PROCEDURAL REFORM: THE NEW PART 10

A PAPER ON REPRESENTATIVE ACTIONS IN THE SUPREME COURT

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Introduction

There is a strand of thinking in our jurisprudence that the rights of individuals cannot be properly determined in proceedings to which they were not party and in circumstances where they have not been given an opportunity to be heard. On that view, representative proceedings, in which one individual seeks to resolve a dispute involving a common issue for a group or class of people who are not themselves party to the proceedings, are unacceptable. Where a right or entitlement was jointly held, all those having a joint interest should be joined, whether as plaintiffs or as defendants. If the rights were several, each should bring his or her own proceedings.

As a comprehensive statement of the position under the general law, the description set out above is misleading, in relation to equity, in relation to proceedings in tort and those for contravention of statutes. Some of the old cases were discussed by McHugh J in *Carnie v Esanda Finance Corporation Ltd*.[1] There is a further discussion to be found in *Wong v Silkfield Pty Ltd*,[2] in relation to proceedings in equity.

Part 10 of the *Civil Procedure Act 2005* (NSW), which commenced on 4 March 2011, largely replicates Part IVA of the *Federal Court of Australia Act 1976* (Cth) and Part 4A of the *Supreme Court Act 1986* (Vic). Then Attorney-General John Hatzistergos,[3] after noting that the new provisions were modelled on Part IVA of the *Federal Court Act*, stated:

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1 [1995] HCA 95; 182 CLR 398 at 427-430.
2 [1999] HCA 48; 199 CLR 255 at [13]-[17].
3 Hansard, Courts and Crimes Legislation Further Amendment Bill 2010, 24 November 2010.

> "Two additional procedural rules have also been included. The first additional rule clarifies that representative proceedings may be taken against several defendants, even if not all group members have a claim against all defendants.[4] The provision overcomes the contrary view … expressed in relation to the operation of Part IVA of the *Federal Court of Australia Act 1976* in *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487. The second rule clarifies that it is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals.[5] This is consistent with the view taken by the Full Court of the Federal Court in relation to the operation of the Federal Part IVA in *Multiplex Funds Management Ltd v Dawson Nominees Pty Ltd* (2000) 244 ALR 600."

Both the federal and Victorian procedures have been challenged on constitutional grounds, unsuccessfully.[6] In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[7] the question as to the propriety of representative actions under the previous New South Wales rules[8] was raised in a context which gave rise to questions as to the common element in the proceedings, the role of litigation funders, where there was an abuse of process and (at least for Gleeson CJ and Kirby J) whether, the proceedings being in federal jurisdiction, a "matter" existed for the purposes of Chapter III of the Constitution. Justice Sackville will explore further the background to, holdings and implication of *Fostif*.

My purpose is not to revisit the issues raised by these cases or to restate the inadequacies which arose when attempts were made to apply the old rules in modern circumstances. Ad hoc amendments were made to deal with specific problems, but the old rules have now been replaced by a comprehensive statutory scheme which will, hopefully, provide one further mechanism to enhance the just, quick and cheap resolution of major disputes. Suffice it to say that the cases in

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4 CPA, s 158(2).
5 CPA, s 166(2).
6 In relation to the Victorian provisions, see *Femcare Ltd v Bright* [2000] FCA 512; 100 FCR 331 and *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; 211 CLR 1.
7 [2006] HCA 41; 229 CLR 386.
8 Supreme Court Rules 1970 (NSW), Part 8, r 13(1).

which the new rules are most likely to operate smoothly are those involving conduct of a commercial enterprise or public authority, which is unlawful or tortious and has the capacity to affect adversely a large number of consumers of relevant goods or services. In such circumstances, representative actions have a number of potential functions, of which the two most commonly cited are those protective of the courts and of small claimants. These two broadly stated functions operate as different sides of the same coin. In relation to the administration of justice, the purpose is to avoid a plethora of individual proceedings, eating into court resources and creating the possibility of inconsistent outcomes. That purpose assumes that numerous claims will be brought. On the other side of the coin, the assumption is that, for one or more of a number of reasons, individual claims are unlikely to be brought and injured parties are thereby left without a remedy, unless their claims can be litigated as a representative procedure.

The provisions now found in Part 10 have deliberately replicated the Commonwealth and Victorian provisions, in large part because there is an established jurisprudence in respect of their operation. In preparing a draft of this paper I therefore found it frustrating that the editors of *Ritchie's Uniform Civil Procedure NSW* had not provided any annotations derived from other jurisdictions in relation to identical provisions. However, that omission is in the process of being corrected: there are references to Federal Court cases with respect to key provisions in the latest service. Further assistance can be obtained from an annotated Federal Court practice.

Criteria for commencement

For ease of reference, the criteria for commencement of a representative proceeding can be identified by labels which have proved commonplace in the United States. Under r 23 of the US Federal Rules of Civil Procedure, the four criteria to be satisfied for the commencement of a class action are "numerosity", "commonality", "typicality" and adequacy of representation. The Americans require additional elements, depending on the nature of the relief sought. We have not adopted that language and, accordingly, much of the US case-law is irrelevant in construing our rules.

Nevertheless, it is easy to recognise the concepts of numerosity, typicality and commonality in our criteria for commencement of representative proceedings, set out in s 157(1) of the *Civil Procedure Act*.

First, numerosity: unlike its predecessor under the general law, the vagueness of the requirement that there be a class of "numerous persons" having the same interest, has been removed by specifying that there must be "7 or more persons".[9]

Secondly, typicality: we do not require that the claims of the representative be "typical" of the claims of class members[10] but we do require that claims of all persons must be "in respect of, or arise out of, the same, similar or related circumstances".[11]

Thirdly, commonality: commonality is satisfied if the claims of all those persons in the class give rise to "a substantial common question of law or fact".[12] This language may be contrasted with the requirement of old r 13(1) that there be "numerous persons" having "the same interest in any proceedings". This language was abandoned in November 2007 in favour of the current formula, which was discussed by Spigelman CJ (Allsop P and Ipp JA agreeing) in *Jameson v Professional Investment Services Pty Ltd*.[13] That analysis remains relevant in relation to an element critical to the concept of a representative proceeding, because each member must have a claim giving rise to a common question. As explained by four members of the US Supreme Court in *Wal-Mart Stores Inc v Dukes et al*:[14]

> "A 'question' is ordinarily understood to be a subject or point open to controversy. … Thus, a question common to the class must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims."[15]

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[9] CPA s 157(1)(a).
[10] Federal Rules of Civil Procedure (USA), r 23(a)(3).
[11] s 157(1)(b).
[12] s 157(1)(c).
[13] [2009] NSWCA 28; 72 NSWLR 281.
[14] 564 US ?; 70 USLW 4527 (2011) opinion of Ginsburg J, Breyer, Sotomayor and Kagan JJ agreeing at pp2-3.
[15] Internal quotations and references omitted.

As was further explained in footnote, the word “questions” means “disputed issues, not any utterance crafted in the grammatical form of a question”.[16]

The common question (there may, of course, be more than one) must be substantial. Care must be taken not to use the word “substantial” as importing a significant restriction on the availability of the procedure. At various times, the High Court has toyed with a distinction between a common issue which was “not insubstantial” and one which was “considerable, solid or big”, in the sense that, if not dispositive of the proceedings, its determination would be likely to predominate at a trial. The latter approach was rejected by the High Court in *Wong v Silkfield*.[17] The Court noted the undesirability of determining such questions at the commencement of the proceedings, in part because the Court is given a broad discretion, at any stage of the proceedings, to discontinue them in representative form where, broadly speaking, they will not provide an efficient and effective means of dealing with the claims.[18]

In fact, there is a swathe of powers available to the Court for management of representative proceedings, including those to be found in ss 164, 165, 166, 168 and 169. These provisions recognise that determination of common questions may not dispose of the proceedings; that there may be other questions which are common to some members of the group, which can thus be constituted as a sub-group; that directions will need to be given for the determination of individual issues and that the efficiency and effectiveness of the proceedings as a mechanism to deal with the claims of group members must be borne in mind. No less would be expected under modern case management, in giving effect to the objectives set out in s 56 of the *Civil Procedure Act*.

Where persons rights are being determined in proceedings to which they are not party, it is obviously important that their interests be adequately represented. Unlike the US rule, the Australian procedures do not require that adequacy of representation be a criterion of commencement, but rather recognise that it may

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16 Opinion of Ginsburg J, footnote 3.
17 199 CLR 255 at [28].
18 CPA, s 166(1).

become an issue at any stage of proceedings. Thus, while inability of a representative party to represent the interests of group members adequately is a ground for discontinuing the proceedings as representative proceedings,[19] there is also a power to substitute another group member.[20] If it be the circumstances of the representative party, rather than the nature of the proceedings, which give rise to concern, the latter power would be appropriate, rather than the more draconian power to discontinue the proceedings.

Notice

The very nature of representative proceedings leads to concern about the position of group members, who are not party to the proceedings. On one view, they should always have notice; on another view, if the relief sought will inevitably be beneficial, if the proceedings succeed and their interests are adequately represented against the risk of failure, notice is irrelevant. The proper accommodation of these polar positions requires consideration of the purpose and practicality of giving notice. These considerations may operate differently, as reflected in the US rules,[21] depending on the causes of action in question and the nature of the relief sought.

In terms of purpose, notice of the commencement of proceedings will inform the member that his or her rights are being pursued. Part 10 provides for group members to opt out.[22] That opportunity must be availed of within a fixed time and before the commencement of the hearing.[23] At a later stage, notice may be appropriate to inform members that the proceedings which have been commenced in their interests are at risk of being discontinued or terminated without a result on the merits. Finally, group members may need to be advised of the outcome, particularly if the judgment entitles them to receive a benefit contingent upon them taking further steps.

The likelihood of a group member opting out is likely to be proportional to the size of the claim and thus its practical viability as an individual proceeding. Accordingly,

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[19] s 166(1)(d).
[20] s 171.
[21] FRCP, r 23(b).
[22] CPA, s 162.
[23] s 162(1) and (4).

where proceedings seek to benefit a large number of people with small claims, the chance of a significant number of persons opting out may be minimal. Nevertheless, those are also the cases in which the cost of giving notice is likely to be disproportionately high. In such circumstances, personal service of a notice would usually be inappropriate, but posting notification by mail may be possible. Sometimes identifying group members may be practically impossible, or only be open to the defendant. If identification of the group is not practically possible, public notification in a newspaper, or some similar mechanism, may be the preferable option.

As the Federal Court cases dealing with notice under s 33X of the *Federal Court Act* demonstrate, the giving notice by advertisement in a newspaper is commonplace. However, particular management issues arise as to the timing of notices and their content. Where notice is given of the commencement of proceedings on a particular basis, subsequent amendment may necessitate the giving of further notice. If a party seeking to amend is not prepared to bear the cost of further notification, there may be a risk of the amendment being refused. Secondly, because the content of the notice will tend to contain the briefest summary of the proceedings, the Court must approve the form and content of the notice.[24] Notice can, however, be given informally as well as by a court-approved process. Thus, the parties to the proceedings and their agents must be careful as to the content of public statements made in the media after notice has been given. If there is a risk that such statements are misleading, the offending party may be required to give, or bear the cost of, a remedial notice.[25]

Individual issues

Major management issues may arise from the need to determine individual issues. In some cases these may be relevant to liability, in others only to relief. The most common issue in relation to liability is that of reliance in cases of misrepresentations or misleading advertising. In respect of relief, the usual individual issue is quantifying loss. Part 10 envisages that there may be circumstances in which the

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[24] CPA, s 176.
[25] See, eg, *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2008] FCA 575 (Tamberlin J).

Court can assess an aggregate amount of damages without specifying the amounts payable to individual members,[26] or may be able to assess damages on some other basis.[27] An example of a case in which aggregate damages were fixed was *ACCC v Golden Sphere International Inc*,[28] where O'Loughlin J fixed an amount of damages, calculated at $50 per member of the class, at $550,000.

The importance of these issues from a broad perspective is that the Court is given significant flexibility in how it deals with such matters. Thus, for example, if the Court felt able in particular proceedings to assess aggregate damages or to determine a method of calculating damages, recovery could then be made contingent upon an individual proving reliance, either as a separate step in the representative proceedings or in individual proceedings.

Judgments

Difficulties have arisen from time to time as to the proper form of judgments in representative proceedings. The determination of a common question which is not dispositive of the case may give rise to an interlocutory judgment, but one which, arguably, cannot be expressed in terms of a declaration.[29]

Further, and importantly, a judgment must make clear against whom it is directed and in whose favour it is given. Because it is sufficient for the originating process to "describe or otherwise identify" group members,[30] a judgment may no doubt be formulated in like fashion, so long as the terms of the description are sufficient to allow recognition of a person who comes forward in answer to a notice, as a member or non-member of the group.

Multiple respondents

It is not uncommon for consumer litigation to have more than one respondent. To take but one example, proceedings for a negligently manufactured therapeutic

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[26] CPA s 177(1)(f).
[27] CPA s 177 (1)(e).
[28] [1998] FCA 598; 83 FCR 424.
[29] See conflicting remarks in *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 at [128] (Gummow and Hayne JJ) and [265]-[268] (Kirby J).
[30] CPA, s 161(1)(a).

device or a drug distributed with inadequate warnings may be brought against the manufacturer, the distributor and the individual medical practitioners who prescribed the device or drug. In representative proceedings, there may well be common issues with respect to the manufacturer and the distributor, but claims against medical practitioners will usually be discrete, with separate practitioners involved in respect of each group member.

Such cases have given rise to significant discussion in the Federal Court. Again there are two polar views are open. One is that representative proceedings are only available where all persons have claims against the one defendant. At the other end of the spectrum is the view that so long as all have claims against one respondent, not necessarily arising out of the same conduct, so long as they arise out of similar or related circumstances, and involve a substantial common question, then it is permissible to include in the proceedings a variety of claims against other respondents, which may nor may not involve a common question with the qualifying claims, or indeed with each other. The broader position is consistent with all aspects of a particular dispute or class of disputes being resolved in one proceeding, whereas the narrower approach is likely to rest on concerns about the efficient management of the proceedings. Related to these issues is a question as to the role of *Anshun*[31] estoppel in representative proceedings. There will obviously be a concern for the representative party, if he or she is not entitled to bring individual claims in the representative proceedings. The concern may be less in respect of group members, but, in an early decision, French J in the Federal Court decided to discontinue the proceedings in a representative form, once he had determined the common issues, to avoid a risk that group members would be deprived of the right to bring related claims.[32]

This issue has been resolved by Part 10, in favour of the broader view.[33] However, the dialogue within the Federal Court, particularly between Sackville J and Moore J, is not without relevance, particularly in relation to the management issues which

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[31] *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; 147 CLR 589.
[32] *Zhang De Yong v Minister for Immigration, Local Government and Ethic Affairs* [1993] FCA 33; 45 FCR 384.
[33] CPA, s 158(2).

arise from the joinder of multiple defendants.[34] It would be undiplomatic for me to enter that debate and I leave the issue to our commentator. It is also important in reading the Federal Court cases to understand why the somewhat unsatisfactory result, which I think has not been resolved yet, but may be by legislation in line with our rule, pertains. The statement of the Full Court in *Phillip Morris* that each group member is required to have a claim against each of the respondents was treated as wrong in *Bray*, which permitted representative proceedings where the applicant had a claim against all respondents, but did not require that every group member had a claim against every respondent. However, there has been some doubt expressed as to whether the ruling in *Bray* was part of the ratio and, accordingly, whether single judges are required to follow *Bray* or *Philip Morris*.[35]

Litigation Funding

As noted earlier, *Fostif* raised an issue as to the role of litigation funders of representative proceedings. The possibility that commercial litigation funding is an abuse of process in relation to litigation is not limited to representative proceedings. Nor is the commercialisation of representative proceedings limited to the role of litigation funders. Nor is this the time to discuss that broader issue. What is worth noting is the potential of representative actions, especially those involving significant individual claims for damages in tort, to generate remunerative business for the legal practitioners running such cases.

It may fairly be said that the role of the representative party has a fiduciary aspect. A practitioner acting for a representative party arguably has a duty adequately to represent the members of the group, as well as the representative applicant, on whose behalf the proceedings are ostensibly brought. To the extent that he or she has a conflict of interest with group members, for example in accepting a settlement,

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[34] *Philip Morris (Australia) Ltd v Nixon* [2000] FCA 229 (Spender, Hill and Sackville JJ); *King v GIO Australia Holdings Ltd* [2000] FCA 617; 100 FCR 209 (Moore J); *Hunter Valley Community Investments Pty Ltd v Bell* [2001] FCA 201; 46 ATR 375 (Sackville J); see now *Bray v F Hoffmann-La Roche Ltd* [2003] FCAFC 153; 120 FCR 317 (Carr, Branson and Finkelstein JJ).

[35] See *McBride v Monzie Pty Ltd* [2007] FCA 1947; 164 FCR 559 (Finkelstein J) and *Kirby v Centro Properties Ltd* [2010] FCA 1115; 189 FCR 301 (Ryan J).

the statutory scheme seeks to address the issue.[36] However, it cannot be disregarded that the lawyers who control the proceedings may have a large financial interest in its outcome (as will a litigation funder). Of course, the potential conflict of interest in such cases is not novel. Lawyers who brought personal injury claims on a speculative basis also had a significant interest in the outcome. Their commercial interests have, however, been restrained by professional restrictions on advertising, introduced as part of the tort law reforms around 2000.

One consequence of the perceived commercial imperatives is that law firms undertaking representative proceedings have themselves imposed an opt-in regime. The sole purpose of this course is to permit them to enter into fee agreements with those likely to benefit from the litigation. This phenomenon is not, I think, limited to cases involving commercial litigation funders. It raises a question as to whether the public interest in providing the means for disadvantaged members of the community to obtain justice is being manipulated by a practice designed to exclude 'freeloaders'. The ability of legal aid and community legal centres to use representative proceedings for those with small claims appears to have been undermined by the pressures of routine work, possibly coupled with a lack of legal imagination. These are not, of course, issues for the courts to resolve, but they may be issues of which the court needs to be aware in exercising its statutory powers, for example, in approving settlements.

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[36] CPA, s 171 (adequacy of representation), s 173 (approval for settlement and discontinuance) and s 174 (settlement of individual claim).