## Rachael Mulheron

*The Class Actions in Common Law Legal Systems: A Coparative Perspective*

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It all seems so simple. If there is a common cause of action, all plaintiffs should be able to be joined together to have this issue determined rather than a series of individual actions being brought, all of which have to cover the same ground. It is this seemingly simple concept which has formed the basis of the class action.

Rachael Mulheron in her text has shown us, however, just how complicated it can be. The author is an Australian with Commerce, Honours Law and Master of Laws qualifications from the University of Queensland. She is a Queensland solicitor. Her text is based on her Doctorate Thesis at Oxford University. In preparing her thesis, the author received financial support at Oxford University which enabled her to study "on the ground" in both Ontario and New York and to gather material and assimilate jurisprudence not available in England.

The author's interest in multiparty litigation was also developed as a young lawyer involved in group litigation and then immediately struck by the complexity and logistical difficulties which accompany such actions.

By any standards of evaluation, the text is a scholarly work. It is both of high academic merit and practical use. Whilst clearly there are complexities in class action proceedings, these complexities do not follow through into the author's explanations. The text is logically segmented into Parts, Chapters and Sections so that the reader is never left wading through unstructured ramblings but deals only with concise and clear presentation. Convenient tabular summaries of comparative legislative positions and comparative "Pro" and "Con" positions on various points are a real boon to this comprehensibility.

What is amazing to this reviewer is the various class action complexities which are dealt with. One is also struck by the fact that, except rarely, have legislatures approached the same issues in the same manner. Further, it is

quite apparent that, whatever approach is legislatively taken, problems, often unforeseen, have invariably arisen. Sometimes these problems appear to be non-solvable. Sometimes we can learn by the experience in other jurisdictions. Mostly, it seems that courts have been vested with wide discretionary powers and have had to exercise these in the most appropriate manner to suit the circumstances of the case.

The text fundamentally draws comparisons between the class action procedures in the United States, Australia (*The Federal Court of Australia Act 1976* (Cth) provisions) and Ontario. Conveniently, the basic legislative provisions of each jurisdiction are reproduced in the text. However, at various points, the author has made comparisons with jurisdictions other than these three. A perusal of the Table of Legislation shows extensive citations to legislative provisions in British Columbia, Manitoba, Newfoundland and Labrador, Quebec, Saskatchewan, Sweden and the United Kingdom in addition to Australia, Ontario and the United States.

There is no doubt as to the importance of class actions and the relevance of the material to Australian practitioners. The author notes that the number of United States class actions in Federal Courts has increased from 922 to 3,000 in the period 1990 to 2001 and that the judiciaries responsible for implementing the class action regimes in Australia have been receptive to the jurisprudence emanating from the much longer class action experience under the United States Federal Rules of Civil Procedure. She cites examples of Australian litigants bringing the courts' attention to overseas akin positions to which they hope to align to their own and to cases in which Australian courts have been receptive to positions taken elsewhere.

The text is divided into three parts. Part One (Pages 1 to 111) deals with the concept of class actions and its alternatives. It discusses in particular why class actions remain unembraced in the United Kingdom. Specifically, the text examines how things could have been different in the UK had the 1910 *Markt* decision[1] received a different emphasis.

Part Two (pages 115 to 318) forms the part of the text probably of most interest to practitioners and advocates in assessing whether to institute a class action. It focuses on the various criteria and factors governing the commencement of a class action (encompassing matters such as communality, the necessity for "superiority" of the class action over other alternative methods of resolving the relevant issue, suitability of the class action and matters relating to the class representative). It is impossible here to summarise this mine of useful information,

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[1] *Markt & Co. v Knight Steamship Co. Ltd* [1910] 2 KB 1032 (CA). Kirby P (as he then was) in *Esanda Finance Corp Ltd v Carnie* (1992) 29 NSWLR 382 (CA) described this effect of this decision as being that "gradually over a period of more than 80 years, the judges of common law countries have been struggling to recover from (this) set back".

legislation and case citations. Suffice it to say that this reviewer found the discussion of the leading Australian decision in *Philip Morris*[2] and how it may be overcome quite fascinating in view of his prior opinion (referred to in the text) that the decision in that case was legally correct but that *Philip Morris* escaped on a technicality based on a "purist legal view".[3] Rachael Mulheron gives good grounds for convincing this reviewer that the case would now not be followed – and this reviewer hopes she is right.

Part Three (pages 319 to 479) covers important practical matters for practitioners in actually running a class action – for example, problems of over and under class inclusiveness, whether criteria for classes are based on subjective belief that parties have a claim or on some prima facie objective evaluation as to the merits of a claim, the difficulties in giving "opt out" notices and whether costs involved may give rise to dispensing with these, the effect of class actions on limitation periods applicable to plaintiffs and relevant related certification issues, types of awards, the use of statistical evidence, distribution of awards and what to do with any surplus cash after distribution. A good illustration of diversity of treatment is given by the fact that within Canada, the legislation of three Canadian Provinces is totally different in relation to limitation and certification issues and covers all ranges in a possible spectrum.

In summary, this text is clearly written, well segmented into appropriate subject matter heads and covers, so far as this reviewer can ascertain, all aspects of class actions which can possibly arise – and a good number of which he was unaware prior to reading the text. The text is a mine of information. Perhaps it may not sell well in the United States because of the more extensive United States experience and, in light of this, the lack of need to refer to issues as determined elsewhere. But it should sell well in Canada and Australia and should serve as an invaluable resource for any Law Reform Commission or Legal Advisory Body researching class actions. The text is a "must have" for any Australian law library and for any academic or practitioner involved in class action proceedings. It is pretty good value too given the cost of legal texts in this day and age.

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2 *Philip Morris (Aust) Ltd* [1999] FCA 1281; [2000] FCA 229 (Full Court).

3. W Pengilley, "Class Actions Stumble: Tobacco Companies Win" (2000) 16 *Trade Practices Law Bulletin* 31; "*Representative Actions under the Trade Practices Act: The Lessons for Smokers and Tobacco Companies*" (2000) 8 *Competition & Consumer Law Journal* 176.