



ICLG

The International Comparative Legal Guide to:

Class & Group Actions 2018

10th Edition

A practical cross-border insight into class and group actions work

Published by Global Legal Group, in association with CDR, with contributions from:

Arnold & Porter Kaye Scholer LLP

Baker Botts L.L.P.

Blake, Cassels & Graydon LLP

Clayton Utz

Cliffe Dekker Hofmeyr

Clifford Chance

De Brauw Blackstone Westbroek N.V.

Drinker Biddle & Reath LLP

Eversheds Sutherland Ltd.

Fangda Partners

J. Sagar Associates

Josh and Mak International

Lin & Partners Attorneys-at-Law

Linklaters LLP

Mori Hamada & Matsumoto

Munari Cavani Studio Legale

Norton Rose Fulbright

Russell McVeagh

Squire Patton Boggs

Yigal Arnon & Co.





global legal group

Contributing Editors
Ian Dodds-Smith & Alison Brown, Arnold & Porter Kaye Scholer LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Editor
Caroline Collingwood

Senior Editors
Suzie Levy, Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George
Print Group
October 2017

Copyright © 2017
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-911367-78-9
ISSN 1757-2797

Strategic Partners



General Chapters:

1	EU Developments in Relation to Collective Redress – Alison Brown, Arnold & Porter Kaye Scholer LLP	1
2	International Class Action Settlements in the Netherlands since <i>Converium</i> – Jan de Bie Leuveling Tjeenk & Dennis Horeman, De Brauw Blackstone Westbroek N.V.	5
3	Deal or No Deal? Increased Judicial Scrutiny of Class Action Settlements in the U.S. – Bradley J. Andreozzi, Drinker Biddle & Reath LLP	13

Country Question and Answer Chapters:

4	Australia	Clayton Utz: Colin Loveday & Andrew Morrison	18
5	Belgium	Linklaters LLP: Joost Verlinden & Michiel Vanwynsberghe	26
6	Canada	Blake, Cassels & Graydon LLP: Jill Lawrie & Daniel Szirmak	31
7	China	Fangda Partners: Frank Li & Rebecca Lu	38
8	England & Wales	Arnold & Porter Kaye Scholer LLP: Alison Brown & Ian Dodds-Smith	45
9	France	Squire Patton Boggs: Carole Sportes & Valérie Ravit	55
10	Germany	Clifford Chance: Burkhard Schneider	63
11	India	J. Sagar Associates: Ananya Kumar & Pragya Chauhan	72
12	Israel	Yigal Arnon & Co.: Barak Tal & Ruth Loven	78
13	Italy	Munari Cavani Studio Legale: Raffaele Cavani & Bruna Alessandra Fossati	85
14	Japan	Mori Hamada & Matsumoto: Daisuke Oda & Aruto Kagami	92
15	New Zealand	Russell McVeagh: Chris Curran & Andrew Butler	100
16	Pakistan	Josh and Mak International: Aemen Zufikar Maluka & Pir Abdul Wahid	107
17	Russia	Baker Botts L.L.P.: Ivan Marisin & Vasily Kuznetsov	113
18	South Africa	Cliffe Dekker Hofmeyr: Pieter Conradie & Anja Hofmeyr	119
19	Switzerland	Eversheds Sutherland Ltd.: Peter Haas	125
20	Taiwan	Lin & Partners Attorneys-at-Law: Robert H. Lou & Joey Kao	132
21	USA	Norton Rose Fulbright: Daniel M. McClure & Matthew A. Dekovich	137

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Class & Group Actions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of class and group actions.

It is divided into two main sections:

Three general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting class & group actions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in class and group actions in 18 jurisdictions.

All chapters are written by leading class and group actions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Ian Dodds-Smith and Alison Brown of Arnold & Porter Kaye Scholer LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Australia

Clayton Utz

Colin Loveday



Andrew Morrison



1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

In Australia, a statutory regime exists in the Federal Court of Australia for representative proceedings. The regime is prescribed in Part IVA of the Federal Court of Australia Act 1976 (Cth) (representative proceedings). Identical provisions exist in one of the State Courts, the Supreme Court of Victoria – Part 4A of the Supreme Court Act 1986 (Vic).

Since March 2011, the New South Wales Supreme Court has had a separate class action procedure. It allows class actions to be brought where claims are based on negligence or for breaches of New South Wales statutes. There are several significant differences between the New South Wales class action procedure and the Federal and Victorian court systems. In New South Wales, class actions may be brought on behalf of a defined, limited group of identified individuals, not only an open, generally-specified class. Further, class actions may be taken against several defendants even if not all group members have a claim against all the defendants.

In November 2016, a class action procedure was enacted in Queensland. This legislative move appeared to reflect, in part, concern that a class claim arising from recent flooding in the Queensland, including the State capital, had been commenced in the NSW Supreme Court under the NSW class action procedure. Indeed, a number of major Queensland-based infrastructure-related class actions had been commenced in other states. This development also reflects the ongoing efforts by each of the principal Australian jurisdictions to attract and secure complex commercial litigation.

The Courts of the other states or territories have more limited provisions for group actions but there is no comprehensive statutory regime.

As the Federal procedure has been in force for more than 20 years, the balance of this chapter will refer to the provisions in the Federal Court of Australia Act (the Act).

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

Representative proceedings are available in most areas of law where the Federal Court of Australia has jurisdiction. Representative

proceedings may be commenced whether or not the relief sought is or includes equitable relief, or consists of or includes a claim for damages even if the claim for damages would require individual assessment. Representative proceedings may also be commenced whether or not the proceedings concern separate contracts or transactions between the respondent in the proceedings and individual group members or involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

Proceedings under Part IVA in the Federal Court of Australia are a form of class action. Representative proceedings were introduced to give the Federal Court an efficient and effective procedure to deal with multiple claims.

A judgment in representative proceedings binds all group members who have not opted out of the proceedings. Part IVA also provides for the determination of specific issues in the proceedings relating to “sub-groups” or even individuals. While the trial of representative proceedings is usually designed to determine all common questions, it is recognised that representative proceedings may not always determine the claims of all group members. Individual causation in product liability claims is usually not pursued as a common question.

1.4 Is the procedure ‘opt-in’ or ‘opt-out’?

Part IVA currently prescribes an “opt-out” system for representative proceedings. At a relatively early stage in the proceedings, the Court will fix a date by which class members may opt out of the proceedings. This is done by way of written notice to the Court. If a claimant is within the class as defined but does not opt out before the fixed date, then they will be bound by any judgment of the Court.

The Federal Court has, however, also permitted classes to be defined in such a way that only persons who had “signed up” with a particular litigation funder (and their lawyers) could be a class member. This is, in effect, a form of gate-keeping or informal opt-in system. It remains to be seen whether this leads the legislature to make more fundamental statutory changes.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

In order to commence a “Representative Proceeding” in Australia, the claims must satisfy three threshold requirements:

- at least seven persons must have claims against the same person or persons;
- the claims of all these persons must arise out of the same, similar or related circumstances; and
- the claims of all these persons must give rise to at least one substantial common issue of law or fact.

In the absence of a certification procedure, there is no other requirement as to numerosity. A representative proceeding can have as many class members as satisfy the class definition and elect not to opt out. The Courts have generally been asked to consider the problems associated with mixed or disparate classes rather than classes that are too small or too large.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

As noted in question 1.5, the Australian system has no certification procedure or requirement – that is, there is no threshold requirement that the proceedings be judicially certified as appropriate to be brought as a representative proceeding.

There is no requirement that the common issues between class members predominate over the individual issues. Rather, there is merely a requirement that there be at least one “substantial” common issue of law or fact. In this sense, Australia’s highest Court has described “substantial” as meaning of substance rather than denoting a certain size. In effect, this means that, although mandatory, the requirements described in question 1.5 are not particularly onerous.

Once an Australian representative proceeding has been commenced, it will continue until resolved or the Court determines that the proceeding should not continue as a representative proceeding. The principal basis for that determination is either that the action does not satisfy the mandatory criteria or otherwise “in the interests of justice”. As noted in question 1.5, the Australian system has no certification procedure or requirement – that is, there is no threshold requirement that the proceedings be judicially certified as appropriate to be brought as a representative proceeding.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Representative proceedings are commenced by a single representative claimant, or sometimes several claimants. The proceedings are brought for and on behalf of group or class members. While the claimant(s) must describe the group in the originating process, there is no obligation to identify, name or even specify the number of group or class members.

There are Federal legislative provisions which allow the Australian competition regulator, the Australian Competition and Consumer Commission (ACCC), to pursue private enforcement (including by way of representative proceedings) on behalf of persons who have suffered, or are likely to suffer, loss or damage by reason of conduct which contravenes those Federal provisions.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Once a representative proceeding has commenced, notice must be given to group members advising them of their right to opt out of the proceeding before a specified date. Notice must be given as soon as practicable.

Under Part IVA, the Court has very prescriptive powers in this area. As a matter of course, Federal Court judges will settle both the precise terms of the notice(s) to be given and make specific orders as to the form and media for publication of that notice. Once proceedings have commenced, parties are otherwise not permitted to decline to “advertise” to claimants.

Notice is frequently given by way of press advertisements in national newspapers. However, it may also be given by radio or television broadcast. Publication through online and social media vehicles (i.e. through new media “apps”) is becoming more commonplace as public consumption of print media declines. In appropriate cases, direct notification is regarded as sufficient.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Representative proceedings have been brought in many types of claims including those involving financial services, investment schemes, shareholder litigation, failure of infrastructure, environmental contamination, real estate investments/marketing, consumer finance, and immigration law, as well as product liability and anti-cartel proceedings.

The total number of product liability representative proceedings commenced in Australia in the last 15 years under Part IVA is in the order of 40. A continuing rise in the number of securities or shareholder representative proceedings brought in Australia reflects the trend away from claims concerning tangible consumer products towards claims concerning financial “products” or services. In part, this is attributable to the level of investment which litigation funders and plaintiffs’ law firms are willing to make in non-commercial ventures.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

See question 1.2. Relief can include equitable relief and damages.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Yes. Federal legislative provisions expressly provide for the institution of proceedings by the ACCC on behalf of those who have

suffered, or are likely to suffer, loss as a result of contraventions of consumer protection and product safety provisions. Under these provisions the ACCC requires the prior written consent of the persons on whose behalf the application is being made.

The ACCC is, however, prevented from pursuing a representative action for personal injury or death under the unfair practice provisions relating to misleading and deceptive conduct.

Aside from the express power granted to the ACCC (see below), in order to bring proceedings under Part IVA as a class applicant, the representative body must have a “claim” and a “sufficient interest” on its own behalf to commence proceedings.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

The ACCC may bring a representative proceeding for breaches of the Federal anti-competitive statutory provisions on behalf of one or more persons. The ACCC can only pursue a representative proceeding on behalf of a group who have been identified and who have consented in writing to the action.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

The ACCC may commence an action on behalf of persons who have suffered, or are likely to suffer, loss or damage by conduct in breach of Federal statutory provisions.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

Relief available to the ACCC is wide and includes injunctive and compensatory relief. It is not necessary for the class applicant and group members to seek the same relief, thus it is possible for the group members to claim compensation against the respondents while the ACCC makes a claim for injunctive relief.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Civil proceedings in Australia are generally heard by a judge sitting without a jury. However, there are provisions in the various Court rules for some matters to be heard by the jury.

As a matter of practice, juries are usually not available in matters before the Federal Court. However, juries are not uncommon in the State of Victoria.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

The Federal Court of Australia utilises an individual docket system as the basis of its listing and case management. Each case commenced in the Court is allocated to a judge, who is then responsible for managing the case until final disposition.

In the State Courts, group proceedings are now commonly assigned to a docket judge (i.e. the NSW Supreme Court Class Actions List Judge) or a group of judges (i.e. the Victorian Commercial Court) for case management.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a ‘cut-off’ date by which claimants must join the litigation?

The Australian procedure has no certification procedure or requirement – that is, there is no threshold requirement that the proceedings be judicially certified as appropriate to be brought as a representative proceeding. Rather, once the action proceeding has been commenced, it will continue until resolved unless the defendant applies to the Court for an order terminating the proceedings as a representative proceeding.

Once proceedings have commenced, the Court must fix a date by which group members may opt out of the proceedings. A group member may opt out by providing written notice to the Court. See questions 1.4, 1.5 and 1.6. More recently, Federal and Victorian Courts have shown some willingness to fix an opt out date and to then require those claimants who do not opt out to positively signal their intention to claim through a registration process. In some cases that registration process is being ordered at the same time as the opt out cut-off date. Claimants who do not opt out but who fail to register may find their claims permanently barred.

3.4 Do the courts commonly select ‘test’ or ‘model’ cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Both options are available and the actual process will depend on the case. There is no established precedent, but some representative proceedings proceed by a determination of the lead applicant’s case first, in an attempt to answer common questions for all group members. In some jurisdictions, the Court may try preliminary issues whether of fact or law or mixed fact and law.

Historically, Courts have been of the view that trials of preliminary issues should only be granted on special grounds, such as whether the preliminary issue will substantially narrow the field of controversy, shorten the trial and/or result in a significant saving in time or money.

Preliminary issues are usually heard and determined by a judge.

Where the determination of the questions common to group members will not finally determine the claims of all group members and there are questions common to the claims of only some group members, the Court may direct that those questions be determined by sub-groups. In addition, the Court can allow an individual group member to take part in the proceeding for the purpose of determining a question that relates only to the claim of that member. If the sub-group questions or the individual questions cannot be adequately dealt with, the Court can direct that further proceedings be commenced.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

Yes. Representative proceedings are heavily reliant on constant judicial management.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The Federal Court of Australia may appoint a “court expert” to inquire and report on a question of fact arising in a matter before the Court or an “expert assistant” to assist the Court on any issue of fact or opinion identified by the Court (other than an issue involving a question of law) in the proceeding, should the need arise.

An expert is generally accepted to be a person who has specialised knowledge about matters relevant to the question based on that person’s training, study or experience.

The role of court experts or expert assistants is advisory in nature and does not extend to sitting with the judge and assessing evidence presented by the parties.

Where the Court has appointed an expert in relation to a question arising in the proceedings, the rules provide that the Court may limit the number of other experts whose evidence may be adduced on that question, or that a party must obtain leave to adduce such evidence.

Court experts are rarely appointed, although there is increasing law reform discussion around this proposition. As a matter of course, parties adduce evidence from appropriate experts.

The nature and extent of expert evidence is subject to the discretion of the Court.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Depositions of the parties and witnesses are not taken before trial. However, the Australian legal system is more onerous in terms of the obligations imposed on parties to give discovery of documents.

In the Federal Court of Australia, pre-trial directions are made in the ordinary course that witness statements and expert reports be exchanged before hearing and that those statements and reports comprise the evidence in chief of those witnesses.

It is also common for directions to be made requiring the parties to exchange objections to their opponent’s statements and reports before trial. Any objections that are not conceded or otherwise addressed are then argued, and ruled upon, before cross-examination of the witnesses at trial.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

The cost and time associated with documentary discovery is well recognised as a significant impediment to the rapid determination of civil litigation, especially in large group proceedings. As a consequence, Australian Courts, including the Federal Court, have significantly modified their approach to discovery. Where discovery was once available as of right, it is now subject to the leave of the Court and only where it has been demonstrated as being necessary to the determination of issues that are genuinely in dispute. Intense case management of discovery is now commonplace, with a focus on a party making reasonable efforts to give discovery and the increasing use of electronic solutions.

Where ordered, a party is obliged to discover – that is to identify and allow the other parties to access – all documents in its possession, custody or power which are relevant to a matter in issue

in the proceedings. Discovery occurs at the pre-trial stage so that discoverable documents relevant to the case are disclosed by the parties before the hearing commences.

Broadly speaking, documents that are relevant to a case include those documents on which the party relies, documents that adversely affect the party’s own case, documents that adversely affect another party’s case, documents that support another party’s case, and documents that the party is required by a relevant practice direction to disclose.

All discovered documents must be listed, and the parties’ lists sworn and exchanged. Parties are entitled to inspect each other’s documents and, if desired, copy them, save for those in relation to which a claim for privilege has been advanced. Much of this process now occurs via electronic protocols and will therefore also deal with document-specific metadata.

Preliminary discovery before the substantive proceedings assists parties in identifying prospective defendants, to determine whether or not they have a claim or to gain information from third parties where any party to a proceeding reasonably believes that a particular party holds a document which relates to any question in the proceeding.

The obligation to discover all relevant documents continues throughout the proceedings. This means that any document created or found after providing initial discovery must also be discovered.

3.9 How long does it normally take to get to trial?

Time to trial depends on the particular case and the nature of the claim. It may take anywhere from six months to several years for a matter to be heard and determined.

Proceedings in the Federal Court are usually heard faster than those in the state and territory Supreme Courts, due in part to the Federal Court’s case management system whereby each proceeding is allocated to a particular judge who manages the case and usually hears and determines it, and the Supreme Courts’ heavier case load.

There are provisions in all jurisdictions for expedited hearings in appropriate circumstances, including the ill health of a litigant.

3.10 What appeal options are available?

In virtually all jurisdictions in Australia there is a right of appeal from the judgment of a trial judge. The procedure varies depending on the jurisdiction in which the original trial was conducted. Leave to appeal is usually necessary when the appeal is from an interlocutory judgment. Even though appeals generally turn on questions of law, it is not uncommon for parts of the evidence used at trial to be reviewed during the course of an appeal.

A party dissatisfied with the decision of a state or territory Court of Appeal or the Full Federal Court may seek leave to appeal to the High Court of Australia, the country’s ultimate appellate Court. Appeals to the High Court are essentially restricted to questions of law. The High Court will only grant leave to appeal if it is convinced that there is a significant question to be determined.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Yes, time limits do exist under common law and statute.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

There are considerable variations between the limitation periods applicable to common law proceedings in the various Australian states and territories, resulting from a profusion of specialist legislation and Court decisions, although recent tort reform has resulted in more uniformity in relation to the limitation period applicable to personal injury actions.

In general terms, limitation periods are routinely defined by reference to the nature of the cause of action, including whether the claimant alleges fault-based or strict liability. In most jurisdictions the limitation period applicable to claims for personal injury is either:

- the earlier of three years from the date the cause of action is discoverable by the plaintiff (“the date of discoverability”) or 12 years from the date of the alleged act or omission (the “long-stop period”); or
- three years from the date the cause of action accrued.

Limitation periods, including those applicable to personal injury claims, are usually suspended while a claimant is suffering from a legal incapacity, which encompasses the period prior to a claimant turning 18, or during which a claimant suffers from a mental or physical disability which impedes them from properly managing their affairs.

Australian Consumer Law

A person has three years in which to commence a defective goods action including actions against manufacturers for goods with safety defects. Time commences to run from when a claimant becomes aware or could reasonably have become aware of each of the following three elements:

- (a) the alleged loss or damage;
- (b) the safety defect of the goods; and
- (c) the identity of the person who manufactured the goods.

A defective goods action must be commenced within 10 years of the supply by the manufacturer of the goods to which the action relates.

A person who suffers loss or damage because of the conduct of another person, in contravention of a provision of Chapter 2 or 3 of the ACL may commence an action for damages at any time within six years after the day on which the cause of action that relates to the conduct accrued. In addition, an affected person may commence an action for damages against manufacturers of goods for a breach of certain consumer guarantees within three years after the day on which the affected person first became aware, or ought reasonably to become aware, that the guarantee to which the action relates has not been complied with.

Representative proceedings

Upon the commencement of representative proceedings under Part IVA, the running of any limitation period is suspended and does not begin to run again until either the group member opts out of the proceedings or the proceedings are finally determined.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Most Australian jurisdictions provide for the postponement of the commencement of the limitation period where the plaintiff’s right of action or the identity of the person against whom a cause of action lies is fraudulently concealed. The limitation period is deemed to

have commenced from the time the fraud was discovered or the time that a plaintiff exercising reasonable diligence would have discovered it. Throughout all Australian jurisdictions the Courts have various discretionary bases for extending the time period where it is just and reasonable.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

The following damages are available at common law for claims of bodily injury:

- general damages, including pain and suffering, loss of amenities and loss of expectation of life; and
- special damages, including loss of wages, medical and hospital expenses and the like.

Tort reforms have resulted in caps, thresholds and other limitations being placed on the amount of such damages that can be recovered.

Damages are assessed on a “once and for all” basis.

Damages are also recoverable for mental damage provided it can be established that the claimant is suffering from a diagnosed psychiatric condition. In addition, common law damages are available for damage to the product itself, or other consequential damage to property. One can recover damages for “pure economic loss” but the nature and extent of such damages is extremely complex.

Under Part 3-5 of the ACL, damages are recoverable for losses suffered as a result of personal injuries, including medical expenses (subject to similar caps, thresholds and other limitations imposed on common law damages following the tort reforms). A person other than an injured party may also claim compensation where that person suffers loss as a result of the other person’s injury or death, for losses relating to personal, domestic or household goods other than the defective goods, and losses relating to private land, buildings and fixtures.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

As a general rule, damages for the costs of medical monitoring in the absence of any established injury or loss are not recoverable.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Exemplary, punitive or aggravated damages can be awarded by the Courts, although not in relation to claims brought under the ACL and, in some jurisdictions (as a result of the tort reforms) not in negligence actions seeking damages for personal injury.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

Generally, no. However, tort reform has resulted in caps, thresholds and other limitations being placed on the amount of damages a personal injury claimant can recover.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Damages are quantified on a compensatory basis depending upon the nature of the claim. For example, whether for breach of contract or as a result of tortious conduct.

When the Federal Court makes an award of damages to group members in representative proceedings, it is required to make provision for the payment or distribution of the money to the group members who are entitled to receive it. The Court may give such directions as it considers just in relation to the manner in which an individual is to establish an entitlement to a share of the damages, and the manner in which any dispute regarding the entitlement of the individual is to be determined.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

Representative proceedings may not be settled or discontinued without the approval of the Court. The approval process means that the settlement is therefore neither private nor confidential. In fact, group members will usually be notified of the proposed settlement by Court ordered and settled notices.

In approving a settlement and determining whether it is a fair and reasonable outcome of the litigation for all group members, the Court must form a view as to whether to approve a settlement on the material presented and the advice provided by counsel as to the prospects of success and risk of loss considered to apply in the particular case. It must take an active role, as the approval of the Court is a protective mechanism safeguarding the interests and rights of group members. The Court will scrutinise whether any settlement or discontinuance of representative proceedings has been undertaken in the interests of the group members as a whole and is not solely beneficial to the class applicant and respondent. The Court may well reject a privately negotiated settlement if it is not satisfied that the outcome is in the interests of group members as a whole.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

The "loser pays" rule applies in representative proceedings – the unsuccessful party is usually ordered to pay the costs of the successful party. These costs include not only Court filing fees, copying charges and other out-of-pocket expenses, but also lawyers' professional fees. In this context, a reference to costs is not a reference to the total or actual costs incurred by the successful party. Recoverable costs are generally calculated by reference to a Court scale, which invariably limits the amounts a successful party can claim for disbursements and services performed by their lawyers.

However, in representative proceedings, Part IVA restricts a costs order being made against class members other than those who actually commenced the proceedings. Where the representative action is successful, a costs order may be made in favour of the class members who commenced the representative proceedings in an amount determined by the Court.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

In a representative proceeding, only the lead applicant(s) is liable to pay costs and is entitled to recover costs. In addition, if the Court has made an award of damages in a representative proceeding, the lead applicant may apply to the Court for reimbursement of costs that exceed the amount recoverable from the other party. If the Court is satisfied these additional costs have been reasonably incurred, it may order the excess paid out of the damages awarded.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Costs are not to be awarded directly against a group member. However, a lead applicant may be liable to pay costs if a claim is discontinued.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Costs are either agreed or assessed. This will usually occur at the end of the proceedings.

See questions 6.1 and 6.2.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Yes, public funding is available.

7.2 If so, are there any restrictions on the availability of public funding?

Legal aid services rigorously apply means and merits tests to determine eligibility for aid. As a general rule, very limited funding is available to assist claimants to bring civil actions, including product liability claims. Funding is available at the Federal level for, *inter alia*, consumer protection matters, arising under a Federal statute.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Recently, rules prohibiting lawyers from entering into contingency fee arrangements were relaxed and a variety of arrangements are now sanctioned. These new arrangements allow lawyer and client to enter into an agreement which provides for the normal fee, or a fee calculated by reference to some pre-determined criteria such as the amount of time expended by a lawyer, to be increased by a pre-agreed percentage. The relevant rules generally impose a cap on the percentage by which such fees can be increased. Some jurisdictions allow lawyers to enter into an agreement to be paid an "uplift fee", where an additional fee may be levied, calculable by reference to

the initial fees. All jurisdictions continue to prohibit contingency fee arrangements where lawyers' fees are calculated by reference to a percentage of a client's verdict.

In recent Federal Court cases, the Court has seemingly willingly embraced the concept of a "common fund" approach whereby a funder may at the outset of the case obtain an order that will, if the claim is successful, entitle them to recover a pecuniary return (or risk reward) from each group member out of the amount awarded or recovered – regardless of whether that group member entered into an agreement with the litigation funder. The Court has signalled an intention to closely supervise what that return amounts to in a given case and that such a decision will likely be reserved until the case is determined or, more likely, settled.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Third party funding of claims is permitted in Australia, subject to the rules set out in question 7.3 above.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

See question 2.1.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

No. A litigation funder may fund an action as discussed above, but they cannot bring the action. See question 2.1.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

No, they cannot.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

The Court may, by order, refer the proceedings to a mediator or an arbitrator. Arbitration is very rare in representative proceedings.

8.5 Are statutory compensation schemes available e.g. for small claims?

Yes. Statutory compensation schemes are available in respect of workplace accidents and motor vehicle accidents.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Any agreement recorded by the parties at mediation is subject to Court approval. In addition, the Federal Court of Australia may make an order in the terms of an award made in arbitration.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

In Australia, matters of substantive law are governed by *lex loci delicti* and matters of procedure are governed by the *lex fori*. The usual rules of *forum non conveniens* apply with respect to individual claimants.

Australian Courts are yet to address how conflicts of law issues can be efficiently addressed in a representative proceeding. It is a difficult issue to determine in a representative proceeding comprising unnamed and, very often, unknown group members.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

The Federal Court has now completed the process of reforming its management of cases through the implementation of a national court framework. These reforms involved placing matters on the dockets of federal judges using a national rather than regional approach in accordance with their individual levels of experience and specialisation. In this model, a revised practice note for the management of representative proceedings (class actions) was issued. The two key areas of procedural reform involved more extensive disclosure requirements in litigation funded class actions and the foreshadowed use of a two-judge management model for the larger and more complex claims. This latter measure has been tried once with no appreciable benefit to the particular case. In part, it is because the two Judges are, generally, peers, but it is the Trial Judge that actually has to run the case if it is to be heard. Federal Judges are, by nature, individualised and particular about the matters they are expected to hear. At first instance, there appears to really only be room for one judicial captain.

The now perennial debate in the context of Australian class actions remains whether the federal or state governments, acting alone or through the Council of Attorneys General, will move to regulate litigation funders or those providing litigation funding services given their rising importance in and promotion of financial loss class actions. The mature players in the field are keen advocates for regulation. The more entrepreneurial players and a number of ambitious law firms are far less enthusiastic. While there is a lively debate whether regulation will have any appreciable impact on the ambitions of the active class actions market players, there remains little doubt that the Courts continue to be asked to adjudicate issues about funding. These issues are not at the heart of the controversies that brought the matters to the particular Courts, but the management of competing interests in the potential financial outcome appears set to continue to absorb a reasonable amount of judicial thinking.

**Colin Loveday**

Clayton Utz
Level 15, 1 Bligh Street
Sydney NSW 2000
Australia

Tel: +61 2 9353 4193
Email: cloveday@claytonutz.com
URL: www.claytonutz.com

Colin Loveday is an experienced litigation lawyer specialising in the defence of class actions and multi-plaintiff claims, particularly those matters involving complex causation issues. He leads the Clayton Utz national class actions team.

Colin has been involved in the defence of matters involving infrastructure failures, financial products and services, pharmaceuticals and medical devices. Recently, he has also been advising on issues arising in securities class actions. Colin is internationally recognised for his work in the field of drug and device litigation. He has worked extensively with in-house counsel and lawyers in the US and Europe developing international defence strategies and working with international expert witnesses. Over the past decade, Colin has been intimately involved in the development of Australia's product liability laws and in the majority of class actions and mass tort cases in this area.

Colin is a member of the International Association of Defense Counsel and was recently appointed Vice President, International, a post he will hold for the next two years. He is a member of the Australian Product Liability Association and the Defense Research Institute. He is also past Chair of the Product Law and Advertising Committee of the International Bar Association.

**Andrew Morrison**

Clayton Utz
Level 18, 333 Collin Street
Melbourne VIC 3000
Australia

Tel: +61 3 9286 6537
Email: amorrison@claytonutz.com
URL: www.claytonutz.com

Andrew Morrison is internationally recognised as a leading Australian class actions lawyer providing advice, advocacy and strategic guidance in the defence of products, and financial- and competition-related multi-party claims.

Andrew's experience in all forms of grouped proceedings reflects the development of modern Australian class actions practice and the breadth of the firm's experience. Since 1992 he has been involved in and led the defence of the major mass product liability claims including involving intra-uterine contraceptives, breast implants, diet pills, anti-acne medication, non-steroidal anti-inflammatory drugs and pelvic mesh. As product-related class actions have evolved into financial loss class actions, Andrew's work has included cases regarded as amongst the first of their kind in this country.

Andrew has twice served as President of Australia's National Product Liability Association. He is an active member of the Defense Research Institute. He is also a member of the International Association of Defense Counsel and the Australian Insurance Law Association.

CLAYTON UTZ

Clayton Utz is one of Australia's leading independent top-tier law firms. Established in 1833, the firm has over 180 partners and more than 1,400 other legal and support staff employees. We have offices in Sydney, Melbourne, Brisbane, Perth, Canberra and Darwin.

Our lawyers are results-driven, commercially savvy and are often recognised as *bona fide* leaders in their respective practice areas. Our clients include many of Australia's top 100 companies, as well as Federal and State Government departments and agencies.

Clayton Utz's litigation team is one of Australia's leading class actions defence practices and has been involved in some of the most significant class actions in Australia. Our unmatched experience extends to financial services products, claims alleging product liability, cartel and price-fixing, securities litigation, and claims arising from consumer finance and recovery.

Our firm has a strong sense of corporate responsibility, reflected in our involvement with a broad section of the Australian community. We have also led the development of *pro bono* programmes in Australia, and operate a structured "Pro Bono Programme" which makes the conduct of *pro bono* work an essential component of each of our solicitors' practice.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com