

1991

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

FEDERAL COURT OF AUSTRALIA AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Duffy MP)



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OUTLINE

This Bill will amend the Federal Court of Australia Act 1976 to provide an enhanced representative action procedure in the Federal Court.

2. Under the new procedure a person may bring an action as representing a group of seven or more persons where all have claims against the same person. The claims must give rise to a substantial common issue of law or fact requiring determination and arise out of the same, similar or related circumstances.

3. The procedural reforms in the Bill confer no new legal rights. They build on the existing centuries old representative action procedure which is already available in the Federal Court and State and Territory Supreme Courts.

4. The reforms in the Bill are of similar effect to those introduced in the Supreme Court of South Australia some years ago while providing a more detailed procedure and greater guidance in the use of the new procedure. The new representative action procedure was developed following the report of the Australian Law Reform Commission entitled 'Grouped Proceedings in the Federal Court' which was tabled in Federal Parliament in December 1988.

Financial Impact Statement

5. It is not expected that the Bill will have a significant financial impact. A small number of additional cases may be brought. Offsetting this will be savings where multiple individual actions would otherwise be brought.

NOTES ON CLAUSES

Clause 1: Short Title

6. This clause provides for the short title of the Act and defines the 'Principal Act' to mean the Federal Court of Australia Act 1976.

Clause 2: Commencement

7. The Act is to commence on a day to be proclaimed. If the Act is not commenced within 3 months of Royal Assent it will commence on the first day after the end of that period. A period of up to 3 months is allowed to enable the Federal Court to make Rules of Court for the new procedure.

Clause 3:

8. Clause 3 inserts new Part IVA after Part IV of the Principal Act.

PART IVA - REPRESENTATIVE PROCEEDINGS

Division 1 - Preliminary

New section 33A - Interpretation

9. This section defines certain words and expressions for the purposes of the new Part. The principal definitions are:

'group member' is defined to mean a member of a group of persons on whose behalf a representative proceeding has been commenced.

'representative party' is defined to mean a person who commences a representative proceeding.

'representative proceeding' is defined to mean a proceeding commenced under section 33C.

New section 33B: Application

10. Under this section a representative proceeding may only be brought in respect of a cause of action arising after the commencement of the amending Act.

Division 2 - Commencement of representative proceeding

New Section 33C: Commencement of proceeding

11. This section provides the criteria that must be satisfied for one or more persons to commence a representative proceeding on behalf of themselves and other persons. There must be seven or more persons who have claims against the same person; the claims of all members of the group must be in respect of, or arise out of, the same, similar or related circumstances and they must give rise to a substantial common issue of law or fact.

12. The section also makes it clear that such a proceeding may be commenced notwithstanding, amongst other matters, that the relief sought includes claims for damages that would require individual assessment and that the proceeding is concerned with separate transactions between the respondent and individual group members or involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

New section 33D - Standing

13. This section provides that a person who has standing to bring an individual claim has standing to bring a representative proceeding on behalf of other persons under section 33C. The section also enables the representative party to continue to represent the group members even though he or she no longer has a claim against the respondent, for example, through settlement of his or her individual claim.

New section 33E - Is consent required to be a group member?

14. This section provides that the consent of a person to be a group member is not required unless that person is the Commonwealth, a State or Territory or a Minister, officer or certain agencies of the Commonwealth, a State or Territory. The activities of Governments, government agencies, Ministers and officials may be subject to legislative and other restraints which make inappropriate the inclusion of such persons in a representative proceeding without consent.

New section 33F - Persons under disability

15. Under this section a group member who is under disability must have a next friend or committee for the purpose of taking a step in the representative proceeding or conducting part of the proceeding, but he or she need not be so represented merely in order to be a group member.

New section 33G: Representative proceeding not to be commenced in certain circumstances

16. This section provides that a representative proceeding cannot be brought where the jurisdiction of the Federal Court would be derived solely from the Jurisdiction of Courts (Cross-vesting) Act 1987 or a corresponding law of a State or Territory. This is to ensure that purely State law claims are not brought in the Federal Court merely to obtain the benefit of the new procedure.

New section 33H: Originating process

17. This section provides for the additional information (the description of the group, the nature of the group members' claims and the common issues for determination) that must be set out in or with an application commencing a representative proceeding. In describing or otherwise identifying group members it will not be necessary to name, or specify the number of, group members.

New section 33J: Right of group member to opt out

18. This section allows a group member to elect to be excluded from the representative proceeding at any time before the date fixed by the Court for this purpose. The Court will be able to extend the period for opting out. Notice of the right to opt out and the date fixed for this purpose must be included in the notice given to group members under section 33X.

19. Except with leave of the Court the hearing of the representative proceeding is not to commence before the period allowed for group members to opt out has expired. The power of the Court to grant leave has been included to enable evidence to be taken before the period given to opt out expires in cases where it might otherwise be lost, for example, through the death of a witness.

New section 33K: Causes of action accruing after commencement of representative proceeding

20. The section will enable the Court to amend the application bringing the proceeding in order to include in the description of group members a person whose cause of action had not accrued when the proceeding was commenced but which accrues before the date fixed by the Court under the section. This enables as many potential group members as possible to be included, in order to remove, so far as possible, the need for separate proceedings to be brought.

New section 33L: Situation where fewer than 7 group members

21. If the number of group members falls to less than seven, this section enables the Court either to allow the proceeding to continue as a representative proceeding or to order that it not so continue. The consequences of making the latter order are dealt with in section 33P.

New section 33M - Cost of distributing money etc. excessive

22. This section enables the Court to prevent the continuation of a representative proceeding if the likely cost (to the respondent) of identifying group members and distributing to them any monetary relief would be excessive, having regard to the total amount of any monetary relief which would be likely to be payable. The Court may order that the proceeding no longer continue under Part IVA (see section 33P) or stay the proceeding so far as it relates to the monetary relief.

New section 33N: Order that proceeding not continue as representative proceeding where costs excessive etc.

23. This section enables the Court to order that a proceeding no longer continue under Part IVA where it is satisfied that it is in the interests of justice to do so because it falls within one of the four criteria set out in subsection 33N(1). These criteria are that it would be less costly to have separate proceedings; that the relief sought can also be obtained by a proceeding other than a representative proceeding under Part IVA (e.g. a separate proceeding brought by the representative party whether singly or in conjunction with one or more other persons as applicants); that the claims of group members will not be efficiently and effectively dealt with by the representative proceeding or it is otherwise inappropriate that the claims be pursued by means of a representative proceeding. This provision will ensure that the Court is able to prevent abuse of the new procedure.

24. To protect the applicant from repeated applications under the section the Court is empowered, where it dismisses an application under the section, to order that no further application may be brought except with leave of the Court.

New section 33P - Consequences of order that proceeding not continue under this Part

25. This section provides that where the Court makes an order under section 33L, 33M or 33N that a representative proceeding not continue under Part IVA, the proceeding may be continued as an individual proceeding between the representative party and the respondent. The section also enables the Court to order that a group member be joined as an applicant in that proceeding.

New section 33Q: Determination of issues where not all issues are common

26. In some cases determination of the common issues in a representative proceeding will still leave some issues relating to the particular claims of group members to be determined. This section enables the Court to provide for the most convenient method of resolving such issues by giving directions. The directions can include establishing a sub-group where there are issues common to the claims of some only of the group members. Where the Court establishes a sub-group it may appoint a sub-group representative party who will be responsible for representing the sub-group in the determination of the common issues and who will be liable for the costs associated with that determination.

New section 33R: Individual issues

27. This section enables the Court, in giving directions under section 33Q, to permit a group member to appear in the proceeding for the purpose of determining an issue particular to the claims of that member. Where such permission is given the group member, and not the representative party, is to be liable for the costs of determining the issue.

New section 33S: Directions relating to commencement of further proceedings

28. After determining the common issues in a representative proceeding it may not be appropriate, in some cases, to deal with remaining issues in the same proceeding. An example would be a case where, after a determination of liability is

made, there are remaining issues in relation to one or more group members which are complex and diverse. In such cases it may be more efficient for separate proceedings, limited to those remaining issues, to be brought either by individual group members or as a separate representative proceeding. This section enables the Court to give directions relating to the commencement and conduct of such an individual proceeding or representative proceeding.

New section 33T: Adequacy of representation

29. This section enables the Court to substitute another group member as a representative party or sub-group representative party where it considers that that representative is not able to adequately represent the interests of group members or sub-group members, as the case requires.

New section 33U: Stay of execution in certain circumstances

30. Where a respondent commences a proceeding in the Court against a group member, this section allows the Court to stay the enforcement of any relief awarded to that group member in the representative proceeding until the other proceeding has been determined.

New section 33V: Settlement and discontinuance - representative proceeding

31. For the protection of group members this section provides that the Court's approval must be obtained before a representative proceeding can be settled or discontinued.

New section 33W: Settlement of individual claim of representative party

32. This section permits a representative party to settle, with leave of the Court, his or her individual claim. Where such a settlement occurs or leave has been sought the representative party may seek the Court's leave to withdraw as representative party. Before granting leave the Court is to

be satisfied that group members have received notice of the application in sufficient time to allow another member of the group to apply to be substituted as the representative party. Leave is not to be granted until any such application is determined.

Division 3: Notice

New section 33X: Notice to be given of certain matters

33. The purpose of sections 33X and 33Y is to set out the requirements for giving notice, in the most efficient and effective way, to group members of the commencement of the representative proceeding and of other events during the course of the proceeding which may affect their rights.

34. Section 33X requires notice to be given to group members of the commencement of the representative proceeding and the right of group members to opt out. Notice must also be given of an application to dismiss the proceeding on the ground of want of prosecution and of an application by a representative party to withdraw as representative party. The Court is given power to dispense with these requirements in cases where damages are not claimed.

35. The section also provides for notice of a payment into Court, approval of a settlement, and of any other matter where the Court so orders. Notice must be given as soon as practicable after the happening of the relevant event.

New section 33Y: Notices - ancillary provisions

36. This section provides that the form and content of any notice under the preceding section must be approved by the Court. The Court will specify who is to give the notice and the way it may be given (which may be by press advertisement or radio or television broadcast). The Court may direct a party to provide information relevant to the giving of notice (such as the names of group members) and may determine who should bear the costs of notice. Because of the likely high

cost of personal notice, the section also provides that personal notice need not be given unless the Court is satisfied that it is reasonably practicable, and not unduly expensive, to do so.

Division 4: Judgment etc.

New section 33Z: Judgment - powers of the Court

37. This section sets out the orders that the Court may make in determining a matter in a representative proceeding.

38. In awarding damages, the Court is given a wide discretion as to the nature of the order it may make to fit the circumstances of the particular case before it. For example, it may wish to make an award consisting of amounts determined by reference to a mathematical formula or by reference to records of the respondent. The Court is also specifically empowered to award damages in an aggregate amount without specifying amounts awarded in respect of individual group members. Except where it is approving a settlement, the Court may not make an aggregate award unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.

39. Where the Court awards damages it may specify the way in which a group member is to establish an entitlement to damages and the means by which any disputes about entitlement are to be determined.

New section 33ZA: Constitution etc. of fund

40. Where the Court awards damages, this section enables the Court to constitute a fund for the purpose of distributing the moneys to group members.

41. The order constituting a fund must provide for notice to be given to group members, specify how the group member can make a claim for payment and establish his/her entitlement to payment, specify the period in which a claim can be made on

the fund (not to be less than 6 months after the order) and provide for distribution to group members who have established an entitlement.

42. Provision is also made for a respondent to apply for the return of any moneys remaining in the fund after the date set for its final distribution.

New section 33ZB: Effect of judgment

43. This section provides that a judgment in a representative proceeding must describe or otherwise identify the group members who will be affected by it, and that it binds all such persons, other than those who have opted out.

Division 5 - Appeals

New Section 33ZC: Appeals to the Court

44. This section makes it clear that an appeal under the Act from a judgment of the Court in a representative proceeding may be brought by the representative party as a representative proceeding. Where the appeal relates only to issues common to the claims of sub-group members it may also be brought by the sub-group representative as a representative proceeding on behalf of the sub-group members. In an appeal in respect of the determination of an issue that relates only to the claim of an individual group member the parties are to be that group member and the respondent.

45. The section also provides that in an appeal by the respondent from the judgment generally the parties are the respondent and the representative party as representing group members and in an appeal from the judgment to the extent that it relates to issues common to sub-group members, the respondent and the sub-group representative party as representing sub-group members.

46. Provision is made to enable a group member or sub-group member to bring an appeal where the representative party or sub-group representative party does not bring an appeal within the time provided. In such cases a further 21 days is allowed in which to institute the appeal.

47. The section enables the Court to direct who should be given notice of the appeal and provides that a group member may not opt out of the appeal. In an appeal it will only be necessary to describe or otherwise identify the group members or sub-group members.

New section 33ZD: Appeals to the High Court - extended operation of sections 33ZC and 33ZF

48. This section provides that section 33ZC (and section 33ZF which confers a general power on the Court to make orders) also applies to appeals to the High Court from the Federal Court in representative proceedings. The section also makes it clear that the operation of section 33 of the Principal Act (which relates to appeals to the High Court from the Federal Court) is not affected.

Division 6 - Miscellaneous

New section 33ZE: Suspension of limitation periods

49. This section provides for the suspension of the limitation period that applies to the claim of a group member on the commencement of a representative proceeding. The suspension is lifted if the member opts out of the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim. The provision is designed to remove any need for a group member to commence an individual proceeding to protect himself or herself from expiry of the relevant limitation period in the event that the representative action is dismissed on a procedural basis without judgment being given on the merits.

New section 33ZF: General power of Court to make orders

50. This section gives the Court (on application or of its own motion) a wide power to make orders it thinks appropriate or necessary to ensure that justice is done in a particular proceeding. This provision does not limit the operation of section 22 of the Principal Act, which relates to determination of a matter completely and finally.

New section 33ZG: Saving of rights, powers etc.

51. This section reflects the fact that while the new Part provides a new procedure for bringing and conducting a representative proceeding, it does not change existing laws that apply generally to proceedings in the Federal Court unless those changes are provided for in Part IVA.

52. The section makes it clear that the new Part does not affect the commencement or continuance of any other representative action in the Court, for example, under the Trade Practices Act 1974 or under the Court's current representative action procedure.

53. The section makes special mention of the Court's powers relating 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 - all of which are explicitly preserved.

33ZH - Special provision relating to claims under Part VI of the Trade Practices Act 1974

54. New section 33ZH makes it clear that the Court has power to give relief to group members under section 87 of the Trade Practices Act 1974. Section 87 of that Act enables the Court to make remedial orders in cases where there has been a contravention of Part V (Consumer Protection) and, in relation to subsection 87(1), also Part IV (Restrictive Trade Practices) of the Act.

New section 33ZJ: Reimbursement of representative party's costs

55. The new Part does not affect the application of the ordinary costs rules applicable in the Federal Court for proceedings generally. However, where the representative party or a sub-group representative party is successful and secures a monetary award in favour of group members or sub-group members, as the case may be, it is appropriate that those group members contribute towards the amount by which the representative will be out of pocket for costs after recovering costs from the respondent. This section allows the Court to make an order for a contribution from group members in these circumstances.

