

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
THE SENATE

(As read a first time)

FEDERAL COURT OF AUSTRALIA AMENDMENT BILL 1991

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1990-91

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
THE SENATE

(Presented and read a first time, 12 September 1991)

(MINISTER FOR JUSTICE AND CONSUMER AFFAIRS, SENATOR TATE)

A BILL

FOR

An Act to amend the *Federal Court of Australia Act 1976*

The Parliament of Australia enacts:

Short title etc.

1.(1) This Act may be cited as the *Federal Court of Australia Amendment Act 1991*.

5 (2) In this Act, “**Principal Act**” means the *Federal Court of Australia Act 1976*¹.

Commencement

2.(1) Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.

10 (2) If this Act does not commence under subsection (1) within the period of 3 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

3. After Part IV of the Principal Act the following Part is inserted:

“PART IVA—REPRESENTATIVE PROCEEDINGS

“Division 1—Preliminary

Interpretation

- “33A. In this Part, unless the contrary intention appears: 5
- ‘**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; 10
- ‘**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; 15
- ‘**sub-group representative party**’ means a person appointed to be a sub-group representative party under section 33Q.

Application

“33B. 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*. 20

“Division 2—Commencement of representative proceeding

Commencement of proceeding

- “33C.(1) Subject to this Part, where: 25
- (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. 30
- “(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 35
- (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

5 (ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

Standing

10 “33D.(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.

15 “(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.

Is consent required to be a group member?

20 “33E.(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.

25 “(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;

30 (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.

Persons under disability

35 “33F.(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.

Representative proceeding not to be commenced in certain circumstances

“33G. 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.

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Originating process

“33H.(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.

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“(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.

Right of group member to opt out

“33J.(1) The Court must fix a date before which a group member may opt out of a representative proceeding.

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“(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.

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“(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.

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Causes of action accruing after commencement of representative proceeding

“33K.(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.

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“(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

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representative proceeding but before such date as the Court fixes when giving leave; and

- 5 (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.

- 10 “(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.

Situation where fewer than 7 group members

- 15 “33L. 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.

20 **Cost of distributing money etc. excessive**

“33M. Where:

- 25 (a) the relief claimed in a representative proceeding is or includes payment of money to group members (otherwise than in respect of costs); and
30 (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:

- 35 (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).

Order that proceeding not continue as representative proceeding where costs excessive etc.

- 40 “33N.(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 5
- (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. 10

“(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. 15

Consequences of order that proceeding not continue under this Part

“33P. 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 20
- (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.

Determination of issues where not all issues are common 25

“33Q.(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. 30

“(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. 35

Individual issues

“33R.(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. 40

“(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.

Directions relating to commencement of further proceedings

5 “33S. 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

10 (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.

Adequacy of representation

15 “33T.(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.

20 “(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.

25 **Stay of execution in certain circumstances**

“33U. 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
30 proceeding is determined.

Settlement and discontinuance—representative proceeding

“33V.(1) A representative proceeding may not be settled or discontinued without the approval of the Court.

35 “(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.

Settlement of individual claim of representative party

40 “33W.(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. 5

“(4) Before granting a person leave to withdraw as a representative party: 10

(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. 15

“(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*” 20

Notice to be given of certain matters

“33X.(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); 25

(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. 30

“(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. 35

“(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. 40

“(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.

5 **Notices—ancillary provisions**

“33Y.(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:

- 10 (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
15 (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.

20 “(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.
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“(7) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.

30 “(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.

Judgment—powers of the Court

“33Z.(1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:

- 35 (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; 5
- (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. 10

“(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: 15

- (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. 20

Constitution etc. of fund

“33ZA.(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: 25

- (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 30
 - (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. 35

“(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 40
- (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.

Effect of judgment

“33ZB. 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

Appeals to the Court

“33ZC.(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 5
- (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. 10

“(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. 15

“(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. 20

“(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. 25

Appeals to the High Court—extended operation of sections 33ZC and 33ZF 30

“33ZD.(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. 35

“Division 6—Miscellaneous

Suspension of limitation periods

“33ZE.(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. 40

“(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.

5 **General power of Court to make orders**

“33ZF.(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.

10 “(2) Subsection (1) does not limit the operation of section 22.

Saving of rights, powers etc.

“33ZG. Except as otherwise provided by this Part, nothing in this Part affects:

- 15 (a) the commencement or continuance of any action of a representative character commenced otherwise than under this Part; or
- 20 (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
- 25 (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.

Special provision relating to claims under Part VI of the *Trade Practices Act 1974*

30 “33ZH.(1) For the purposes of subsection 87(1) of the *Trade Practices Act 1974*, a group member in a representative proceeding is to be taken to be a party to the proceeding.

35 “(2) An application under subsection 87(1A) of the *Trade Practices Act 1974* by a representative party in a representative proceeding is to be taken to be an application by the representative party and all the group members.

Reimbursement of representative party’s costs

40 “33ZJ.(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.

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“(3) On an application under this section, the Court may also make any other order it thinks just.”.

NOTE

1. No. 156, 1976, as amended. For previous amendments, see Nos. 19 and 87, 1979; No. 61, 1981; No. 26, 1982; No. 91, 1983; Nos. 11, 72 and 165, 1984; Nos. 65 and 193, 1985; No. 76, 1986; No. 141, 1987; Nos. 8 (as amended by No. 120, 1988) and 99, 1988; No. 157, 1989; Nos. 11, 70 and 115, 1990; and Nos. 112, 113 and 122, 1991.

