# TAXPAYERS AND CLASS ACTIONS

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Little attention has, to date, been given to the potential use of the procedural device of class actions for the benefit of groups or classes of taxpayers who share common or similar legal grievances in relation to the operation of Commonwealth or State taxation laws. It is posited that the use of the class action device by aggrieved taxpayers deserves closer scrutiny. Circumstances where this procedural device is likely to be within the reach of taxpayers are highlighted.

## I. INTRODUCTION

Class actions have traditionally been seen as procedural devices which are available only to consumers and related groups. As was indicated by Dr De Maria:

> the legal imagination has only extended to using class action for issues like product liability, credit and financial injustices, and deceptive advertising. It has yet to embrace the issue of class action in administrative law where good decisions and quality governance, rather than hefty damages, ought to be the goals.[1]

But this important procedural device *is* available to other groups. As French J highlighted in relation to the recently established Federal class action regime:

> the new procedure was said to enable groups of people, whether they be shareholders or investors or people pursuing consumer claims, to obtain redress and do so more cheaply and efficiently than would be the case with individual actions. There was no reference in the Second Reading Speech to the use of the representative action in judicial review proceedings... Prior to and at the time of the enactment of the legislation, the emphasis of public discussion was on its application to possible consumer class actions and their impact on business. But there is nothing in the language of Pt IVA which limits its application to such

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1 W De Maria, "Grouped Proceedings in Administrative Law: Activism at the AAT" (1993) 36 *Administrative Review* 48 at 48

actions. Nor is there anything to prevent its application to appropriate proceedings for an order of review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) or prerogative or associated relief.[2]

This article explores the procedural device of class actions and canvasses the potential use of this device for the benefit of groups or classes of taxpayers who share a common or similar legal grievance with regard to the operation of Commonwealth or State tax laws.

Part II explores the regimes governing the use of class actions in all Australian jurisdictions. The benefits which may flow from the employment of this procedural device are canvassed in Part III. The problems that may be encountered in running, or being involved in, a class suit are considered in Part IV. Part V focuses on some of the circumstances in which this device may become available to taxpayers who are seeking legal remedies as a result of the impact of tax laws upon them.

## II. CLASS ACTIONS IN AUSTRALIA

A class action has been defined as "a procedure whereby the claims of many individuals against the same defendant can be brought or conducted by a single representative".[3] Class actions are available, in one form or another, in all Australian jurisdictions.

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2 *Zhang de Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 118 ALR 165 at 183

3 Australian Law Reform Commission Report 46, *Grouped Proceedings in the Federal Court*, 1988 at [2] The term *class actions* is sometimes used in a narrower sense See, for instance, the comment of Kirby P in *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 at 390-1, that a class action is a "radical form of legal procedure [that] has been developed by the courts of the United States. But, it has a number of important features which distinguish it from a representative action . The scope of the proceedings is typically much larger, the parties roped in far more numerous and uncertain, the relief sought is typically different and the costs rules and procedures fashioned are alien to ours" Another procedure that may be employed in litigation involving numerous applicants is the "joinder of parties" procedure, pursuant to which all members of the relevant class would be joined together as plaintiffs. However, joining as parties on the record all members of a group similarly affected by the conduct of the defendant sets "at nought one of the essential characteristics and advantages of representative proceedings"· M Tilbury, "The Possibilities for Class Actions in Australian Law", paper presented at the 1993 Australian Legal Convention in Hobart at 2. See also V Morabito and J Epstein, *Class Actions in Victoria - Time for a New Approach*, 1995 (Report prepared for the Attorney-General's Law Reform Advisory Council) at ch 5 and *Dolgow v Anderson* (1968) *Federal Rules Decisions* 472 at 484-5, per Weinstein J: "It is the duty of the federal courts to render private enforcement practicable Other than the class action, the procedures available for handling proliferated litigation - joinder, intervention, consolidation, and the test case - cannot serve this function in a situation like the one presented here These alternative devices presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention'"

## A. The Traditional Representative Procedure

The rules of court of all Australian jurisdictions contain provisions permitting numerous persons to sue through a representative.[4] Part 8, Rule 13(1) of the *Supreme Court Rules* 1970 (NSW), for instance, provides that "where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them".[5] This 'traditional' representative procedure was derived from Rule 10 of the English Rules of Procedure.[6]

The scope of this procedure was greatly restricted when, in 1910, the English Court of Appeal, in *Markt and Co Ltd v Knight Steamship Co Ltd*,[7] indicated that the 'same interest' requirement meant that the procedure was unavailable in actions where separate and individual contracts were involved or in cases where damages were claimed.[8] However, in *Carnie v Esanda Finance Corporation Ltd*,[9] the High Court indicated that "it has now been recognised that persons having separate causes of action in contract or tort may have 'the same interest' in proceedings to enforce those causes of action".[10] The remedy sought in *Carnie* was a declaration and did not involve damages.[11] The judgments in *Carnie* are, however, inconsistent with the proposition that "where the claim of the plaintiff is for damages the machinery of a representative suit is absolutely

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4 *Federal Court Rules*, Order 6 Rule 13; *Supreme Court Rules* (ACT), Order 19 Rule 10; *Supreme Court Rules* 1970 (NSW), Part 8, Rule 13, *Rules of the Supreme Court of the Northern Territory of Australia*, Order 18 Rule 2, *Rules of the Supreme Court* (Qld), Order 3 Rule 10; *Supreme Court Rules* 1987 (SA), Rule 34.08; *Rules of the Supreme Court* 1965 (Tas), Order 18 Rule 9; *General Rules of Procedure in Civil Proceedings* 1986 (Vic), Rule 18 02; *Rules of the Supreme Court* 1971 (WA), Order 18 Rule 12

5 The representative proceedings in *Carnie*, note 9 *infra* were brought under this provision

6 This rule, which was scheduled to the *Supreme Court of Judicature Act* 1873 (UK), provided that "where there are numerous parties having the same interest in the one action, one or more of such parties may sue .. on behalf of or for the benefit of all parties so interested".

7 [1910] 2 KB 1021. "The law took a wrong turning in *Markt*... The result of *Markt* was to set back English court procedures in a way which was singularly ill-timed The decision coincided with the advent of mass production of goods, such as cars. The mass provision of services (such as banking, finance, insurance and government services) was to follow during the course of this century": *Esanda* note 3 *supra* at 394-5, per Kirby P

8 See V Morabito and J Epstein, note 3 *supra* at ch 4. Judicial hostility towards class actions often produced harsh assessments of the motives of representative plaintiffs: "it is entirely contrary to the spirit of our judicial process to allow one person to interfere with another man's contract where he has no common interest" (*Markt* note 7 *supra* at 1040, per Fletcher-Moulton LJ) and "they [the representative plaintiffs] are seeking to intermeddle in the commercial relationship between Esanda [the defendant] and its customers" (*Esanda* note 3 *supra* at 404, per Meagher JA).

9 (1995) 182 CLR 398

10 *Ibid* at 404, per Mason CJ, Deane and Dawson JJ Similar comments appear at 408, per Brennan J, at 420-1 per Toohey and Gaudron JJ, at 430, per McHugh J.

11 In that case the plaintiffs, Mr and Mrs Carnie, were borrowers who had entered into a variation agreement, the terms of which were protected by the *Credit Act* 1986 (NSW). They alleged that the defendant, Esanda Finance Corporation Ltd, had failed to comply with Part 3 of the Act They sought a declaration that they were not liable to pay the credit charges as a result of the failure of compliance. The Carnies sought to represent both themselves and all other persons who entered into loan or credit sale contracts with the defendant on or after 28 February 1985

inapplicable".[12] Justices Toohey and Gaudron, for instance, endorsed[13] the following proposition enunciated by a Canadian judge:

> ... a class action is appropriate where, if the plaintiff wins, the other persons he purports to represent win too, and if he, because of the success, becomes entitled to relief whether or not in a fund or property, the others also become likewise entitled to that relief, having regard, always, for different quantitative participation.[14]

## B. The Class Action Regimes in Victoria, South Australia and the Federal Court

In addition to these representative action rules, class action regimes exist in Victoria, South Australia and the Federal Court. In the 1980s, Victoria and South Australia each introduced class action regimes that were intended to overcome, among other things, the problems experienced as a result of the narrow meaning given in *Markt* to the 'same interest' prerequisite for the commencement of representative proceedings.[15]

The Victorian regime is regulated by ss 34 and 35 of the *Supreme Court Act* 1986 (Vic). Three requirements must be fulfilled before a class suit may be initiated. The Court must be satisfied that:

1. three or more persons have the right to the same or substantially the same relief against the same person;[16]
2. if separate proceedings were brought by each of them against that person in respect of that right, some common question of law or fact would arise in all the proceedings;[17] and
3. all persons being represented in the proceeding have, before the commencement of the proceeding, consented in writing to being represented[18] and have been named in the originating process;[19] and the written consents have been filed in the Court at the same time as the originating process is commenced.[20]

A class suit may be commenced pursuant to ss 34 and 35 even if:

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12 *Markt* note 7 *supra* at 1035, per Fletcher-Moulton LJ

13 *Carnie* note 9 *supra* at 419.

14 *Shaw v Real Estate Board of Greater Vancouver* (1973) 36 DLR (3d) 250 at 254, per Bull JA See also the comments of Mason CJ, Deane and Dawson JJ that "the sub-rule is expressed in broad terms and it is to be interpreted in the light of the obvious purpose of the rule, namely, to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions" *Carnie* note 9 *supra* at 404.

15 "The result [of *Markt*] has been the development of a second category of procedures designed to alleviate the rigours of the interest requirement. . This model applies in South Australia and Victoria". M Tilbury, note 3 *supra* at 4-5

16 *Supreme Court Act* 1986 (Vic), s 34(a)

17 *Ibid*

18 *Ibid*, s 35(2)(a) The Victorian regime, therefore, uses what is commonly referred to as an 'opt in' model pursuant to which only those who take positive action, by giving their express consent to the commencement of the class suit, will be covered by the judgment on the common questions.

19 *Supreme Court Act* 1986 (Vic), s 35(2)(b).

20 *Ibid*, s 35(3).

1. the relief to which each class member is entitled is or includes damages;[21]
2. any damages to which any class member is entitled will need to be assessed individually;[22]
3. all rights to relief are not in respect of or arise out of the same transaction or series of transactions;[23]
4. any Act, law, rule or practice to the contrary prevents it;[24] or
5. any class member could join or be added as plaintiff in the proceeding under any Act, law, rule or practice.[25]

The Appeal Division of the Supreme Court of Victoria has identified a number of fundamental problems in relation to the three prerequisites, set out above, for the commencement of a class suit.[26] These problems include the use of an 'opt in' model[27] and the difficulties entailed in ascertaining the meaning of ambiguous phrases such as "the same or substantially the same relief".[28] Further problems have been generated by the Victorian Act's silence on a number of important issues, including the ability of class members to withdraw their consents; the binding effect of a judgment on the class members; the effect of a compromise entered into by the representative plaintiff; and the ability of the representative plaintiff to discontinue the class suit.[29] It is, therefore, not surprising that the Supreme Court recommended the prompt repeal of ss 34 and 35.[30] Consequently, Victorian taxpayers should not commence class suits pursuant to this regime.[31]

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21 *Ibid*, s 35(6)(a).

22 *Ibid*, s 35(6)(b)

23 *Ibid*, s 34(b)

24 *Ibid*, s 35(1)

25 *Ibid*, s 35(6)(c).

26 *Zentahope Pty Ltd v Bellotti* (unreported, Supreme Court of Victoria, Appeal Division, Brooking, Fullagar and Tadgell JJ, 2 March 1992) The author's discussion of the weaknesses of the Victorian regime can be found in V Morabito and J Epstein, note 3 *supra* at 14-20

27 One of the problems associated with the Victorian 'opt in' scheme is the rigidity which it introduces in relation to class suits brought under the Victorian Act: "the fact that s 35 requires a represented person to consent to being represented in the proceeding means, in effect, that the proceeding is set in stone from the outset. The represented persons are confined by the cause or causes of action referred to in the consent. Moreover, the proceeding cannot be amended to add other defendants to those referred to in the consent": G Reinhardt, "Class Actions in Victoria - Quo Vadis?" (1993) 67 *Law Institute Journal* 61 at 62

28 "[It is] impossible to define abstractly the scope of the words 'the right to the same or substantially the same relief'. They are .. calculated to remain a snare so long as they stand in the present form as part of s 34, and give rise to protracted and expensive litigation while their extent is ascertained, case by case": *Zentahope* note 26 *supra* at 5, per Brooking J

29 A complete list of the unresolved issues referred to by Tadgell and Brooking JJ can be found in N Williams, *Civil Procedure - Victoria*, Butterworths (looseleaf, 1996) at [I 18 01 12]

30 *Zentahope* note 26 *supra* at 34, per Fullagar J "in my opinion the legislature should give careful and early consideration to the repeal of ss 34 and 35 of the *Supreme Court Act*"; and at 12, per Brooking J: "serious consideration should be given to the repeal of the Victorian sections". A commentator has recently observed that "in the *Zentahope* case, their Honours Justices Brooking and Tadgell savaged the provisions of the *Supreme Court Act* with a ferocity rarely seen in the ordinarily calm climes of the Victorian Supreme Court": P Gordon, "The Case for Class Actions", paper presented Public Interest Advocacy Centre Forum on Class Actions, Sydney, October 1996 at 7.

31 As was recently indicated by Charles J of the Court of Appeal of the Supreme Court of Victoria, "sections 34 and 35 are now generally regarded as useless so far as the institution of class actions is

Under the South Australian regime, a class suit may be commenced "where numerous persons have common questions of fact or law requiring adjudication".[32] Representative plaintiffs must apply to the Court for, first, an order authorising the action to be maintained as a class action and, secondly, directions as to the conduct of the class suit.[33] Rule 34.03 provides that judicial authorisation is not to be refused on the ground:

(a) that the relief claimed includes claims for damages that would require individual assessment;
(b) that separate contracts or transactions made with or entered into between the members of the group represented and the defendant are involved.

In the only class suit that has been brought under this regime, it was indicated by the Supreme Court's Master that many of the principles enunciated in *Carnie* were applicable to the South Australian regime.[34]

Part IVA of the *Federal Court of Australia Act* 1976 (Cth) (the Federal Act),[35] which came into effect in March 1992, introduced the most extensive framework regulating class actions ever seen in Australia.[36] Section 33C(1) of the Federal Act allows class suits to be commenced if the following three requirements are complied with:

(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.[37]

To overcome the problems created by the principles formulated in *Markt*, s 33C(2) provides that a class suit may be commenced even if the relief sought

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concerned". SP Charles, "Class Actions in Australia", paper presented at the 1996 Australian Bar Association Conference in San Francisco at 10.

32 *Supreme Court Rules* 1987 (SA), Rule 34 01.

33 *Ibid*, Rule 34 02 The application must be lodged "within twenty-eight days after the day upon which the defendant filed the appearance, or after the date of the defendant's default in doing so"

34 See *Abrook & Ors v Paterson & Ors* as discussed in SP Charles, note 31 *supra* at 6-7 and 25

35 The Act was based on the recommendations of the Australian Law Reform Commission: see *Grouped Proceedings*, note 3 *supra*. Given that the series of events leading to the enactment of the Federal Act was initiated by the Liberal Party, through the reference to the Commission on class actions in 1977, it was somewhat ironic that the Federal Act was heavily criticised by the Liberal MPs with Senator Durack going so far as to say that "it really is one of those rather loony proposals that come up from time to time from commissions like the Law Reform Commission" Australia, Senate 1991, Debates, vol S149, p 3019.

36 "It represents the first attempt to provide a detailed legislative framework supporting class actions in their modern functional context". M Tilbury, note 3 *supra* at 5. A similar regime may soon be introduced in NSW: see Newsletter of the Coalition for Class Actions, *Class Actions Update*, May 1996, at 1; "the NSW Attorney General's Department has been considering possible legal provisions for class actions in NSW for nearly a year"

37 A class action may only be brought in respect of a cause of action arising after 5 March 1992. s 33B. Michael Duffy, the then Commonwealth Attorney-General, indicated in Parliament that "practical considerations have led to the . [Federal Act] applying only to future causes of action These are the possible insurance implications of enabling increased recovery of claims in respect of past premium years and the possible impact on the Federal Court if past claims could be brought" Australia, House of Representatives 1991, Debates, vol HR181, p 3175 Section 33B was considered in *Poignand v NZI Securities Australia Ltd* (1992) 109 ALR 213.

includes, among other things, claims for damages that would require individual assessment; and whether or not the proceeding is concerned with separate contracts or transactions between the respondent and the class members.

Section 33E of the Act provides that "the consent of a person to be a group member in a representative proceeding is not required".[38] In order to accommodate this 'opt out' model,[39] it is provided that an application commencing a representative proceeding, in describing or otherwise identifying class members to whom the suit relates, need not "name, or specify the number of the group members".[40] Class members have the right to 'opt out' of the class action before a date fixed by the Court and, except with the leave of the Court, the hearing of the action is not to commence earlier than the date before which a group member may 'opt out' of the proceeding.[41] A judgment handed down in a class action "binds all such persons [described or otherwise identified in the judgment] other than any person who has opted out of the proceeding".[42]

## III. THE VIRTUES OF CLASS ACTIONS

Class actions were devised by the Court of Chancery for reasons of convenience. As Lord MacNaghten indicated in *Duke of Bedford v Ellis*:

> The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice', to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed.[43]

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38 This state of affairs does not apply to the Commonwealth, a State or a Territory, or a Minister, officer or certain agencies of the Commonwealth, a State or a Territory. This exception is justified in the Explanatory Memorandum on the ground that "the activities of governments, government agencies, Ministers and officials may be subject to legislative and other restraints which make inappropriate the inclusion of such persons in a representative proceeding without consent": *Explanatory Memorandum*, Federal Court of Australia (Amendment) Bill 1991 (Cth) at [14].

39 An 'opt out' model permits a class suit to be commenced by the representative plaintiff without the express consent of the class members However, an opportunity is offered to the class members to exclude themselves from the class action, that is, to 'opt out' 'Opt out' regimes are vastly superior to 'opt in' regimes: see, generally, V Morabito, "Class Actions - The Right to 'Opt Out' Under Part IVA of the *Federal Court of Australia Act* 1976 (Cth)" (1994) 19 *MULR* 615.

40 Section 33H(2).

41 Section 33J. A person under disability does not need a next friend or committee in order to be a class member. However, he or she "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": s 33F.

42 Section 33ZB. As a result of this provision, "in a case in which the group members have not raised individual claims but have been defined into the group on their related circumstances and the common issue, it is necessary that care be taken to ensure that claims based on individual circumstances of which the court knows nothing are not prejudiced": *Zhang de Yong* note 2 *supra* at 185-6, per French J See also *Jenkins v NZI Securities Australia Ltd* (1994) 52 FCR 572 at 576-7, per Beaumont, Gummow and Carr JJ; and J Basten, "Representative Proceedings in New South Wales - Some Practical Problems" (1996) 34(2) *LSJ* 45 at 47

43 [1901] AC 1 at 8

In more recent times, it is possible to state, with some degree of confidence, that three major social benefits will flow from the employment of class action procedures: (1) access to justice, (2) judicial economy and (3) behaviour modification.[44]

## A. Access to Justice

There appears to be widespread acceptance of the notion that access to the courts and, therefore to justice, is a fundamental right of every citizen.[45] As was recently indicated by the Access to Justice Advisory Committee,[46] "all Australians, regardless of means, should have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests".[47] In recent years there has been heightened awareness of the sad reality that, for most members of the public, access to the courts is beyond their reach as a result of the high cost of litigation.[48]

Class actions can enhance access to justice by opening the 'doors' of our courts to those with individually non-recoverable claims[49] or whose claims would not have led to an individual proceeding due to social or psychological barriers. Michael Duffy, the then Commonwealth Attorney-General, revealed in Parliament that one of the purposes of the class action procedure introduced under the Federal Act was:

> ... to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.[50]

Economic considerations do not constitute the only barriers to the commencement of legal proceedings by those who have suffered harm as a

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44 See V Morabito, note 39 *supra* at 627-9 and the articles cited therein. A Canadian commentator has remarked that "if we did not have class actions, we would have to go out and invent them": WA Bogart, "Questioning Litigation's Role - Courts and Class Actions in Canada" (1987) 62 *Indiana Law Journal* 665 at 700.

45 See AM Gleeson, "Access to Justice" (1992) 66 *ALJ* 270 at 270 "the phrase 'access to justice' is used to express a value so widely acknowledged that even to pause to examine its meaning and its implications may be taken as a sign of ideological unsoundness"

46 This Committee was appointed, in 1993, by the Commonwealth "Attorney-General and the Minister for Justice to make recommendations for reform of the administration of the Commonwealth justice and legal system in order to enhance access to justice and render the system fairer, more efficient and more effective": Access to Justice Advisory Committee, *Access to Justice - An Action Plan*, 1994 at xxiii

47 *Ibid* at [1.9].

48 See V Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 *Mon LR* 231 at 231 and the articles cited therein.

49 Note, "Developments in the Law - Class Actions" (1976) 89 *Harvard Law Review* 1318 at 1356: "A claim is individually non-recoverable if it would not justify the expense to an individual of independent litigation but would justify the lesser expenditure required to obtain a share of a class judgment"

50 Australia, House of Representatives 1991, Debates, vol HR181, p 3174. See also Law Reform Committee of South Australia Report 36, *Report Relating to Class Actions*, 1977 at 6. "the same wrongful act, or default, may affect the rights of many people. Each person may suffer loss or detriment which is important to him but which would not justify, on economic grounds, individual resort to the Courts. If action can be taken by one or more persons representing the class there may be an effective method by which the legal remedy for the wrong can be enforced".

consequence of the illegal conduct of others. Empirical evidence from Australia and overseas indicates that factors such as fear of sanctions from employers or others in a position to take reprisals; fear of involvement in the legal system; and ignorance of their legal rights prevent 'injured' persons from taking the legal measures, such as litigation, which enforcement of their rights entails.[51] These persons "could be assisted to a remedy if one member of a group, all similarly affected, could commence proceedings on behalf of all members".[52]

Excellent illustrations of the ability of class actions to attain the access to justice goal, in appropriate circumstances, are provided by a number of class suits which have been brought under the Federal Act and which "have involved appeals from applications for refugee status, and a claim for damages for unlawful imprisonment".[53]

## B. Judicial Economy

Class suits can reduce costs, increase efficiency and prevent defendants from being exposed to conflicting judgments, by enabling a single determination of issues which are common to members of a class or group.[54] A single proceeding is clearly a more efficient option than the commencement of a number of individual proceedings, possibly in different jurisdictions, by 'potential' class members who have individually recoverable claims.[55]

A unique feature of class actions which allows the attainment of judicial economies, and avoids the possibility of inconsistent judicial holdings, is the principle that the class members, represented by the representative plaintiff, will be bound by the judgment handed down at the conclusion of the class suit, despite the fact that they are not parties to the action.[56] As Williams pointed out:

> ... the merit of the class action procedure lies in the *res judicata* effect of the judgment that will be pronounced at its conclusion. Judgment in a class action binds not only the plaintiff and the defendant but also those whom the plaintiff represents, the class members. It is this characteristic that makes the class action such a convenient method of determining the claims of a large number of individuals who are essentially in the same legal situation as regards the defendant.[57]

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51 See, for instance, Ontario Law Reform Commission Report 48, *Report on Class Actions*, 1982 at 128-32; and *Grouped Proceedings*, note 3 *supra* at [15]

52 *Grouped Proceedings*, note 3 *supra* at [69] See also T A Cromwell, "An Examination of the Ontario Law Reform Commission Report on Class Actions" (1983) 15 *Ottawa Law Review* 587 at 589.

53 Public Interest Advocacy Centre, Report prepared for the Coalition for Class Actions (NSW), *Representative Proceedings in New South Wales - A Review of the Law and a Proposal for Reform*, 1995 at 21

54 Another advantage is that "because of the efforts put in by each side . [a class action] is more likely to produce the correct result": N Francey, "Grouped proceedings in the Federal Court: some comments in favour of class actions" (1989) 27 *LSJ* 56 at 59.

55 "A claim is individually recoverable if it warrants the costs of separate litigation, that is, if an action to recover the claim would be economically rational regardless of the availability of class action procedures": note 49 *supra* at 1356.

56 See N Francey, note 54 *supra* at 59, and M Tilbury, note 3 *supra* at 2.

57 N Williams, "Consumer Class Actions in Canada - Some Proposals for Reform" (1975) 13 *Osgoode Hall Law Journal* 1 at 13

## C. Behaviour Modification

It appears reasonable to claim that the knowledge by potential defendants that numerous persons can, through the device of class actions, pursue legal remedies which would otherwise not be available to them, because of economic, social or psychological barriers, should provide potential defendants with a greater incentive not to break the law.[58]

Whether or not discouraging illegal behaviour is accepted as a legitimate aim of class action procedures will essentially depend upon one's views as to the proper function of civil litigation.[59] The philosophy underlying the behaviour modification goal is that:

> ... the function of a legal system is not limited to its role in providing individuals with a mechanism by which to resolve disputes and redress grievances. Law also serves as a standard of the conduct which the community or the society expects from its members and by the same token, the judicial system should provide realistic sanctions which the community can invoke in order to enforce obedience to its prescribed values and rules of conduct. It seems clear, therefore, that if sellers and manufacturers are, for whatever reason, in practical effect immune from the sanctions of the present legal structure with respect to some claims which might be brought against them, the community has to that extent lost its ability to compel obedience to the standards of conduct it has established.[60]

## D. Advantages of Class Actions for Class Members

As has been noted above, class actions can play a crucial role in relation to those class members who would not have been able to initiate their own individual proceedings. But they may also provide considerable benefits for those class members who were willing and able to commence their own individual proceedings. Some of the potential benefits of a class action for this 'category' of class members are that:

(1) it economises on transactions or permits greater financial or other resources to be assembled to counteract the typically greater resources of the defendants;

(2) it threatens risk averse defendants with greater liability and so deters them from going to trial; and

(3) it avoids a 'race to judgment' among competing plaintiffs who fear ... the impact of precedents in other related cases.[61]

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58 SL Sumnick, "California Corporation Code Section 25530(b) Government Agency Suit versus the Private Class Action" (1975) 27 *Hastings Law Journal* 265 at 288, and Ontario Report, note 51 *supra* at 140-6.

59 JS Emerson, "Class Actions" (1989) 19 *Victoria University of Wellington Law Review* 183 at 188

60 MG Jones and BB Boyer, "Improving the Quality of Justice in the Marketplace The Need for Better Consumer Remedies" (1971-2) 40 *George Washington Law Review* 357 at 361. For criticisms of the behaviour modification goal, see K Scott, "Two Models of the Civil Process" (1975) 27 *Stanford Law Review* 937 at 937-9, and W Simon, "Class Actions - Useful Tool or Engine of Destruction" (1972) 55 *FRD* 375 at 392.

61 J Coffee, "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action" (1987) 54 *University of Chicago Law Review* 877 at 904.

## IV. THEORY *v* REALITY

Before initiating a class suit, potential representative plaintiffs and class members need to be aware of some of the problems that they may face as a result of the imperfections of the existing Australian regimes governing class suits.

### A. Class Members

As was indicated earlier, a unique feature of class suits is that while class members are not parties to the action they are nevertheless bound by the judgment. While this state of affairs promotes efficiency, it may also place class members in a vulnerable position as the control of the class suit lies in the hands of the class lawyers and the representative plaintiffs.[62] Furthermore, for many class members the cost of monitoring the class lawyer may exceed the value of his or her own claim.[63] Consequently, what is required, in order to protect the interests of absent class members, is the employment of special safeguards and procedures which are simply not found in the traditional forms of legal proceedings.

While the High Court's decision in *Carnie* is a landmark decision[64] which will increase considerably the circumstances in which a representative action may be initiated under the traditional representative procedure,[65] it unfortunately sheds no light in relation to a number of fundamental issues concerning the conduct of representative proceedings, including the measures that need to be implemented in order to safeguard the interests of absent class members.[66] No guidance was provided by the High Court in relation to:

> ... such important matters as whether or not consent is required from persons who are to be group members in representative proceedings, the position of persons under disability, the right of a group member to 'opt out' of a representative proceeding, alterations to the description of the group, settlement and

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62 "These absent plaintiffs are not necessarily present before the court and lack any real ability to determine the course of litigation which may affect their individual rights": *Report of the Attorney-General's Advisory Committee on Class Action Reform*, Ontario, 1990 at 18

63 See V Morabito, note 48 *supra* at 247-8

64 See N Francey, "High Court clears the way for class actions" (1995) 30(4) *Australian Lawyer* 27, MR Liverani, "Marching on Goliath - pressure mounts for easier class actions" (1996) 34(2) *LSJ* 41, and C Semple, "Representative Proceedings in Victoria - The Effect of a Recent High Court Decision" (1996) 70(3) *Law Institute Journal* 51

65 The immediate impact of the *Carnie* decision has been to prompt calls for new State class action regimes similar to the existing Federal regime. see V Morabito and J Epstein, note 3 *supra* at 56, J Bennett, Report prepared for the Consumer Law Centre of Victoria Ltd and the Public Interest Law Clearing House (Vic) Incorporated, *Class Actions: The Victorian Direction - A Blueprint for Representative Proceedings in the Supreme Court*, 1996 at 30, and note 53 *supra* at ch 7.

66 Chief Justice Gleeson lamented that "if class actions of the kind now available in the Federal Court are to be permitted in New South Wales . . then this should only be done with the backing of appropriate legislation or rules of Court, adequate to the complexity of the problem, and appropriate to the requirements of justice". *Esanda* note 3 *supra* at 390 Justices Toohey and Gaudron, in contrast, were of the view that "the simplicity of the rule is also one of its strengths, allowing it to be treated as a flexible rule of convenience in the administration of justice and applied 'to the exigencies of modern life as occasion requires'" *Carnie* note 9 *supra* at 422

discontinuance of proceedings, and the giving of various notices to group members.[67]

When the *Carnie* litigation was remitted to Young J, he enunciated a number of general principles. One such principle is that an 'opt in' procedure[68] should be employed "when one has the situation that there is a potential liability on the member of the group".[69] Justice Young also indicated that notices must be sent to all class members,[70] in order to allow the Court to make an informed decision as to whether or not it should order the discontinuance of the representative proceeding. Representative plaintiffs must bear the burden of paying for the costs of these notices.[71]

Unlike the rules governing traditional representative actions, the Federal Act provides the Court with fairly extensive guidance as to some of the measures that need to be implemented in order to safeguard the interests of class members.[72] The Australian Law Reform Commission has indicated that "without active court management, the interests of unidentified parties may not be taken properly into

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67 *Esanda* note 3 *supra* at 388, per Gleeson CJ Other unresolved issues include the raising of counterclaims by the defendants, the discovery of the documents of class members, the procedures and philosophy for the distribution of damages, the extent to which a judgment is binding, whether a declaratory judgment merely creates *res judicata* upon that specific issue or whether it has some effect upon damages and the replacement of an 'inadequate' representative plaintiff: V Morabito and J Epstein, note 3 *supra* at ch 4 . See also J Wilkin, "Representative proceedings in Victoria - no change in contract cases?" (1996) 70(8) *Law Institute Journal* 36.

68 In a post-*Carnie* representative proceeding the following comments were made by the Court "Each claimant should make a decision on an informed basis that he wishes to be associated with this claim and with the basis on which it is put forward It is not obvious that every person would wish to be associated with the proceedings and with the alleged basis on which the defendants are said to fall within subs 556(1), particular customers might have personal or commercial reasons for dissociating themselves, and they should be given a fair opportunity to perceive their own reasons and act on them. In other words, the only persons who should be represented are people who decide on an informed basis to 'opt in'" *Shepherd v ANZ Banking Group* (unreported, NSW Supreme Court, Bryson J, 8 May 1996) at 15.

69 *Carnie v Esanda Finance Corporation Ltd* (1996) 38 NSWLR 465 at 473. The judicial preference for an 'opt in' model, in both *Carnie* and *Shepherd*, is unfortunate given that the implementation of an 'opt in' requirement will reduce the size of the class and will therefore prevent some people from obtaining a legal remedy: "requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people - especially small claims held by small people - who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable": B Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)" (1967) 81 *Harvard Law Review* 356 at 397-8 For more details on the "'opt in'/'opt out' dilemma" see V Morabito, note 39 *supra* at 619-35

70 These notices would have informed the absent class members of the various scenarios they would have faced depending on the outcome of the representative proceeding.

71 *Carnie* note 69 *supra* at 473-4. Given that the issue of whether the Court should order the discontinuance of a class suit is an issue that needs to be considered by the Court each time a class suit is commenced, the practical effect of Justice Young's ruling, if followed in future class suits, is that notices to class members are always compulsory, regardless of the particular circumstances surrounding a given class suit. The undesirability of a mandatory notice regime was highlighted by the outcome of the class suit in *Carnie* itself Justice Young ordered that the proceeding no longer continue as a representative proceeding after the representative plaintiffs refused to incur the expense of sending out notices to the 88 class members A discretionary notice regime is a more satisfactory system, for the reasons set out in V Morabito and J Epstein, note 3 *supra* at 67-70.

72 See V Morabito, note 39 *supra* at 626

account".[73] The provisions of the Federal Act have incorporated the recommendations of the Commission, which stem from the above mentioned proposition, as the Federal Court is empowered to take an active role in protecting the interests of parties not before the Court. In fact, the Court has been vested with the power to order the discontinuance of a class proceeding,[74] to substitute a representative plaintiff who is not adequately representing the interests of the class members[75] and to establish, in the case of issues common to the claims of only some of the class members, a sub-group and appoint a person to be the sub-group representative party on behalf of the sub-group members.[76] The Court needs to give its approval before a class action can be settled or discontinued[77] and before settlement of the representative plaintiff's individual claim can take place.[78]

Further examples of the interventionist role which the Federal Court is expected to assume are provided by s 33X(5) which allows the Court "at any stage, [to] order that notice of any matter be given" to class members and by the Court's direct involvement in "administering and distributing monetary relief".[79] But perhaps the most important provision is s 33ZF(1) which empowers the Federal Court to make "any order... [it] thinks appropriate or necessary to ensure that justice is done in the proceedings".[80]

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73 *Grouped Proceedings*, note 3 *supra* at [157]. In a recent Federal class suit, Merkel J indicated that his ruling in the case "may be seen to constitute a more interventionist role on the part of the Court than is appropriate in a civil proceeding" but justified his approach partly on the basis that a class action "can give rise to a greater responsibility on the part of the Court in relation to the conduct of the hearing. Under Part IVA, the group members are not strictly parties in the proceeding able to give instructions as such. Yet group members are bound by the result (s 33ZB)": *Trong v Minister for Immigration, Local Government and Ethnic Affairs* (unreported, Federal Court, Merkel J, 17 May 1996) at 8-9 Similarly, Brennan J has indicated that judicial control of class actions "is important, to ensure .. that the interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf": *Carnie* note 9 *supra* at 408.

74 Sections 33L, 33M, 33N and 33P.

75 Section 33T. Brennan J has warned that "the self-proclaimed carrier of a litigious banner may prove to be an indolent or incompetent champion of the common cause in the courtroom": *Carnie* note 9 *supra* at 408 As was noted by Williams, the risk of prejudice to an absent class member "will be minimised, if not eliminated altogether, if the representative parties and their lawyers exercise the same vigour and competence in presenting his [the class member's] claim as could be expected if he were to sue himself. Hence the requirement that the court be satisfied that the representative parties will fairly and adequately protect class interests". note 57 *supra* at 75. In the US, a class action cannot progress unless the Court is satisfied that "the representative parties will fairly and adequately protect the interests of the class" Rule 23(a)(4) of the United States Federal Rules of Civil Procedure

76 Section 33A.

77 Section 33V(1). Judicial approval of the settlement or discontinuance of class actions is also required in Ontario, in Quebec and in the US Federal Courts: see, respectively, *Class Proceedings Act* 1992 (Ont), s 29(2), arts 1016 and 1025 of Quebec's *Code of Civil Procedure* and Rule 23(e) of the United States Federal Rules of Civil Procedure The purpose behind these provisions is, of course, to protect the interests of class members.

78 Section 33W(1).

79 *Grouped Proceeding*, note 3 *supra* at [158]

80 This provision has recently been described as "valuable in that, in conjunction with the court's discretion under s 43, the court may make an order, including presumably an order for costs, to ensure that justice is done in the proceeding": *Marks v GIO Australia Holdings* (1996) 137 ALR 579 at 590, per Einfeld J.

The Federal regime is not, however, perfect.[81] No guidance is provided by the Federal Act in relation to a number of issues, including whether a respondent should be able to obtain discovery of relevant documents of class members, other than representative plaintiffs,[82] and the factors or criteria that should guide the Court when deciding whether to approve the settlement of the class suit[83] or when being asked to replace a representative plaintiff who is accused, by some of the class members, of not adequately protecting the interests of the class.[84]

## B. Representative Plaintiffs

Class members, other than representative plaintiffs, are often referred to as 'free riders' for the following reasons:

> ... absent class members who are the beneficiaries of the efforts of the class representative and the class lawyer, get a 'free ride' in two respects. First, since absent class members are not parties to the action, they are not potentially liable for the party and party costs of the defendant should the class action fail.[85] Secondly, absent class members are not obliged to contribute to the solicitor and client costs owed by the class representative to the lawyer for the class, unless they have entered into agreements to do so.[86]

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81 For more details on the weaknesses of the Federal regime see V Morabito and J Epstein, note 3 *supra* at ch 6.

82 American Courts have allowed discovery against class members "at least when the information requested is relevant to the decision of common questions, when the interrogatories or document requests are tendered in good faith and are not unduly burdensome, and when the information is not available from the representative parties". *Dellums v Powell* 566 F 2d 167 (1977) at 187 as quoted in BS Augenbraun, "Discovery of Class Members in Securities Class Actions" (1995) 22 *Securities Regulation Law Journal* 398 at 400 The *Class Proceedings Act* 1992 (Ont) allows defendants, after discovery of the representative plaintiff, to seek leave from the Court to discover other class members. Section 15(3) provides the Court with a list of criteria to be considered in deciding whether to grant leave to discover class members The factors specified include whether the discovery is necessary, the monetary value of individual claims, and whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered

83 Relevant factors include: the nature and likely cost and duration of the proceedings, the amount offered and the likelihood of success in the proceeding; the views of the class members; and whether satisfactory arrangements have been made for the distribution of money to be paid to class members. see cl 28(3) of the Federal Court (Grouped Proceedings) Bill 1988 in *Grouped Proceedings*, note 3 *supra* Appendix A

84 For a discussion of the factors considered by US Courts see M McGowan, "Certification of Class Actions in Ontario - A Comparison to Rule 23 of the US Federal Rules of Civil Procedure" (1993) 16 *Carswell's Practice Cases (3rd)* 172 at 174.

85 It should be noted, however, that recently English and Australian Courts have indicated that, contrary to the traditional wisdom on this issue, they do possess the power to award costs against non-parties such as absent class members: see *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, *Burns Philp & Co Ltd v Bhaget* [1993] 1 VR 203; and *Knight v FP Special Assets Ltd* (1992) 174 CLR 178. It appears reasonable to say, however, that the Court's power to award costs against absent class members will be exercised rarely, if ever: see *Carnie* note 9 *supra* at 420, per Toohey and Gaudron JJ: "though any judgment or order will be binding on those for whom a plaintiff sues, the represented persons are not liable for costs"; and V Morabito, note 48 *supra* at 239-41 Finally, mention should be made of s 43(1A) of the Federal Act which provides that in a class action brought under its provisions "the court or judge may not award costs against a person on whose behalf the proceeding has been commenced " Consequently, the recent judicial developments mentioned above do not apply to Federal class actions.

86 Ontario Report, note 51 *supra* at 657 See also DN Dewees, J Robert, S Prichard, MJ Trebilcock, "An Economic Analysis of the Cost and Fee Rules for Class Actions" (1981) 10 *Journal of Legal Studies*

This privileged status of absent class members means that representative plaintiffs need to take appropriate measures to ensure that the financial burdens of the representative proceedings will not fall solely on their shoulders.[87] Two obvious measures come to mind. The first measure is to enter into agreements with most, or at least some, of the class members pursuant to which some of the financial burdens of the litigation will be shifted from the representative plaintiff to the class members.[88] However, the most effective way of dealing with this problem is for the representative plaintiff to enter into contingency fee arrangements with the lawyers acting on behalf of the class.[89] The practical effect of such arrangements is to transfer some of the risk, and part of the cost, of litigation "from clients to their lawyers who are better able to assess the risks involved and to bear those risks by spreading them over a large number of law suits".[90]

Section 33ZJ(2) purports to alleviate the financial burdens of representative plaintiffs by providing that, in successful class suits seeking monetary relief:

> 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.[91]

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155 at 158-9; and D Kell, "The Liability of Represented Persons for Party-Party Costs in Representative Actions" (1994) 13 *Civil Justice Quarterly* 233 at 237 Another potential problem for representative plaintiffs is that a class suit is generally a more expensive form of litigation than individual proceedings. see A Homburger, "State Class Actions and the Federal Rule" (1971) 71 *Columbia Law Review* 609 at 649; HP Glenn, "Class Actions in Ontario and Quebec" (1984) 62 *Canadian Bar Review* 247 at 264-8, PM Iacono, "Class Actions and Product Liability in Ontario: What Will Happen?" (1991) 3 *Canadian Insurance Law Review* 99 at 103, and V Morabito, note 48 *supra* at 233

87 "It is a problem inherent in representative proceedings. In a nutshell, the problem is that a representative party is exposed to the risk of an order to pay the costs of a respondent ... without gaining any personal benefit from the representative role. So there is little or no incentive for a person to act as a representative party. Unless the person's potential costs are covered by someone else, there is a positive disincentive to taking that course": *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139 at 145, per Wilcox J. For an extensive study of this problem, see V Morabito, note 48 *supra.*

88 As one commentator has indicated, "if classes with genuine claims wish to pursue the claims through the class procedure, it would seem appropriate that the risk of financial investment in the action should fall on those parties who would receive the direct benefit of an award". JS Emerson, note 59 *supra* at 207 There are, however, a number of practical problems associated with this method of funding a class suit: see V Morabito, note 48 *supra* at 235-9.

89 "The defining characteristic of a contingency fee is that the client pays the lawyer only if the lawyer obtains the result sought. If the client loses, the lawyer is not paid or reimbursed for his or her work". Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation - Discussion Paper No 3: Contingency Fees*, 1991 at [2.3].

90 Trade Practices Commission Draft Report, *Study of the Professions - Legal*, 1993 at 233. A study of the potential advantages and disadvantages entailed in the use of contingency fees in class suits can be found in V Morabito, note 48 *supra* at 242 -55

91 This provision is based on the American "Common Fund" doctrine In *Boeing Co v Van Gemert*, 444 US 472 (1980) at 478, the US Supreme Court explained that it "has recognised consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole... The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to court costs are unjustly enriched at the successful litigant's expense Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus

However, this scheme "does not meet the problem of people being deterred from acting as a representative party at all, because of the possibility of the proceeding failing".[92] Furthermore, it is of no assistance to representative plaintiffs seeking injunctive or declaratory relief.

## V. CLASS ACTIONS IN THE TAX ARENA

Attention will now be turned to the crucial question of whether the class action procedure is within the reach of groups of taxpayers who have a common or similar grievance pertaining to tax-related matters. Whenever commentators have turned their attention to the potential beneficiaries of class actions reference is rarely made to taxpayers.[93] It is submitted that this state of affairs is more attributable to a natural tendency to concentrate on the most obvious categories of class members[94] than to an inherent inability of tax-related litigation to satisfy the prerequisites for class actions.

### A. Standing to Sue

The principles of law governing standing to sue,[95] that is, the right to commence legal proceedings, do not constitute an obstacle for taxpayers wishing to commence class suits.

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spreading fees proportionately among those benefited by the suit" See also s 32(2) of the *Class Proceedings Act* 1992 (Ont) which provides that "amounts owing under an enforceable agreement [respecting fees and disbursements between the solicitor and the representative plaintiff] are a first charge on any settlement funds or monetary reward"

92 *Woodlands* note 87 *supra* at 146, per Wilcox J In the class suit before him, Wilcox J addressed this problem by imposing a ceiling on the maximum amount of costs that could be recovered against the class if it were unsuccessful in the proceeding. This ruling was made pursuant to Order 62A of the Federal Court Rules which provides, among other things, that the Court may "specify the maximum costs that may be recovered on a party and party basis".

93 Consumers are invariably mentioned: "the recent cases have been more liberal in allowing representative actions to proceed In the Age of Consumerism, it is proper that this should be so. The cost of litigation often makes it economically irrational for an individual to attempt to enforce legal rights arising out of a consumer contract. Consumers should not be denied the opportunity to have their legal rights determined when it can be done efficiently and effectively on their behalf by one person with the same community of interest as other consumers". *Carnie* note 9 *supra* at 429-30, per McHugh J. See, however, *Grouped Proceedings*, note 3 *supra* at [63] for a reference to the use of class actions in judicial review proceedings.

94 This 'tendency' has resulted in substantially inaccurate predictions as to the likely users of the Federal class action regime: "class actions have been described as representing the 'Legal Good Ship Lollipop' to consumer and environment bodies and the 'darkest fears of commercial interest. .' Looking at the number and type of representative proceedings in the Federal Court since 1992 reveals a different story": note 53 *supra* at 20.

95 "Questions of standing do not usually arise in purely private proceedings, where the persons whose interests are affected will be clear However, in legal proceedings that have a public element, such as those challenging government decisions or seeking to enforce public rights or duties, issues arise as to the extent of personal interest that a person should have before being entitled to litigate the matter": *Access to Justice*, note 46 *supra* at [2 49] The Australian Law Reform Commission has recently recommended significant legislative changes to the existing law on standing: Australian Law Reform Commission Report 78, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, 1996

Section 33D of the Federal Act provides that, if the three prerequisites for the commencement of class suits are satisfied, a representative plaintiff has standing to commence a class suit as long as he or she has "a sufficient interest to commence a proceeding on his or her own behalf".[96] In the tax-related class suits discussed in this article,[97] representative plaintiffs would face no great difficulties in demonstrating 'a sufficient interest' as "taxpayers and persons directly affected under taxing legislation have standing to challenge its application".[98]

## B. State Tax Laws and Federal Court Class Suits

There is a jurisdictional problem concerning the ability of the Federal Court to preside over class suits concerning State law issues. In fact, s 33G of the Federal Act provides that 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. The purpose of this provision is "to ensure that purely State law claims are not brought in the Federal Court merely to obtain the benefit of the new procedure".[99]

The problems generated by s 33G were evident in the class suit before the Federal Court in *Glass v New South Wales.*[100] The class suit was initiated, on behalf of inter alia, Aboriginal persons who were serving sentences of imprisonment in New South Wales prisons, on the basis that the sentencing

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96 A similar requirement applies to the traditional representative procedure: "the class action is essentially a procedural device by which a class of persons, who each individually have a good cause of action and *locus standi* to pursue it but are unable to do so effectively .. may enforce their rights through a representative plaintiff and by utilising the class action machinery": SA Report, note 50 *supra* at 11 In the US, the Supreme Court has been accused of using "two conflicting and fundamentally irreconcilable approaches in resolving class action standing and mootness issues . . [In one line of cases] the Supreme Court applied a traditional 'personal stake' approach to standing and mootness developed in nonclass lawsuits... The Court then looked to the class representative to fulfil this standing requirement .. In a second line of cases, however, the Supreme Court largely ignored the class representative and focused on the *class* element of the class action to resolve standing and mootness questions": JW Burns, "Decorative Figureheads. Eliminating Class Representatives in Class Actions" (1990) 42 *Hastings Law Journal* 165 at 168-70

97 Such suits do not entail one group of taxpayers challenging the assessments of, or other tax decisions concerning, another group of taxpayers Therefore, the restriction on the standing of taxpayers highlighted by the House of Lords in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 does not apply For more details on this judgment see P Burgess, "Some Aspects of the Trade-Off Between Due Process, Equity and Efficiency in Tax Administration", paper presented at the 1995 Australian Taxation Office National Compliance Research Conference in Canberra.

98 *Standing Report*, note 95 *supra* at [3 5]. For the rules governing standing in tax-related constitutional challenges and in applications for judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) see, respectively, note 111 *infra* and note 140 *infra*

99 Note 38 *supra* at [16]. The ability of s 33G to attain this goal was doubted by Peter Costello, the then Shadow Attorney-General. "but since the Federal Court has an associated jurisdiction, this Bill will open the procedure to claims which primarily relate to State law where there is an associated Federal element" Australia, House of Representatives 1991, Debates, vol HR181, p 3285. For more details on the Federal Court's associated jurisdiction see note 103 *infra*

100 (1994) 52 FCR 336.

regime in New South Wales, and in particular the *Sentencing Act* 1989 (NSW), constituted racial discrimination for the purposes of the *Racial Discrimination Act* 1975 (Cth). Consequently, it was claimed that the *Sentencing Act* was invalid as a result of the operation of s 109 of the *Constitution*.[101] This class suit was not allowed to proceed as the Court held that it did not have jurisdiction to deal with the claim of the plaintiff. One of the reasons for the Court's conclusion was that "because the proceedings are commenced as representative proceedings, the Court has no jurisdiction pursuant to the provisions of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (NSW)".[102] Consequently, class actions concerning the operation of State tax laws would, generally, need to be brought pursuant to the rules governing the traditional representative procedure.[103]

## C. Constitutional Challenges

An obvious example of tax-related litigation, which could advantageously be conducted as a class action, is provided by the facts in *Payne v Young*,[104] a 1980 judgment of the High Court. This case involved an action by seven abattoir owners for the repayment of slaughter fees, and for a declaration that the Western Australian regulations under which the fees were levied were unconstitutional, as they imposed excise duties contrary to s 90 of the *Constitution*.[105] The facts above would satisfy the 'same interest' prerequisite for the commencement of a class action pursuant to the traditional representative procedure.[106] The following comments of Toohey and Gaudron JJ in *Carnie* are apposite to constitutional challenges such as the one in *Payne*:

> There are many persons who have entered into variation agreements with the respondent. They have the 'same interest' in testing those agreements against the Act to see if the method of calculating the amount owed was correct. If that method was not in accordance with the Act, then those persons have a common interest in obtaining the relief of being released from liability for the credit charges. That is, they have the same interest in these proceedings in the sense that there is a

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101 It provides that "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid" See, generally, V Morabito and H Strain, "The Section 109 'Cover the Field' Test of Inconsistency: An Undesirable Legal Fiction" (1993) 12 *University of Tasmania Law Review* 182.

102 Note 100 *supra* at 337, per Sheppard J.

103 The only exception would be where the representative plaintiff can successfully rely on the Federal Court's accrued jurisdiction: "[the Federal] Court will have accrued or attached jurisdiction to deal with a non-federal claim if it has before it a federal claim and, connected with that claim, is a non-federal claim the resolution of which depends upon facts and circumstances identical with or closely connected with or common to those in question in the federal claim. Sometimes it is said that the two claims, federal and non-federal, must have a common substratum of fact Unless those conditions exist, the Court will not have accrued jurisdiction". *ibid* at 339, per Sheppard J

104 (1980) 145 CLR 609. The actual decision of the High Court is not relevant to this discussion as it concerned the question of whether the action had been correctly brought under Order 16 Rule 1 of the High Court Rules, pursuant to which persons could join as plaintiffs in the action if, inter alia, the causes of action arose out of the same transaction or series of transactions.

105 Section 90 provides that only the Commonwealth Parliament has the power to impose excise duties.

106 See note 4 *supra*.

> significant question common to all members of the class and they stand to be equally affected by the declaratory relief which the appellants seek.
>
> Although each contract will be different in the details of the amounts involved, this will not eliminate the convenience of finding a right to a release which is common to all of them.[107]

The litigation in *Payne* would also appear to satisfy the other definition of 'same interest' that was enunciated in *Carnie*, namely, that the class members and the representative plaintiff "have a community of interest in the determination of any substantial question of law or fact that arises in the proceedings".[108]

The factual scenario in *Payne* would also comply with the requirements for the commencement of a class suit under the Federal Act as there are seven class members[109] whose claims "are connected by circumstances sufficiently related to warrant the use of the procedure under Part IVA for the termination of the common issue of law defined in the application".[110]

The ability to bring a class suit, whether before the Federal Court or pursuant to the traditional representative procedure, as a means of raising constitutional challenges against State and/or Commonwealth tax laws, can be of considerable

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107 *Carnie* note 9 *supra* at 421. See also at 404, per Mason CJ, Deane and Dawson JJ. "It may be . [that the same interest requirement] extends to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings". In *Payne*, of course, the claim of the plaintiffs was that the law imposing the tax was not in accordance with the Constitution and not that the conduct of the defendant "was not in accordance with the Act", as in *Carnie* However, this difference is of no relevance for present purposes, namely, to determine compliance with the 'same interest' prerequisite for the commencement of a representative action.

108 *Carnie* note 9 *supra* at 427, per McHugh J; at 408, per Brennan J See also *Shepherd* note 68 *supra* at 14, per Bryson J "In my view there is a strong commonality or community of interest in the sense conveyed by ... [the judgments in *Carnie*] among all the plaintiffs and the represented persons They are all alleged to be entitled to remedies under s 556(1) in respect of the payments made under substantially similar contracts which failed to be performed in substantially similar ways, and they all make claims under the provision of the Code which requires an examination of Holdings' capacity to pay. The alleged times at which the debts were incurred are sufficiently close for it to be seen that the attempt to prove Holdings' lack of capacity to pay them can be undertaken for all of them together". The provision in question, s 556 of the *Companies (NSW) Code* 1981, imposes legal liability on a company director if he or she allows the company to incur debts where there are no reasonable grounds to expect that the company will be able to pay them.

109 It is important to note that the requirement of at least seven members was found by Wilcox J, in *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1994) 118 ALR 510 at 514, to be potentially irreconcilable with other provisions of the Act· "What is the effect of this addition [the 'seven or more persons' requirement found in s 33C(1)(a)]? It cannot have been intended to require that the application commencing the proceeding demonstrate that at least seven members have associated claims against the respondents Such a requirement would conflict with s 33H(2), which expressly states that it is not necessary for that document to specify the number of group members." His Honour concluded at 515 that "the only way of making sense of s 33C(1)(a) is to interpret it as restricting the use of Part IV to claims that, by their nature and assuming that they have substance, are shared by at least seven persons" See also *Marks v GIO Australia Holdings* (1996) 63 FCR 304 at 315, per Einfeld J "It is sufficient if the evidence before the Court justifies the assumption that at least seven persons have such a potential claim" For criticism of the reasoning upon which this judicial conclusion was based see P Lynch, "Representative Actions in the Federal Court of Australia" (1994) 12 *Australian Bar Review* 159 at 168 note 28.

110 *Zhang de Yong* note 2 *supra* at 185, per French J However, as discussed above, there is a jurisdictional problem concerning Federal Court class suits involving State law claims

benefit to taxpayers.[111] In fact, the constitutionality or otherwise of legislation dealing with tax-related matters is one of the first issues that should be canvassed when contemplating a challenge to actions taken by the relevant tax authorities. State legislation imposing taxes may be invalid on a number of constitutional grounds, including ss 52(i),[112] 90,[113] 92,[114] 109[115] and 114[116] of the *Constitution*; the doctrine of intergovernmental immunity;[117] and the doctrine of extra-territorial limitations.[118] Federal tax legislation is also not immune from constitutional challenges. The most obvious grounds would include ss 51(ii),[119] 55,[120] 99[121] and 114 of the *Constitution* as well as the prohibition on arbitrary exactions.[122]

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111 The principles governing the standing to sue of taxpayers in constitutional cases have been summarised as follows "individual citizens have been held to lack standing to seek a declaration as to the constitutional validity of tax legislation when at the time of the proceedings they have not been assessed to pay the relevant tax The courts have required instead that the would-be plaintiff should be assessed to pay the tax in question and should then object" Australian Law Reform Commission Report 27, *Standing in Public Interest Litigation*, 1985 at [125].

112 This provision confers upon the Commonwealth Parliament the exclusive power to legislate with respect to, inter alia, "all places acquired by the Commonwealth for public purposes" For a recent successful constitutional challenge against a State tax (Victorian stamp duty), based on this provision, see *Allders International Pty Ltd v Commissioner of State Revenue of Victoria* (1996) 140 ALR 189. For more details see V Morabito, "State Taxes and Commonwealth Places" [1997] 33 *CCH Tax Week* 458

113 See note 105 *supra*

114 The section provides that "trade, commerce, and intercourse among the States ... shall be absolutely free". The High Court held Victorian tobacco tax to be invalid in *Bath v Alston* (1988) 165 CLR 411 pursuant to s 92.

115 See note 101 *supra*.

116 This provision prohibits State taxes on property of the Commonwealth Crown and Commonwealth taxes on property belonging to a State. Section 114 "protects the property of a State from a [Commonwealth] tax [and the property of the Commonwealth from a State tax] on the ownership or holding of property but it does not protect the State [and the Commonwealth] from a tax on transactions which affect its property, unless the tax can be truly characterised as a tax on the ownership or holding of property" *Queensland v Commonwealth* (1987) 162 CLR 74 at 98, per Mason CJ, Brennan and Deane JJ.

117 Subject to a number of exceptions, State legislation cannot bind the Commonwealth Crown see *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372. For more details see S Barkoczy and V Morabito, "Are the Commissioner of Taxation's Recovery Powers Fettered by State Moratorium and Limitation of Actions Legislation?" (1997) 25 *Australian Business Law Review* 236

118 In *Millar v Commissioner of Stamp Duties* (1932) 48 CLR 618, the High Court held that, in order to be valid, "a New South Wales Act must be based on a connection with the State and must not go beyond legislating in respect of that connection The justices used this formula to support the conclusion that New South Wales legislation, taxing the full value of shares in a Victorian-based company which carried on some part of its business in New South Wales, was invalid". P Hanks, *Constitutional Law in Australia*, Butterworths (2nd ed, 1996) p 217 See, however, s 2(1) of the *Australia Act* 1986 (Cth and UK) which provides that "the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation".

119 Commonwealth taxing legislation enacted pursuant to this head of legislative power cannot "discriminate between States or parts of States"

120 "Laws imposing taxation shall deal only with the imposition of taxation .. [and] shall deal with one subject of taxation only". Section 55 was successfully relied upon by aggrieved taxpayers in two fairly recent High Court cases *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450; and *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555

121 Commonwealth laws of "trade, commerce, or revenue, [cannot] give preference to a State.. ".

122 A tax will not be held to be arbitrary, as long as the liability to pay the tax is "imposed by reference to ascertainable criteria with a sufficiently general application and ... the tax [is not] imposed as a result

## D. Breaches of Secrecy Provisions

Constitutional challenges do not provide the only circumstances in which the class action procedure may be utilised by taxpayers. Another obvious example is provided by litigation with respect to alleged breaches of s 16 of the *Income Tax Assessment Act* 1936 (Cth) (the ITA Act) or other similar provisions.[123] Section 16 imposes secrecy obligations on "officers", namely any person who is or has been employed or appointed by the Commonwealth or by a State, and who by reason of that appointment or employment, has acquired information respecting the affairs of any other person, disclosed or obtained under the ITA Act or any previous law of the Commonwealth relating to income tax.[124] The "officers" in question:

> ... shall not either directly or indirectly, except in the performance of any duty as an officer, and either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any information respecting the affairs of another person acquired by the officer as mentioned in the definition of 'officer' in subsection (1).[125]

While breaches of s 16 attract "criminal" sanctions,[126] civil proceedings may be brought by taxpayers who have been, or will be, adversely affected[127] by conduct of "officers" which is alleged to be in contravention of s 16.[128] An example of litigation initiated in relation to s 16 is provided by *Consolidated Press Holdings Ltd v Federal Commissioner of Taxation*,[129] where the taxpayer sought an injunction to prevent the Deputy Commissioner and the Australian Taxation Office (the ATO) officers from communicating information concerning

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of some administrative decision based upon individual preference unrelated to any test laid down by the legislation" *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 684, per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ For more details see V Morabito and S Barkoczy, "What is a Tax? - the Erosion of the Latham Definition" (1996) 6 *Revenue Law Journal* 43 at 58-62

123 Section 8XB of the *Taxation Administration Act* 1953 (Cth), for instance, provides that "a person" is not allowed to: make a record of any taxation information relating to another person, divulge or communicate to another person any taxation information relating to a third person, or otherwise make use of any taxation information relating to another person in circumstances where the information is disclosed to or obtained by the person in question in breach of a provision of a taxation law.

124 Section 16(1).

125 Section 16(2).

126 $10,000 or imprisonment for two years, or both.

127 "Much of the information which is examined in considering issues concerned with the tax liability of taxpayers is very confidential. The scientific information involved in a Div 10B or s 73B matter, or in relation to the question whether a process is 'manufacture' for sales tax purposes, may be extremely vulnerable to disclosure to actual or potential competitors Financial information concerning the taxpayer's affairs is always confidential, but in the case of a taxpayer carrying on business, it may be such that disclosure of it would expose the taxpayer to attack or takeover": A Slater, "Commissioner's use of outside experts" [1995] 2 *CCH Tax Focus* 9 at 9.

128 It is interesting to note that s 17B of the *Taxation Administration Act* 1953 (Cth) provides that "where a person has engaged, is engaging or is proposing to engage in any conduct that constituted or would constitute a contravention of a taxation law that prohibits the communication, divulging or publication of information or the production of, or the publication of the contents of, a document, the Federal Court of Australia may, on the application of the Commissioner, grant an injunction restraining the person from engaging in the conduct and, if in the court's opinion it is desirable to do so, requiring the person to do any act or thing".

129 95 ATC 4178; and 95 ATC 4231

the tax affairs of the taxpayer to the partner of an accounting firm. The application for an injunction was based on the arguments that such communication was in breach of the secrecy obligation imposed by s 16 and that the taxpayer had a legitimate expectation that such disclosure would not take place without the taxpayer being first consulted.[130]

If the proposed communication of information, which is alleged to be in contravention of the relevant statutory secrecy provisions or of the rules of natural justice, concerns the tax affairs of a group of taxpayers, a class suit may be brought under the Federal Act.[131] An example of a suitable factual scenario for a class suit in this area would be where a number of taxpayers have, separately and independently, claimed deductions under Division 10B of the ITA Act, for the capital cost of developing or purchasing a copyright, patent or registered design, and, for the purpose of deciding whether to allow such deductions, the assistance of outside experts is sought by the ATO.[132] If it is believed that this disclosure is illegal, a class suit may be initiated by one of the taxpayers in question.

Such litigation would be likely to satisfy the requirements, found in s 33C(1), of "the same, similar or related circumstances" and "substantial common issue of law or fact". These requirements have generally been interpreted in a fairly generous manner by the Federal Court. In a recent case, for instance, Einfeld J indicated that he was

> ... not convinced that mere volume of evidence disqualifies a proceeding from being undertaken as a class action. Nor in my experience has complexity ever been a reason for failure to determine an issue. I am also not persuaded that substantial differences in individual circumstances disqualify a case from being a class action. Part IVA anticipates that individuals in the group will have differing circumstances... As far as group actions provided for by Pt IVA are concerned, what is relevant is similarity not difference.[133]

Similarly, French J expressed the view that "the word 'related' suggests a connection wider than identity or similarity".[134]

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130 This latter argument, based on the rules of natural justice, was successful as Lockhart J held that the taxpayer should have been offered an opportunity to make submissions on matters such as the identity of the outside expert to be selected and whether the taxpayer wished to limit the information made available to such expert. 95 ATC 4231, 4239

131 It is interesting to note that in *Re Mann and Federal Commissioner of Taxation* 87 ATC 2010, the Administrative Appeals Tribunal indicated that the use of anonyms and obscurities will not prevent a breach of s 16(2) where the information revealed is in respect of a class of persons and where, even though that class varies slightly in membership over a relevant period, its membership is known or readily ascertainable by persons beyond the confines of the class.

132 "Where the availability of Div 10B deductions turns on complex scientific issues, it is improbable that the ATO . will have the resources to assess the technical questions raised. In dealing with such matters, the ATO will inevitably have to draw on outside help" A Slater, note 127 *supra* at 9

133 *Marks* note 109 *supra* at 311 See also *Tropical* note 109 *supra* at 516, per Wilcox J; *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100, and *Metcalfe v NZI Securities Australia Ltd* [1995] ATPR 40,645

134 *Zhang de Yong* note 2 *supra* at 185 *Cf Soverina Pty Ltd v Natwest Australia Bank Ltd* (1993) 40 FCR 452; and *Cameron v Qantas Airways Ltd* (unreported, Federal Court, Beaumont J, 14 July 1993)

It should be noted, however, that in a recent judgment, Drummond J placed emphasis on the term "substantial" to justify a narrow formulation of the circumstances in which a class suit may be commenced in the Federal Court:

> But the object of Pt IVA would not be served if it was enough for there to be an issue common to each of the group members' claims that could not be dismissed as trivial or insubstantial, even though that common issue was, when compared with the other non-common issues raised in the various claims as to liability and damages, merely one of a number of issues which had to be resolved before each claim could be determined. If, in addition to the common issue (or issues), the determination of each group member's claim involves other non-common issues, the litigation of which will, in a practical sense, have a real impact on the nature and extent of the interlocutory steps likely to be involved in bringing the case to a state of readiness for trial and the nature and duration of the trial, then that common issue will not be 'a substantial common issue' within s 33C(1)(c).[135]

A proceeding seeking to prevent the allegedly 'illegal' disclosure of information by the ATO, concerning a number of taxpayers, would appear to satisfy the judicial formulations set out above, including Justice Drummond's test, as there would probably be very few, if any, 'non-common issues'. The central and most significant issue would simply be whether the conduct that is being challenged constitutes a violation of either the secrecy obligations imposed by the relevant statutory provisions or the relevant principles of administrative law, such as the rules of natural justice. In light of the high costs of judicial proceedings, a class action under the Federal Act may represent the only option available to the taxpayers in question.

## E. Tax Audits

A class suit may also be appropriate where a group of persons wish to challenge the validity of s 264 notices which have been served upon them. Section 264 provides that

> ... the Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connection with any department of a Government or by any public authority -
>
> (a) to furnish him with such information as he may require; and
>
> (b) to attend and give evidence before him or before any officer authorised by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.

If the s 264 notices that have been served upon a number of taxpayers, over a particular period of time, suffer from the same legal problem such as, for instance, failing to specify a reasonable time in which the taxpayer is required to

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135 *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723 at 731. Justice Drummond's judgment demonstrates the accuracy of the author's prediction that "the use of an ambiguous requirement such as 'substantial' adds uncertainty, as it confers upon courts excessive discretion, and . . is not necessary as the requirement that there be a 'common issue of law or fact' is more than adequate to prevent disparate matters from being brought together". note 39 *supra* at 623. Ironically, this passage appeared in Justice Drummond's judgment, at 731.

comply with its terms,[136] then the validity of such notices may be challenged through a class suit, under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (the ADJR Act).[137]

The ADJR Act allows judicial review of "a decision of an administrative character made, proposed to be made, ... under an enactment".[138] An application for judicial review may be lodged by "a person who is aggrieved by a decision to which this Act applies".[139] This is defined to include a person whose interests are adversely affected by the decision in question.[140] Section 5 contains an extensive list of the grounds upon which judicial review of "decisions" may be sought, including the argument that a breach of the rules of natural justice has occurred in connection with the making of the decision;[141] that the decision was not authorised by the enactment in pursuance of which it was purported to be made;[142] or that the making of the decision was an improper exercise of the power conferred upon the decision-maker.[143] A wide range of tax-related decisions may be challenged pursuant to this Act.[144]

A useful precedent for a class suit in the Federal Court seeking judicial review under the ADJR Act is provided by Justice French's judgment in *Zhang de*

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136 "The test for determination of a 'reasonable time' is objective, and is judged in light of the nature of the requirement made (eg the number and variety of documents or information sought) and all the surrounding circumstances, such as prior discussions between the parties and requests for similar information which might make it more likely that the recipient could locate the documents sought within the specified time" RH Woellner, TJ Vella, L Burns and S Barkoczy, *1997 Australian Taxation Law*, CCH (7th ed, 1997) p 112.

137 In the Second Reading Speech on the Administrative Decisions (Judicial Review) Bill 1977, RJ Ellicott, the then Commonwealth Attorney-General, explained that "what the present Bill seeks to do is to establish a single form of proceeding in the Federal Court of Australia for judicial review of Commonwealth administrative actions as an alternative to the present cumbersome and technical procedures for review by way of prerogative writ, or the present actions for a declaration or injunction". Australia, House of Representatives 1977, Debates, vol HR105, p 1394 It has been stated that "the comprehensive, even elaborate, Australian review system is unique amongst common law countries" HP Lee, PJ Hanks and V Morabito, *In the Name of National Security - The Legal Dimensions*, Law Book Company Information Services (1995) p 119

138 Section 3

139 Section 5.

140 Section 3(4) The Australian Law Reform Commission has recently noted that until the late 1980s "to be a 'person aggrieved' the applicant had to show that he or she would suffer a grievance as a result of the decision complained of beyond that which he or she would suffer as an ordinary member of the public. Since the late 1980s the courts have moved towards a more liberal construction of the 'person aggrieved' test". Australian Law Reform Commission Discussion Paper 61, *Who Should Sue? A review of the Law of Standing*, October 1995 at [3 12]

141 Section 5(1)(a)

142 Section 5(1)(d).

143 Section 5(1)(e)

144 Examples include: a refusal to issue a withholding tax exemption certificate under s 128H of the ITA Act, a refusal to grant an extension of time for the lodgment of a return, and the issue of a notice to debtors of a taxpayer under s 218 of the ITA Act CCH, *Australian Federal Tax Reporter* at [934-200] Paragraph (1)(e) of Schedule 1 of the ADJR Act does, however, exclude from review under the ADJR Act decisions under tax Acts, including the ITA Act, "leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax"

*Yong*.[145] This action was brought on behalf of all persons who had been refused refugee status between March 1992 and June 1993. It was submitted by the representative plaintiff that the principles of natural justice conferred upon all persons applying for refugee status a legal right to an oral hearing by the relevant decision-maker.

Justice French held that proceedings under the ADJR Act could be brought as class suits in the Federal Court. He also ruled that the claims of the class members were in respect of "the same, similar or related circumstances":

> In so holding, I have regard to the need for a purposive approach to the construction of s 33C(1)(b), bearing in mind the utility of determining the common issue in this way. If the application were to succeed, all group members would be entitled to the offer of an oral hearing by the decision-maker... If the application fails, then a principle applicable to each group member would be established, namely that there is no entitlement in any member of the group to an oral hearing by reason only of the fact that the member is an applicant for administrative review of the refusal to grant refugee status.[146]

Similarly, in the example of a possible challenge to s 264 notices given above, of failing to provide a reasonable time in which to comply with its requirements, "a principle applicable to each group member would be established" through a class suit, namely, whether the notices served on the taxpayers in question are invalid because of a common "legal flaw".

A suitable factual scenario for a class action, in the context of tax audits, is provided by the litigation in *Industrial Equity Ltd v Deputy Federal Commissioner of Taxation*.[147] The case concerned an audit into the taxation affairs of Industrial Equity Ltd and associated entities for the period of 1 July 1984 to 30 June 1988. As part of this audit, s 263[148] and s 264 notices were issued by the ATO. These notices were unsuccessfully challenged by the taxpayer. The legal submissions of the taxpayer were summarised as follows by the High Court:

> IEL did not argue that the selection of the top 100 companies as a category for inquiry was necessarily improper; rather, the complaint was of the selection of IEL merely because it fell within that category.[149]

The litigation in *Industrial Equity* could have been initiated as a class suit on behalf of the other top 100 companies that had been, or were about to be, audited. The conclusion that such proceedings would satisfy the requirements of s 33C(1) of the Federal Act appears to be supported by the class suit in *Tang Jia Xin v Minister for Immigration and Ethnic Affairs*.[150] It involved a proceeding by a Chinese applicant for refugee status seeking damages, on behalf of himself

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145 Note 2 *supra* See also *Wu v Minister for Immigration and Ethnic Affairs (No 2)* (1994) 51 FCR 232; *Ling v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court, Neaves J, 10 February 1994); *Trong* note 73 *supra*, and *Lek* note 133 *supra*.

146 Note 2 *supra* at 185. This passage was endorsed by the full Federal Court in *Chen Zhen Zi* v *Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 83 at 88, per Black CJ, Lee and Heerey JJ

147 90 ATC 5008

148 Under s 263 the ATO has "at all times . . full and free access to all buildings, places, books, documents and other papers" for any of the purposes of the ITA Act.

149 Note 147 *supra* at 5014, per Mason CJ, Brennan, Deane, Dawson, Toohey and McHugh JJ.

150 Unreported, Federal Court, Wilcox J, 11 April 1996

and 37 other persons, against the Commonwealth in respect of their detention in custody for a period exceeding that prescribed by the *Migration Act* 1958 (Cth). Justice Wilcox allowed this action to proceed as a class suit. In *Tang Jia Xin*, as in challenges to tax audits, the legality of government action was challenged, pursuant to common or similar legal and/or factual grounds, by those who have been, or will be, adversely affected by it.[151]

Needless to say, the use of the class action procedure would not have altered the outcome of the case in *Industrial Equity* as no person can assert a substantive right in a class action that could not have been asserted, as a matter of law, in an individual proceeding.[152] Nonetheless, where the taxpayers who are to be audited have considerably less resources at their disposal than the taxpayers in *Industrial Equity*, the class action procedure may represent the only means available to those taxpayers to put forward their case before a court of law.

## F. Challenges to Taxation Decisions

Part IVC of the *Taxation Administration Act* 1953 (Cth) (the TA Act) comes into play if a provision of a Commonwealth tax Act allows a person who is dissatisfied with a "taxation decision", defined as an "assessment, determination, notice or decision",[153] to object against it "in the manner set out in" Part IVC.[154] The taxation decisions to which Part IVC applies include various decisions under the ITA Act, the *Fringe Benefits Tax Assessment Act* 1986 (Cth), the *Superannuation Guarantee (Administration) Act* 1992 (Cth) and the *Training Guarantee (Administration) Act* 1990 (Cth).[155] Section 14ZU provides that a person making a taxation objection must: (a) make it in writing; (b) lodge it with the Commissioner within the period set out in s 14ZW;[156] and (c) state in it, fully and in detail, the grounds that the person relies on.

The Commissioner is then required to decide whether to allow the objection, wholly or in part, or to disallow it.[157] Such a decision is referred to as an "objection decision".[158] The legislation draws a distinction between two categories of objection decisions, namely, appealable objection decisions and reviewable objection decisions. An appealable objection decision is defined as an objection decision other than one made on a taxation objection under s 63 of the *Pay-roll Tax (Territories) Assessment Act* 1971 (Cth), s 14E of the TA Act or

151 See also *Wu* note 145 *supra*, *Ling* note 145 *supra*; *Trong* note 73 *supra*, and *Lek* note 133 *supra*

152 "Part IVA does not create a new cause of action in any substantive sense" *Cameron* note 134 *supra* at 13, per Beaumont J.

153 Section 14ZQ of the TA Act.

154 Section 14ZL(1). The taxpayer's objection is called a taxation objection: s 14ZL(2)

155 An extensive list of the taxation decisions caught by Part IVC can be found in *Australian Federal Tax Reporter*, note 144 *supra* at [972-540]. Some of the more significant decisions, which may be challenged pursuant to the provisions of this Part, include assessments of the taxable income of taxpayers under Part IV of the ITA Act, franking account assessments in relation to companies under Part IIIAA of the ITA Act, and assessments of the fringe benefits tax liability of employers under s 72 of the *Fringe Benefits Tax Assessment Act* 1986 (Cth).

156 In most cases the time limit is four years after notice of the taxation decision in question is served on the taxpayer

157 Section 14ZY(1).

158 Section 14ZY(2).

s 43A of the *Wool Tax (Administration) Act* 1964 (Cth).[159] A reviewable objection decision is defined as an objection decision that is not an ineligible income tax remission decision[160] or an ineligible sales tax remission decision.[161]

The distinction between these two categories of objection decisions is of crucial importance in determining whether the dissatisfied taxpayer can seek the assistance of the Federal Court or the Administrative Appeals Tribunal (the AAT). Three different scenarios are provided for by s 14ZZ. The first scenario is where the objection decision is both a reviewable objection decision and an appealable objection decision. In such an event the dissatisfied taxpayer can choose between an application to the AAT for review of the decision or an appeal to the Federal Court against the decision. The second possible scenario is where the objection decision in question satisfies the definition of a reviewable objection decision but not the definition of an appealable objection decision. Where this occurs the only legal avenue available to the aggrieved taxpayer is an application to the AAT. The third and final possibility is that the decision in question is an appealable objection decision but not a reviewable objection decision. In this scenario, the taxpayer may appeal to the Federal Court only against the decision.

If the Commissioner makes a number of appealable objection decisions in relation to a class of taxpayers in circumstances where those decisions can be challenged on similar grounds, such as, for instance, the argument that the Commissioner took into account the same or similar irrelevant considerations in relation to each of the taxpayers in question or exercised a discretionary power in accordance with a rule or policy without regard to the merits of the cases of the relevant taxpayers, then a class suit may be initiated in the Federal Court. An example of a suitable scenario for a class suit seeking to challenge appealable objection decisions is provided by the regime governing the taxation of the net income of trust estates in relation to which there is no presently entitled beneficiary. The Commissioner has the power to assess such income under s 99 of the ITA Act[162] if he or she is of the view that it would be unreasonable to apply the regime under s 99A of the same Act.[163] If the Commissioner adopts a policy of not exercising the power noted above, whenever the beneficiaries of the trust estates in question have certain characteristics, such as being doctors, a legal challenge may be launched against this policy, on behalf of the taxpayers

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159 Section 14ZQ. These three exceptions are of very limited significance

160 According to s 14ZS, an objection decision can be regarded as an ineligible income tax remission decision if, subject to certain exceptions, it relates to the remission of additional tax payable by a taxpayer under the ITA Act.

161 According to s 14ZT, an objection decision can be regarded as an ineligible sales tax remission decision if, subject to certain exceptions, it relates to the remission of additional tax under the *Sales Tax Assessment Act (No 1)* 1930 (Cth).

162 The tax rates applied under s 99A are higher than those applicable under s 99

163 This power can only be exercised in relation to bankrupt estates, deceased estates and trust estates that consist of certain types of property such as death benefits under a life insurance policy or workers' compensation For more details see *1997 Australian Master Tax Guide*, CCH (28th ed, 1997) at [6 230]

who have been, or will be, adversely affected by it.[164] The extent to which the Courts can review this discretion of the Commissioner was explained as follows by Barwick CJ:

> ... the Court can determine whether or not the opinion was formed arbitrarily or fancifully, or upon facts or considerations which could not be regarded as relevant even to such a question as the unreasonableness of applying a taxing provision to a particular taxpayer in respect of the income of a particular year.[165]

The legal issues noted by Barwick CJ could be conveniently determined, in relation to factual scenarios such as the one given above, in the one proceeding.[166]

It must be borne in mind, however, that a significant disadvantage of commencing judicial proceedings, as compared with an application to the AAT, is that the Federal Court can only review the *legality* of the decision in dispute[167] whilst the AAT may review the *merits* of the decision.[168] Another major disadvantage of judicial proceedings is their substantially higher cost vis-à-vis AAT proceedings.[169]

The ability to bring a class suit in any given tax-related dispute may also depend on the following two important matters:

1. the time limit for the commencement of the legal proceedings in question; and
2. the Court's discretion to order that a properly instituted class suit no longer proceed as a class suit.

Attention will now be turned to these two issues.

*(i) Time Limits*

Some of the potential tax-related class suits that have been mentioned so far, such as challenges to tax audits, may be launched as applications for judicial

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164 "A challenge to the lawfulness of an administrative policy or practice affecting the exercise of statutory power may raise ... a narrow point for decision" *Zhang de Yong* note 2 *supra* at 184, per French J. Being a "narrow point" it can be easily dealt with in a class suit.

165 *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 375

166 "Where the lawfulness of a policy is contested by an individual, that test case may, pending an appeal, establish the law. However, it does not provide as firm a bulwark against re-litigation of the same point in like cases as does the determination in representative proceedings which directly binds the decision-maker and members of the group" *Zhang de Yong* note 2 *supra* at 184, per French J.

167 "When a judicial review action is successful, it is usual for the Federal Court to quash the decision, or to refer it back to the decision maker for further consideration. Ordinarily it is not part of judicial review for a court to substitute a new decision, or to award compensation to an aggrieved person": Administrative Review Council Discussion Paper, *Review of Commonwealth Merits Review Tribunals*, August 1994 at [2.9].

168 However, it has been argued that "the boundary between these two concepts is 'porous' and there are occasions when the Court might be thought to have crossed the boundary": RH Woellner et al, note 136 *supra*, p 192

169 There have been calls for the introduction of the class action procedure in the AAT: see note 1 *supra* at 51: "reformatting the AAT along class action lines, and permitting the AAT to be a reviewer of decision and bureaucratic policy would make the Tribunal a more meaningful service to people overwhelmed by the cost and complexity of dealing with large bureaucracies".

review pursuant to the provisions of the ADJR Act.[170] Section 11 of this Act sets out the time limits for lodging applications for judicial review. Section 11(3)(a) provides that, "if the decision sets out the findings on material questions of fact, refers to the evidence or other material on which those findings were based and gives the reasons for the decision", an application to the Court for judicial review of the decision in question must be lodged twenty-eight days after the day on which "a document setting out the terms of the decision is furnished to the applicant".[171]

A time limit also applies to appeals lodged against appealable objection decisions pursuant to s 14ZZ of the TA Act. Section 14ZZN provides that an appeal to the Federal Court against an appealable objection decision must be lodged within sixty days after the person appealing is served with notice of the decision. It appears that this time limit cannot be extended.[172]

The fairly 'tight' time limits of 28 days under the ADJR Act and of 60 days under the TA Act represent not insignificant obstacles for aggrieved taxpayers seeking to employ the class action procedure. It must be remembered, however, that the commencement of a class suit, rather than a 'traditional' suit, need not delay commencement of the proceedings as the Federal Act does not require the representative plaintiff to either identify the members and size of the class,[173] or to obtain their consents to the class suit.[174]

Furthermore, in the context of ADJR actions, if the suit is commenced outside the time limit, the Court has the power, under s 11(1)(c) of the ADJR Act, to allow an applicant to lodge an application outside the 28 day period specified in s 11(3).[175] The usual considerations involved in the exercise of the Court's discretion include:

> ... the period of the delay in making the application, the reasons for the delay, the dealings between the applicant and the Commissioner, the merits of the application for review, and whether there has been any prejudice to the Commissioner (specifically and in the wider sense of the public interest in the proper administration of the taxation laws).[176]

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170 "Despite the limits placed on the scope of the Act by Sch 1 and 2 and other provisions, it seems fair to say that the ADJR Act has been of significant benefit to taxpayers" RH Woellner et al, note 136 *supra*, p 195

171 See also s 11(3)(b) and s 11(4) of the ADJR Act.

172 "If an objector fails to lodge an appeal within the specified 60-day period, there is no provision in Div 5 of Pt IVC for the court to grant an extension of time This contrasts with the position before 1 March 1992 . It should be noted that the general power in r 3 of O 3 to extend any time fixed by the Federal Court Rules does not apply, as the time for lodging an objection is fixed by statute (s 14ZZN) and not by the Rules In addition, s 23 of the *Federal Court of Australia Act* 1976 (Cth), which confers on the court the power to make any order it thinks appropriate in relation to matters in which it has jurisdiction, may not apply because the court would not have jurisdiction to hear an appeal against an appealable objection decision lodged after the expiry of the 60 day period specified in s 14ZZN if there is no provision for granting an extension of time" *Australian Federal Tax Reporter*, note 144 *supra* at [973-300].

173 Section 33H(2)

174 Section 33E.

175 Section 11(1)(c) provides that the application must be "lodged within the prescribed period or within such further time as the Court (whether before or after the expiration of the prescribed period) allows".

176 *Australian Federal Tax Reporter*, note 144 *supra* at [934-400].

More often than not, the Court's discretion has been exercised in favour of tardy applicants.[177]

In the context of Federal class suits, reliance may be placed by taxpayers on s 33ZE of the Federal Act which suspends, for class members, the running of the limitation period from the date the representative proceeding is commenced.[178] The suspension is lifted if the class member 'opts out' or if the proceeding is determined without finally disposing of the class member's claim. The Explanatory Memorandum to the Federal Act explains the role of this provision as removing:

> ... any need for a group member to commence an individual proceeding to protect himself or herself from expiry of the relevant limitation period in the event that the representative action is dismissed on a procedural basis without judgment being given on the merits.[179]

The effect of s 33ZE, in the context of class suits seeking judicial review under the ADJR Act, was considered by the full Federal Court in *Tian v Minister for Immigration, Local Government and Ethnic Affairs*.[180] The applicants sought judicial review, under the ADJR Act, of the Minister's rejection of their applications for refugee status. But their applications were lodged out of time and Neaves J refused to grant them an extension of time under s 11(1)(c) of the ADJR Act. The applicants had been members of the class involved in the *Zhang de Yong* litigation.[181] On 6 October 1993, French J had made a declaration in respect of the issue that was common to all members of the class represented by Zhang de Yong, namely, whether the class members were entitled to an oral hearing by the relevant decision-maker.[182] The Full Court was of the view that:

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177 See, for instance, *Intervest Corporation Pty Ltd v Federal Commissioner of Taxation* 84 ATC 4744; and *Winter v Deputy Federal Commissioner of Taxation* 87 ATC 4065.

178 As was indicated by the Law Reform Committee of South Australia, "class actions require some modification of the rules regarding limitation of actions The ordinary limitation provisions must be made subject to the right of individual members of a class to establish their claims after the common questions have been determined, notwithstanding that the time for instituting proceedings has expired". SA Report, note 50 *supra* at 10

179 Note 38 *supra* at [49] Under 'opt in' models it appears that the running of the limitation period is suspended only after the class member files his or her consent. see, JM Bowermaster, "Two (Federal) Wrongs make a (State) Right: State Class-Action Procedures as an Alternative to the Opt-in Class-Action Provision of the ADEA" (1991) 25 *University of Michigan Journal of Law Reform* 7 at 29 note 145 and J Kennedy, "Class Actions: The Right to 'opt out'" (1983) 25 *Arizona Law Review* 3 at 30-1. It is interesting to note that some commentators have attacked the suspension of the operation of the statute of limitations under 'opt out' schemes: "[it] goes beyond permitting an individual to pursue private relief, by giving class members more time in which to sue than they would enjoy if the class action had never been filed. Thus considerations of fairness do not support tolling [suspending] the limitations period for opt-out plaintiffs" (Notes, "Statutes of Limitations and Opting Out of Class Actions" (1982) 81 *Michigan Law Review* 399 at 427); and "it is feasible that a person could be a member of a class for six or seven years whilst the action was proceeding, pull himself out and effectively commence his own action" (P Costello, Australia, House of Representatives 1991, Debates, vol HR181, p 3286).

180 (1994) 33 ALD 451.

181 *Zhang de Yong* note 2 *supra* .

182 Justice French held that the class members had no such entitlement and, consequently, made an order, under s 33N, that the proceedings not continue as representative proceedings

> ... the words 'any limitation period' appearing in s 33ZE(1) of the Act include the period prescribed in s 11 of the ADJR Act for the institution of proceedings under that Act.
>
> It follows that, upon the making of any decision affecting the applicants with whom we are now concerned, and the fact that there were then on foot representative proceedings, the class in which encompassed the applicants, time did not run during the period of the representative proceedings.[183]

Consequently, time commenced to run, for the applicants, from the making of Justice French's order. Since the applications were lodged only a few days out of time,[184] the Full Federal Court concluded that "this is obviously a case in which time ought to be extended".[185]

Another provision of the Federal Act which may assist taxpayers is s 33K. It allows the Court to alter the description of the class 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.[186]

The purpose of this provision is to enable "as many potential group members as possible to be included, in order to remove, so far as possible, the need for separate proceedings to be brought".[187] In *Lek*[188] and in *Zhang de Yong*,[189] the class represented by the representative plaintiff was expanded by the inclusion of persons whose causes of action arose *after* the commencement of the class suit.

Finally, it is important to note that an application for relief under s 39B of the *Judiciary Act* 1903 (Cth) is not subject to lodgment within any prescribed period of time. This provision confers upon the Federal Court jurisdiction in "any matter in which a writ of mandamus or prohibition or an injunction is sought against" Commonwealth officers.[190] It must be borne in mind, however, that as a result of the recent decision of the Full Bench of the High Court in *Deputy Federal Commissioner of Taxation v Richard Walter Pty Ltd*,[191] the

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183 (1994) 33 ALD 451 at 452, per Davies, Wilcox and Von Doussa JJ

184 They were lodged on 12 November 1993

185 Note 183 *supra* at 453, per Davies, Wilcox and Von Doussa JJ.

186 Francey has argued that the Federal Court should have also been vested with the power "to redefine the group so as to include persons who might not be within the group as originally described .. but whose inclusion would be appropriate to ensure that as many group members as possible and practicable are included having regard to the nature of the proceedings and the common questions of law or fact potentially involved". N Francey, "Stay In and Miss Out?" (1992) 27 *Australian Law News* 10 at 12.

187 Note 38 *supra* at [20].

188 Note 133 *supra* at 105, per Wilcox J: "Between the institution of the proceeding and the commencement of the hearing, there were variations in membership of the group . two new names were added, these being persons whose applications [for refugee status] were refused after the institution of the proceeding".

189 Note 2 *supra*. The proceeding was initiated on 23 December 1992 and the class represented by the representative plaintiff consisted of persons who had been refused refugee status between March 1992 and June 1993. Consequently, the class included persons whose applications for refugee status had been rejected *after* the commencement of this class suit

190 Certain categories of "officers", such as Family Court judges, are taken out of the reach of s 39B by s 39B(2).

191 95 ATC 4067.

circumstances in which challenges to income tax assessments[192] may be brought under s 39B are very limited:

> In essence the circumstances in which an assessment may be challenged under s 39B(1) will be limited to cases where the assessment itself is invalid in the sense that it is, for instance, made mala fides or is an abuse of power or where it is not really an assessment at all but merely an 'illusory' assessment.[193]

*(ii) Judicial Order to Discontinue a Class Suit*

Both the Federal regime and the traditional representative procedure rules confer upon the Court presiding over the class suit the discretion to order that properly instituted class suits no longer continue as class suits. As was explained by Williams in relation to the judgment of the High Court in *Carnie*:

> The Court recognised the distinction made by the rule of court between the commencement of a representative proceeding and its continuance. Whether a representative proceeding is properly brought depends upon the existence of numerous persons having the same interest; whether a representative proceeding properly brought ought to be allowed to continue is a matter within the discretion of the court.[194]

Consequently, representative plaintiffs, acting on behalf of groups of taxpayers, must be able to convince the Court, not only that the legal proceeding satisfies the prescribed requirements for the commencement of class suits, but also that the circumstances which justify the exercise of the Court's discretion to direct that the proceeding no longer continue as a class suit are not present in the litigation in question.

In relation to the traditional representative procedure, there was, unfortunately, no consensus among all High Court Justices as to how the discretion conferred upon the Court by the phrase "unless the court otherwise orders", found in the NSW rules, should be exercised in *Carnie*. While Toohey, Gaudron and McHugh JJ could not find any basis for exercising a discretion to stop the action proceeding as a representative action, Mason CJ, Deane, Dawson and Brennan JJ remitted the matter to the NSW Court of Appeal for consideration of the question whether it should order that the action not continue as a representative action.[195] In light of this divergence of views, and lack of clear guidance in *Carnie*, it cannot be predicted with any confidence how this discretion would be exercised in any given case.[196]

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192 "An 'assessment' is . an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer": *R v Deputy Federal Commissioner of Taxation, ex parte Hooper* (1926) 37 CLR 368 at 373, per Isaacs J For more details see S Barkoczy and V Morabito, "The Nature of an Assessment in the light of *Stokes'* case" [1997] 19 *CCH Tax Week* 261, and GT Pagone, "The Significance of Assessments" (1990) 19 *Australian Tax Review* 88.

193 S Barkoczy and N Bellamy, "The High Court Decision in *Deputy Federal Commissioner of Taxation v Richard Walter Pty Ltd*" (1995) 3 *Current Commercial Law* 86 at 90

194 N Williams, note 29 *supra* at [I 18.01.0].

195 The concerns that the majority of the High Court Justices raised were first mentioned by Gleeson CJ of the NSW Court of Appeal: see note 67 *supra*

196 Justice Young was of the view that his "main task was to consider the most efficient method of conducting the trial of the present proceedings and that if the trial of a representative action would involve delay and expense and prejudice over and above other ways of handling the problem, then

Sections 33L, 33M, and 33N of the Federal Act set out, in some detail, the circumstances which may justify the Federal Court directing that the proceeding no longer continue as a representative proceeding.[197] Section 33L confers upon the Court the discretion to order that the proceeding no longer continue as a class suit where it appears, at any stage of the class suit, that there are less than seven class members. In *Tropical Shine Holdings*, Wilcox J indicated that to terminate a representative proceeding because there are less than seven class members

> ... would be a drastic course, often productive of injustice and inconvenience; and it would conflict with the policy expressed by s 51 of the *Federal Court of Australia Act* that proceedings are not invalidated by a formal defect or irregularity unless the Court thinks substantial and irremediable injustice has occurred.[198]

Section 33M empowers the Court to order the termination of a class action where the cost to the respondent of identifying the class members and distributing to them the damages won by the representative plaintiff would be excessive.[199] Section 33N allows the Court to order that the action no longer continue as a class action 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.[200]

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probably the Court should 'otherwise order'": *Carnie* note 69 *supra* at 468. Justice Bryson has indicated that "a decision by the court to allow representative proceedings to continue will sometimes, as it would in this case, commit the court to an elaborate task of managing the litigation, giving directions in detail, attending to particular circumstances affecting each of numerous persons represented and devising fair procedures to do so. The complexities of such a task should be balanced with the complexities involved in the alternative course, which would require the represented persons to bring their own proceedings if they wish to do so. I would think that the complexity of a task involving an apparent need to address some of the details of hundreds or perhaps even thousands of claims would not usually be a predominant consideration; if overall the complexities of determining all the claims are reduced the task would usually be undertaken": *Shepherd* note 68 *supra* at 14.

197 "The other main feature of the Bill [the Federal Act] is the comprehensive powers given to the Court to ensure that the proceedings are not abused": M Duffy, Australia, House of Representatives 1991, Debates, vol HR181, p 3175. Where the Court orders the discontinuance of a class suit, the proceeding may be continued as a proceeding by the representative party on his or her own behalf and "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". s 33P.

198 Note 109 *supra* at 514. See also *Marks* note 109 *supra* at 315, per Einfeld J.

199 This provision has been cogently attacked on the basis that it "has the effect of allowing unlawful behaviour to continue without penalty simply because a large number of people are affected in a way that requires only a small amount of compensation" note 53 *supra* at 20.

200 Paragraph (b) may be criticised on the basis that it may allow the Court to order the termination of many class suits on the ground that the relief sought can be obtained through the joinder procedure. Indeed, it is wide enough to allow Courts to prevent class suits where most of the class members have individually

The interpretation of these provisions by the Federal Court indicates that the judicial findings on the question of compliance with the requirements of s 33C(1) tend to mirror the judicial findings on the issue of the continuance of the proceedings. In fact, judicial conclusions that the relevant class suits were properly initiated have usually been followed by a refusal to order that the actions should no longer continue as class actions.[201] Similarly, whenever the Court has ruled that there has been no compliance with one or more of the prerequisites for the commencement of class suits, it has also, usually, reached the conclusion that, even if the class suit in question could be said to have been properly brought, the circumstances of the case justified the exercise of the Court's power to stop the litigation progressing as a class suit.[202]

Consequently, provisions such as ss 33L, 33M and 33N do not appear to constitute an additional obstacle for litigants acting on behalf of classes. Once the representative plaintiff is able to convince the Court that the suit satisfies the prerequisites for the *commencement* of a class suit, the Court is then unlikely to be persuaded that there exist grounds for the exercise of the Court's power to stop the *continuance* of such a suit.

## VI. CONCLUSION

The need for class actions in modern times was aptly explained by Gordon:

> The same developments in technology which enable a telephone company to maintain an electronic communication system and a computerised electronic mass billing system and the same developments in technology which enable finance companies to sign up clients to long term finance contracts on the internet require the Australian legal system to develop systems which enable large numbers of them to obtain appropriate compensation and redress when they are overcharged or misled by fraudulent contracts.
>
> This is what class actions are fundamentally about. A legal technology to service a technologically and commercially diverse mass market in Australia in the late twentieth century and into the twenty-first century.[203]

Gordon's concluding comments are just as applicable to taxpayers as they are to users of phones and borrowers. The interpretation and application of tax laws necessitate decisions on the part of tax authorities, which may affect simultaneously, or over a short period of time, hundreds, if not thousands, of taxpayers. If these decisions are flawed because of a common or similar mistake, taxpayers should not be denied access to justice simply because, for instance, the amount at stake may not justify the expenses entailed in pursuing

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recoverable claims and could, therefore, start their own proceedings. Paragraph (d) is also excessively broad.

201 See, for instance, *Marks* note 109 *supra*, and *Tropical* note 109 *supra*.

202 See, for instance, *Soverina* note 134 *supra*; and *Connell* note 135 *supra*

203 P Gordon, note 30 *supra* at 2. "There is a clear public interest in encouraging and developing representative actions They save costs and significant court time. They dispose of legal issues efficiently. They bring many people to justice. They are potentially a vehicle which our law provides to breathe reality into the much boasted shibboleths about the rule of law": *Esanda* note 3 *supra* at 402, per Kirby P.

individual legal proceedings. As was indicated by the Ontario Law Reform Commission:

> ... many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers ... class actions can help to overcome such barriers and, by providing increased access to the courts, may perform an important function in our society. Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights.[204]

Given that the Court which has in place the best class action regime in Australia, the Federal Court, is also the most likely judicial forum for the resolution of the tax-related grievances of many individuals, the use of the class action device by aggrieved taxpayers is a possibility that deserves close scrutiny.[205] The examples of tax-related class suits highlighted in this article provide only a snapshot of the numerous circumstances in which the class action procedure may well be within the reach of taxpayers.[206]

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204 Ontario Report, note 51 *supra* at 139 Similarly, Debelle has strongly argued that "if we seriously believe in the rule of law, we cannot be content with a legal system which creates paper rights but does not provide a practical means of enforcement or provides means only to a select few sufficiently affluent to invoke those rights". BM Debelle, "Class Actions for Australia ? Do they Already Exist?" (1980) 54 *ALJ* 508 at 515-16.

205 In relation to legal disputes concerning State taxes, in most cases, persons wishing to issue legal proceedings on behalf of classes of aggrieved taxpayers will need to rely on the less satisfactory, but nevertheless acceptable, traditional representative procedure.

206 Many examples of the tax challenges that may be brought pursuant to the ADJR Act and the TA Act are found in *Australian Federal Tax Reporter*, note 144 *supra* at [934-200] and [972-540], respectively. Many of these listed challenges could, potentially, be brought as class suits