

OVERVIEW AUSTRALIA-Authors Odette McDonald and Ben Phi

	Points	Australia
1	<p>What kind of claim may be suitable for a collective redress claim?</p> <ul style="list-style-type: none"> • Suitable • Not suitable • Injunctive • Financial redress • Examples 	<p>Any kind, save that since 2001 there has been a legislative prohibition against certain types of migration claims being pursued as collective actions.</p> <p>Examples: shareholder, investor, human rights, trustee, consumer, personal injury (especially, defective product), trade union and wage underpayment, environment / disaster, anti-cartel.</p> <p>There are class action regimes in Australia at the Federal level (Part IVA of the <i>Federal Court of Australia Act 1974</i> (Cth) (FA)), and similar regimes in most States (including NSW, Victoria, Queensland) which are modelled on the FA. WA currently in the process of adopting one.</p>
2	<p>In practical terms, how does the action come about?</p> <ul style="list-style-type: none"> • Who 'creates' it - takes steps to put it forward? • Is there claimant demand • Book build/ opt-in claimants • Role of the lawyer 	<p>Class actions are typically lawyer-driven, but can also be driven by litigation funders, persons impacted by the wrong, and industry associations.</p> <p>There needs to be seven or more persons with a claim against the same person, arising out of the same, similar or related circumstances, and giving rise to a substantial common issue of law or fact (often referred to as "threshold" requirements) (FA, s33C(1)).</p> <p>We have an opt out class action system, but in practice book building often occurs prior to commencement in certain types of class action as a way of ensuring the action is financially viable. Traditionally, claims involving book building were issued as "closed" actions, but this occurs less often now due to advent of common fund orders and multiplicity / competition.</p> <p>The lawyer represents the named plaintiffs / applicants and the class of group members. They must not also represent third parties (e.g. litigation funders)</p>

<p>3</p>	<p>Who may file a claim and who stands to gain?</p> <ul style="list-style-type: none"> • Representative claimant/ plaintiff? • Equivalent? • Consumer association? • Role (if any) of 'Opt in' and 'Opt out' • Specific entities responsible for the pursuit of multi-claims procedures 	<p>A representative plaintiff / applicant files on their behalf, and on behalf of group members. Group members do not need to be named in the proceeding, but can be defined by reference to criteria (e.g. persons who purchased certain shares in a company between certain dates).</p> <p>Trade unions issue class actions in their own name (on behalf of members), as can regulators pursuant to specific legislative provisions that give them standing. Other consumer associations may in their own name, subject to standing requirements (which, in practice, explains why we don't see this often).</p> <p>Australia has an opt out regime, but some claims issued on a "closed" basis (e.g. where group membership is limited to persons who have "opted in" by signing a litigation funding agreement). Also, Court-ordered registration process often used during an "open" proceeding for the purpose of settlement etc.</p>
<p>4</p>	<p>What are the basic procedural steps? Admissibility and Certification Procedure (by court)?</p> <ul style="list-style-type: none"> • Leave? • Certification? • Trial on common issues? • Separate quantum / damages trial? • Is determination of liability separate from determination of quantum (i.e. damages awarded)? 	<p>A party can file a class action at any time. While the threshold requirements need to be met, the representative party doesn't need to prove them in order to issue. The Court document must comply with minor technical requirements (e.g. it must say it's a representative proceeding pursuant to the FA; use a specific Court form; describe or otherwise identify the group members, common issues of fact / law, the nature of the claims and relief sought).</p> <p>No certification, but defendants / respondents may apply to "declass" a class action by arguing it doesn't meet the threshold requirements in 33C, that the costs of identifying group members and distributing money would be excessive if the case wins (FA, s33M), and / or that it's not in the interests of justice to continue as a class action (FA, s33N).</p> <p>There is a trial of common issues (and sub-group issues where appropriate), which may be followed by trials of individual issues (but Court can make an award of damages / other relief at end of common issues trial; FA, s33Z(1)). No requirement for separate quantum / damages trial, but judge may order it where appropriate.</p> <p>The court needs to approve any settlement or discontinuance (FA, s33V).</p>

5	<p>What are the likely levels of costs involved?</p> <ul style="list-style-type: none"> • Own side’s costs – please explain to congress • Adverse – please explain to congress 	<p>Own side: No maximum amount, but lawyers may only recover from settlement amounts that are approved by the Court as reasonable.</p> <p>Adverse: Australia is a costs jurisdiction. Group members are not exposed to adverse costs orders (FA, s43(1A)), but representative party is. Adverse costs orders are typically 60-75% of a defendant / respondent’s actual costs (assuming no indemnity cost orders are made).</p> <p>Security for costs: basically always ordered where there is a litigation funder, and case-by-case where the lawyer is acting on a conditional fee basis. Courts typically accept a Deed of Indemnity plus payment of around \$40k into trust for enforcement costs, but will sometimes require payment into Court / bank guarantee (e.g. in order to win carriage in a multiplicity contest – see AMP class action).</p>
6	<p>How are own costs dealt with?</p> <ul style="list-style-type: none"> • Paid on standard basis. • Conditional fee agreement / contingency fee? • Third party litigation funding? • Insurance cover BTE/ATE? 	<p>Rarely paid on a standard basis, given high amounts of costs.</p> <p>Lawyers can act on a conditional basis, and may charge an uplift on their professional fees of no more than 25% (e.g. \$100 becomes \$125). Contingency fees calculated as a proportion of damages are banned under the Uniform Law (but see Lee J in <i>BHP</i> and <i>Turner v Tesa Mining</i>, where his Honour suggests that a Court-approved damages-based contingency arrangement may be permissible, assuming the law firm also lodges security for costs).</p> <p>Third party litigation funding is common (often include blended arrangements, whereby lawyer acts part conditional).</p> <p>ATE in respect of adverse costs common where lawyer acting on conditional basis and certain funders use it. Rarely used to insure disbursements (but good scope for that business to develop in Australia).</p> <p>BTE is basically non-existent in Australia.</p>
7	<p>How is the risk of exposure to Opponent’s costs dealt with?</p> <ul style="list-style-type: none"> • Role of ‘loser pays’ principle –is it engaged/ ‘costs shifting’ • Insurance cover BTE/ATE? • Third party litigation funding 	<p>ATE insurance, third party litigation funding and (rarely) indemnification by a law firm used to manage exposure.</p> <p>In some public interest class actions, the Court has exercised its discretion by not awarding adverse costs (e.g. <i>DBE17</i>)</p>
8	<p>When is a multi-party claim a collective action?</p> <ul style="list-style-type: none"> • Numbers of claimants? <ul style="list-style-type: none"> ○ Minimum ○ Maximum • Who decides? • Other 	<p>See above.</p>

9	<p>Are there different types of multiparty claims in your jurisdiction? E.g. below? Can you explain to congress?</p> <ul style="list-style-type: none"> • Multiple claimants named in an action • Representative claimant proceedings • Test case • Group Litigation Order • Class action • Other 	<p>In addition to opt out class actions (which are referred to as “representative proceedings” in some courts), we have traditional UK-style representative proceedings, test cases, multiple claimants named in an action, representative proceedings that can be run at tribunals (e.g. discrimination claims).</p> <p>However, unless there is some specific restriction, most claims are issued as class actions given how well the regime works.</p>
10	<p>Who establishes which potential claimants can be included in the claim? Who decides if their claims are good enough?</p> <ul style="list-style-type: none"> • Criteria? • Legal team? • Court? • Other? 	<p>The legal team usually, but group definition may change as a result of / following challenges by the defendant / respondent.</p>
11	<p>What is the role - if any - for IT in collective redress?</p> <ul style="list-style-type: none"> • Legal technology • Web based actions • Collection of data • Communication with claimants/ class • Analysis • Other 	<p>A huge role, particularly in group member communications and data analysis, and discovery review. Savvy firms use IT to ensure cases run efficiently, and in a way that reduces legal costs.</p>
12	<p>Please explain a typical collective redress action you have been involved in and discuss points of interest arising:</p> <ul style="list-style-type: none"> ▪ Difficulties ▪ Obstacles ▪ Plus points ▪ What worked and what didn’t work ▪ What would you change if you could? 	<p>See slides.</p>