

**CLASS ACTIONS: A PROPOSED PROCEDURE IN TERMS OF
THE CONSUMER PROTECTION ACT 68 OF 2008**

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DECLARATION OF CANDIDATE

I, Raeesa Haneef, hereby declare that the contents of this dissertation represent my own unaided work and that the dissertation has not previously been submitted for academic examination towards any qualification. Furthermore, it represents my own opinions and not necessarily those of the University of Kwa-Zulu Natal, Howard College Campus and it does not contain any other persons' writing, unless specifically acknowledged as being sourced from other researchers.

Where other written sources have been quoted, then:

1. their words have been re-written but the general information attributed to them has been referenced; and
2. where their exact words have been used, their writing has been placed inside quotation marks and referenced.

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ABSTRACT

Due to length and time constraints, this dissertation will briefly examine and provide an overview of the current method that courts have adopted in bringing a class action in Southern Africa and internationally. Specific focus will be on the United States of America, Australia and the Canadian province of Ontario. Challenges of bringing a class action will also be discussed, with a view of ascertaining the most appropriate or well-suited method of bringing a class action under the Consumer Protection Act 68 of 2008. The main issue that will be analysed will be the certification process. The key question to be answered is which approach or procedure, in dealing with the certification requirements under various jurisdictions, should South Africa adopt or incorporate into, class action procedure legislation? In chapter one I will introduce the concept of a class action as it is a relatively new concept found in South African consumer legislation. Different definitions of a class action will be discussed in context of particular statutes. I will define and highlight the purposes of a class action in South Africa and show why there is firstly, a need for such a procedure and secondly why there is a need for such procedure to be codified into legislation. In chapter two I will discuss certain important aspects of class actions. The purpose of this is to identify the main features of a class action. Ultimately, the purpose will be to discuss whether or not these features should be included in South African class actions. Chapter three will commence with the comparative perspective portion of this paper. The legislation adopted by the United States, will be discussed in chapter three followed by a discussion of the Ontario legislation in chapter four and the Australian legislation in chapter 5. The approaches that these jurisdictions have taken in respect of a class action procedure serve as a basis upon which a class action procedure for South Africa will be recommended. Chapter six will provide conclusions that have been drawn through analysis of the foreign jurisdictions' class action procedures which will reflect the best and worst elements of a class action procedure. This is significant in determining what type of class action procedure would be best suited to South Africa. Chapter seven will highlight the current South African approach to class actions through an examination of case law and a Report by the South African Law Commission. This chapter will also analyse the short-comings in the South African approach through a critique of case law. In chapter eight of this paper I will propose an approach that South Africa should adopt with

regard to a class action procedure that is best suited to South Africa's social climate. Finally, I will conclude with a summation of the arguments presented in this paper in chapter nine.

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CLASS ACTIONS: A PROPOSED PROCEDURE IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008.

CHAPTER ONE

INTRODUCTION

On 22 January 2013, under Californian law, a consumer protection class action was launched against world renowned cyclist Lance Armstrong and his publishers. The action arose from the allegations that the publishers of Armstrong's books knew or should have known that these books were works of fiction and therefore their action in the selling these books as works of non-fiction, constituted a misrepresentation.¹ Such actions are virtually unknown in South Africa but due to recent developments in the law, it is not inconceivable that a similar type class action could be launched in South Africa.

According to De Vos a class action is defined as follows:

“A class action ... is a [procedure] that enables a large group of people, whose rights have been similarly infringed by a wrongdoer, to sue the defendant as a collective entity. One member (or more members) of a group, which does not have to form an organisational unit, initiates the action as a representative party on behalf of a whole group, without the need to join all the members. If the court is satisfied that certain requirements have been met, *inter alia*, that the plaintiff will represent the interests of the absent members of the class adequately, it may grant leave for the action to proceed as a class action. And the order of the court at the end of the proceedings is not only for the benefit of all members of the group, but it also binds all of them.”²

South Africa has been slow to develop the notion of class actions. This notion was initially introduced in section 7(a)(b) of the Interim Constitution of 1993,³ and then included permanently

¹ *Rob Stutzman, Jonathan Wheeler, Gloria Lauria, David Reimers and Scott Armstrong, on behalf of themselves and all others similarly situated, Plaintiffs, v. Lance ARMSTRONG; Penguin Group (USA), Inc.; G.P. Putnam's Sons; The Berkley Publishing Group; Random House, Inc.; Broadway Books; Crown Publishing Group; Thomas W. Weisel; William J. Stapleton; and Does 1-50, inclusive, Defendants* 2013 WL 1178749 (E.D.Cal., Mar. 7, 2013).

² WLR De Vos 'Is a class action classy to implement outside the ambit of the constitution?' (2012) 4 *Journal of South African Law* 737, 738.

³ Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter referred to as the 'Interim Constitution').

in section 38(c) of the Final Constitution of 1996.⁴ However, this class action procedure is restricted to when a right in the Bill of Rights has been infringed or threatened.⁵

Although section 157 of the Companies Act⁶ also makes provision for individuals to form a group or class and to then apply their collective powers to access redress for an infringement of their rights, it was not until the enactment of the Consumer Protection Act 68 of 2008⁷ – South Africa’s first consumer protection statute – that the class action proceeding was brought out of the realm of constitutional rights and into the realm of consumer rights. Section 4(1) of the CPA provides for class actions to be brought in terms of consumer law. This section provides as follows:

“Realisation of consumer rights

4. (1) Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission alleging that a consumer’s rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

- (a) A person acting on his or her own behalf;
- (b) an authorised person acting on behalf of another person who cannot act in his or her own name;
- (c) a person acting as a member of, or in the interest of, a group or class of affected persons;
- (d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and
- (e) an association acting in the interest of its members.”

The substantive law regarding class actions has been laid down in various statutes. However, a lack of class action procedure legislation remains.

⁴ Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the ‘Constitution’).

⁵ E Hurter ‘Some thoughts on current developments relating to class actions in South African law as viewed against leading foreign jurisdictions’ (2006) 39 *Comparative and International Law Journal of South Africa* 485, 485.

⁶ Companies Act 71 of 2008.

⁷ Hereinafter referred to as the ‘CPA.’

The recognition of a class action for consumers is an important development in consumer rights. In a modern society where businesses or large corporations distribute goods and services to consumers who are not familiar with the complexities of the production and manufacturing processes, there is a need to protect consumers, especially those who are uneducated and disadvantaged and who may encounter similar problems in respect of these products on a day-to-day basis.⁸

There is also a grave need to assist the already over-burdened judiciary in South Africa, by avoiding the situation where multiple parties approach the courts with multiple actions involving the same issues.⁹ This is time consuming and costly for both consumers and the courts and can result in inconsistent judgments being handed down.

As necessary as a class action procedure may be in modern times, forming a class action is expensive for an attorney as huge infrastructure is required. Nevertheless, South African law has made provision for the introduction of a class action and it can be assumed that such an action is acceptable in certain circumstances.

However, although the CPA makes provision for a class action it does not provide a procedure for bringing such an action. In cases where the courts have been faced with class action proceedings in matters involving the Bill of Rights and matters that fall outside the Bill's scope of application, judges have relied on the South African Law Commission Report on the Recognition of Class Actions and Public Interest Actions in South Africa¹⁰ to guide them through such proceedings.¹¹ These guidelines define a class action as:

⁸ Hurter (note 5 above) 486.

⁹ WLR De Vos 'Reflections on the introduction of a class action in South Africa' (1996) 4 *Journal of South African Law* 639, 640-641.

¹⁰South African Law Commission Report 88 *The recognition of class actions and public interest actions in South African law* 1998, 33 (hereinafter referred to as 'SA Law Commission Report').

¹¹ *Permanent Secretary, Department Of Welfare, Eastern Cape, and another v Ngxuza and others* 2001 (4) SA; 1184 (SCA); *Mukaddam v Pioneer Food* (49/12) [2012] ZASCA 183 (29 November 2012); *Mukaddam v Pioneer Foods (Pty) Ltd and others* (CCT 131/12) [2013] ZACC 23 (27 June 2013); *The Trustees for the Time Being for the Children's Resource Centre Trust and others v Pioneer Foods (Pty) Ltd and others* case no: 25302/10 (C); *Children's Resource Centre Trust v Pioneer Food* (50/2012) [2012] ZASCA 182 (29 November 2012).

“an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action in terms of the Act.”¹²

These guidelines are not found in legislation and therefore, there is and will continue to be, a variation in the approach that different courts take towards class action proceedings. Judge-made procedural law is therefore not the best option because there is a need for uniformity, certainty and consistency. It is therefore submitted that a formal procedure codified into legislation is required.

The purpose of this paper will be to analyse and discuss foreign (American, Australian and Canadian) and local legislation and case law in order to propose a procedure for class action litigation in South Africa, that can be followed by both consumers and courts in instituting such an action and adjudicating upon one, respectively.

¹² SA Law Commission Report (note 10 above) 33.

CHAPTER TWO

IMPORTANT ASPECTS OF A CLASS ACTION

Two of the main features of a class action are the certification process and the form of notice. The requirements of a class action are considered during the certification process. There are two forms of notice which are commonly used under the class action regime. These are the opt in vs. the opt out form of notice. The notices serve to protect the rights of the absent class members during the class litigation.

2.1 THE CERTIFICATION PROCESS

Certification is a process in terms of which a judge is called upon to declare that a particular group of individuals constitute a class due to certain similarities in the claims that they wish to bring. The judge also considers whether a class action is the appropriate form for the lawsuit that is to be instituted.

Mulheron defines certification as the vital preliminary hearing or screen which classifies an action as a class action and allows it to proceed as one.¹³ It is a process that is aimed at ensuring 1) better management of class actions¹⁴ and 2) that only laudable cases proceed as class actions.¹⁵ A judge is required to examine evidence in support of a class action and then either grant or deny the certification of the action.¹⁶

The certification process is vital to a class action as the rights of members of a class that are not active in the litigation are determined in their absence and therefore the classification of whether an action should proceed as a class action is significant in relation to access to justice.¹⁷

This process is important in ensuring that the parties to the litigation are treated equitably and fairly, for example, defendants are permitted to know the case that they are to meet at an early

¹³ RP Mulheron 'The class action in common law legal systems: a comparative perspective' (2004) 23; E Hurter 'Certification: the procedure, its role in class action proceedings in Ontario and the proposed South African certification procedure' (2000) *Comparative and International Law Journal of South Africa* 42, 42;46.

¹⁴ Hurter (note 5 above) 489.

¹⁵ Ibid 494.

¹⁶ DR Hensler 'Using class actions to enforce consumer protection law' in Howells G, Ramsay I, Wilhelmsson T (eds) *Handbook of Research on International Consumer Law* 521.

¹⁷ RP Mulheron 'The class action in common law legal systems: A comparative perspective' (2004) 24.

stage of the litigation.¹⁸ It prevents the court from feeling overburdened by the procedures that need to be followed by granting the court an opportunity to deal with preliminary procedural issues prior to dealing with the merits of the case at subsequent proceedings.¹⁹

Certification also allows for the ordinary litigation process, which is overburdened by the large number of litigants in an action, to be adapted, controlled and extended in order to cater for more complex litigation as found in a class action.²⁰ The process of certification allows for proper and effective management of the class action²¹ and lessens the risks of inadequate representation, conflicts of interest and abuse of the *res judicata* principle.²²

The certification process provides a system to combat the inadequacies of the “joinder” device as found under the common law. Rule 10 of the Uniform Rules of Court allows parties and causes of action to be joined in order to bring one action before the court.²³ This rule allows an individual litigant to represent another only where both litigants can be joined as co-litigants in the matter.²⁴ Each litigant is required to maintain its own claim. This poses a problem where there is a multitude of litigants because the citing of individuals as co-litigants becomes a tedious, time-consuming and impractical exercise. Class actions therefore provide a procedure that caters to the collective interests of the litigants through one representative litigant and there is no need for the individual members of the proposed class to be present at the litigation. The certification process also allows, unlike the strict procedural rules that govern joinder, a variation or differentiation in the claims of the litigants and the remedies sought by the proposed class members.²⁵

¹⁸ De Vos (note 9 above) 645.

¹⁹ E Hurter ‘Certification: the procedure, its role in class action proceedings in Ontario and the proposed South African certification procedure’ (2000) 33 *Comparative and International Law Journal of South Africa* 42, 47.

²⁰ Ibid 42.

²¹ Hurter (note 5 above) 489.

²² Mulheron (note 13 above) 24.

²³ Rule 10(1) of the Uniform rules of Court states: (1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.

²⁴ JS van Wyk ‘The need and requirements for a class action in South African law with specific reference to the prerequisites for *locus standi in iudicio*’ (LLM thesis, University of Pretoria, 2010) 8.

²⁵ Hurter (note 19 above) 48.

The American federal class action regime, the Canadian provincial model and the Australian federal regime are considered to be the leaders in the field of class actions, with the American and Canadian jurisdictions adopting the certification process.²⁶ An analysis of the general trends of these regimes in adopting a class action procedure is helpful in determining what procedure would be best suited to South Africa.

2.2 THE OPT IN PROCEDURE vs. THE OPT OUT PROCEDURE

Even though class members are absent and unnamed at the early stages of a class action, they must be enabled to make informed decisions regarding their participation in the impending proceedings. Notices are therefore important in informing class members of the status of the litigation and to request that they either include or exclude themselves from being bound by the court's judgment.²⁷ Class members are therefore required to actively opt into proceedings, or opt out of them, depending on which procedure or form of notice is being used.

A notice in the form of the opt in model calls upon members of a potential class to affirmatively state that they wish to be part of the litigation as members of the class.²⁸ The opt in model allows an individual to participate in the class action suit only if they wish to do so.²⁹ This model is advocated for many reasons. The main advantage is that if an individual opts into the litigation, he or she shows a genuine class interest,³⁰ on the other hand a failure to opt in does not preclude that individual from bringing his or her own separate action.³¹

The opt out model allows for members that have been included in the class action to actively indicate that they wish to be excluded. This may be because these individuals wish to pursue individual claims against the defendant(s) or if they are not satisfied with the settlement terms.³²

Some advantages of the opt out model are:

²⁶ De Vos (note 2 above) 742.

²⁷ BJ Rothstein & TE Willging *Managing class action litigation: A pocket guide for judges* (2005) 18-19.

²⁸ Hensler (note 16 above) 522; De Vos (note 9 above) 646.

²⁹ Mulheron (note 13 above) 30.

³⁰ EH Cooper 'Class action advice in the form of questions' (2001) 11 *Duke Journal of comparative & International Law* 215, 230: A genuine interest is present when the individual opts into the class litigation as this shows that that he has reflected on the issues at hand and considered the potential conflicts and adequacy of representation.

³¹ Mulheron (note 13 above) 30.

³² Mulheron (note 13 above) 34; E Hurter 'The class action in South Africa: *Quo vadis?*' (2008) *De Jure* 293, 300; JC Alexander 'An introduction to class action procedure in the United States' 9, available at <http://law.duke.edu/group/litpapers/classactionalexander.pdf>, accessed on 21 April 2013.

- the regime enhances access to justice by including all individuals until they opt out;³³
- silent class members are not denied redress;³⁴ and
- it discourages forum shopping.³⁵

If individuals fail to opt out of the class action they will be bound by the judgment of the court, favourable or not.³⁶ This is one of the disadvantages of the opt out model. There is failure to take into consideration those individuals who may not have received notice of the impending class action resulting in the loss of legal autonomy. It has been submitted by Beisner that the opt out model should be rejected due to its “anti-consumer effects” such as litigation risks, internal conflicts between class member and conflicts between the class members and the representative.³⁷

Despite the disadvantages, the jurisdictions discussed in this paper have all adopted the opt out model of notice because it increases access to justice for individuals who would not ordinarily be able to pursue their claims.

³³ Mulheron (note 13 above) 37.

³⁴ Ibid.

³⁵ Ibid 35.

³⁶ JC Alexander ‘An introduction to class action procedure in the United States’ 8, available at <http://law.duke.edu/grouplitpapers/classactionalexander.pdf>, accessed on 21 April 2013; Mulheron (note 13 above) 38.

³⁷ JH Beisner “‘Opt-in’ vs. ‘opt-out’ procedures in collective and representative litigation’ (United States Chamber Institute for Legal Reform) 7 available at <http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/international/optoutpaper.pdf>, accessed on 12 September 2013.

CHAPTER THREE

THE AMERICAN FEDERAL CLASS ACTION REGIME

3.1. THE CERTIFICATION PROCESS

The idea of a class action was first developed in the United States of America and many other jurisdictions have been influenced by the procedure adopted in this particular jurisdiction.³⁸ In both legal articles and case law, representative litigation is often referred to as “American-style class action” because it has been extensively used, particularly for consumer matters, in the United States.³⁹

3.1.1 The requirements for the certification of a class action

These requirements are stated in Rule 23 of the United States Federal Rules of Civil Procedure (Annexure A).⁴⁰ This process is divided into two stages – First, all the requirements laid down in Rule 23(a) must be satisfied and then the requirements laid down in Rule 23(b) must be satisfied. The requirements under Rule 23(a) are briefly numerosity, commonality, typicality and adequacy. Rule 23(b) states predominance and superiority as requirements. Subsequent amendments to the Federal rules were introduced by the Class Action Fairness Act (CAFA).⁴¹

(a) Numerosity

The first requirement of certification is listed in Rule 23(a)(1). This is the requirement of ‘numerosity’, which entails a finding by a judge that the members of a proposed class are so numerous that joinder is impracticable as it would be inconvenient to name each individual party in the lawsuit.⁴² It is important to note that the naming of each individual party need not be impossible but merely inconvenient or difficult.⁴³

³⁸ E Hurter ‘Class action: failure to comply with guidelines laid down by courts ruled fatal’ (2010) 2 *Journal of South African Law* 409, 413.

³⁹ Hensler (note 16 above) 518.

⁴⁰ Rule 23 of the United States Federal Rules of Civil Procedure, 1966 hereinafter referred to as ‘Rule 23’.

⁴¹ Class Action Fairness Act, 2005; De Vos (note 2 above) 743: “The thrust of CAFA is to expand diversity jurisdiction of federal courts over class actions and to permit the removal of certain class actions from state courts to federal courts.”

⁴² NM Pace ‘Class actions in the United States of America: An overview of the process and the empirical literature 6, available at http://globalclassactions.stanford.edu/sites/default/files/documents/USA_National_Report.pdf, accessed on 24 June 2013.

⁴³ Mulheron (note 13 above) 121.

Mulheron argues that a common sense and general knowledge approach should be taken in determining whether the numerosity requirement is satisfied.⁴⁴ In the case of *Paxton v Union National Bank*⁴⁵ the Court of Appeal stated that the following factors should be considered in determining the numerosity requirement:

- the number of persons in a proposed class;
- the nature of the action;
- the size of the individual claims;
- the inconvenience of trying the individual suits;
- the nature of the relief sought; and
- Any other factor relevant to the practicability of joinder.

Mulheron⁴⁶ is, however, of the opinion that the numerosity test can be confusing at times due to the lack of guidelines as to when joinder may be impracticable for smaller or larger classes. The differing individual “common sense” approaches by different judges has also led to inconsistency as depicted in the case of *Shields v. Local 705, International Brotherhood of Teamsters*⁴⁷ and *Andrews v. Bechtel Power Corporation*⁴⁸ where in the former case the class consisted of thirty-five members and a representative and in the latter case certification was denied due to the class consisting of forty-nine members.

(b) Commonality

In terms of this requirement there must be questions of law or fact which are common to the class.⁴⁹ There needs to be but a single issue⁵⁰ that is alleged to be ‘common’ and legitimately in dispute between the parties.⁵¹ In the case of *Wal-Mart Stores, Inc. v Dukes*⁵² Betty Duke, who

⁴⁴ Ibid 122.

⁴⁵ *Paxton v Union National Bank* 519 F.Supp. 136 (1981). The complaint charged that the bank had discriminated against plaintiff and the class he represents on the basis of race or color in hiring, testing procedures, promotions, raises and job assignments.

⁴⁶ Mulheron (note 13 above) 126.

⁴⁷ *Shields v. Local 705, International Brotherhood of Teamsters*, 188 F.3d 895, 897 (7th Cir. 1999) available at http://classactiondefense.jmbm.com/2006/05/defending_class_actions_certif_3.html, accessed on 28 August 2013.

⁴⁸ *Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985)

available at http://classactiondefense.jmbm.com/2006/05/defending_class_actions_certif_3.html, accessed on 28 August 2013.

⁴⁹ Rule 23(a)(2) of the United States Federal Rules of Civil Procedure, 1966.

⁵⁰ Mulheron (note 13 above) 169.

⁵¹ Ibid 166.

sought to represent women who worked for Wal-Mart stores in a gender discrimination class action, was denied certification of her action as she failed to show common questions of law or fact between the 1,6 million female class members.⁵³ The court held that what is important to the process of certification is the capacity of a class proceeding to generate common answers pertinent to the resolution of the litigation.⁵⁴

(c) Typicality

The penultimate requirement of certification in terms of Rule 23 is that of ‘typicality’. Rule 23(a)(3) states that the claims or defenses of the representative parties must be typical of the claims or defenses of the class.

Many different meanings can be given to the requirement of typicality. Claims that meet this requirement can be based on the same legal theory, factual allegations or essential characteristics.⁵⁵

In the case of *The North-West, Inc., et al. v Equal Employment Opportunity Commission et al*⁵⁶ the typicality requirement was said to “limit the class claims to those fairly encompassed by the named plaintiff’s claims.” The claims need not be identical and rather focus should be on the essential characteristics of a claim where the minor differences in the claims will not prejudice the certification process.⁵⁷

⁵²*Wal-Mart Stores, Inc. v Dukes* 131 S. Ct. 2541 (2011). In this case the plaintiffs alleged that Wal-Mart had policies that allowed local supervisors to exercise their power in a manner that resulted in payment and promotion decisions being made subjectively, which perpetrated gender bias in the workplace.

⁵³ DV Smith ‘*Wal-Mart Stores, Inc. v. Dukes*: How the record-breaking class action decision was overturned’ available at <http://employment-law.burgsimpson.com/wal-mart-stores-inc-v-dukes-how-the-record-breaking-class-action-decision-was-overturned.html>, accessed on 28 August 2013.

⁵⁴ C Mehri & MD Lieder ‘Onward and upward after the *Wal-Mart v. Duke*’ available at <http://www.justice.org/cps/rde//justice/hs.xml/20503.htm>, accessed on 28 August 2013.

⁵⁵ Mulheron (note 13 above) 310.

⁵⁶ *The North-West, Inc. et al v Equal Employment Opportunity Commission et al* 446 U.S. 318, 330 (1980).

⁵⁷ E Hurter ‘The class action in South Africa: *Quo vadis?*’ (2008) *De Jure* 293, 297.

In another case, *General Telephone Co. of the Southwest v Falcon*⁵⁸ the court laid down factors to determine whether the representative plaintiff's claim is typical of the class he or she seeks to represent:

- “The representative plaintiff’s situation and that of the prospective class members;
- the circumstances surrounding the representative plaintiff’s grievance and those surrounding the prospective class members’ grievances; and
- the relief sought by plaintiff and that sought by the class.”

Although an express requirement, ‘typicality’ is said to closely overlap with the concepts of ‘commonality’, ‘superiority’ and ‘adequacy of representation’ which suggests that the requirement may be redundant.⁵⁹ In the case of *Estate of Mahoney v RJ Reynolds Tobacco Co*⁶⁰ it was stated that where the requirements of commonality and superiority are unsatisfied, it is difficult to attach much significance to the requirement of typicality. This has led to many United States’ courts eliminating this requirement from their certification process.⁶¹

(d) ‘Adequacy’

This is the final requirement listed in Rule 23(a) and requires that the representative will fairly and adequately protect the interests of the class.⁶² Courts usually interpret this requirement as being counsel’s ability to effectively litigate or drive the litigation on behalf of the class.⁶³

Rule 23 requires that the representative be a member of the class as in litigating his own interests he will ensure that he conducts himself to the best of his ability.⁶⁴ This allows members of the class to comfortably place complete confidence in the class representative to adequately represent them and their interests.⁶⁵

⁵⁸*General Telephone Co. of the Southwest v Falcon* 457 U.S. 147 102 S Ct 2364 (1982), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=457&page=147>, accessed on 28 April 2013. See also *Wakefield v. Monsanto Co.*, 120 F.R.D. 112, 116 (E.D. Mo. 1988); AB Spencer ‘Class actions, heightened commonality, and declining access to justice’ (2013) 93 *Boston University Law Review* 441, 469.

⁵⁹ Mulheron (note 13 above) 310-313.

⁶⁰*Estate of Mahoney v RJ Reynolds Tobacco Co* 204 FRD 150, 154 (SD Iowa 2001) 5-9.

⁶¹ Mulheron (note 13 above) 313.

⁶² Rule 23(a)(4) of the United States Federal Rules of Civil Procedure, 1966.

⁶³ Hensler (note 16 above) 520.

⁶⁴ De Vos (note 9 above) 643.

⁶⁵JC Alexander ‘An introduction to class action procedure in the United States’ 7, available at <http://law.duke.edu/grouplitpapers/classactionalexander.pdf>, accessed on 21 April 2013 : “A fiduciary relationship is a special relationship of trust and confidence in which another person relies on the fiduciary to protect his interests.

In the case of *General Telephone Co. of the Southwest v Falcon*⁶⁶ it was stated that the representative must not have conflicting interests with that of the other class members.⁶⁷ In some situations the adequacy of the representative is negated. These are as follows:

- Conflict of interests on the common issues;⁶⁸
- A competitive relationship between the representative and the class members that gives rise to conflict;⁶⁹ and
- Where the relief sought is not beneficial to all members of the class.⁷⁰

3.1.2 Rule 23(b)

As stated previously, once the requirements of Rule 23(a) are met the action must fall into one of the categories of Rule 23(b). The most significant category is Rule 23(b)(3). This rule is applicable to class actions where damages are claimed. The rule lists two additional requirements over and above the four requirements in Rule 23(a) – ‘predominance’ and ‘superiority’.⁷¹ This means that the judge must find that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members” and “that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”⁷²

(a) Predominance

In the case of *Watson v Shell Oil Company*⁷³ the predominance requirement was said to require that common issues constitute “a significant part of individual cases.” Other cases have stated that the test for predominance requires that the proposed class is “to be sufficiently cohesive to warrant adjudication by representation” or “that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that

One with a fiduciary obligation must put the other’s interests above his own, and must not act with any conflict of interest.”

⁶⁶*General Telephone Co. of the Southwest v Falcon* (note 58 above).

⁶⁷ Mulheron (note 13 above) 276.

⁶⁸ Ibid 277.

⁶⁹ Ibid 278.

⁷⁰ Ibid 284.

⁷¹ Pace (note 42 above) 12.

⁷² Rule 23(b)(3) of the United States Federal Rules of Civil Procedure, 1966.

⁷³ *Watson v Shell Oil Company* 979 F 2d 1014 (5th Cir 1992).

available at http://www.leagle.com/decision/19921993979F2d1014_11821 accessed on 28 April 2013.

are subject only to individualized proof.”⁷⁴ The court is not required to engage in a numerical test of weighing the number of individual issues against the number of common issues. However, where individual issues outweigh the common issues, the court has in some circumstances denied certification.⁷⁵ In most circumstances, the court looks for the trend that the common issues be weightier than the individual issues.

(b) Superiority

The requirement of ‘superiority’ asks the court to balance the merits of a class action against alternate methods of adjudication.⁷⁶ The court must also ensure that a class proceeding is best suited to the handling of the claims in comparison to other available methods of adjudication.⁷⁷ In a case involving the infringement of consumer rights it was stated that “a class action is the more efficient procedure for determining liability and damages in a case such as this, involving a defect that may have imposed costs on tens of thousands of consumers yet not a cost to any one of them large enough to justify the expense of an individual suit.”⁷⁸

This requirement is considered to be irrelevant unless the other requirements listed in Rule 23(a) are met along with the predominance requirement and it is considered to be unfulfilled if the class action is proved to be unmanageable due to size, notice or distribution considerations.⁷⁹ If alternative methods of resolution are available to class members but not feasible, then they are

⁷⁴ *Rutstein v Avis Rent-a-Car Sys. Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000) and *Amchem Prods. Inc. v Windsor*, 521 U.S. 591, 623 (1997) available at <http://www.law360.com/articles/74785/class-action-killer-the-predominance-requirement>, accessed on 28 August 2013.

⁷⁵ Mulheron (note 13 above) 200. See also *Butler v Sears Roebuck and Co.*, U.S. Court of Appeals, 7th Circuit [November 13 2012] available at <http://caselaw.findlaw.com/us-7th-circuit/1615665.html>, accessed on 24 July 2013. In this case an appeal was brought due to the district judge denying certification of a class action relating to defective washing machines sold by Whirlpool and Sears to consumers. The district judge denied certification because the common questions did not predominate over individual questions.

⁷⁶ *In re Prudential Insurance Company of America Sales Practices Litigation* 148 F 3d 283 (3d Cir 1998) available at http://www.leagle.com/decision/1998431148F3d283_1393, accessed on 28 April 2013.

⁷⁷ Hurter (note 19 above) 45.

⁷⁸ *Butler v Sears Roebuck and Co.* U.S. Court of Appeals, 7th Circuit [November 13 2012] available at <http://caselaw.findlaw.com/us-7th-circuit/1615665.html>, accessed on 24 July 2013.

See also *Whirlpool Corporation v Gina Glazer* U.S. Court of Appeals, 6th Circuit [July 18 2013] accessed at <http://www.ca6.uscourts.gov/opinions.pdf/13a0180p-06.pdf> on 23 July 2013.

⁷⁹ Mulheron (note 13 above) 220; De Vos (note 9 above) 649; Hurter (note 5 above) 489.

considered to be unavailable due to infeasibility.⁸⁰ Some factors that determine whether a class action is the superior device to handling claims are mentioned in Rule 23(b)(3) as well as:

- the difficulties likely to be encountered in the management of a class action;⁸¹
- the class members' interests in individually controlling the prosecution or defense of separate actions;⁸² and
- the comparison of the costs of one class action and individual actions.⁸³

3.2 DEFINING A CLASS

In defining the class, 'commonality' and 'typicality', as mentioned above, are the key requirements that need to be satisfied.⁸⁴ In terms of Rule 23 a class is only required to be ascertainable and not specified in a manner that would render the ascertainment of a class definition very stringent.⁸⁵ The time-consuming task of specifically naming individual class members is therefore not required. In order to identify a class, an objective approach is taken and the merits of the case are not analysed, unless it is necessary to inquire into them in order satisfy the requirements for certification.⁸⁶ Rule 23(c)(4) also provides for sub-classes in class action suits which allows the courts to tackle certain individual issues.⁸⁷ This means that if there are individuals with similar claims but they are in different positions or have varying interests from the whole class, a sub-class can be formed to deal with these issues that are common to a smaller group of individuals.

3.3 NOTICE TO THE CLASS

In order to satisfy due process requirements, Rule 23(c)(2) prescribes that notice of a class action must be given, the type of notice to be given and what the notice is to state.⁸⁸ This Rule

⁸⁰ Mulheron (note 13 above) 223. These alternative measures may be joinder, intervention, consolidation, a test case or an administrative proceeding.

⁸¹ Alexander (note 65 above).

⁸² Rule 23(b)(3)(A) of the United States Federal Rules of Civil Procedure, 1966.

⁸³ Mulheron (note 13 above) 232.

⁸⁴ Hurter (note 57 above) 297.

⁸⁵ Hurter (note 5 above) 494. There is therefore no need to provide a list of names and addresses of each of the class members and this will not be fatal to the action brought. See also Mulheron (note 13 above) 322.

⁸⁶ Mulheron (note 13 above) 330; *Amgen Inc. v. Conn. Retirement Plans & Trust Funds* 133 S. Ct., available at <http://www.leagle.com/decision/In%20SCO%2020130227E52>, accessed on 18 august 2013.

⁸⁷ Hurter (note 57 above) 297; Hurter (note 5 above) 494.

⁸⁸ Rule 23(c)(2) states “ (A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

highlights the opt out model which is favoured by United States jurisdiction and which has been adopted by many other jurisdictions.⁸⁹

Rule 23(c) (2)(B) refers to “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort” to be given. This requirement has been interpreted by some courts to imply reasonable notice while other courts have taken a stricter approach and interpreted it literally as in the case of *Eisen v Carlisle & Jacquelin*.⁹⁰ Often individual notice is sent via mail, which is sometimes supplemented or even substituted by mass media.⁹¹ In terms of Rule 23(b)(3) actions however, notice is mandatory if individual class members can be identified.⁹² The mandatory nature of the notice in terms of damages claims (as in Rule 23(b)(3)) varies in other jurisdictional regimes.⁹³

3.4 SETTLEMENT OF A CLASS ACTION

Rule 23(e) sets out the procedure that needs to be followed in settlement cases. The court must give notice of the settlement to all class members,⁹⁴ it must approve the settlement only after a hearing and finding of it being fair and adequate⁹⁵ and it must refuse approval in circumstances where an opt out notice is needed and not provided.⁹⁶

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).”

⁸⁹ Both the Canadian and Australian regimes have adopted this model.

⁹⁰ *Eisen v Carlisle & Jacquelin* 417 US 156 94 S Ct 2140 (1974). See De Vos (note 9 above) 647 for a brief explanation of the facts and judgement of this case.

⁹¹ Hensler (note 16 above) 523; Pace (note 42 above) 40; Alexander (note 65 above) 8: mass media may include “newspaper, television and radio advertisements, product package inserts, billing inserts, notices mailed to doctors’ offices for posting, internet websites, and other methods likely to reach class members.”

⁹² As stated in 23(c) (2)(B) of the United States Federal Rules of Civil Procedure, 1966. See also Mulheron (note 13 above) 338; 349.

⁹³ Mulheron (note 13 above) 337.

⁹⁴ Rule 23(e)(1) of the United States Federal Rules of Civil Procedure, 1966.

⁹⁵ Ibid Rule 23(e)(2).

⁹⁶ Ibid Rule 23(e)(4).

A class action suit cannot be settled unless court approval has been given and members of the class are notified of the proposed settlement in a manner prescribed by the court.⁹⁷ Judges are required to act as protectors of the rights of the parties in scrutinizing the settlement terms to ensure that just and reasonable terms have been reached without the presence of collusion.⁹⁸ This, along with a court hearing on the settlement, where members of the class are given an opportunity to object to terms of the settlement,⁹⁹ goes a long way in preventing a situation where the representative disposes of the class members' rights without their consent.¹⁰⁰

3.5 MONETARY RELIEF

There are various devices which can be used by the court to ascertain the monetary relief to be granted to the members of the class. Rule 23 does not prescribe what type of awards can be made nor does it prescribe how these awards are to be distributed. It is ultimately up to the judge to decide on the type of damages awards and how the awards are to be distributed.¹⁰¹ This must be the option that is in the best interests of the class.

With an individual damages assessment, the court determines the amount due to each member of the class on an individual basis.¹⁰² However, De Vos is of the opinion that this device can sometimes be impractical as it is both time consuming and tends to overburden the class action proceedings.¹⁰³ He goes on to state that in these circumstances, aggregate monetary awards may be a better option. This process allows the awarding of damages by estimation to a class as a whole, instead of the awarding of damages on an individual basis where evidence on each claim must be produced.¹⁰⁴ Here, the class members are not required to prove their actual loss in separate trial proceedings which aids in the process because it is less costly and time-consuming.¹⁰⁵

⁹⁷ De Vos (note 9 above) 652.

⁹⁸ De Vos (note 9 above) 652; Hensler (note 16 above) 521. See also Alexander (note 65 above): "class actions require more active supervision from the trial judge...They are expected to play an active role in settlement negotiations."

⁹⁹ Alexander (note 65 above) 9. Only after this hearing is settlement approved by the court.

¹⁰⁰ Cooper (note 30 above) 238.

¹⁰¹ Pace (note 42 above) 43.

¹⁰² Mulheron note (13 above) 407.

¹⁰³ De Vos (note 9 above) 648.

¹⁰⁴ De Vos (note 9 above) 648; Mulheron (note 14 above) 408: "aggregate assessment is judicially sanctioned under Rule 23, but only in suitable cases."

¹⁰⁵ Mulheron (note 13 above) 408;412.

Distribution of monetary compensation to the class members can happen individually (by direct distribution), by average distribution (pro-rata shares of a lump sum) or by *cy pres* distribution, as directed by the court.¹⁰⁶ According to Mulheron,¹⁰⁷ direct distribution of compensation can be made to individual class members by the defendant, a court fund which the defendant has paid compensation into, or a trust. Class members may be required to participate in this distribution by, *inter alia*, filling out claim forms or submitting affidavits. *Cy pres* distribution (“fluid recovery”) occurs in circumstances where the cost of distributing compensation to individual class members is infeasible or impracticable.¹⁰⁸ Examples of *cy pres* distribution includes a court order ordering the defendant to temporarily employ a reduced charge for services that he previously overcharged for,¹⁰⁹ or one that orders a defendant who mislead consumers to support a consumer or educational programme that will be to the benefit of the class members.¹¹⁰ There has, however, been a great deal of debate regarding the use of the *cy pres* method of distribution under the U.S class action regime.¹¹¹

A non-monetary distribution that occurs most commonly in consumer class actions is the coupon distribution or settlement method.¹¹² Defendants are required to provide coupons to the class members at certain points of purchase to either reimburse them directly, provide free merchandise or discounts on purchases.¹¹³

¹⁰⁶ Hensler (note 16 above) 524.

¹⁰⁷ Mulheron (note 13 above) 424.

¹⁰⁸ Ibid 426: “*cy pres* distributions have been utilised where class members are difficult to identify, or where they change constantly, or where the claims of the individual class members are so small in quantum that they will not be pressed or economically distributed.”; Hensler (note 16 above) 524: “if the cost of distributing the compensation fund to consumers is very high or it is infeasible to distribute to individuals.”

¹⁰⁹ De Vos (note 9 above) 649.

¹¹⁰ Cooper (note 30 above) 244.

¹¹¹ Mulheron (note 13 above) 428-430. In *In re Thornburg Mortgage, Inc. Securities Litigation*, 2012 U.S. Dist. LEXIS 107934 (July 24, 2012) the court highlighted problems with the *cy pres* method of distribution by stating as follows: “(i) class actions are disputes between parties and the money damages should remain among the parties, rather than be distributed to some third party; (ii) it is unseemly for judges to engage in the selection of third party beneficiaries and to distribute class action damages to third parties; (iii) judges are often not in the best position to choose a charitable organization that would best approximate the unpaid class members’ interests; and (iv) the doctrine encourages charitable organizations, and plaintiffs’ lawyers, to lobby the court for *cy pres* awards.” Available at <http://www.lexology.com/library/detail.aspx?g=eb516ca0-1b60-4ea8-9764-760549453dcd> accessed on 19 November 2013.

¹¹² Alexander (note 65 above) 15.

¹¹³ Hensler (note 16 above) 524; Alexander (note 65 above) 15; Pace (note 42 above) 43.

CHAPTER FOUR

THE CANADIAN PROVINCE OF ONTARIO CLASS PROCEEDING REGIME

One of the Canadian provinces that has adopted a class action procedure is the province of Ontario. In Ontario class actions are regulated by the Class Proceedings Act (Annexure B).¹¹⁴ The word “proceedings” has been used to show that both actions and applications may be brought in terms of the Ontario CPA.¹¹⁵ It has been stated that although the Canadian regime resembles the regulatory framework of the American federal rule, it is far less convoluted and devoid of the intricacies of the American regime.¹¹⁶

According to section 2 of the Ontario CPA there must also be a motion of certification brought in order to classify an action as a class proceeding and to appoint a class representative. The requirements for certification are listed in section 5 of the CPA. The claim must disclose a cause of action, there must be an identifiable class of two or more persons, the claims of the class must raise common issues, a class action must be the preferable procedure for resolving these common issues and the representative plaintiff must fairly and adequately represent the interests of the class, not have a conflict on the common issues with other class members, and have a workable plan for processing the action.¹¹⁷ Hurter submits that the court has a wide discretion in determining if the requirements listed in section 5 have been met.¹¹⁸

4.1 THE REQUIREMENTS FOR CERTIFICATION OF A CLASS PROCEEDING

(a) Cause of action

The first requirement which refers to the disclosure of a cause of action entails a test of whether it is “plain and obvious” that one is lacking.¹¹⁹ In the case of *Brown v. Canada (Attorney General)*¹²⁰ the importance of identifying a cause of action was highlighted as follows:

¹¹⁴ Class Proceedings Act 1992, SO 1992 c6 hereinafter referred to as the ‘Ontario CPA.’

¹¹⁵ W A Bogart, J Kalajdzic & I Matthews ‘Class actions in Canada: A national procedure in a multi-jurisdictional society?’⁴ available at http://globalclassactions.stanford.edu/sites/default/files/documents/Canada_National_Report.pdf, accessed on 21 April 2013.

¹¹⁶ Hurter (note 5 above) 489; Hurter (note 57 above) 297.

¹¹⁷ Section 5(1) of the Ontario CPA.

¹¹⁸ Hurter (note 19 above) 47.

¹¹⁹ *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959 available at <http://www.canlii.org/en/ca/scc/doc/1990/1990canlii90/1990canlii90.html> accessed on 28 September 2013.

“...identification of a cause of action is fundamental. It is impossible for the defendant to meaningfully respond to an application for certification without knowing the cause of action. The definition of the class and the identification of the common issues depend upon the nature of the cause of action... It is not possible to know whether an action can be appropriately prosecuted as a class action without identifying the fundamental issue of whether or not there is a cause of action.”

(b) Identifiable class

For a class action to be certified there must be “an identifiable class of two or more persons.”¹²¹ This class definition is termed the “bare threshold test.”¹²² Since the Ontario CPA only refers to an “identifiable class” it would seem that the identity of each class member is not strictly required and that a failure to strictly state the identity and number of class members is not a bar to certification.¹²³ This test may seem to open the floodgates when it comes to class action litigation, however it has been stated in the case of *Lau v Bayview Landmark Inc.*¹²⁴ that the satisfaction of this requirement by itself will not result in certification, unless other requirements are also satisfied.

(c) Common issues

The presence of common issues between the class members is the third requirement of certification. ‘Common issues’ are defined in the definition section of the Ontario CPA as being “not necessarily identical issues of fact” or “not necessarily identical issues of law that arise from common but not necessarily identical facts.”

When considering section 5 of the Ontario CPA, section 6 of the Ontario CPA must be considered simultaneously.¹²⁵ This section provides that the court shall not refuse to certify a proceeding as a class proceeding solely on the grounds that the relief claimed includes a claim

¹²⁰ *Brown v. Canada (Attorney General)*, 2013 ONCA 18, available at <http://www.canlii.org/en/on/onca/doc/2013/2013onca18/2013onca18.html> accessed on 28 September 2013.

¹²¹ Section 5(1)(b) of the Ontario CPA.

¹²² Hurter (note 5 above) 494; Mulheron (note 13 above) 126.

¹²³ Mulheron (note 13 above) 126.

¹²⁴ *Lau v Bayview Landmark Inc* (1999), 40 CPC (4th) 301 (SCJ) 26 : “The class definition, and thus the class size, also has pertinence to other considerations on certification, such as whether class proceedings would be the preferable procedure. Although s5(1)(b) only requires that there be a minimum of two members in the class, it is readily apparent that whether a proposed class includes a handful of plaintiffs or conversely, a multitude of members, will have an impact on the disposition of the certification motion.”

¹²⁵ Hurter (note 13 above) 48.

for damages that would require individual assessment after determination of the common issues,¹²⁶ or that different remedies are sought for different class members.¹²⁷ In this way the objective of the Canadian regime in improving access to justice through class proceedings is met.¹²⁸

(d) Preferable procedure

As a fourth requirement, the class proceeding must be the preferable procedure for the resolution of common issues.¹²⁹ The Ontario CPA does not provide any express guidelines as to how to interpret the ‘preferability’ requirement.¹³⁰ However, certain factors have been judicially considered. In the case of *Carom v Bre-X Minerals Limited*¹³¹ it was stated that a class proceeding will be the preferable method of adjudication where it entails a “fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs, and where such determination will advance proceedings in accordance with the goals of judicial economy, access to justice and modification of the behavior of wrongdoers.” Alternate methods to resolve the dispute or to pursue compensation must also be considered.¹³²

(e) Representative plaintiff

The final requirement of certification in terms of the Ontario CPA is that the representative plaintiff must fairly and adequately represent the interests of the class, not have a conflict on the common issues with other class members and have a workable plan for processing the action.¹³³ The representative plaintiff must be a member of the class.¹³⁴ Vigorous prosecution by the class representative is ensured by requiring the representative to provide a workable method of

¹²⁶ Section 6(1) of the Ontario CPA.

¹²⁷ Ibid section 6(3).

¹²⁸ J Kalajdzic ‘Accessing justice: Appraising class actions ten years after *Dutton, Hollick & Rumley*’ (2011) 53 *Supreme Court Law Review* 3, 4.

¹²⁹ Section 5(1)(d) of the Ontario CPA.

¹³⁰ Mulheron (note 13 above) 222.

¹³¹ *Carom v Bre-X Minerals Limited* (1999) 44 OR (3d) 173 239 (SCJ).

¹³² Mulheron (note 13 above) 224-225; Hurter (note 19 above) 47: Alternate methods include “individual proceedings, joinder, consolidation, test cases and declarations.”

¹³³ Section 5(e) of the Ontario CPA.

¹³⁴ De Vos (note 9 above) 643.

advancing the class proceeding and to instruct legal counsel.¹³⁵ The Ontario CPA has, however, catered and allowed for the presence of individual issues being adjudicated upon by the court.¹³⁶

4.2. DEFINING A CLASS

The identity of each class member is not required in great detail under the Ontario CPA and provision is made for sub-classes and their protection.¹³⁷ The Ontario CPA also only prescribes that the “best information” regarding the number of members in a class be provided.¹³⁸ Differentiation between class members does not preclude the proceeding from being adjudicated as a class proceeding.¹³⁹ Ontario courts have cautioned against subjective class definitions and endorsed the use of objective definitions where the enquiry is not just restricted to the consideration of the personal circumstances of the class members.¹⁴⁰

4.3 NOTICE TO THE CLASS

According to the Ontario CPA, notice of certification is required to be given to class members.¹⁴¹ The court has the power to determine when and by what means notice shall be given by considering various factors¹⁴² as well as the power to determine the content of the notice.¹⁴³ Notice must also be given in circumstances where the court believes individual participation is required¹⁴⁴ or that it is necessary for the protection of affected persons¹⁴⁵ or if there is a dismissal, discontinuance, abandonment or settlement of a proceeding.¹⁴⁶ It is important to note

¹³⁵ Mulheron (note 13 above) 291-292.

¹³⁶ Section 11(1)(c); section 18(1); section 25(1) of the Ontario CPA.

¹³⁷ Hurter (note 5 above) 494; Section 5(2) and section 8(2) of the Ontario CPA.

¹³⁸ Section 5(3) of the Ontario CPA. See also section 6(4) of the Ontario CPA.

¹³⁹ Hurter (note 19 above) 48: this differentiation may be “individual assessment of damages, separate contracts involving different members, or different remedies sought for different members.”

¹⁴⁰ Mulheron (note 13 above) 328-330.

¹⁴¹ Section 17(2) of the Ontario CPA.

¹⁴² Ibid section 17(3): these factors are “(a) the cost of giving notice; (b) the nature of the relief sought; (c) the size of the individual claims of the class members; (d) the number of class members; (e) the places of residence of class members; and (f) any other relevant matter”. Section 17(4): The means by which notice can be given are: “(a) personally or by mail; (b) by posting, advertising, publishing or leafletting; (c) by individual notice to a sample group within the class; or (d) by any means or combination of means that the court considers appropriate.”; Section 17(6) of the Ontario CPA.

¹⁴³ Ibid section 17(6).

¹⁴⁴ Ibid section 18(1).

¹⁴⁵ Ibid section 19(1).

¹⁴⁶ Ibid section 29(4).

that notice to class members regarding certification and settlement is not mandatory and subject to the discretion of the court as indicated by Section 17(2).¹⁴⁷

The Ontario CPA also favours the opt out model of notice.¹⁴⁸ According to the Ontario Law Commission, the opt in model is considered to be merely a “permissive joinder device” and that the opt out model is more suited to a general class action regime.¹⁴⁹ The Ontario CPA expressly allows the court to decide whether an opt out notice should be given in all types of class actions.¹⁵⁰ As can be seen in section 17(4) of the Ontario CPA flexibility and innovation is encouraged in deciding on an appropriate method to deliver notice to class members and a single statutory method has not been prescribed.¹⁵¹ This section caters for both individual notice and non-individual notice.

4.4 SETTLEMENT OF A CLASS PROCEEDING

According to section 29 of the Ontario CPA, a class proceeding will come to an end upon court approval of a settlement in the matter.¹⁵² The settlement will not be binding unless approved by court and it will then bind all class members.¹⁵³ Class members are to be notified of settlement if the court deems it fit to order such notice.¹⁵⁴ The judge that is approached with settlement must ensure that the proposed settlement is fair, reasonable and in the best interests of the class members by judicially considering various factors.¹⁵⁵ Approving of a settlement that is not in the best interests of the class members would be counter-productive to the concept of access to justice.¹⁵⁶

¹⁴⁷ G D Watson ‘Class actions: the Canadian experience’ (2001) 11 *Duke Journal of Comparative & International Law* 269,273; Section 17(2) of the Ontario CPA: “The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.”

¹⁴⁸ Hurter (note 57 above) 300.

¹⁴⁹ De Vos (note 9 above) 647.

¹⁵⁰ Mulheron (note 13 above) 341-342.

¹⁵¹ *Ibid* 344-346.

¹⁵² Section 29(1) of the Ontario CPA.

¹⁵³ *Ibid* section 29(2); section 29(3).

¹⁵⁴ *Ibid* section 29(4).

¹⁵⁵ Bogart, Kalajdzic & Matthews (note 115 above) 22: these factors include “the the likelihood of recovery, or the likelihood of success; the amount and nature of discovery evidence; settlement terms and conditions; future expense and likely duration of litigation; number of objectors and nature of objections; presence of good faith and absence of collusion; and information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.”

¹⁵⁶ Watson (note 147 above) 282. See also *Epstein v First Marathon Inc.* (2000), 41 CPC (4th) 159 (SCJ).

4.5 MONETARY RELIEF

The court may determine whether individual claims need to be made in order to make awards individually¹⁵⁷ or it may make aggregate awards or share awards on an average or proportional basis.¹⁵⁸ The court also has the power to determine whether an award should be paid by the defendant by way of a lump sum or in installments.¹⁵⁹

The distribution methods that can be employed by the court are similar to those under the American regime and include the defendant distributing the award directly to class members,¹⁶⁰ the defendant paying the award into a depository¹⁶¹ and any the method of employing any other person to distribute the award directly to individuals.¹⁶² The Ontario regime also recognizes and approves of the *cy pres* method of distribution.¹⁶³ Whichever method the court employs, it must be sure that it is the most practical way of distribution.¹⁶⁴

¹⁵⁷ Section 24(2) of the Ontario CPA.

¹⁵⁸ Ibid section 24(1) and section 24(2). See also Bogart, Kalajdzic & Matthews (note 115 above) 24.

¹⁵⁹ Ibid section 26(8).

¹⁶⁰ Ibid section 26(2)(a).

¹⁶¹ Ibid section 26(2)(b).

¹⁶² Ibid section 26(2)(c).

¹⁶³ Ibid section 26(4) and section 26(6).

¹⁶⁴ Ibid section 26(3).

CHAPTER FIVE

THE AUSTRALIAN FEDERAL CLASS ACTION REGIME

Pt IVA of the Federal Court of Australia Act (Annexure C)¹⁶⁵ governs representative proceedings in Australia. One of the purposes of the Act is to provide groups of persons pursuing consumer claims access to redress in an inexpensive and efficient manner.¹⁶⁶

5.1 THE LACK OF A CERTIFICATION PROCESS

Australia does not require a certification hearing to commence a representative proceeding.¹⁶⁷ The lack of a certification procedure is based on the opinion that the procedure is more complex and time consuming, leading to delays and further expense.¹⁶⁸ Instead of the representative party approaching the court to satisfy the requirements of certification, the Respondent is instead granted opportunities to prove that the threshold requirements for instituting an action have not been met by the representative party.¹⁶⁹ The respondent does this by way of interlocutory applications. It is submitted by Mulheron that this series of interlocutory applications, at the commencement of a proceeding, is somewhat equivalent to the certification process and so the omission of a certification process is questionable¹⁷⁰ In the case of *Bright v Femcare Ltd*¹⁷¹ the court stated that the bringing of numerous interlocutory applications is an intolerable situation that prevents speedy determination of issues and results in parties being “bogged down” by immaterial issues.

5.2 THE THRESHOLD REQUIREMENTS

Section 33C(1) of the Act introduces the threshold requirements for a representative proceeding.¹⁷²

¹⁶⁵ Pt IVA of the Federal Court of Australia Act, 1976 hereinafter referred to as ‘the Act’.

¹⁶⁶ B Murphy & C Cameron ‘Access to justice and the evolution of class action litigation in Australia’ (2006) 30 *Melbourne University Law review* 399, 402.

¹⁶⁷ SS Clark & C Harris ‘Multi-plaintiff litigation in Australia: A comparative perspective’ (2001) 11 *Duke Journal of Comparative & International Law* 289, 296.

¹⁶⁸ Mulheron (note 13 above) 25.

¹⁶⁹ Clark & Harris (note 167 above) 297.

¹⁷⁰ Mulheron (note 13 above) 27; 29.

¹⁷¹ *Bright v Femcare Ltd* (2002) 195 ALR 574 160.

¹⁷² Mulheron (note 13 above) 117.

(a) Seven or more persons

The first requirement is that seven or more persons must have claims against the same person in order to commence a representative proceeding.¹⁷³ In the case *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd*,¹⁷⁴ Wilcox J rejected the argument that this requirement would require automatic termination of a class action if there were less than seven persons with claims and that such an interpretation would give rise to injustice and inconvenience. This opinion could be said to be contradictory to what is said in section 33L of the Act.¹⁷⁵ It is therefore submitted by Mulheron that the numerosity test is unsatisfactory for a number of reasons including that the number seven is an arbitrary number of no particular significance.¹⁷⁶

(b) Same, similar or related circumstances

The second threshold requirement is that group members must have claims that are in respect of or arise out of the same, similar or related circumstances.¹⁷⁷ According to the case of *Zhang v Minister for Immigration, Local Government and Ethnic Affairs*¹⁷⁸ it was stated that the word “related” implies a connection wider than identity or similarity and that the similarities or circumstances giving rise to a claim must merit a grouping as a class action. This requirement overlaps with the third threshold requirement and it is therefore submitted that it is unconvincing that it should be a free standing requirement to commence a representative proceeding.¹⁷⁹

(c) Common issues

The third and most controversial threshold requirement is that the claims of all persons must give rise to a substantial common issue of law or fact.¹⁸⁰ It has been held that “substantial” implies an issue that is “real or of substance” and not an issue that is “large” or “of special significance”.¹⁸¹

¹⁷³ Section 33C(1)(a) of the Act.

¹⁷⁴ *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 462.

¹⁷⁵ Section 33L of the Act states: “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.”

¹⁷⁶ Mulheron (note 13 above) 117-120.

¹⁷⁷ Section 33C(1)(b) of the Act.

¹⁷⁸ *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 405 (Austl.)(French, J.)

¹⁷⁹ Mulheron (note 13 above) 189-190.

¹⁸⁰ Section 33C(1)(c) of the Act.

¹⁸¹ *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 28.

It is important to note that only one substantial common issue of law or fact is needed to fulfill this requirement.¹⁸²

(d) Superiority

The ‘superiority’ criteria required to institute a representative proceeding are listed in section 33N(1) of the Act. The factors mentioned include a consideration of costs of litigation, alternate proceedings, efficiency and effectiveness of a representative proceeding in dealing with the claims and the otherwise inappropriateness of a representative proceeding in the circumstances.¹⁸³ If the court decides (either of its own accord or an application by the respondent) by considering these factors and the interests of justice that the representative proceeding should not continue, it may order such.¹⁸⁴

(e) Adequate representative

Under the Act, an entity that has the capacity to commence a proceeding on its own behalf may act as a representative on behalf of others as stated in section 33D(1) of the Act. Practically, it is difficult under the Australian regime to find a group member that is willing to be the representative party, as this person will have to bear the risk of an adverse costs order.¹⁸⁵ The representative party is also required to represent the group members in an adequate manner or the court may, on application by a group member, substitute another group member as the representative party.¹⁸⁶

5.3 DEFINING A GROUP

Apart from the requirements in section 33C of the Act, the Act allows for a representative proceeding to commence even where individual assessments would be required, separate contracts are concerned or separate acts or omissions have occurred.¹⁸⁷ The court may in these circumstances direct that issues not falling within the common issues of the group be determined separately by establishing sub-groups, or that an individual group member appear in the proceeding for the purpose of determining an issue in relation to that individual.¹⁸⁸ Section 33H

¹⁸² Clark & Harris (note 167 above) 297.

¹⁸³ Section 33N(1)(a)-(d) of the Act.

¹⁸⁴ Section 33N(1) of the Act.

¹⁸⁵ B Murphy & C Cameron (note 63 above) 432.

¹⁸⁶ Section 33T(1) of the Act.

¹⁸⁷ Section 33C(2) of the Act

¹⁸⁸ Ibid section 33Q and section 33R.

states that at the establishment of representative proceedings there is no need to provide specific details about the group members, the papers are to merely state a description or identify the group members.¹⁸⁹

5.4 NOTICE TO THE GROUP MEMEBERS

According to section 33X(1) of the Act, notice must be given to group members at the commencement of a proceeding, if there is an application for dismissal of the proceeding brought by the respondent and where there is an application seeking to withdraw the representative proceeding. The court has a discretion to dispose of any of the requirements set out where the relief sought is one of damages and it may also order that notice be given in any other circumstances.¹⁹⁰

The form and content of the notice must specified by the court and the court may order that notice be given by a specific person in a particular manner such as through advertisement, radio or television broadcast or by any other means.¹⁹¹ Individual notice may be ordered where it is reasonably practicable and not unduly expensive.¹⁹² This indicates that individual notice may be used as a last resort only.¹⁹³

The above notices all follow the opt out model. Group members may elect to opt out of the proceedings by written notice before a certain date or they will be bound by the judgment of the court.¹⁹⁴

5.5 SETTLEMENT OF A REPRESENTATIVE PROCEEDING

Section 33V of the Act clearly states that a representative proceeding may not be settled or discontinued without prior approval of the court.¹⁹⁵ This may only be deviated from if the court

¹⁸⁹ Ibid section 33H(1); Section 33H(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.”

¹⁹⁰ Section 33X(2) and section 33X(5) of the Act.

¹⁹¹ Ibid section 33Y(1) – 33Y(4); Clark & Harris (note 167 above) 299; Murphy & Cameron (note 166 above) 432.

¹⁹² Section 33Y(5) of the Act.

¹⁹³ Mulheron (note 13 above) 344-345.

¹⁹⁴ Section 33J and section 33Y(8) of the Act.

¹⁹⁵ Ibid section 33V(1).

considers it just to do so.¹⁹⁶ Settlement of an individual claim must also be done only with the approval of the court and this can be obtained at any stage of the proceeding.¹⁹⁷

There are no strict guidelines are present in the Act to guide courts in ascertaining whether a settlement is suitable or not, however the court commonly considers, *inter alia*, the terms of the settlement, cost consequences and whether there has been a measure of good faith involved in reaching the settlement.¹⁹⁸ Group members must also be given notice of the pending settlement and given an opportunity to opt out of the proceeding, before the settlement can be approved by the court.¹⁹⁹

5.6 MONETARY RELIEF

The court may award damages on an individual basis or by way of an aggregate amount where a reasonably accurate assessment can be made of the total amount of money the group members are entitled to.²⁰⁰ In the case of *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd*²⁰¹ as quoted by Mulheron,²⁰² the court interpreted the words “reasonably accurate assessment” as one that is not precise but that is “good enough in law.”

Section 33ZA allows the court to order that the monetary award be distributed to the group members through a fund that the Respondent pays into either by way of a lump sum or installments.²⁰³ It is submitted that the court may order that monetary relief be paid directly to members of the group through the use of section 33Z(2). The *cy pres* method of distribution has not been sanctioned under the Australian regime.²⁰⁴

¹⁹⁶ Ibid section 33X(4).

¹⁹⁷ Ibid section 33W(1).

¹⁹⁸ Mulheron (note 13 above) 397-405. See also Murphy & Cameron (note 163 above) 428 : “The test is whether the proposed settlement is fair, reasonable or adequate in the interests of group members. In considering whether a proposed settlement satisfies this test, the courts will have regard to such factors as: the complexity and duration of the litigation; the reaction of the class to the settlement; the stage of the proceedings; the risks of establishing liability and damages; and the reasonableness of the settlement, in light of the best recovery and the risks of litigation.” Clark & Harris (note 164 above) 305.

¹⁹⁹ Section 33X(4) of the Act.

²⁰⁰ Ibid section 33Z(1)(e); section 33Z(1)(f); section 33Z(3).

²⁰¹ *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545 (CA).

²⁰² Mulheron (note 13 above) 415.

²⁰³ Section 33ZA(1) of the Act.

²⁰⁴ Mulheron (note 13 above) 427-428.

CHAPTER SIX

LESSONS LEARNT FROM THESE FOREIGN JURISDICTIONS

It can be seen that in the American, the Canadian Province of Ontario and the Australian jurisdictions the usual civil procedure mechanisms adopted are incompatible with the resolution of shared claims of vulnerable litigants. Therefore, the main reason for these jurisdictions enacting class action legislation is to increase access to justice by providing an effective procedural system to manage multiple claims and the collective interests of the individuals who wish to form a class.

The United States of America has been at the forefront of class action litigation with Ontario and Australia adopting many of its features. The American class action system is described as complex, complicated, convoluted and technical.²⁰⁵ Despite this, both Ontario and Australia have structured their class action regimes on this model, albeit in a more simplified manner. There are, however, important differences between the procedures adopted by these jurisdictions.

6.1 FORMS OF CLASS ACTIONS²⁰⁶

The American class action regime provides for three different types or categories of class actions. These are the mandatory class action, the injunctive class action and the common questions class action.²⁰⁷ Ontario provides for a general class action, with no specific categorization of actions, as does the Australian regime.²⁰⁸ This general class action model is the favoured approach because it allows for class actions to be brought in terms of all legal issues instead of restricting the applicability of a class action to certain legal issues or certain relief that is being claimed. This approach is also beneficial to judges who are confronted with a class action because they do not need to spend time deciding which category of class action is most appropriate. They can simply apply the general class action requirements to any class action that may come before them.

²⁰⁵ Hurter (note 5 above) 489; Hurter (note 57 above) 295.

²⁰⁶ For ease of reference the term 'class action' will be used to refer to class actions, class proceedings or representative proceedings under the American, Ontario and Australian regimes respectively.

²⁰⁷ De Vos (note 9 above) 643.

²⁰⁸ De Vos (note 2 above) 744.

6.2 CERTIFICATION OF A CLASS ACTION

The American class action regime lists more requirements to bring a class action in comparison to the regime adopted in Ontario. As discussed above, section 5 of the Ontario CPA states that only 5 requirements are to be met before certification of an action can be granted. This increases access to justice for individuals in Ontario as opposed to those in the United States of America who are required to meet Rule 23 requirements. The Ontario CPA also makes it clear under what circumstances certification may not be refused thereby increasing access to justice. Unlike the United States of America and Ontario, Australia has not adopted a certification process. Despite the reasons put forward for the omission of the certification process together with the possibility of it resulting in in-depth administrative responsibilities on the part of judges, overall, the risks of a sloppy class action are too great without a certification procedure.²⁰⁹

6.3 NUMEROSITY

The American class action regime requires that joinder be impracticable when assessing whether an action should proceed as class action. The Australian and Ontario class action regimes have differing versions of the numerosity requirement. The Ontario CPA requires that there be an identifiable class of two or more persons while the Australian position is that seven or more persons must have claims against the same person in order to commence a representative proceeding. Depending on what factors the courts take into account regarding the impracticability of joinder test, there will be discrepancies in when a class will be certified under the American regime. The Ontario and Australian regimes specify a number of persons that must be met in order to meet the numerosity requirement. This approach is restrictive and has no bearing on the complexities of the litigation. It is possible that a smaller class action may prove to be more complex than that of a larger class. It is also more likely that the smaller the class, the less likely it is that an action will be certified to proceed as a class action. Flexibility should be present when satisfying this requirement and therefore the favoured approach would be that of the American regime.

6.4 COMMONALITY

The American, Ontario and Australian class action regimes require that there be common issues of law or fact between the class members. Both the Ontario and Australian class action regimes

²⁰⁹ Cooper (note 30 above) 231.

state that common issues of law or fact must arise from similar circumstances of the class members. There is also no strict requirement in any of these jurisdictions that the common issues of law or fact between the class members be identical. It is merely an enquiry of which issues would arise repeatedly if class members were to bring their claims individually. The commonality requirement is significant in the certification process as it determined the class definition and allows judges to adequately assess the direction and length of the class action litigation.

6.5 TYPICALITY

Unlike the American class action regime, this requirement has not been expressly mentioned in the Australian and Ontario class action regimes. As previously stated the typicality requirement overlaps with other requirements mentioned in Rule 23 and therefore it appears unnecessary as a stand-alone requirement. The factors used in ascertaining typicality under the American regime are catered for under the ‘commonality’ and ‘preferability’ requirements in terms of the Ontario CPA.²¹⁰ It has been submitted that in this way, the American class action regime sets a higher bar to certification than Ontario’s class action regime.²¹¹ The Australian regime also deems the typicality requirement to be an unnecessary requirement that is already catered for under the ‘commonality’ requirement of the Act.²¹² Whether included in legislation as a stand-alone requirement or incorporated into other requirements, it is important to satisfy the typicality requirement in order to ensure that the class representative is actually furthering the interests of the class while simultaneously furthering his own individual interest.

6.6 THE REPRESENTATIVE

The satisfaction of this requirement is important as the success of the class action is dependent on the skill of the representative and because the representative is relied upon by the absent class members to enforce their rights.²¹³ Under both the American and Ontario class action regimes the class or group representative is required to fairly and adequately represent the members of

²¹⁰ J Yates ‘Comparison between Canadian and U.S. class actions law and practice’ para 12, available at http://www.slideshare.net/jyatesdahlgren/comparison-between-canadian-and-us-class-actions-law-and-practice-15504793?utm_source=slideshow03&utm_medium=ssemail&utm_campaign=share_slideshow_loggedout, accessed on 21 April 2013.

²¹¹ Yates (note 210 above) para 13.

²¹² Mulheron (note 13 above) 309.

²¹³ Hurter (note 57 above) 294. The action becomes *res judicata* after the class action is determined and the individual class members are precluded from reinstating the action if dissatisfied with the outcome.

the class. The Australian regime requires that group members be adequately represented as implied in section 33T of the Act. The American and Ontario class action regimes have also not adopted the ‘ideological plaintiff’ concept into their certification proceeding. This concept does not require that the representative litigant be a member of the class instituting the action even though the reality is that there is a possibility of the representative acting on his own interests, to the detriment of the other members of the class.²¹⁴ The Australian class action is different, in that it allows for an ideological plaintiff to represent the group members. This position prevents the situation where an inexperienced group member is required to represent the class, when a Consumer or Competition Commission would be in a better position to do so.

6.7 PREDOMINANCE

Unlike the American class action regime, ‘predominance’ is not a requirement in the Ontario CPA and therefore this approach is considered to be more liberal than that of the American regime.²¹⁵ Both the Ontario courts and the Supreme Court of Canada have emphatically rejected the ‘predominance’ requirement.²¹⁶ As stated above, under the Australian regime commonality requires that the claims of all persons give rise to a substantial common issue of law or fact. Even though the Australian regime has no express requirement of ‘predominance,’ it is submitted that the use of the word “substantial” in this way equates this requirement to the requirement of ‘predominance’ under the American regime.²¹⁷ The Australian regime is the most flexible in this regard as the requirement is met by finding just one substantial common issue. The predominance requirement – whether as an express or implied requirement – is significant as it serves as an adhesive binding individuals through common issues and allowing them to bring an action as a class instead of individually. Where there are more individual issues to be decided in comparison to common issues, it does not make sense to bring a class action instead of separate individual actions because the adjudicating of individual issues will have to take place in any event.

²¹⁴ De Vos (note 9 above) 644.

²¹⁵ Hurter (note 19 above) 47; Hurter (note 5 above) 494.

²¹⁶ *Rosedale Motors Inc. v Petro-Canada Inc.* (1999), 42 OR (3d) 776 (Gen Div) 31; *Western Canadian Shopping Centres v Dutton* (2001), 201 DLR (4th) 385, (2001) 2 SCR 534 (SCC) 39.

²¹⁷ Mulheron (note 13 above) 191 : “Only in Ontario is there absolutely no requirement of substantiality of the common issues nor any requirement that common issues of fact or law “predominate” over any questions affecting only individual members.”; Hurter (note 38 above) 299.

6.8 SUPERIORITY

Whilst under the American regime, a class action is required to be superior to other methods of adjudication; the Ontario CPA only requires that the class action to be the preferred method of adjudication.²¹⁸ In considering whether a class action is the preferable method of adjudicating, the ‘predominance’ requirement is catered for as common issues and individual issues are weighed. Both the American and Australian legislation lists factors that are to be considered when determining the fulfillment of this requirement. The Ontario CPA, however, does not list factors that are to be taken into account in determining the preferability of the class action. The absence of guidelines in this manner provides the courts with a wide discretion in deciding whether a class action is the preferable method of adjudication which inevitably results in inconsistency. A better approach would be to expressly include these factors in legislation or court rules so that judges are guided in making their determinations and do not veer off track by taking into account irrelevant considerations.

6.9 CLASS DEFINITION

Class definition is an important aspect of the certification process as it allows a judge to determine which individuals will be bound by the judgment of the court, entitling them to relief and who will be eligible to receive notice of the pending class action.²¹⁹ A class is ordinarily shaped in the manner it is described or defined and usually this is one of the most difficult tasks associated with class actions.²²⁰ The discussed jurisdictions require the class to be merely ascertainable and not specifically or individually named. This is because the certification process would be unduly burdened and extended if explicit detail of the members were to be required. Provision for sub-classes and sub-groups is also made under all of the abovementioned jurisdictions. This means that individual issues that are different from the common issues are not precluded from being dealt with and are not a bar to certification. This increases access to justice for individuals forming the class or group.

²¹⁸ Bogart, Kalajdzic & Matthews (note 115 above) 4.

²¹⁹ Rothstein & Willging (note 27 above) 7.

²²⁰ Mulheron (note 13 above) 321.

6.10 NOTICE TO THE CLASS

The American, Ontario and Australian regimes require notice to be given to the class members under different circumstances. The main reason for this is to enable absent class members to firstly be fully aware of the progress of the class action and secondly, to judge how adequately they are being represented by the class representative. The different jurisdictions require individual notice in certain circumstances but largely the courts have discretion as to what type of notice to order and what the notice is to contain. The legislation in each jurisdiction does however provide guidelines as to what the notice should state. All three jurisdictions favour the opt out model of notice over the opt-in model as it gives effect to one of the core aims of a class action – higher participation rates in litigation due to access to justice being increased.

6.11 SETTLEMENT OF A CLASS ACTION

The abovementioned jurisdictions require any settlement between the parties to be approved by the court. In some instances class actions have been used as a form of blackmail to coerce defendants into settlements rather than bearing the costs of class litigation. Therefore, court approval of settlements ensures that no coercion is used in bringing about an end to the litigation process. Notice to class members of impending settlement is also required to be given and the court may only deviate from this procedure under certain circumstances, as under the Australian regime. Court approval of settlements is recommended and appropriate as it prevents the representative and the defendants from coming to an agreement that may only benefit them. Instead the court ensures that the class members' interests have been adequately seen to by the representative in the best possible way.

6.12 MONETARY RELIEF

All three of the focus jurisdictions allow for damages to be awarded on an individual basis where practical, or on an aggregate or proportional basis. The methods of distribution utilized by these jurisdictions are also similar, save for the American and Australian regimes. The American regime makes provision for coupon settlements or awards while the Australian regime does not recognize the *cy pres* method of distribution. The problem with both the *cy pres* and coupon concepts is that they do not really compensate the class for injuries they have suffered in monetary terms. However, jurisdictions should not be quick to disregard any method of award or

distribution, as only the particular circumstances of each case is capable of determining the most appropriate method of award and distribution.

6.13 CONCLUSION

Class action legislation has been developed and continues to develop in the American, Ontario and Australian jurisdictions. Through this analysis of the class action procedures in these jurisdictions it is noted that various issues arise during class litigation. These issues cannot be entirely catered for through strict interpretation of the legislation and judicial intervention is sometimes required, especially during the certification stage of the proceedings.

The importance of a certification procedure in initiating a class action is held to be a distinguishing characteristic of this type of litigation. It sets the stage for the impending action and is important in ensuring that absent class members' rights are catered for. This is by far the most important goal of class action litigation – the provision of access to justice for those who cannot afford to bring individual actions. Due to the importance of the certification procedure in guiding the class action litigation, flexibility should be allowed when interpreting the legislative requirements. However, judges are not to be given free reign. They must abide by the legislative requirements of certification to the best of their ability keeping in mind the goals of this type of specialized litigation.

In terms of developing a South African consumer class action procedure, adopting and implementing any one of these jurisdictions' class action procedures in its entirety is not recommended. This is evidenced by the opposing views of academics. Hurter submits that the requirements of the Ontario regime are less onerous and more in line with the “spirit, purport and object of the Bill of Rights, in comparison to the American regime.”²²¹ On the other hand, De Vos submits that the American regime is in harmony with the South African civil procedure model and that they “subscribe to the same fundamental principles” thereby making this procedure a suitable one for adoption by South Africa.²²²

South Africa needs a procedure that is unique to the country's characteristics. The pros and cons of each jurisdiction must be weighed and contrasted to the economic, judicial and social climate

²²¹ Hurter (note 57 above) 302.

²²² De Vos (note 9 above) 656.

of South Africa. In this way, the South African legislature will be able to identify the flaws in these foreign jurisdictions and ensure that proper precautions are taken. This will ensure that the detrimental effects of foreign class action procedures are negated when the formation of a South African class action procedure takes place.

CHAPTER SEVEN

THE CURRENT SOUTH AFRICAN APPROACH TO CLASS ACTIONS

7.1 THE BILL OF RIGHTS AND CLASS ACTIONS

7.1.1 INTRODUCTION

As previously stated, section 38(c) of the Constitution makes provision for a class action to be brought by anyone alleging that a right in the Bill of Rights has been infringed or threatened. On a plain reading of this section, it is deduced that a class action can only be brought where a right in the Bill of Rights is infringed and not where one's rights in terms of competition or consumer law have been infringed or threatened. A recent Supreme Court of Appeal (SCA) decision cast doubt as to whether the court's interpretation of section 38(c) extended the use of class actions to the infringement or threat of rights that are not contained in the Bill of Rights. A discussion of both the trial court and Supreme Court judgments is required for proper understanding of the current position.

7.1.2 NGXUZA AND OTHERS v PERMANENT SECRETARY, DEPARTMENT OF WELFARE, EASTERN CAPE, AND ANOTHER 2001 (2) SA 609 (E)²²³

The Applicants had received social grants under social legislation and alleged that the Respondents had unlawfully cancelled and suspended their grants along with the grants of many other pensioners. The Applicants sought to claim relief in the form of a declaration and reinstatement of the social grants on behalf of all individuals in the same position and for the Respondents to provide the names of these individuals. The Applicants invoked section 38(c) to enable them to sue on behalf of all individuals similarly situated and the court had to decide whether the applicant could actually use this section for this purpose.

Froneman J, in delivering his judgment laid down certain guidelines in terms of class action procedure since the legislature had not yet signed the SA Law Commission's Report into legislation. The judge also stated many crucial points. He mentioned the contents of section 38(c) and stated that there was no valid reason for a restrictive interpretation of the section.²²⁴ The judge went onto state that despite the problems associated with public interest litigation, the

²²³ Hereinafter referred to as the 'Trial Court decision.'

²²⁴ 619.

ability to represent individuals in terms of section 38(c) should not be restricted. Instead proper safeguards should be put into place to combat these problems.²²⁵

The court acknowledged the need and use of class action procedure in catering for poorer individuals by allowing them to bring their claims collectively thereby increasing access to justice.²²⁶

Froneman J also dealt with the common objections of sanctioning a class action as follows. He stated that the floodgates of litigation would not be opened due to the exorbitant costs of pursuing a matter at Supreme Court level. He then proposed the procedural requirement of an applicant having to seek leave from the High Court to proceed on a representative basis before initiating a class action.²²⁷

With regard to the problem of classification and the different circumstances of the individuals, it was submitted by the judge that the class definition and the common issues must relate to the infringement of a fundamental right.²²⁸ This determination would also take place when seeking leave to proceed on a representative basis.²²⁹

The practical impossibility argument was based on the impossibility of courts to deal with cases involving thousands of people. This argument was dismissed when Froneman J stated that “if there is a clearly defined class of people who have been wronged in the manner required by s 38, it is no answer for either the judicial or administrative arms of government to say that it will be difficult to give them redress. If it means that Courts will have to act in new and innovative ways to accommodate them, then so be it.” The court referred to the case of *Maluleke v MEC Health and Welfare, Northern Province*²³⁰ where evidence was required to identify each of the beneficiaries. The court in that case held that the individuals constituted a class “in only the vaguest and broadest sense.” Froneman J disagreed with the approach in the case of *Maluleke* and held that in both the *Maluleke* case and the present case there was a clear infringement of the Applicants’ right to just administrative action, a fundamental right found in section 33 of the Bill

²²⁵ 619.

²²⁶ 621, 623.

²²⁷ 624.

²²⁸ 624.

²²⁹ 624.

²³⁰ *Maluleke v MEC Health and Welfare, Northern Province* 1999 4 SA 367 (T) hereinafter referred to as ‘Maluleke.’

of Rights.²³¹ The fact that all the individuals suffered infringement of the same fundamental right was enough to define the individuals as a class.

A flexible and generous approach was held to be the appropriate manner of approaching class actions.²³² Given the fact that there was no legislation to guide the court in approving an action as a class action, Froneman J implicitly relied on section 173 of the Constitution²³³ to develop a class action procedure.²³⁴ The judge therefore held that the Applicants had standing to bring a class action on behalf of other individuals who found themselves in similar circumstances and that these individuals were to be given notice of the proceeding and an opportunity to exclude themselves from it. The Respondents were unhappy with the judgment in the *court-a-quo* and took the matter on appeal.

7.1.3 PERMANENT SECRETARY, DEPARTMENT OF WELFARE, EASTERN CAPE & ANOTHER v NGXUZA & OTHERS 2001 4 SA 1184 (SCA)²³⁵

The two main issues that were taken on appeal by the Appellants were class definition and jurisdiction of the class action. Generally, Cameron JA defined a class action and stated the need for such an action by quoting American authors on the inadequacies of the joinder model as follows:

“The cardinal difficulty with joinder . . . is that it presupposes the prospective plaintiffs’ advancing *en masse* on the courts... What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it.”²³⁶

The judge went on to state that although the Constitution makes provision for a class action, it is left to the courts, through section 39(2) and section 173 of the Constitution, to develop and implement such procedure.²³⁷ The court also held that provisions enabling a class action are to be

²³¹ 622.

²³² 623

²³³ Section 173 of the Constitution states: “The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

²³⁴ 627

²³⁵ Hereinafter referred to as the ‘Appeal Court decision.’

²³⁶ 1193.

²³⁷ 1196.

interpreted generously and expansively as stated in the case of *Ferreira v Levin NO and others*.²³⁸

Cameron JA then proceeded to deal with the issue of class definition. He stated that the complaint of the Appellants that the class was not adequately defined was “difficult to appreciate.”²³⁹ The individuals had all had their social benefits cancelled or suspended. Therefore, the court held that the class consists of individuals that are “victims of official excess, bureaucratic misdirection and unlawful administration methods” and that this was a situation that was “pattern made” for a class action.²⁴⁰ The Judge went on to state how the definition of the class met the numerosity, commonality, typicality and adequate representative requirements of a class action as found in foreign jurisdictions.²⁴¹

The court emphatically agreed with the trial court’s reasoning in being unable to agree with the position in the case of *Maluleke*. It deemed the principles related to class action in *Maluleke* inconsistent with the present judgement and therefore *Maluleke* was overruled.²⁴²

Based on the above considerations together with the court’s condemnation of government conduct, the court dismissed the appeal.

7.1.4 CONCLUSION

In essence, the Trial Court decision established many of the requirements already mentioned in the foreign jurisdictions’ class action regimes. The request for leave by an applicant to proceed on a representative basis is equivalent to the certification proceeding under the American and Ontario regimes. The defining of a class and the ascertaining of common issues are also part of the certification process of the American and Ontario regimes. The requiring of notice and the opportunity for individuals to exclude themselves from the litigation is equivalent to the opt out model adopted in the foreign jurisdictions.

²³⁸ 1196; *Ferreira v Levin NO and others* 1996 (1) SA 984 (CC).

²³⁹ 1197.

²⁴⁰ 1195. The proceeding was pattern made for a class action as it involved a poor society that consisted of individuals with relatively small claims in comparison to the relief claimed, who would not ordinarily be able to afford legal redress.

²⁴¹ 1197.

²⁴² 1200.

The Appeal Court decision is considered to be authority for the use of a class action procedure in relation to an infringement of a right contained in the Bill of Rights, despite the lack of legislation or court rules guiding the process.²⁴³ However, it has been submitted that the Appeal Court decision quotes the requirements of the American class action regime exactly.²⁴⁴ This blind adoption of a foreign jurisdiction's class action procedure is something to be cautioned against as previously discussed.

Kok submits that the appeal decision indicated an intention to create a general class action.²⁴⁵ He based his submission on various "hints" in the Appeal Court decision – the judge in the Appeal Court decision did not expressly identify an infringement of a fundamental right, the court found the acts of governments to be "unlawful and not unconstitutional and the appeal decision reflects a consideration of requirements not required by section 38 of the Constitution.²⁴⁶ Both Hurter and De Vos disagree with Kok's view. They submit that an infringement of a fundamental right was identified by Cameron JA in the Appeal Court decision and that the Appeal Court decision must be read in context of the Trial Court decision.²⁴⁷ The trial court clearly approached the facts of the case in the context of section 38 of the constitution.

It can therefore be stated that the *Ngxuza* decisions firmly entrench the notion of a class action being used to enforce infringed or threatened constitutional rights. The only question remaining is whether the class action model can be extended to cover an infringement of rights that are not found within the Bill of Rights.

²⁴³ De Vos (note 2 above) 749.

²⁴⁴ Hurter (note 57 above) 302.

²⁴⁵ A Kok 'Has the Supreme Court of Appeal recognized a general class action in South African law?' (2003) 66 *Tydskrif vir hedendaagse Romeins-Hollandse Reg* 158, 160.

²⁴⁶ Kok (note 245 above) 161.

²⁴⁷ Hurter (note 5 above) 501-502; De Vos (note 2 above) 751.

7.2 A GENERAL CLASS ACTION

In 2012 and 2013, two landmark rulings were handed down by the Supreme Court of Appeal (SCA) and the Constitutional Court (CC), respectively. Both these cases set the framework for class actions to be brought out of the realm of the Bill of Rights and the judgments are now regarded as precedent in class action cases. A discussion of these cases proves helpful in ascertaining the current position of non-constitutional class actions in South Africa.

7.2.1 CHILDREN'S RESOURCE CENTRE TRUST V PIONEER FOOD (50/2012) [2012] ZASCA 182 (29 NOVEMBER 2012)²⁴⁸

In this case the Appellants, who are bread consumers, sought to have an action certified as a class action in order to bring their claims collectively against various Respondents, being bread cartels. The Respondents were allegedly engaging in anti-competitive conduct in terms of the Competition Act²⁴⁹ by fixing the price of bread. When the Competition Commission investigated the allegations it was found that the bread cartels were in contravention of the Competition Act²⁵⁰ and it was upon this finding that the Appellants sought certification of their action. The main issues to be decided on appeal were when may a class action be brought and what were the procedural requirements that needed to be satisfied before its institution.

The Appellants claimed that the Respondents had infringed their right to sufficient food and water as contained in section 27(1)(b) of the Constitution only to bring their claim within section 38 of the Constitution thereby entitling them to bring a class action. The court held this to be an unnecessary attempt by the Appellants to ensure that they were able to bring the action as a class.²⁵¹ The appellants were poor and their individual claims were small in comparison to the eventual costs of litigation. Therefore, they were only able to bring the action as a class or not at all, which would infringe their right to access to courts as contained in section 34 of the Constitution.²⁵² Although the threatened infringement of the right to access to courts would entitle the individuals to make use of a class action, Wallis JJA held that:

²⁴⁸ Hereinafter referred to as the 'Bread Case'.

²⁴⁹ The Competition Act 89 of 1998.

²⁵⁰ Ibid section 4(1)(b)(i) and (ii).

²⁵¹ 16.

²⁵² 17.

“In my judgment it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants’ inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal injury cases or consumer litigation.”²⁵³

The court referred to the SA Law Commission Report with approval, acknowledging that Parliament has not yet enacted legislation as per the Report’s recommendations.²⁵⁴ Wallis JJA therefore stated that the courts must use their power in terms of section 173 of the Constitution to address this area of law.²⁵⁵ He rejected the idea that the courts should wait for the legislature to enact class action law before they deal with actions on this basis.²⁵⁶ However he did state that in laying down procedural requirements the court should not usurp the power of the Legislature in making policy decisions.²⁵⁷

The certification process and its requirements were then discussed by the court in a great deal of detail. The court often referenced the SA Law Commission Report in its discussion of the abovementioned process and requirements.

The certification process was held to be necessary in the circumstances with Wallis JJA holding that there are numerous benefits to the certification process. He pointed out that through the certification process, at the outset of the litigation the court is ensured that the interests of those being represented are protected and that the defendant is given the opportunity to show at an early stage why the action should not proceed. Further, the court is able to oversee the litigation process and the conduct of the litigation is facilitated by the issues determined during the certification process. The court further stated that a lack of the certification process in foreign jurisdictions has not proved useful.²⁵⁸

²⁵³ 17-18.

²⁵⁴ 13

²⁵⁵ 14.

²⁵⁶ 18.

²⁵⁷ 18.

²⁵⁸ 20.

In ascertaining the requirements for certification, the court held that they closely resembled those laid out in the SA Law Commission Report as well as the requirements laid down by Cameron J in the *Ngxuza* Appeal Court decision and those laid out in Rule 23 of the American class action regime.²⁵⁹ Some of the requirements for certification were listed and commented upon by the court as follows:

(1) The existence of a class identifiable by objective criteria

The court held that it is not necessary to specifically identify the members of a class and that the class must merely be defined with sufficient precision so that a particular individual's membership can be easily ascertained.²⁶⁰ The court highlighted the concept of class definition by stating that it affects the method by which notice is given to the class members, it is important for individuals to know whether they can commence their own litigation if not part of the class and it is important in determining who will be bound by the class judgment.²⁶¹ Wallis JJA highlighted the issues of an over-inclusive class definition and a definition formed through subjective criteria, thereby favouring a class that has instead been defined by objective criteria.²⁶² The judge concluded his discussion of this requirement by stating that “the essential question will always be whether the class is sufficiently identified that it is possible to determine at all stages of the proceedings whether a particular person is a member of the class.”²⁶³

(2) A cause of action raising a triable issue

The court concluded that there will be no cause of action where there is no prima facie case made, if it is based on a legally untenable claim, it lacks evidence to support it or it will be the subject of a successful exception.²⁶⁴ In ascertaining a cause of action Wallis JJA stated that “the test does not preclude the court from looking at the evidence on behalf of the person resisting

²⁵⁹ 22. The court stated the following on page 21 of its judgement: “In the course of argument the presiding judge put to counsel the following list of the elements that should guide a court in making a certification decision. They were: the existence of a class identifiable by objective criteria; a cause of action raising a triable issue; that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class; that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination; that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class; that the proposed representative is suitable to be permitted to conduct the action and represent the class; whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.”

²⁶⁰ 23.

²⁶¹ 23.

²⁶² 23-26

²⁶³ 26.

²⁶⁴ 27.

certification...That is not an invitation to weigh the probabilities at the certification stage. It is merely recognition that the court should not shut its eyes to unchallenged evidence in deciding a certification application.”²⁶⁵ The court laid down a procedural guideline relating to the evidence to be adduced during the certification proceeding. It stated that Applicants are to set out evidence to support the existence of a class in the affidavits accompanying the application for certification.²⁶⁶

(3) Common issues of fact or law

Wallis JJA indicated that the common issues of law or fact need not be identical but that they are common enough to be determined in one action.²⁶⁷ The common aspect of a claim may refer to the primary issue to be dealt with while other more specific issues can be dealt by way of subclasses.²⁶⁸

(4) A suitable representative

The court approved of the ‘ideological plaintiff’ concept by quoting section 38 of the Constitution and stating that there should be no differentiation between class actions based on an infringement of a right in the Bill of Rights and class actions that are not.²⁶⁹ In ascertaining whether a representative is suitable the court asked two questions. First whether the representative has interests in the litigation that are in conflict with whom it wishes to represent and secondly, whether the representative has the capacity to properly conduct the litigation on behalf of the absent class members.²⁷⁰ The court stated that the latter inquiry involved, *inter alia*, the following determinations:

“has the representative the time, the inclination and the means to procure the evidence necessary to conduct the litigation; has the representative the financial means to conduct the litigation and, if not, how is it going to be financed; and does the representative have access to lawyers who have the capacity to run the litigation properly.”²⁷¹

²⁶⁵ 31.

²⁶⁶ 29.

²⁶⁷ 33.

²⁶⁸ 34.

²⁶⁹ 35.

²⁷⁰ 35.

²⁷¹ 35.

In this case the class consisting of bread consumers across four provinces of South Africa was held to be over-broad and as a result no commonality was established between the class members.²⁷² Therefore, the certification of this class failed. The class definition restricted to bread consumers in the Western Cape was also described as being too broad of a definition but the court held that with statistical information the appellants would be able to define the class with the requisite amount of clarity.²⁷³ The matter was therefore remitted to the High Court for determination.²⁷⁴

(5) Ascertainable relief and appropriate allocation of damages

The remedy sought in this case was money to be paid to a trust or similar body that will use the funds to fund community and school feeding schemes in order to benefit all consumers generally.²⁷⁵ The money would not go directly to the bread consumers to compensate their loss. In essence, a *cy pres* method of distribution was sought. The court unequivocally stated that the *cy pres* method was not a means of compensating the class for the damages that they had suffered.²⁷⁶ Wallis JJA, in quoting the contents of the SA Law Commission Report²⁷⁷, stated as follows:

“In my view the suggested remedy is not a permissible one. It departs from the purpose of the class action to compensate those who have suffered loss for that loss...The new principle that would be created would be that where a large number of people had relatively small claims against a defendant, that it would not be worth their while to pursue individually, those claims can be confiscated from them by judicial *fiat* and vested in a person that will be able to use the proceeds of those claims in a socially useful manner. In my view that is a bridge we should decline to cross.”²⁷⁸

The court instead proposed that the damages of each individual class member be ascertained on an aggregate basis through the use of statistical methods.²⁷⁹ Distribution methods were listed as

²⁷² 39; 42.

²⁷³ 52-53.

²⁷⁴ 62.

²⁷⁵ 53-54.

²⁷⁶ 54.

²⁷⁷ 66.

²⁷⁸ 57-58.

²⁷⁹ 58.

an open list including distribution either directly to the class members or in a manner that would be directly or indirectly beneficial to them.²⁸⁰

In light of, *inter alia*, points (1)-(5) above, the court held that the appeal was to be upheld and the class action in respect of the bread consumers in the Western Cape be remitted to the High Court for determination with due consideration of the principles that have been laid down in this judgment.²⁸¹

7.2.2 MUKADDAM V PIONEER FOODS (PTY) LTD AND OTHERS (CCT 131/12) [2013] ZACC 23 (27 JUNE 2013)²⁸²

A brief history of this case is relevant to the decision taken in this court. In the High Court²⁸³ the Applicant and two others sought to bring a class action on the basis that they, as bread distributors, suffered damages due to the misconduct of the Respondent bread cartels that engaged in price-fixing of bread. This application was brought together with the application in the Bread Case. The application for certification in the High Court was dismissed by Van Zyl AJ on two grounds, namely, the cause of action raised by the applicants did not give rise to triable issues²⁸⁴ and no common issues of fact or law were absent between the members of the proposed class.²⁸⁵

In the Supreme Court of Appeal (SCA),²⁸⁶ Nugent JA held that the reliance of the Appellants on section 22 of the Constitution was unfitting. The section grants the right to South African citizens only and there was no evidence to suggest that all the members of the proposed class were citizens.²⁸⁷ Also, some of the claimants were juristic persons while the right in section 22 is conferred upon natural persons only.²⁸⁸ The court went onto state that the Competition Act does not protect the profits of an enterprise, it is merely protects consumers from the results of over-competitive conduct.²⁸⁹ The learned judge also submitted that because the applicants sought to

²⁸⁰ 59.

²⁸¹ 62.

²⁸² Hereinafter referred to as 'Mukaddam.'

²⁸³ *Mukaddam and others v Pioneer Foods (Pty) Ltd and others* (25353/10) [2011] ZAWCHC 102 (7 April 2011).

²⁸⁴ 45.

²⁸⁵ 45.

²⁸⁶ *Mukaddam v Pioneer Food* (49/12) [2012] ZASCA 183 (29 November 2012).

²⁸⁷ 5.

²⁸⁸ 5.

²⁸⁹ 5.

use the opt in model; joinder in terms of section 10 of the Uniform Rules of Court would be preferable procedure.²⁹⁰ The claim was not found to be “potentially plausible” and the appeal was therefore dismissed.²⁹¹

The Constitutional Court (CC) in this case was faced with three issues. First, whether the High Court correctly exercised its power in refusing certification. Secondly, whether the SCA was correct in dismissing the appeal and confirming the High Court’s decision and thirdly, whether the correct test of certification was applied by the SCA.²⁹²

Jafta J outlined the fundamental importance of access of justice by quoting from the case of *Chief Lesapo v North West Agricultural Bank and another*²⁹³ where it was stated that “very powerful considerations would be required for its limitation to be reasonable and justifiable.”

The court agreed with the SCA in its use of section 173 of the Constitution in laying down procedural requirements for certification.²⁹⁴ It stated that the principle guiding the courts power in terms of this section was the interest of justice and this is the standard that is to be applied when considering certification applications.²⁹⁵ Jafta J added the following to what was said in the SCA:

“These requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise.”²⁹⁶

The requirements for certification are not to be applied rigidly and class actions are to be welcomed by courts as a procedural mechanism available to litigants.²⁹⁷ However, the court must maintain full control over the action at all times.²⁹⁸

²⁹⁰ 6.

²⁹¹ 6.

²⁹² 12.

²⁹³ *Chief Lesapo v North West Agricultural Bank and another* (CCT23/99) [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (16 November 1999) 20.

²⁹⁴ 15.

²⁹⁵ 15.

²⁹⁶ 15.

²⁹⁷ 16.

Another innovative point that was made by the court was that certification need not be obtained in cases where a class action is instituted against the State where a right in the Bill of Rights has been infringed or threatened.²⁹⁹ The court left open the question of whether certification needs to be pursued when bringing an action against private companies, as it was not brought before them.³⁰⁰

In considering the interests of justice standard together with the list of factors laid down in the SCA, this court held that the list of factors are not exhaustive and that the court may take into account any other factor it deems relevant.³⁰¹ It was against this background that the learned judge held as follows:

“The High Court was asked to negotiate uncharted waters without any guidelines. It is therefore understandable that the Court ended up applying a standard other than the interests of justice. As a result its decision was based on an incorrect test.”³⁰²

The court held that the reasoning of the SCA in refusing certification was not compelling. The issues in this case arose from the same facts in the Bread Case. In that case the matter was remitted to the High Court for determination, while in this case the SCA refused certification outright.³⁰³ Another point that the SCA raised that Jafta J disagreed with was the SCA’s interpretation of the Competition Act in supporting the cause of action. Jafta J stated that section 65(6)(a) of the Competition Act undoubtedly allowed for a party who suffered damages due to anti-competitive conduct to approach the court for an assessment or award of damages.³⁰⁴

The SCA also stated that exceptional circumstances would need to be presented before it allowed for an opt in class action to proceed instead of using the joinder device in terms of Rule 10 of the Uniform Rules of Court.³⁰⁵ This court disagreed with this approach and instead held that to

²⁹⁸ 17

²⁹⁹ 18.

³⁰⁰ 18.

³⁰¹ 22-23.

³⁰² 23.

³⁰³ 25.

³⁰⁴ 26.

³⁰⁵ *Mukaddam v Pioneer Food* (49/12) [2012] ZASCA 183 (29 November 2012) 7-8.

require the presence of exceptional circumstances is to go against the standard laid down in the SCA.³⁰⁶

Therefore the CC held that the appeal succeeds and that the matter also be remitted to the High Court for determination in accordance with the principles laid down in this court.³⁰⁷

Although concurring with Jafta J, Mhlantla AJ disagreed on the point of certification. He held that the certification procedure has benefits for all and any types of class actions and therefore the certification procedure should apply to class actions where they are brought even against the State in circumstances where a right in the Bill of Rights has been infringed or threatened.³⁰⁸

7.2.3 CONCLUSION

There are significant contributions that emanated from the SCA judgment in the Bread Case. First, the court approved of the principle laid down in the *Ngxuza* Trial Court decision relating to leave being first sought from the High Court to proceed on a representative basis. This effectively gave rise to certification proceedings in South Africa. Secondly, the court laid down fundamental factors that are to be considered by courts faced with certification proceedings.

However, due to a lack of legislation in South Africa on class action procedure, the CC's judgment serves as precedent to other courts when approached with prospective class actions. Therefore this serves as the current legal position of class action procedure in South Africa.

The CC in *Mukaddam*, although approving the standards set down by the SCA in the Bread Case, found that these requirements or factors were applied too strictly in its SCA judgment. The CC also held that these requirements are not to be treated as conditions precedent to certification proceedings and that the absence of anyone of these factors should not be a bar to certification. These requirements should not be strictly applied when considering a class action.

The ultimate test laid down by the CC was that of the interests of justice, which must serve as the overriding principle. Whilst this is a laudable aim, it does leave things somewhat in the air. How then does the court determine if a class action is the best way forward if it does not meet certain requirements laid down specifically for this purpose?

³⁰⁶ 26.

³⁰⁷ 26-27.

³⁰⁸ 28-30.

The CC judgment has given rise to probable situations where a court may certify a class action based on a judge's sense of justice. This means that even if requirements for certification, as laid down in the Bread Case, are not satisfied, if it is in the interests of justice to proceed as a class action the court may rule accordingly. This would lead to severe consequences such as class lawyers pursuing class actions solely for their financial benefit and not with the interests of the class members at heart. This is a common occurrence in the United States of America and one of the criticisms of class actions in this foreign jurisdiction.

It is submitted that in stating that the requirements for certification of a class action are not to be applied rigidly and that the interests of justice is the overriding consideration, the CC displayed a profound ignorance of court procedure. The certification procedure can be viewed as one that either promotes or prevents access to justice. However, one must look at these requirements not as a block of individual's rights to sue but rather as a mechanism for the court to ensure that this type of proceeding is not abused. The interests of justice would undoubtedly include concepts such as access to court, the prevention of abuse of process and speedy litigation. These are the same concepts that are considered when applying the requirements for certification laid down in the Bread Case. It is difficult to imagine the interests of justice ever justifying the absence of any one of the requirements for certification as laid down in the Bread Case.

While the SCA in the Bread Case required certification proceedings prior to the institution of all class actions, the CC ruled that certification is not a requirement when a claim is instituted to enforce an infringed or threatened right in the Bill of Rights against the State. However, no guidelines were formulated by the CC regarding certification of proceedings against private litigants where a right in the Bill of Rights has been infringed or threatened.

The SCA judgment of the *Mukaddam* case held that certification of an opt in class action required the presence of exceptional circumstances. It can be said that in rejecting this argument, the CC increased access to justice by laying down the interests of justice test, however this test poses its own challenges as mentioned above.

One of the most important points that can be drawn from the CC judgment is that it confirms that class actions are no longer limited to constitutional claims. It confirmed the development of the common law and the factors laid down by the SCA in the Bread Case and it eloquently stated

that the test to be applied when assessing the suitability of a class action would be the interests of justice test.

Overall, the SCA in the Bread Case and the CC in the case of *Mukaddam* have laid down important guidelines in class action procedure. These guidelines need to be considered together with the recommendations contained of the SA law Commission Report. A preferable procedure, best suited to South Africa, can only be obtained through a combination of elements that have been tried and tested in both South Africa and the foreign jurisdictions.

CHAPTER EIGHT

A PROPOSED PROCEDURE FOR CLASS ACTIONS IN SOUTH AFRICA

There is no point to the existence of substantive law if no effect can be given to it procedurally. Class actions have proven to be an exceptional method to give effect to Constitutional rights as in the *Ngxuza* Trial Court decision and the Appeal Court decision. However, they can be equally beneficial in consumer litigation. The fact that many South African statutes make provision for class actions is not an indication of the Legislature reaching its goal of providing access to justice. Only once vulnerable litigants can put this provision into practice, can access to justice be truly achieved. Therefore, some direction needs to be given to litigants who wish to use this form of litigation in seeking judicial redress. Through the amalgamation of foreign jurisdictions' class action legislation, the class action guidelines laid down by South African courts and the recommendations of the SA Law Commission's Report, the Legislature should be able to introduce legislation to govern class action procedure in the best way possible. In this way, both the theoretical and practical aspects of class action procedure can be considered together with the identified pitfalls found in foreign jurisdictions' class action procedures.

8.1 ELEMENTS OF THE PROPOSED PROCEDURE

8.1.1 A PROCEDURE THROUGH LEGISLATION OR COURT RULES

Currently in South Africa, there is no legislation governing class action procedure. In the abovementioned foreign jurisdictions, both Ontario and Australia have enacted class action legislation, while the United States of America has opted for a rule of court instead. Academics submit that further development of a class action procedure should not be left entirely to the courts as a legislative framework guiding this procedure would be preferable in ensuring consistency.³⁰⁹ Courts must be able to apply the same rules to all prospective class actions brought before them. The SA Law Commission recommended that "the principles underlying class actions and public interest actions should be introduced by an Act of Parliament and the necessary procedures by rules of court."³¹⁰ In practice, the SCA in the *Bread Case* stated that in determining a procedure for class actions, policy issues may arise which is for the Legislature to decide and not the courts.³¹¹ The substantive and procedural aspects of a class action enacted

³⁰⁹ Hurter (note 57 above) 303, De Vos (note 2 above) 754.

³¹⁰ SA Law Commission Report (note 10 above) 12.

³¹¹ 18.

through legislation is preferable for South Africa, with the intricacies of the procedure being provided for through rules of court as suggested by the SA Law Commission. In this way there will be one codified approach that can be used by courts faced with class actions, ensuring uniformity and certainty.

8.1.2 A CERTIFICATION PROCESS

The benefits and importance of the certification process have been mentioned above along with a discussion of the Australian regime where this process has not been adopted. Despite the time consuming nature of this process, a certification process is followed in the American and Canadian foreign jurisdictions. Hurter has referred to the certification process as being the most important feature of class action litigation.³¹² The Trial Court decision in the case of *Ngxuza* distinctly acknowledged a certification process by stating that “the possibility of unjustified litigation can be curtailed by making it a procedural requirement that leave must be sought from the High Court to proceed on a representative basis prior to actually embarking on that road.” The SA Law Commission recommended same in its Report and went on to expressly define the word “certify” in its Draft Bill.³¹³

In the case of *Mukaddam* the CC held that there was no need for a certification process where a class action was sought to enforce a claim against the State where a right in the Bill of Rights has been infringed or threatened. In agreeing with Mhlantla AJ,³¹⁴ it is my submission that certification would be beneficial in these circumstances as it is imperative in guiding class litigation. Section 38(c) of the Constitution guarantees a class action to individuals in certain circumstances and therefore there is no need to satisfy the requirements of certification to be able to institute a class action in cases involving a right in the Bill of Rights. However, the certification process should be used purely as a procedural tool in ensuring that the class litigation runs smoothly and efficiently.

It is therefore proposed that certification proceedings, as stated in the *Ngxuza* Trial Court decision, form part of the class action litigation process in matters involving a right in the Bill of Rights and in matters involving a non-constitutional right.

³¹² Hurter (note 57 above) 295.

³¹³ SA Law Commission report (note 10 above) 40; 89.

³¹⁴ 28.

8.1.3 THE CERTIFICATION REQUIREMENTS

According to the South African National Consumer Council, the criteria for certification should be defined as broadly as possible in order to facilitate access to justice.³¹⁵

As stated above, there are many similarities between the certification requirements laid down in South African case law, the foreign jurisdictions and the SA Law Commission Report's Draft Bill³¹⁶ on class actions. This Bill lists the requirements of certification as follows:

“In deciding to certify an action as a class action, the court may take into account -

- (a) evidence of the existence of an identifiable class of persons;
- (b) the existence of a *prima facie* cause of action;
- (c) issues of fact or law which are common to the claims or defences of individual members of a class;
- (d) the availability of a suitable representative or representatives to represent the interests of the members of the class;
- (e) the interests of justice; and
- (f) whether, having regard to all relevant circumstances, a class action would be the appropriate method of proceeding with the action.”³¹⁷

As found in the foreign jurisdictions, the SA Law Commission Report correctly recommends that an action no longer proceed as a class action if any of the criteria for certification that was originally met, is no longer fulfilled.³¹⁸ This prevents the litigation from becoming unmanageable in the future.

(a) Identifiable class of persons

The mentioned foreign jurisdictions have differing versions of the numerosity requirement. In debating the approaches adopted by the foreign jurisdictions, the SA Law Commission acknowledges that “the precise number of the litigants is not necessarily directly related to the complexity of the litigation and whether it deserves a special procedure.”³¹⁹ This negates the Ontario and Australian approaches. The Commission then acknowledges the impracticability of

³¹⁵ SA Law Commission Report (note 10 above) 41.

³¹⁶ Hereinafter referred to as the ‘Draft Bill.’

³¹⁷ Section 6(2). Of the Draft Bill.

³¹⁸ Section 6(3) of the Draft Bill.

³¹⁹ SA Law Commission Report (note 10 above) 42.

joinder test as required under the American regime but does not formulate a test exactly like it. The Commission instead asks the court to determine whether there are so many potential litigants that suing together in terms of ordinary civil procedure would be impracticable.³²⁰ This approach is preferable and proposed as it allows for flexibility in not providing for a specific number of litigants or restricting the numerosity determination to that of joinder being impracticable. It essentially allows for the impracticability to be considered as one of the factors and not the only factor in determining the numerosity requirement. Given the SA Law Commission's recommendation of supplementing proposed class action legislation with rules of court, guidelines should be provided to enable the court to establish whether the factors determining numerosity requirement have been met.

(b) *Prima facie* cause of action

The SA Law Commission and the Ontario CPA specifically require that the pleadings disclose a cause of action while the American and Australian regimes do not list this as a requirement for certification. This often involves the question of whether a preliminary test of the merits of the case should occur at this stage. Mulheron submits that none of these foreign jurisdictions expressly permits the consideration of the merits of the claim at certification proceedings.³²¹ However, in satisfying the other requirements for certification in the foreign jurisdictions as well in Australia where there is no certification process, an assessment of the merits does occur, albeit at a superficial level. It is therefore proposed that at the stage of certification the only question that is to be answered is whether the claim(s) of the potential class members will be able to be pursued through class litigation. The success of the litigation should not be a consideration at this stage and a consideration of the merits and evidence in support of it should only occur with reference to question of whether the claims are “legally plausible” as stated by the SCA in the Bread Case.³²²

(c) Common issues of fact or law

Common issues of law or fact form the foundation of a class action and this requirement is therefore of utmost importance. The foreign jurisdictions have recognized this and have included this requirement in their class action legislation. The American class action regime requires the

³²⁰ Ibid.

³²¹ Mulheron (note 13 above) 134.

³²² 27.

common issues to ‘predominate’ over the individual issues. As previously stated this predominance requirement is not provided under the Ontario class action regime and the Australian regime includes it in an indirect manner. Despite the advantages of including predominance as a stand-alone requirement, the SA Law Commission does not suggest it citing access to justice as its reason for doing so. However, it is proposed that due to the advantages of the predominance requirement highlighted in the discussion of the American class action regime above, this requirement should either be included in class action legislation as a stand-alone requirement or in the court rules as a factor that must be taken into consideration when dealing with the requirement of commonality. In this way the predominance of the common issues are taken into account in any event.

(d) Suitable representative

The different pieces of legislation in the abovementioned foreign jurisdictions state that adequate representation of the absent class members is required by the representative litigant. The SA Law Commission Report states that the representative should be suitable and adequately represent absent class members with the required financial resources to pursue the litigation in the absence of a conflict of interest.³²³ It also states that the court must be satisfied that a *bona fide* class action is being brought before appointing the representative.³²⁴ This was the approach of the SCA in the Bread Case, where various factors gauging the suitability of the representative were mentioned.³²⁵

Hurter submits that the word ‘suitability’ in the Draft Bill of the SA Law Commission Report should be replaced by the word ‘adequately’ in order to avoid any redundancy of the legislation.³²⁶ This would also bring the proposed South African legislation in line with that of the foreign jurisdictions discussed.

It is submitted that Hurter proposes a noteworthy change to the Draft Bill and in implementing her suggestion the Legislature would avoid the unintended ambiguity that now exists in the section. Also, the factors listed by the SCA in the Bread Case and the SA Law Commission Report should be included in the class action legislation and guidelines as to how to assess these

³²³ SA Law Commission Report (note 10 above) 49.

³²⁴ Ibid 38.

³²⁵ 35.

³²⁶ Hurter (note 19 above) 51.

factors should be made available in the rules of court. This will serve as a guideline to judges in giving procedural effect to the substantive law.

In assessing the suitability or adequacy of the representative, the court should also take cognizance of the fee agreement between the lawyer and the class members. The awards made in class actions are usually very large with the lawyer, who is usually the class representative, taking a percentage of these awards towards his legal fees. Therefore the court must be especially aware of fee agreements that reflect that the lawyer is to receive a large sum of money in fees which may be most of the class award.

In acknowledging that “a large percentage of the South African population is unsophisticated, poorly educated and indigent and therefore unable to enforce their rights on their own...that it is not an answer to the problem to allow somebody, regardless of the wishes of the group of unsophisticated and poorly educated litigants, to proceed with an action on behalf of such a group,” both the SA Law Commission and the SCA in the Bread Case cited the ideological plaintiff concept with approval.³²⁷ This removes the need for the requirement of ‘typicality’ found under the American class action regime, as the representative plaintiff need not even have a claim against the defendants in order to represent the absent class members.

It is therefore proposed that the concept of the ideological plaintiff be adopted into South African class action legislation as it is the concept best suited to the reparation of historical injustices suffered in the country. By allowing consumer and legal aid organisations to represent individuals who are unable to represent themselves in obtaining redress, a contribution is made to the principle of access to justice. The courts should also be obliged to take into account fee agreements between the members and the class representative or lawyer, in deciding whether a class action should proceed.

(e) The interests of justice

The SA Law Commission Reports lists the interests of justice as a stand-alone requirement in the certification process. The CC in *Mukaddam* stated that the interest of justice is the standard that is to be applied when considering certification applications.³²⁸ As previously stated, one could

³²⁷ SA Law Commission Report (note 10 above) 37; the Bread Case 35.

³²⁸ 15.

conclude that the manner in which the court phrased this test indicates an intention for this requirement to be an overriding requirement.

The question that needs to be answered base on the CC judgment is whether class actions in South Africa should proceed on vague concepts like the interests of justice, or should they proceed on carefully considered rules that are put into place to ensure that class actions are brought only in carefully considered circumstances? On the other hand, should the approach be that a class action should be brought even if all the requirements laid down in the Bread Case are met but it is not in the interests of justice to bring such an action?

It is submitted that instead of a specific stand-alone requirement, the interest of justice should be an overarching requirement of the certification process. The reasoning is that the interests of justice should be a goal that courts should strive to attain when any claim is brought, by way of a class action or not. It links closely to the concept of access to justice and is therefore considered to be a pillar of the South African justice system. It is suggested that the interests of justice need not be a stand-alone requirement for certification and should instead be included in section 6(1) of the Draft Bill. The section should then read “No action shall proceed as a class action unless the court has certified the action as a class action to be commenced in the interests of justice.” The requirements of certification laid down in the Bread Case should therefore be met along with the consideration of whether it is in the interests of justice to bring such an action.

(f) An appropriate procedure

Amongst the foreign jurisdictions the class action is either required to be the superior method of adjudication or the preferred method of adjudication. Requiring a preferred method over a superior method increases access to justice as this is an easier standard to meet. The SA Law Commission Report goes further in promoting access to justice by merely requiring the class action to be an appropriate procedure to pursue the claims. This proposal seems to be an acceptable one. However, it is proposed that like some of the foreign jurisdictions, clear factors need to be laid down in legislation under this requirement to guide the representative litigant in making its case. Guidelines laid down in the court rules under each factor will also prove helpful in aiding the court in its determination.

(g) Class definition

First, the definition section of the Draft Bill does not define the word ‘class.’ It is proposed that some definition, even if broadly stated, be given to this word. A proposed definition of a class that can be adopted and that is adapted from the Draft Bill’s definition of a class action is “persons claiming relief arising from substantially similar issues.”

Secondly, as stated in the Trial Court decision of *Ngxuza* and later affirmed in the Appeal Court decision of the same case, specific details regarding the identities of the class members is not required. In the CC case of *Mukaddam* the court confirmed the same reasoning in the Bread Case.³²⁹ This position is recommended as it should never be that certification is refused due to the identity of – sometimes hundreds of thousands – individuals not being ascertained.

Thirdly, all of the foreign jurisdictions make provision for sub-classes. Section 6(5) of the Draft Bill states as follows:

“The court shall not be precluded from certifying an action as a class action merely by reason of the fact that there are issues pertaining to the claims of all or some of the members of the class which will require individual determination, or that different class members seek different relief.”

It is proposed that the draft legislation be amended to provide expressly for the use of sub-classes to allow the court to deal with individual issues or issues that are only common to a certain numbers of the class.

(h) Notice to the class

The opt-out model model of notice has been favoured in both the foreign jurisdictions and in the South African courts.³³⁰ Although the opt in model has its advantages, the Ontario regime shuns it in its entirety. Legislation in each of the foreign jurisdictions dictate which model is to be used, when notice is to be given, to whom notice is to be given and what the notice is to contain. The Draft Bill leaves it to the courts to decide on notice requirements by stating as follows:

³²⁹ The Bread Case 23-26.

³³⁰ In the *Ngxuza* trial court decision and in the Bread Case the opt out model of notice was sought to be used.

“The court which certifies an action as a class action may give directions to the representative with regard to -

- (a) the giving of notice of the action to the members or potential members of the class concerned;
- (b) the form which such notice should take;
- (c) the way in which such notice is to be communicated to the members of the class.”³³¹

In section 8(3) of the Draft Bill in the SA Law Commission Report, the options of the opt out notice, the opt in or no notice at all is given to the court. This approach allows for flexibility in certifying a class action. Not only are judges able to exercise their discretion with regard to the unique facts of each case but they are also able to actively avoid problems encountered in the foreign jurisdictions where a specific type of notice is prescribed. The list factors listed in the Draft Bill is not a closed list and judges are able to regard any other factor they think relevant to the certification enquiry.³³²

The main objective of this requirement is that class, or potential members of the class, are to be notified of the progression of the class action. Due process is required. It is recommended that the types of notice and the mediums through which notice can be given be highlighted in the court rules as this is not provided for in the Draft Bill. For example, if a class is relatively small a judge can be guided into ordering that individual notice be given. Whereas if the class is relatively large notice can be given via electronic means such as radio, television, posters or publication in a newspaper circulated in the relevant area. The instances when notice is most important, for example at the commencement of certification proceedings and when settlement is reached, should also be mentioned. The content requirements of the different notices should also be made available to the judges in the court rules. Flexibility should be at the forefront of this consideration. Guidelines in the court rules assisting the court in determining the factors highlighted in section 8(2) of the Draft Bill would also prevent inconsistency among judgments. The SA Law Commission Report proposes that the legislation provide for this detail.³³³ However, it is submitted that in order to prevent proposed legislation from becoming long and convoluted, such detail should instead be covered in the court rules.

³³¹ Section 8(1).

³³² Section 8(2).

³³³ SA Law Commission Report (note 10 above) 60-61.

(i) Settlement of a class action

Court approval of settlements and notice of a proposed settlement to class members seems to be the rule of thumb in the foreign jurisdictions. It is therefore no surprise that the SA Law Commission Report recommends the same approach. This approach is recommended as it gives effect to the interests of the absent class members. A representative litigant is unable to settle a class action on his own terms for his own benefit only. Through notice given about a proposed settlement, the class members are able to object to terms and conditions of the settlement and the court will be able to carefully consider these objections. It is pertinent and thus recommended; that factors be listed in proposed legislation to enable the court to determine if a settlement is unjust and therefore improper. Such factors factor should be, *inter alia*, if the settlement is excessively one-sided or if there has been any collusion between the parties.

(j) Monetary relief

The ultimate goal of the class members is to obtain redress, most commonly in the form of monetary relief, for the damages they each suffered. At this stage of the class action, the focus diverts from arguments in courtroom to the formation of the best practical method of actually providing compensation to the absent class members.

In the mentioned foreign jurisdictions the assessment of awards and the distributing of compensation can occur in many different ways. South Africa has restricted itself to making awards through individual or aggregate assessments and the court is ultimate decision-maker of which is the most appropriate assessment in the circumstances.³³⁴ This is in line with what is stated in section 76(1)(c) of the Consumer Protection Act:

“a court can award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any conditions that the court considers just and equitable to achieve the purpose of the Act.”

³³⁴ SA Law Commission Report (note 10 above) 66.

In practice, the court has also been inclined to reject the *cy pres* method of distribution and favoured an award being made on aggregate basis through the use of statistical formulae.³³⁵ Money should replace money lost. The courts have refused to take it upon themselves to determine what would be a suitable replacement for money in the class members' hands. It is submitted that although this is an admirable approach, the alternate methods of distribution like the *cy pres* and coupon methods should not be disregarded entirely. There may be instances where the class is so large that actual monetary distribution becomes burdensome with the result that the total sum of the award is not effectively distributed. The alternate methods of distribution may then just be the solution to these problems, even for a limited period of time.

It is therefore proposed that the draft legislation make provision for these alternate methods of distribution and that the court rules contain guidelines as to when it would be most appropriate for the courts to suggest the use of such methods.

³³⁵ The Bread Case 58.

CHAPTER NINE

CONCLUSION

The inclusion of a collective redress provision in the Consumer Protection Act has opened the doors to class litigation for consumers in South Africa. It is now easy to envisage a situation where South African courts will inevitably be faced with its own version of a ‘Lance Armstrong’ class action. Although a welcomed development, if we were to be faced with a claim like this at present, our courts would still be making their way through the dark, hoping for a light at the end of the tunnel which would hopefully come in the form of class action procedure legislation. This is because since the SA Law Commission’s Report in 1998, there has been no promulgation of any class action procedure legislation or guidelines in line with the Commission’s recommendations. This has not come without consequence.

The Trial Court decision and the Appeal Court decision of the *Ngxuza* case together with the Bread Case and the case of *Mukaddam*, were groundbreaking decisions that contributed to the development of class action law in South Africa. These cases laid down important procedural requirements of the certification process that coincide with the requirements initially laid down by the SA Law Commission in its Report. However, one is inclined to consider what the position would have been had a procedural framework been in place to guide the judges who adjudicated over these matters in the lower courts. A great saving in court time and resources would no doubt have occurred.

Although appreciative of the positive impact of these cases on class action development, they serve as a clear indication of the inconsistencies of judge made procedural law. The judges in these cases drew only on a combination of class action legislation of the mentioned foreign jurisdictions and the recommendations of the SA Law Commission Report. This is not sufficient and therefore should not be accepted as an adequate method of adjudication. Drawing on the positive aspects of the foreign jurisdictions’ legislation and combatting the negative effects of their class action procedures is recommended. However, a blind adoption of foreign legislation does not do justice to consumers who are differently situated in comparison to those consumers in the foreign jurisdictions. A procedure that is tailor-made to suit the past and current social, political and historical context of South Africa is one that should be adopted.

The certification process is an integral part of a class action. It serves as a road map to both judges and class representatives in assessing the direction and progress of the action. It is also fundamental in ensuring that the rights of the absent class members are considered at each stage of the litigation and provides certain checks and balances through its requirements to avoid an abuse of the class action procedure.

The proposed class action procedure is a combination of what has been laid down in the foreign jurisdictions as well as the in the SA Law Commission Report and in South African case law. The recommendation that a procedure be enacted through legislation and court rules is in line with the foreign jurisdictions and will go a long way in ensuring consistency and uniformity in class action adjudication. The proposed procedure is by no means perfect but it is a procedure that takes into account a comparative perspective of procedures that have been successfully implemented in foreign jurisdictions. This comparison serves as a basis for informed discussions on class actions.

The Preamble of the Consumer Protection Act states that one of the purposes of the Act is to “facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests.” Section 3(1)(h) of the Act then goes on to state that another purpose of the Act is to provide for “an accessible, consistent, harmonised, effective and efficient system of redress for consumers.” This coincided perfectly with the provision for class actions that is made in section 4(1)(c) of the Act. However, the Act makes no mention of a certification process.

In order to truly give effect to these sections, the first step that must be taken is to enact legislation that caters for an appropriate class action procedure. Once this is done, the frequency of class actions in courts will lead to further development and amendment of the certification and post-certification procedure, resulting in greater access to justice for vulnerable consumers. One can only hope that through this practice, class action procedure in South Africa will eventually ensure that the aim of the CPA to provide relief for vulnerable consumers, who on their own cannot afford to litigate, is achieved.

APPENDIX – LEGISLATION

The United States of America: Rule 23, Federal Rules of Civil Procedure

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of:
 - (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
 - (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
- (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other

available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment.

Whether or not favorable to the class, the judgment in a class action must:

- (A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and
- (B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues.

When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses.

When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General.

In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders.

An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals.

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel.

When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel.

The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel.

Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs.

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

The Canadian Province of Ontario: Class Proceedings Act, 1992, SO 1992 c6

Definitions

1. In this Act,

“common issues” means,

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; (“questions communes”)

“court” means the Superior Court of Justice but does not include the Small Claims Court; (“tribunal”)

“defendant” includes a respondent; (“défendeur”)

“plaintiff” includes an applicant. (“demandeur”)

Plaintiff’s class proceeding

2. (1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.

Motion for certification

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff.

(3) A motion under subsection (2) shall be made,

(a) within ninety days after the later of,

(i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and

(ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or

(b) subsequently, with leave of the court.

Defendant's class proceeding

3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff.

Classing defendants

4. Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

- (a) would fairly and adequately represent the interests of the subclass;
 - (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
 - (c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.
- (3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.
- (4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.
- (5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

Certain matters not bar to certification

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
- 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
 - 2. The relief claimed relates to separate contracts involving different class members.
 - 3. Different remedies are sought for different class members.
 - 4. The number of class members or the identity of each class member is not known.
 - 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

Refusal to certify: proceeding may continue in altered form

7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,
- (a) order the addition, deletion or substitution of parties;
 - (b) order the amendment of the pleadings or notice of application; and

(c) make any further order that it considers appropriate.

Contents of certification order

8. (1) An order certifying a proceeding as a class proceeding shall,

(a) describe the class;

(b) state the names of the representative parties;

(c) state the nature of the claims or defences asserted on behalf of the class;

(d) state the relief sought by or from the class;

(e) set out the common issues for the class; and

(f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out.

(2) Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, subsection (1) applies with necessary modifications in respect of the subclass.

(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding.

Opting out

9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

Where it appears conditions for certification not satisfied

10. (1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties.

(3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c).

Stages of class proceedings

11. (1) Subject to section 12, in a class proceeding,

(a) common issues for a class shall be determined together;

(b) common issues for a subclass shall be determined together; and

(c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25.

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

Court may stay any other proceeding

13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

Participation of class members

14. (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

Discovery

15. (1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding.

(2) After discovery of the representative party, a party may move for discovery under the rules of court against other class members.

(3) In deciding whether to grant leave to discover other class members, the court shall consider,

(a) the stage of the class proceeding and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;

(d) the approximate monetary value of individual claims, if any;

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and

(f) any other matter the court considers relevant.

(4) A class member is subject to the same sanctions under the rules of court as a party for failure to submit to discovery.

Examination of class members before a motion or application

16. (1) A party shall not require a class member other than a representative party to be examined as a witness before the hearing of a motion or application, except with leave of the court.

(2) Subsection 15 (3) applies with necessary modifications to a decision whether to grant leave under subsection (1).

Notice of certification

17. (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(a) the cost of giving notice;

- (b) the nature of the relief sought;
 - (c) the size of the individual claims of the class members;
 - (d) the number of class members;
 - (e) the places of residence of class members; and
 - (f) any other relevant matter.
- (4) The court may order that notice be given,
- (a) personally or by mail;
 - (b) by posting, advertising, publishing or leafleting;
 - (c) by individual notice to a sample group within the class; or
 - (d) by any means or combination of means that the court considers appropriate.
- (5) The court may order that notice be given to different class members by different means.
- (6) Notice under this section shall, unless the court orders otherwise,
- (a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;
 - (b) state the manner by which and time within which class members may opt out of the proceeding;
 - (c) describe the possible financial consequences of the proceeding to class members;
 - (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;
 - (e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
 - (f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;
 - (g) describe the right of any class member to participate in the proceeding;
 - (h) give an address to which class members may direct inquiries about the proceeding;
- and

(i) give any other information the court considers appropriate.

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

Notice where individual participation is required

18. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

(3) Notice under this section shall,

(a) state that common issues have been determined in favour of the class;

(b) state that class members may be entitled to individual relief;

(c) describe the steps to be taken to establish an individual claim;

(d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;

(e) give an address to which class members may direct inquiries about the proceeding;
and

(f) give any other information that the court considers appropriate.

Notice to protect interests of affected persons

19. (1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

Approval of notice by the court

20. A notice under section 17, 18 or 19 shall be approved by the court before it is given.

Delivery of notice

21. The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical.

Costs of notice

22. (1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties.

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

Statistical evidence

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

(2) A record of statistical information purporting to be prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity.

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

(a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;

(b) complied with subsections (4) and (5); and

(c) complied with any requirement to produce documents under subsection (7).

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

(a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;

- (b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or
- (c) was derived from reference material generally used and relied on by members of an occupational group.

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

- (a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and
- (b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information.

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

Aggregate assessment of monetary relief

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

- (2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.
- (3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.
- (4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.
- (5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.
- (6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,
 - (a) the use of standardized proof of claim forms;
 - (b) the receipt of affidavit or other documentary evidence; and
 - (c) the auditing of claims on a sampling or other basis.
- (7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.
- (8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.
- (9) The court may give leave under subsection (8) if it is satisfied that,
 - (a) there are apparent grounds for relief;
 - (b) the delay was not caused by any fault of the person seeking the relief; and
 - (c) the defendant would not suffer substantial prejudice if leave were given.
- (10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

Individual issues

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

- (a) dispense with any procedural step that it considers unnecessary; and
- (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).

(7) A determination under clause (1) (c) is deemed to be an order of the court.

Judgment distribution

26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined.

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate.

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

Judgment on common issues

27. (1) A judgment on common issues of a class or subclass shall,

(a) set out the common issues;

(b) name or describe the class or subclass members;

(c) state the nature of the claims or defences asserted on behalf of the class or subclass;
and

(d) specify the relief granted.

(2) A judgment on common issues of a class or subclass does not bind,

(a) a person who has opted out of the class proceeding; or

(b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

- (a) are set out in the certification order;
- (b) relate to claims or defences described in the certification order; and
- (c) relate to relief sought by or from the class or subclass as stated in the certification order.

Limitations

28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

- (a) the member opts out of the class proceeding;
- (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
- (c) a decertification order is made under section 10;
- (d) the class proceeding is dismissed without an adjudication on the merits;
- (e) the class proceeding is abandoned or discontinued with the approval of the court; or
- (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

Discontinuance, abandonment and settlement

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

(2) A settlement of a class proceeding is not binding unless approved by the court.

(3) A settlement of a class proceeding that is approved by the court binds all class members.

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

Appeals

30. (1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding.

(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court.

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

(4) If a representative party does not appeal or seek leave to appeal as permitted by subsection (1) or (2), or if a representative party abandons an appeal under subsection (1) or (2), any class member may make a motion to the court for leave to act as the representative party for the purposes of the relevant subsection.

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3).

(6) A class member may appeal to the Divisional Court from an order under section 24 or 25 determining an individual claim made by the member and awarding more than \$3,000 to the member.

(7) A representative plaintiff may appeal to the Divisional Court from an order under section 24 determining an individual claim made by a class member and awarding more than \$3,000 to the member.

(8) A defendant may appeal to the Divisional Court from an order under section 25 determining an individual claim made by a class member and awarding more than \$3,000 to the member.

(9) With leave of the Superior Court of Justice as provided in the rules of court, a class member may appeal to the Divisional Court from an order under section 24 or 25,

(a) determining an individual claim made by the member and awarding \$3,000 or less to the member; or

(b) dismissing an individual claim made by the member for monetary relief.

(10) With leave of the Superior Court of Justice as provided in the rules of court, a representative plaintiff may appeal to the Divisional Court from an order under section 24,

(a) determining an individual claim made by a class member and awarding \$3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief.

(11) With leave of the Superior Court of Justice as provided in the rules of court, a defendant may appeal to the Divisional Court from an order under section 25,

(a) determining an individual claim made by a class member and awarding \$3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief.

Costs

31. (1) In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court.

Fees and disbursements

32. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(4) If an agreement is not approved by the court, the court may,

- (a) determine the amount owing to the solicitor in respect of fees and disbursements;
- (b) direct a reference under the rules of court to determine the amount owing; or
- (c) direct that the amount owing be determined in any other manner.

Agreements for payment only in the event of success

33. (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

(2) For the purpose of subsection (1), success in a class proceeding includes,

- (a) a judgment on common issues in favour of some or all class members; and
- (b) a settlement that benefits one or more class members.

(3) For the purposes of subsections (4) to (7),

“base fee” means the result of multiplying the total number of hours worked by an hourly rate;
 (“honoraires de base”)

“multiplier” means a multiple to be applied to a base fee. (“multiplicateur”)

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member.

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor’s base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee.

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding.

Motions

34. (1) The same judge shall hear all motions before the trial of the common issues.

(2) Where a judge who has heard motions under subsection (1) becomes unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

(3) Unless the parties agree otherwise, a judge who hears motions under subsection (1) or (2) shall not preside at the trial of the common issues.

Rules of court

35. The rules of court apply to class proceedings.

Crown bound

36. This Act binds the Crown.

Application of Act

37. This Act does not apply to,

- (a) a proceeding that may be brought in a representative capacity under another Act;
- (b) a proceeding required by law to be brought in a representative capacity; and
- (c) a proceeding commenced before this Act comes into force.

38. Omitted (provides for coming into force of provisions of this Act).

39. Omitted (enacts short title of this Act).

Australia: Pt. IVA of the Federal Court of Australia Act, 1976

Division 1—Preliminary

33A Interpretation

In this Part, unless the contrary intention appears:

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.

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.

sub-group representative party means a person appointed to be a sub-group representative party under section 33Q.

33B Application

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*.

Division 2—Commencement of representative proceeding

33C Commencement of proceeding

- (1) Subject to this Part, where:
 - (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.

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

33D Standing

(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.

(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.

33E Is consent required to be a group member?

(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.

(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;

- (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.

33F Persons under disability

- (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.

33G Representative proceeding not to be commenced in certain circumstances

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.

33H Originating process

- (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.
- (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.

33J Right of group member to opt out

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

33K Causes of action accruing after commencement of representative proceeding

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

33L Situation where fewer than 7 group members

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.

33M Cost of distributing money etc. excessive

Where:

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

- (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).

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

(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

- (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.

(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.

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

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
- (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.

33Q Determination of issues where not all issues are common

(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.

(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.

33R Individual issues

(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.

(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.

33S Directions relating to commencement of further proceedings

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
- (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.

33T Adequacy of representation

(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.

(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.

33U Stay of execution in certain circumstances

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 proceeding is determined.

33V Settlement and discontinuance—representative proceeding

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

33W Settlement of individual claim of representative party

- (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.
- (4) Before granting a person leave to withdraw as a representative party:
 - (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.
- (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

33X Notice to be given of certain matters

- (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);
- (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.

(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.

(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.

(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.

33Y Notices—ancillary provisions

(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:

- (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

(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.

(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.

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

(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.

33Z Judgment—powers of the Court

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

- (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;
- (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.

(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:

(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.

33ZA Constitution etc. of fund

(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:

(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

(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.

(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

(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.

33ZB Effect of judgment

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

33ZC Appeals to the Court

(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

(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.

(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.

(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.

(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.

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

(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.

Division 6—Miscellaneous

33ZE Suspension of limitation periods

(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.

(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.

33ZF General power of Court to make orders

(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.

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

33ZG Saving of rights, powers etc.

Except as otherwise provided by this Part, nothing in this Part affects:

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

- (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
- (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.

33ZH Special provision relating to claims under Part VI of the *Competition and Consumer Act 2010* etc.

(1) For the purposes of the following provisions, a group member in a representative proceeding is to be taken to be a party to the proceeding:

- (a) subsection 87(1) of the *Competition and Consumer Act 2010*;
- (b) subsection 238(1) of Schedule 2 to that Act, as that subsection applies as a law of the Commonwealth.

(2) An application by a representative party in a representative proceeding under:

- (a) subsection 87(1A) of the *Competition and Consumer Act 2010*; or
- (b) subsection 237(1) of Schedule 2 to that Act, as that subsection applies as a law of the Commonwealth;

is to be taken to be an application by the representative party and all the group members.

33ZJ Reimbursement of representative party's costs

(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.

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

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