member except —

(a) any class member who opts out ... ; and

(b) any class member who —

(i) is not domiciled in the United Kingdom at a time specified, and

(ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings.

the reasons were complex, e.g.:

• a real prospect that any UK judgment rendered over those foreign class members would not be recognised by the court in the foreign class members’ own jurisdiction, and nor would it have preclusive effect there

• the court asserts jurisdiction proactively, with numbers definitively known

• enhances personal autonomy and choice for foreign class members

• due process and adequate representation for foreign class members

• a question of judicial resources
D. Funding the Australian Class Action: Lessons Learnt from the ‘Tied Class’ Experience

★ The usual accoutrements of costs and funding, as applied under Australia’s federal regime

- costs-shifting + security for costs orders may be made against the representative C + class members are ‘immunised’ from costs, except in respect of the individual issues
- damages-based agreements are expressly prohibited, for opt-out collective proceedings (per Competition Act 1998, s 47C(8)) — but third party funding is not prohibited

★ The interplay of class actions and third party funding

- third party funding in the UK is governed by a long line of authority, e.g. *Giles v Thompson* (1994); *Factortame Ltd v Sec of State (No 8)* (2002); *Arkin v Borchard Lines Ltd* (2005)
- ‘soft regulation’ applies, per the *Code of Conduct for Litigation Funders* (2011, revised 2014)
- but how does the Funder recover its ‘success fee’?

The equitable ‘common fund’ doctrine: i.e., where there is ‘the creation, preservation or increase of a fund in which others have an interest’ — and considered in: *Blairgowrie Trading Ltd v Alco Finance Group Ltd (R&M Appointed) (in liq)* (2015), per Wigney J:

> “There is something to be said for the proposition that some form of common fund approach, similar to the common fund doctrine in the United States, should be adopted in Australia to deal with the reality of commercial litigation funding in representative proceedings. It would, however, perhaps be preferable for that to occur as a result of legislative reform, rather than by way of the piecemeal utilisation by judges of general discretionary powers such as ss 23 and 33ZF”.

And since – the ‘in principle’ decision to uphold a ‘common fund’ order: *Money Max Int Pty Ltd v QBE Ins Group Ltd* (26 Oct 2016)

The possibilities:

- **A general judicial supervisory power**: vested by virtue of the governing legislation — ‘to make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding’, per s 33ZF(1) – *Earglow Pty Ltd v Newcrest Mining Ltd (Newcrest I)* (2015), and *Newcrest II* (2016)
- **A contractual entitlement**, by virtue of ‘tied classes’ — and noting the strong division of judicial opinion, e.g.: *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005, Stone J); *Rod Investments (Vic) Pty Ltd v Clark* (2005, VSC); *Jameson v Professional Investment Services Pty Ltd* (2007, NSWSC); versus: *Dawson Nominees Pty Ltd v Multiplex Ltd* (2007, FCA); *Jameson* (2009, NSWCA)
- **An express statutory provision** – analogous (in a loose way) to s 33ZJ(2) – the concept of the ‘statutory charge’
the concern of UK law reformers — per Stone J in *Dorajay* (per [111] and [117]):

‘Parliament has made a clear choice [in Part IVA], and it is not for the courts to hold otherwise. Therefore it is necessary to address whether [a tied class] has the effect of implementing an opt-in procedure or otherwise subverting the process that the legislature has adopted...

[The legislature made a clear choice [to adopt an opt-out regime] that was consistent with the recommendation of the Australian Law Reform Commission on this issue. Whatever advantages, real or apparent, may flow from the ability to identify each member of the class at the outset, a decision to apply an opt-in procedure can only be made by the legislature’.

the UK legislative response to this conundrum:

**Competition Act 1998, s 47C(6):**

In a case within subsection (5) [where the Competition Appeal Tribunal makes an award of damages in opt-out collective proceedings], the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings.


- the relevant clause
- likely effect of the *Merricks* decision

### E. Conclusion: The First 25 Years

- bold and ambitious — having utility, across a range of areas, involving thousands of class members
- an exercise in pragmatism and compromise
- problems and conundrums, and judicially-crafted solutions
- giving rise to design points of great comparative importance — lessons learnt, and to be learnt
Please note: several of the matters dealt with in this presentation are covered, in greater detail, in the author’s following selected publications (and in a forthcoming publication based on this conference presentation):

- ‘The United Kingdom’s “Third Generation” Statute’ [forthcoming]
- ‘Class Actions and Law Reform: Insights from Australia and England, a Quarter of a Century Apart’ in D Grave and H Mould (eds), 25 Years of Class Actions in Australia (Ross Parsons, Sydney, 2017), ch 14, 303–323;
- Costs and Funding of Collective Actions: Realities and Possibilities (commissioned by BEUC, Feb 2011), vii + 133pp
- Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal (Research Report for the Department of Business, Enterprise and Regulatory Reform, October 2008), ix + 76 pp;
- Reform of Collective Redress in England and Wales: A Perspective of Need (Research Report for the Civil Justice Council, Feb 2008), ix + 161pp;
- The Modern Cy-Près Doctrine: Applications and Implications (Routledge Cavendish, London, 2006);