Review Article

Class actions*

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Two recent volumes add substantially to the literature on class actions, or representative proceedings as they are known in the Federal Court of Australia. One, written by an Australian academic living in the United Kingdom, presents information on a number of different jurisdictions including the Federal Court. The other is from two Australian practitioners, providing detailed commentary as well as useful primary material in the form of ***Hansard*** *excerpts and precedents. While they contain some surprises in terms of the depth of analysis and recognition of broader issues, both books should prove immensely useful to tort lawyers from all walks of life.*

Introduction

Class actions represent a fascinating field of study not just for those with an interest in procedure, but also for scholars of the substantive fields where they are typically used. Tort law must figure largely on any list of such fields; other likely inclusions would be taxation and trade practices. The interest of class actions for the torts scholar lies in their potential to even out power imbalances between wealthy, organised defendants and dispersed, disempowered plaintiffs. More generally they represent a rare example of the legal system responding to a systemic issue at a systemic level, with vision and flexibility. That is, providing they work and are applied in the spirit in which they were intended.

A class action enables one person to carry on proceedings on behalf of a group, not all of whom necessarily know they are being affected, but all of whom will be bound by the outcome. It has the potential to make a defendant answer for wrongs to a number of people whose claims might not otherwise have been viable on account of their small size or for some other reason. A broad understanding of how class actions work can be gleaned from the structure of Rachael Mulheron's book, as revealed in its table of contents. First, the moving party must establish that the case is an appropriate one for class action treatment: this will involve consideration of some combination of the number of plaintiffs (numerosity);[1] the existence of common issues (commonality);[2] and whether a class action is a preferable means of conducting the litigation, compared to individual proceedings (superiority).[3]

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* A review essay of Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective*, Hart Publishing, 2004, lxxvii + 479 pp + appendix, bibliography and index, £65; and Damian Grave and Ken Adams, *Class Actions in Australia*, Lawbook Co, 2005, xxxix + 504 pp + 10 appendices + index, $157.95.

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1 Chapter 5B, pp 117–30.

2 Chapter 6, pp 165–217.

3 Chapter 7, pp 219–73.

The person seeking to commence the proceedings must usually demonstrate that he or she (or it) is a suitable representative.[4] Once the proceedings are under way, it is necessary to define the class of plaintiffs to be bound by the outcome[5] and certain impediments, such as variations in the limitation period for different members of the class, might be encountered.[6] It is necessary to take a fresh approach to the quantification of monetary relief[7] and to costs and funding of the action.[8]

Mulheron

Rachael Mulheron's stated purpose in her very substantial work is 'to compare and contrast the class action jurisprudence . . . emanating from three jurisdictions . . . so as to draw parallels and counterpoints that may assist those who study, conduct, legislate for, or adjudicate on class actions'.[9] The jurisdictions in question are the United States, Australia and Canada (with separate attention being given, where appropriate, to British Columbia and Ontario). There is also a substantial chapter on England's 'different approach'.[10] The book is nothing if not encyclopaedic. The author must surely have read, reflected on and referenced everything written about class actions in the United States, British Columbia, Ontario and Australia in recent times until the cut-off date of 1 December 2003. At least, it is hard to imagine that there has been any case or article omitted. The table of cases runs to some 26 pages; the bibliography to 20 pages. It is likely that the only person who would know about any omissions would be the author herself.

The book will therefore be a gold-mine for anyone requiring a quick answer or a quick citation or reference on any sub-issue of class actions: their features and objectives, their commencement and conduct, or ways of dealing with costs and remedies. I believe the book will be useful in this way not just for those requiring access to information on an individual jurisdiction, but for those who need comparative information about the jurisdictions under consideration. The latter will be facilitated all the more by the inclusion as appendices of all relevant statutes. Further, the book has brought together in a useful way a range of perspectives on some matters, for example the use of sub-classes to get around apparent disparities between members of a general class.[11]

Thoroughness of coverage can be a mixed blessing, however. It can be attended by a level of superficiality, as is found especially in the early parts of the book where Mulheron tends to provide heavily footnoted lists that only hint at what is being referred to, for example, the list of matters where courts have considered foreign jurisprudence:

> American jurisprudence has been considered [by Canadian courts] . . . with respect to several matters arising from certification,[fn] mass torts,[fn] where there are

4 Chapter 8, pp 275–318.
5 Chapter 9, pp 321–66.
6 Chapter 10, pp 367–88.
7 Chapter 11, pp 389–434.
8 Chapter 12, pp 435–79.
9 Page viii.
10 Chapter 4, pp 67–111.
11 Pages 184–8.

> competing class actions and therefore competing law firms seeking carriage of the action,[fn] the use of bar orders[fn] in complex litigation,[fn] and reimbursement for the representative plaintiff's time and effort;[fn] and under the Australian federal regime, in respect of settlement with individual class members,[fn] of the fairness of the settlement process generally,[fn] and of the *res judicata* effect of a class action judgment.[fn][12]

Such lists no doubt have their uses, but they do not make satisfying reading. One might venture to suggest that a list like this belongs in the footnotes itself.[13] Another example of this problem is in the conclusion to the section on assessing the preliminary merits of the claim, where Mulheron strings together a number of observations without developing any of them fully or clearly linking them.[14] Sometimes it feels as if the reader is being provided with such a mass of details that few ideas shine through. For example, in the section on commonality Mulheron takes some time in discussing the US rule before coming to the vital point of the link between superiority and the predominance of common issues over non-common.[15]

On the other hand, the book does contain some lists that provide, in compressed form, useful summaries of such things as the differences between plaintiff and defendant class actions[16] and the reasons why the Federal Court of Australia has been reluctant to hold class actions to have been invalidly commenced in spite of the numerosity requirement not necessarily being satisfied.[17] There are also numerous useful tables summarising, for example, the arguments for and against a particular approach.[18] But that is not what a prospective reader needs to know in order to decide whether to read this book. Readers are unlikely to notice these contrasts unless they read the book from cover to cover. This, I suggest, very few people will have call to do. It is precisely the meticulous and extensive research base that makes it hard to imagine anyone, except a reviewer, walking through this book from beginning to end. Surely nobody except the author of such a book is going to need to know quite this many details at once about class actions in the four focus jurisdictions.[19]

However, one might wonder whether Mulheron achieves her goal of comparing and contrasting, or whether her efforts are, at least at times, limited to describing conditions under various regimes. This can be done without any necessary comparing, contrasting or drawing of parallels or counterpoints.

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12 Pages 17–18. Other such lists appear at pp 24 and 64.

13 By contrast, there is material in the footnotes that belongs in the text, for example the explanation of the fairly intricate differences between Rule 23(b)(1)(A) and Rule 23(b)(1)(B) of the US Federal Rules of Civil Procedure: p 10 (n 58). This causes problems some pages further on when Mulheron engages in a detailed discussion assuming knowledge of the content of those and other sections: p 32. See also n 62 on p 78, which sets out CPR19.6(1).

14 Page 143.

15 Pages 193–4.

16 Page 44.

17 Pages 120–1.

18 For example, the list of competing arguments regarding the opt-out approach to class formation in Table 2.1, pp 37–8.

19 I say 'four' because there are apparently some substantial differences between British Columbia and Ontario. When Mulheron refers to 'three' jurisdictions, she is obviously thinking of the three nations under consideration: Australia, Canada and the United States.

Although Mulheron provides the raw material for her prospective students, litigators, legislators and judges to draw comparisons,[20] there is room to argue that the book is distinctly lacking in critical analysis or development of issues. In particular, the book could be described as non-committal on the merits or otherwise of class actions.

One exception to Mulheron's general tendency to describe the law and leave it to the reader to ponder the deeper issues it raises is the discussion of the 'typicality' criterion that exists under US law. There are difficulties associated with giving a meaning to the concept of typicality, apart from the criteria[21] that generally play some part in establishing a right to proceed in the first place under class action provisions. Mulheron explains them lucidly, hinting at an awareness of the role of class actions in evening out power imbalances between plaintiffs and defendants. She points out that proving the existence of a class, in the sense that has been developed under the typicality criterion, 'may depend on information wholly within the defendant's possession' and that 'an apparent lack of support [among potential class members] for an action may mask that the class members are in favour of the suit, but fear retribution'.[22] This kind of rare hint at a deeper awareness of the power dynamics that form the background for class actions only serves to put in relief the book's general descriptive and, as I say, non-committal approach.

This approach can be seen in the section on 'Access to Justice' as an objective of class action regimes: it reads largely as a (heavily referenced) list of quotations from other people, with little or no comment from Mulheron herself weighing the actual value of the class action mechanism against the significance of the objective. On the other hand, she does provide a scholarly description of the problem of objectives 'pull[ing] in different directions . . . particularly in the case of small economically unviable claims'.[23] She also acknowledges that 'there remains considerable scope for the defendant to attack successfully [the] commencement [of class actions] on legal, procedural, financial and factual grounds'.[24] But this is the last sentence of the section, whereas in another book it might have been the beginning.[25] Once again that would have been a different book from the one Mulheron set out to write, but Mulheron might at least have discussed what defendant opposition to the commencement of class actions shows about access to justice.

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20 A rare overt comparative statement is on the difference between statutory treatment of the commonality issue in Ontario and the United States: p 191.

21 Namely commonality, superiority and the requirement that the representative provide fair and adequate representation.

22 Page 314.

23 Pages 55–6.

24 Page 57. Another good example of analysis at this level is a lucid presentation of arguments against Lord Woolf's rejection of class actions: p 70.

25 A further opportunity for critical analysis is missed in discussion of a US committee's views on the scenario where individual members of a large class stand to gain only a small amount of damages each: pp 141–2. Mulheron quotes the committee's statement '[b]ut it is not clear that such a class should be certified' and lists some arguments for and against the introduction of an 'it just ain't worth it' rule, but gives no appraisal of the strength of the arguments. See also the (under)statement that 'the Australian view [on multiple defendants] as espoused in *Philip Morris* is problematical and productive of significant hurdles for plaintiff classes': p 163. *Phillip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 (Fed Ct of A, FC) was a devastating blow to plaintiffs, not a source of significant hurdles.

That is, if the alternative to defending one class action by 100 people is defending 100 individual actions, a defendant surely has no interest in opposing the class action procedure. A defendant who engages in such opposition must realise that the alternative is not 100 actions, but some much smaller number and quite possibly none at all. This surely proves that class actions play some part in helping all 100 hypothetical claimants get access to justice — or at the very least, that they are perceived that way by defendants. This is an example of the kind of analysis that is generally missing from the book. Further on, when discussing 'judicial economy', Mulheron does refer to the defendant interest in defining the class broadly so as to bind as many people as possible to the outcome, whatever it might be. There is a fascinating web of issues here to be sorted out, but that has been left for another day.

In one sense it is admirable that Mulheron has managed to produce such a substantial work without really giving a hint as to her views on the utility of class actions, or for want of a better expression, which side she is on. That is, most people would have a tendency to want to resolve issues in favour of either maximising or minimising the use of class actions; after a close reading of the book I have concluded that either Mulheron's view is perfectly balanced or (more likely) she has exercised considerable discipline in an attempt to maintain objectivity.[26] This leads in to a perennial debate surrounding legal scholarship and education: can true objectivity ever be achieved? If not, we might expect that even that which appears to be objective on the surface is indeed suffused by a world view. Is it not better as a reader (or a student) to be told what that world view is so that you have at least some idea what kind of reading-between-the-lines needs to be done? Or where to place one's scepticism? If, like me, you have some sympathy with this proposition, you might find yourself wondering which 'side' you are getting, and what the other 'side' might be.

In saying this I am probably speaking as a tort lawyer. As a group, I suggest that we are in the habit of thinking of the world as divided up into plaintiffs and defendants; it is difficult to feel one really understands a situation unless one has brought it into focus through this lens. So for example, when Mulheron says that '[t]he requirement that the represented persons should have the "same interest" has undoubtedly proven to be the most problematic and least workable aspect of the rule', I want to ask, least workable from whose point of view? When she says that the failure to include a particular test made a regime 'less onerous', I want to ask, less onerous on whom?[27]

I imagine it is quite different for proceduralists, of whom Mulheron appears to be one.[28] This would explain why it is enough for her to observe that in

26 A possible hint at Mulheron's views lies in her statement that the class action procedure 'confer[s] a "great advantage" upon plaintiffs' — rather than *removing a disadvantage* that plaintiffs would otherwise suffer: p 143. She also expresses a preference for the more restrictive (on plaintiffs) approach to multiple defendant litigation: pp 163–4.

27 Page 139.

28 Although Mulheron rightly acknowledges the 'problem of separating substantive and procedural law', in the sense that 'implementation of a class actions procedure entails some modification of the substantive laws that would otherwise apply' (p 39), this does not interfere with the proposition that a culture or mindset can grow up in lawyers who habitually work with one aspect or other of law.

Australia, despite the absence of a formal certification process for class proceedings, 'a series of interlocutory applications at the commencement of the proceedings usually determines whether the proceedings have been properly commenced . . ., acting as "a de facto certification process" in any event'.[29] Through a procedural lens, this is probably all you need to know. However, the tort lawyer in me is left thirsting for a discussion of the adequacy of the Pt IVA regime to redress the inherent power imbalances between defendants and plaintiffs.

Still, it is dangerous to dwell too much on such matters, as the book deserves to be appraised on the basis of what it set out to do. As we have already seen, the author's aims did not include engaging in debate on the merits of class actions. One important aim in addition to the one(s) quoted above, for at least a substantial part of the book, was to receive a doctoral qualification. The book's genesis in doctoral studies[30] can probably explain a lot about the kind of book it is, its strengths as well as its weaknesses. The depth and thoroughness of the research, for example, are exactly what one would expect of a diligent and well-supervised doctoral student. The comparative perspective — or as one might more accurately describe it, the bringing together of material from different jurisdictions — ensures the requisite originality. However, there is a risk that a piece of work produced, primarily at least, for the eyes of a small number of examiners will contain some shorthand that is not necessarily descriptive and leaves a broader audience disenfranchised, as it were. Therefore, we see Mulheron using the term 'judicial economy' extensively, to mean (I gather) the idea that the application of a class action can, at least sometimes, save court resources by comparison to a plethora of individual proceedings. This is not, however, an obvious meaning for the phrase. A similar comment could be made of the extensive use of 'superiority' to refer to the test for commencement of a class action that the representative procedure must be superior or preferable to individual actions.

One might also expect that a piece of writing aimed primarily (in the first instance) at doctoral examiners might assume a certain amount of foreknowledge on the part of the reader. This can lead to some discussion which appears cryptic to other readers; for example there is a lengthy quotation from the 1996 Woolf Report:

> The earlier the court exercises control in a potential multi-party action the better chance of managing the case to a satisfactory resolution. Other jurisdictions have achieved this by requiring certification of a group or class action where there is an identifiable class or a specified number of persons, and the claims give rise to common issues of fact and law and where handling them together appears to the court to provide the best and most practicable approach. The disadvantage of the solution usually adopted in other jurisdictions is that there may be many claimants with similar complaints but their claims may be more satisfactorily dealt with, at

29 Page 27.

30 Mulheron tells us in her Preface that '[t]he opportunity to undertake detailed academic study of the class action device arose from doctoral research at Oriel College, Oxford, from which this book has developed and expanded': p 10.

> least in part, in separate proceedings. In this situation, it is likely that a group action will not be certified even though the case would benefit from collective management by the court.[31]

This might have spoken for itself from the point of view of Mulheron's examiners but would have been considerably more use to me as a reader if Mulheron had summarised and explained it.

Another feature of doctoral research is that the immediate audience — that is, the examiners, some or all of whom are presumably unknown at least while the work is being completed — has considerable power over the author. Doctoral students are placed in such a position as to wish to avoid offending anyone and this raises an inherent danger of perceivably 'political' issues being sidestepped. This could provide the perfect explanation for why an author would produce such a substantial work of scholarship, but rarely if ever reveal her point of view on anything besides what we might call black-letter debates. If this is indeed what happened with Mulheron's work, it is perfectly understandable. It might explain, for example, her simple reference to the arguments in favour of a re-examination of the prohibition on preliminary merits assessment in the United States, without any attempt to assess their merits.[32]

What is slightly less understandable however is the frequent failure to engage even broader issues like the position and interests of defendants discussed above. As mentioned, Mulheron missed the opportunity to discuss the tension between defendants' interests in preventing representative proceedings from being commenced and their interests in including as many people as possible in the class once they are commenced. The latter point was noted only as arising out of a study by the Rand Institute — as if by way of proving thoroughness of research — and the absence of further discussion, let alone drawing of a link to the earlier point about blocking commencement, is a limitation.

Although the jurisdictions for study did not include England and Wales, there is a substantial chapter on England, a jurisdiction where a conscious decision has been made *not* to introduce class actions. Considering the book's genesis as an Oxford doctorate, it is probably no coincidence that this chapter contains one of the best organised and most engaging passages in the book.[33] It is also in this chapter that Mulheron makes one of her most confident statements addressed to the broader context of debates on class actions: 'The clamouring for change can be swift and abrupt, and an ongoing awareness by law reformers of other options is essential.'[34] Perhaps the same spark would be found in discussion of the other jurisdictions if there had been closer and more sustained institutional contact with them. It is at least arguable that such contact might have led Mulheron to realise that McLachlin CJ of the Canadian

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31 Page 69; the quotation is from Great Britain, Lord Chancellor's Dept, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* by the Right Honourable Lord Woolf, HMSO, London, 1996, Ch 17, para [16].

32 Page 132.

33 See pp 80–2.

34 Page 111. Mulheron also makes a confident critical statement about a 'rather purposeless threshold criterion' in her home jurisdiction of Australia: p 190.

Supreme Court is a she and not a he![35]

A comment needs to be made about the language in the book. Readers might notice a degree of stiltedness; for example, Mulheron persistently refers to class action 'schemas' instead of 'schemes'. The *Macquarie Dictionary* defines 'schema' as 'a diagram, plan or scheme' and scheme as including 'a body or system of related doctrines, theories etc'. Since it is clear that the latter meaning is intended, 'scheme' is actually a better word. Why Mulheron uses 'schema' when 'scheme' would convey her meaning more closely is not clear. Mulheron also has a habit of using complicated passive constructions, for example, 'it has been judicially stated' when 'judges have stated' would do just as well. Naming the judge or judges concerned would be even better. This might be another unfortunate by-product of the book's encyclopaedic nature: there is not the space to contextualise the vast amount of information she seeks to impart.

Grave and Adams

If Mulheron's book is encyclopaedic in its coverage, Damien Grave and Ken Adams' is encyclopaedia-like in its layout. There is abundant white space on the page, liberal use of dot-points, numbered paragraphs and an intricate system of sub-headings as well as a detailed table of contents at the start of each chapter. All these things combine to make for a very accessible book where one might instinctively expect to find a quick answer even more easily than one could in Mulheron's volume. In short, the book presents like a ready-reference for practitioners. The authors' own stated purpose supports such an impression, being, very modestly, 'to state the law . . . to provide practical guidance to the practitioner'.[36] One might therefore expect the work to be a little superficial or perhaps a little dry — but one should not be fooled.

As to superficiality, it needs to be borne in mind that Grave and Adams spend roughly the same number of pages discussing Australian law as Mulheron spends discussing that of four jurisdictions (five, if you count the chapter on England which takes up a substantial portion, about 9%, of the pages in question). Admittedly there is, as already noted, considerable white space on Grave and Adams' pages and admittedly they do aspire to discuss the Victorian provisions as well as those under the Federal Court of Australia Act 1976 (Cth). However, the treatment of Australian law remains considerably more detailed in the later book.

If the measure of dryness is the extent to which the authors keep to matters that are strictly likely to be of use to practitioners in participating in class actions, Grave and Adams' book fails to meet any such expectation. It is true that the references contain a stronger concentration of continuing legal education-type materials than one would expect in a more academic book. A glance at the main table of contents does give a clear impression of a practical orientation as, unlike Mulheron, these authors have included chapters on 'Pleadings in Representative Proceedings', 'Conclusion of Proceedings and Appeals' and 'Settlement of Representative Proceedings'. Certainly the

35 See p 101 (reference to *Western Canadian Shopping Centres Inc v Dutton* (2001) 201 DLR (4th) 385).

36 Page 21.

authors have included, in appendices, numerous samples and precedents from pleadings and notices in past class action litigation; certainly these are likely to be of immense use to practitioners. But documents of this kind are of intrinsic interest to anybody who is trying to gain a better understanding of the class action regime and how it works. Moreover the appendices contain, in addition to the concretely practical, a wealth of fascinating information about the background to the various legislative reforms. For example, there are extensive passages from the *Hansard* debates on the introduction of Pt IVA of the Federal Court of Australia Act. These are an even clearer example of the kind of material that can be of use and interest to a range of readers.

More generally, Grave and Adams do not shy away from discussion and analysis of controversial issues; I suspect that at least some of their statements of a position are inherently unlikely to be of assistance to their intended practitioner audience. This is at least in part because those practitioners will be positioned on either side of the plaintiff/defendant divide, so the defence of a view that tends to support one or other side has the opposite effect on the other side. For example, in discussing the circumstances that are permitted by s 33(1)(c) of the Federal Court of Australia Act, the requirement of a 'substantial' common interest, Grave and Adams list three possible approaches and comment:

> Provided that the objectives of Pt IVA of the Federal Court Act are advanced, the last of these three constructions is preferred. Adopting this approach will enable representative proceedings to be commenced with less risk of failure to satisfy the threshold requirements.[37]

Thus — ironically perhaps — the authors of the practitioner's guide show more willingness than the academic author to 'reveal their hand'. Here they have stated not only a preference for a particular resolution but a clear criterion for evaluating any resolution of any issue. This might be seen as all the more surprising given that the criterion given seems to be somewhat pro-plaintiff in nature whereas the two authors, as partners of Freehills, have probably been given every reason in their own professional lives to develop pro-defendant sympathies.

Not only that, the authors demonstrate a nascent appreciation of the complexities of the defendant/plaintiff face-off mentioned above: when it comes to encouraging class actions or limiting access to them, we have already seen that defendants generally fall into the latter camp, until the stage in the proceedings when substantive issues are being resolved. Then, it is in defendants' interests to cast as wide a net as possible so as to exclude future individual suits. The authors go some way towards recognising this level of complexity in the following passage, taken from the introductory chapter:

> There is substance to the proposition that class actions promote litigation. Conversely, however, it may be said that class actions enable the more expeditious, efficient and economic resolution of claims, to the extent they would have been brought, in the form of one proceeding. Therefore there is room for legitimate debate

37 Page 119.

> as to whether class actions promote litigation which would not otherwise have been brought or whether they merely, but more efficiently, dispose of litigation that would have been brought in any event.[38]

In other words, Grave and Adams have at least started to understand that a defendant's enthusiasm, or lack thereof, for class actions depends on what the alternative is: if it is no action at all or fewer actions, there will be little interest, but if the alternative is a multiplicity of actions a well-informed defendant might see a class action as very much in its interests.

Conclusion

For these reasons, Grave and Adams' book provides some pleasant surprises if it is first approached as the practitioner's guide it purports to be. It is much more than this. Mulheron's book, on the other hand, fails to deliver on some of its promise, specifically the part that relates to actual comparison of different legal regimes. It is, however, a remarkable achievement of information-gathering and presentation. In a sense it is unfair to talk about two such different books in the same breath; one cannot help but at least imply a comparison when both deserve to be taken on their own terms. Let me conclude, then, by expressing my pleasure that the literature on class actions has been thus expanded. The availability of these two valuable sources of information on class actions can only raise awareness of them and speed their development as an integral part of our legal system.

38 Page 13 (footnote omitted).