

New South Wales

Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010

Explanatory note

Overview of Bill

The object of this Bill is to amend the *Civil Procedure Act 2005* (the **Principal Act**) to provide for a statutory regime based (with some modifications) on the provisions of Part IVA of the *Federal Court of Australia Act 1976* of the Commonwealth for the conduct of proceedings of a representative nature in certain actions and proceedings in the Supreme Court.

The provisions are modified where necessary to fit in with New South Wales law and practice. In addition, provisions are included:

- (a) to make it clear that representative proceedings may be brought on behalf of a limited group of identified individuals, and
- (b) to make it clear that representative proceedings may be taken against several defendants even if not all group members have a claim against all the defendants, and
- (c) to enable the Supreme Court to order the cy-pres application of the undistributed part of a fund created by a defendant to reimburse injured group members.

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Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Clause 3 repeals rules 7.4 and 7.5 of the *Uniform Civil Procedure Rules 2005* as a consequence of the enactment of the proposed Act.

Schedule 1 Amendment of Civil Procedure Act 2005 No 28

Schedule 1 [1] amends section 4 of the Principal Act to limit the application of proposed Part 10 to civil proceedings in the Supreme Court.

Schedule 1 [2] inserts proposed Part 10 (sections 155–184) into the Principal Act. The Part contains the following provisions:

Division 1 Preliminary

Proposed section 155 contains terms and expressions used in the proposed Part. ***Representative proceedings*** are defined as proceedings in respect of a cause of action commenced in accordance with the proposed Part by one or more persons on their own behalf and on behalf of any other person or persons. A ***representative party*** in representative proceedings is defined as any person who commences the proceedings. A ***defendant*** in representative proceedings is defined as any person against whom representative proceedings are commenced.

Proposed section 156 limits the bringing of proceedings under the proposed Part to causes of action arising after the commencement of the section unless leave to bring the proceedings is given by the Supreme Court.

Division 2 Commencement of representative proceedings

Proposed section 157 enables representative proceedings against a defendant to be brought under the proposed Part in certain circumstances. The circumstances are as follows:

- (a) there are 7 or more persons (the ***claimants***) who have claims against the same proposed respondent,
- (b) one or more of these claimants seeks to commence the proceedings,
- (c) the claims of all of the claimants are in respect of, or arise out of, the same, similar or related circumstances,
- (d) the claims of all of the claimants give rise to a substantial common issue of law or fact,
- (e) all persons seeking to commence the proceedings have a sufficient interest to commence the proceedings on behalf of the claimants.

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Proposed section 158 provides that a person has a sufficient interest to commence representative proceedings against one or more defendants on behalf of others if that person would have a sufficient interest to commence proceedings against the defendants on the person's own behalf. It also provides that such standing to continue representative proceedings is not lost simply because the person ceases to have an individual claim against a defendant.

Proposed section 158 (2) makes it clear that representative proceedings may be taken against several defendants even if not all group members have a claim against all defendants. The provision overcomes the view to the contrary expressed in relation to the operation of Part IVA of the *Federal Court of Australia Act 1976* of the Commonwealth in *Philip Morris (Australia) Ltd v Nixon* [2000] FCA 229.

Proposed section 159 provides that generally there is no requirement for consent to being a group member in representative proceedings. However, such consent is required from any of the following:

- (a) the Commonwealth, a State or a Territory, or
- (b) a Minister or other officer of any such jurisdiction, or
- (c) a body corporate (other than an incorporated company or association) established for public purposes under a law of any such jurisdiction.

Proposed section 160 provides that a person under a legal incapacity may be a group member even though the person does not have a tutor. However, a tutor is required if the person wishes to take any step in the proceedings.

Proposed section 161 sets out additional information that must be contained in the originating process that commences representative proceedings.

Proposed section 162 enables a group member to opt out of representative proceedings by written notice given in accordance with rules of court before a date fixed for that purpose by the Supreme Court.

Proposed section 163 enables the Supreme Court, on the application of a representative party, to alter the description of the group of persons in respect of which representative proceedings have been commenced.

Proposed section 164 enables the Supreme Court to order either that representative proceedings continue or no longer continue under the proposed Part if at any stage the group members are fewer than 7.

Proposed section 165 enables the Supreme Court to direct that representative proceedings no longer continue under the proposed Part if the cost of distributing relief to group members is excessive or to stay the proceedings to the extent that they relate to such relief.

Proposed section 166 enables the Supreme Court to order that proceedings in the Court no longer continue under the proposed Part in certain circumstances if it considers it is in the interests of justice to do so. The circumstances are if:

- (a) the costs that would be incurred if the proceedings were to continue as representative proceedings are likely to exceed the costs that would be incurred if each group member conducted separate proceedings, or

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- (b) all the relief sought can be obtained by means of proceedings other than representative proceedings under the proposed Part, or
- (c) the representative proceedings 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 representative proceedings.

Proposed section 166 (2) makes it clear that it is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals. This is consistent with the view taken by the Full Court of the Federal Court in relation to the operation of Part IVA of the *Federal Court of Australia Act 1976* of the Commonwealth in *Multiplex Funds Management Limited v Dawson Nominees Pty Limited* [2007] FCAFC 200.

Section 167 specifies the effect of an order under the proposed Part for the discontinuation of representative proceedings. The section provides that such proceedings may be continued by a representative party against a defendant on the party's own behalf. It also enables the Supreme Court to join former group members as applicants in such continued proceedings.

Section 168 enables the Supreme Court to give directions in respect of the determination of issues in representative proceedings that are common to some, but not all, group members. For this purpose, the Court may direct the establishment of sub-groups in the proceedings and the appointment of sub-group representative parties.

Section 169 enables the Supreme Court to give a direction that a group member appear in proceedings for the purpose of determining an issue relating only to the claims of that member.

Section 170 provides that if an issue cannot conveniently be determined by the Supreme Court by the giving of directions under proposed sections 168 and 169, the Court may:

- (a) if the issue concerns only the claim of a particular member—give directions relating to the commencement and conduct of separate proceedings by that member, or
- (b) if the issue is common to the claims of all members of a sub-group—give directions relating to the commencement and conduct of representative proceedings in relation to the claims of those members.

Section 171 enables the Supreme Court to substitute another group member as representative party (or sub-group representative party) if it considers that the existing representative party (or sub-group representative party) is not able to adequately represent the interests of group members (or sub-group members).

Section 172 enables the Supreme Court to order a stay of execution in respect of relief awarded to a group member in representative proceedings if the group member has brought other proceedings. The stay operates until those other proceedings are determined.

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Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010

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Section 173 requires any settlement or discontinuance of representative proceedings to be approved by the Supreme Court.

Section 174 enables a representative party, with the leave of the Supreme Court, to settle the party's individual claim against the defendant and withdraw as a representative party.

Division 3 Notices

Section 175 requires notices to be given to group members in representative proceedings in relation to certain matters (including, for instance, dates for opting out of the proceedings).

Section 176 provides for the form and content of, and the manner for giving, such notices to group members.

Division 4 Powers of the Court

Section 177 specifies the powers of the Supreme Court in determining representative proceedings, including determining individual entitlements to relief.

Section 178 enables the Supreme Court, in determining representative proceedings, to order the establishment of a fund consisting of money to be distributed to group members. It also enables the Court to make orders in respect of the administration of the fund and establishing schemes for any money remaining in the fund (or any part of it), that can not practicably be distributed to group members to be applied cy-pres.

Section 179 provides for the content and effect of judgments given by the Supreme Court in representative proceedings.

Division 5 Appeals

Section 180 provides for appeals to the Court of Appeal from judgments of the Supreme Court in representative proceedings also to be conducted as representative proceedings.

Division 6 Miscellaneous

Section 181 provides that the Supreme Court may not award costs against a person on whose behalf representative proceedings have been commenced (other than a representative party) except as authorised by proposed section 168 or 169.

Section 182 provides for the suspension of certain limitation periods on the commencement of representative proceedings.

Section 183 confers a general power on the Supreme Court to make such orders as it considers appropriate or necessary to ensure that justice is done in representative proceedings.

Section 184 enables the Supreme Court to order that a representative party's costs in representative proceedings in which damages have been awarded be recoverable from the damages awarded.

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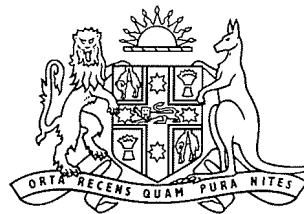
Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010

Explanatory note

Schedule 1 [3] amends Schedule 6 to the Principal Act to enable the making of savings and transitional regulations.

Schedule 1 [4] amends Schedule 6 to the Principal Act to preserve certain existing proceedings of a representative character.

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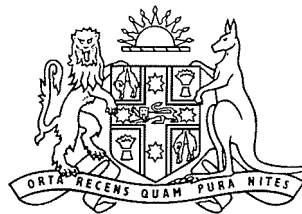
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Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010

No. , 2010

A Bill for

An Act to amend the *Civil Procedure Act 2005* to provide for representative proceedings in the Supreme Court.

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Clause 1 Civil Procedure Amendment (Supreme Court Representative Proceedings)
Bill 2010

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Civil Procedure Amendment (Supreme Court Representative Proceedings) Act 2010*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Repeal

Rules 7.4 and 7.5 of the *Uniform Civil Procedure Rules 2005* are repealed.

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Civil Procedure Amendment (Supreme Court Representative Proceedings)
Bill 2010

Amendment of Civil Procedure Act 2005 No 28

Schedule 1

Schedule 1 Amendment of Civil Procedure Act 2005 No 28

[1] Section 4 Application of Parts 3–10

Insert after section 4 (1):

- (1A) Subject to this section, Part 10 applies in relation to civil proceedings in the Supreme Court.

[2] Part 10

Insert after section 154:

Part 10 Representative proceedings in Supreme Court

Division 1 Preliminary

155 Definitions (cf s33A FCA)

In this Part:

Court means the Supreme Court.

defendant means a person against whom relief is sought in representative proceedings.

group member means a member of a group of persons on whose behalf representative proceedings have been commenced.

proceedings means proceedings in the Court other than criminal proceedings.

representative party means a person who commences representative proceedings.

representative proceedings means proceedings commenced under section 157.

sub-group member means a person included in a sub-group established under section 168.

sub-group representative party means a person appointed to be a sub-group representative party under section 168.

Note. For the purposes of comparison, a number of provisions of this Part contain bracketed notes in headings drawing attention (“cf”) to equivalent or comparable (though not necessarily identical) provisions of Part IVA of the *Federal Court of Australia Act 1976* (“FCA”) of the Commonwealth as in force immediately before the commencement of this Part.

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Schedule 1 Amendment of Civil Procedure Act 2005 No 28

156 Application (cf s33B FCA)

- (1) Proceedings may only be brought under this Part in respect of a cause of action arising on or after the commencement of this section, except with the leave of the Court.
- (2) The provisions of this Part apply in proceedings in the Court despite any other Act or law concerning the jurisdiction of the Court and its functions.

Division 2 Commencement of representative proceedings

157 Commencement of proceedings (cf s33C FCA)

- (1) Subject to this Part, where:
 - (a) 7 or more persons have claims against the same person, and
 - (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and
 - (c) the claims of all those persons give rise to a substantial common question of law or fact,proceedings may be commenced by one or more of those persons as representing some or all of them.
- (2) Representative proceedings may be commenced:
 - (a) whether or not the relief sought:
 - (i) is, or includes, equitable relief, or
 - (ii) consists of, or includes, damages, or
 - (iii) includes claims for damages that would require individual assessment, or
 - (iv) is the same for each person represented, and
 - (b) whether or not the proceedings:
 - (i) are concerned with separate contracts or transactions between the defendant in the proceedings and individual group members, or
 - (ii) involve separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

158 Standing (cf s33D FCA)

- (1) For the purposes of section 157 (1) (a), a person has a sufficient interest to commence representative proceedings against one or more defendants on behalf of other persons if the person has a

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sufficient interest to commence proceedings on the person's own behalf against the defendant or defendants.

- (2) The person may commence representative proceedings on behalf of other persons against more than one defendant irrespective of whether or not each of those persons has a claim against every defendant in the proceedings.
- (3) If a person has commenced representative proceedings, that person retains a sufficient interest:
 - (a) to continue the proceedings, and
 - (b) to bring an appeal from a judgment in the proceedings, even though the person ceases to have a claim against any defendant.

159 Is consent required to be a group member? (cf s33E FCA)

- (1) Subject to subsection (2), the consent of a person to be a group member is not required.
- (2) None of the following is a group member in representative proceedings unless the person gives consent in writing to being so:
 - (a) the Commonwealth, a State or a Territory,
 - (b) a Minister of the Commonwealth, a State or a Territory,
 - (c) a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an incorporated company or association,
 - (d) an officer of the Commonwealth, a State or a Territory, in his or her capacity as an officer.

160 Persons under legal incapacity (cf s33F FCA)

- (1) It is not necessary for a person under legal incapacity to have a tutor merely in order to be a group member.
- (2) A group member who is a person under legal incapacity may only take a step in representative proceedings, or conduct part of the proceedings, by the member's tutor.

161 Originating process (cf s33H FCA)

- (1) The originating process in representative proceedings, or a document filed in support of the originating process, must, in addition to any other matters required to be included:
 - (a) describe or otherwise identify the group members to whom the proceedings relate, and

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- (b) specify the nature of the claims made on behalf of the group members and the relief claimed, and
 - (c) specify the question of law or facts common to the claims of the group members.
- (2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members.

162 Right of group member to opt out (cf s33J FCA)

- (1) The Court must fix a date before which a group member may opt out of representative proceedings in the Court.
- (2) A group member may opt out of the representative proceedings by written notice given under the local rules before the date so fixed.
- (3) The Court, on the application of a group member, the representative party or the defendant in the proceedings, may fix another date so as to extend the period during which a group member may opt out of the representative proceedings.
- (4) Except with the leave of the Court, the hearing of representative proceedings must not commence earlier than the date before which a group member may opt out of the proceedings.

163 Causes of action accruing after commencement of representative proceedings (cf s33K FCA)

- (1) The Court may at any stage of representative proceedings, on application by the representative party, give leave to amend the originating process commencing the representative proceedings so as to alter the description of the group.
- (2) The description of the group may be altered so as to include a person:
 - (a) whose cause of action accrued after the commencement of the representative proceedings 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 proceedings.
- (3) The date fixed under subsection (2) (a) may be the date on which leave is given or another date before or after that date.

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- (4) If the Court gives leave under subsection (1), it may also make any other orders it thinks just, including an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceedings.

164 Situation where fewer than 7 group members (cf s33L FCA)

If, at any stage of representative proceedings, it appears likely to the Court that there are fewer than 7 group members, the Court may, on such conditions (if any) as it thinks fit:

- (a) order that the proceedings continue under this Part, or
- (b) order that the proceedings no longer continue under this Part.

165 Distribution costs excessive (cf s33M FCA)

If:

- (a) the relief claimed in representative proceedings is or includes payment of money to group members (otherwise than in respect of costs), and
- (b) on application by the defendant, the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the defendant of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts,

the Court may, by order:

- (c) direct that the proceedings no longer continue under this Part, or
- (d) stay the proceedings so far as it relates to relief of the kind mentioned in paragraph (a).

166 Court may order discontinuation of proceedings in certain circumstances (cf s33N FCA)

- (1) The Court may, on application by the defendant or of its own motion, order that proceedings no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because:
 - (a) the costs that would be incurred if the proceedings were to continue as representative proceedings are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding, or

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- (b) all the relief sought can be obtained by means of proceedings other than representative proceedings under this Part, or
 - (c) the representative proceedings 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 representative proceedings.
- (2) It is not, for the purposes of subsection (1) (d), inappropriate for claims to be pursued by means of representative proceedings merely because the persons identified as group members in relation to the proceedings:
- (a) do not include all persons on whose behalf those proceedings might have been brought, or
 - (b) are aggregated together for a particular purpose such as a litigation funding arrangement.
- (3) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the defendant except with the leave of the Court.
- (4) Leave for the purposes of subsection (3) may be granted subject to such conditions as to costs as the Court considers just.

167 Effect of discontinuance order under this Part (cf s33P FCA)

- (1) If the Court makes an order under section 164, 165 or 166 that proceedings no longer continue under this Part:
- (a) the proceedings may be continued as proceedings by the representative party on the party's own behalf against the defendant, and
 - (b) on the application of a person who was a group member for the purposes of the proceedings, the Court may order that the person be joined as an applicant in the proceedings.
- (2) In this section:
applicant, in relation to proceedings, includes a claimant or plaintiff (as the case may be) in the proceedings.

168 Determination of questions where not all common (cf s33Q FCA)

- (1) If it appears to the Court that determination of the question or questions common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining questions.

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- (2) In the case of questions common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person to be the sub-group representative party on behalf of the sub-group members.

169 Individual questions (cf s33R FCA)

- (1) In giving directions under section 168, the Court may permit an individual group member to appear in the proceedings for the purpose of determining a question that relates only to the claims of that member.
- (2) In such a case, the individual group member, and not the representative party, is liable for costs associated with the determination of the question.

170 Directions relating to commencement of further proceedings (cf s33S FCA)

If a question cannot properly or conveniently be dealt with by the Court under section 168 or 169, the Court may give directions for the commencement and conduct of other proceedings, whether or not group proceedings.

171 Adequacy of representation (cf s33T FCA)

- (1) If, on application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and make such other orders as it thinks fit.
- (2) If, on an application by a sub-group member, it appears to the Court that a sub-group representative party is not able adequately to represent the interests of the sub-group members, the Court may substitute another person as sub-group representative party and may make such other orders as it thinks fit.

172 Stay of execution in certain circumstances (cf s33U FCA)

If a defendant in representative proceedings commences proceedings in the Court against a group member, the Court may order a stay of execution in respect of any relief awarded to the group member in the representative proceedings until the other proceedings are determined.

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173 Approval of Court required for settlement and discontinuance (cf s33V FCA)

- (1) Representative proceedings may not be settled or discontinued without the approval of the Court.
- (2) If the Court gives such approval, it may make such orders as are just with respect to the distribution of any money, including interest, paid under a settlement or paid into the Court.

174 Settlement of individual claim of representative party (cf s33W FCA)

- (1) A representative party may, with the leave of the Court, settle the party's individual claim in whole or in part at any stage of the representative proceedings.
- (2) A representative party who is seeking leave to settle, or who has settled, the party's individual claim may, with the leave of the Court, withdraw as representative party.
- (3) If a person has sought leave to withdraw as representative party under subsection (2), the Court may, on the application of a group member, make an order for the substitution of another group member as representative party and may make such other orders as it thinks fit.
- (4) Before granting a person leave to withdraw as a representative party:
 - (a) the Court must be satisfied that notice of the application has been given to group members in accordance with section 175 (1) and in sufficient time for them to apply to have another person substituted as the representative party, and
 - (b) any application for the substitution of another group member as a representative party must have been determined.

Division 3 Notices

175 Notice to be given of certain matters (cf s33X FCA)

- (1) Notice must be given to group members of the following matters in relation to representative proceedings:
 - (a) the commencement of the proceedings and the right of the group members to opt out of the proceedings before a specified date, being the date fixed under section 162 (1),

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- (b) an application by the defendant in the proceedings for the dismissal of the proceedings on the ground of want of prosecution,
 - (c) an application by a representative party seeking leave to withdraw under section 174 as representative party.
- (2) The Court may dispense with compliance with any or all of the requirements of subsection (1) if the relief sought in the proceedings does not include any claim for damages.
 - (3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceedings is founded.
 - (4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 173 must not be determined unless notice has been given to group members.
 - (5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.
 - (6) Notice under this section must be given as soon as practicable after the happening of the event to which it relates.

176 Notices under section 175 (cf s33Y FCA)

- (1) The form and content of a notice under section 175 must be approved by the Court.
- (2) The Court must, by order, specify:
 - (a) who is to give the notice, and
 - (b) the way in which the notice is to be given.
- (3) An order under subsection (2) may also include provision:
 - (a) directing a party to provide information relevant to the giving of the notice, and
 - (b) relating to the costs of giving notice.
- (4) An order under subsection (2) may require that notice be given by means of press advertisement, radio or television broadcast, or by any other means.
- (5) The Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.
- (6) A notice that concerns a matter for which the Court's leave or approval is required must specify the period within which a group

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member or other person may apply to the Court, or take some other step, in relation to the matter.

- (7) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.
- (8) The failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in any proceedings.

Division 4 Powers of the Court

177 Judgment—powers of the Court (cf s33Z FCA)

- (1) The Court may, in determining a matter in representative proceedings, do any one or more of the following:
 - (a) determine a question of law,
 - (b) determine a question of fact,
 - (c) make a declaration of liability,
 - (d) grant any equitable relief,
 - (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies,
 - (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members.
- (2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.
- (3) Subject to section 173, the Court is not to make an award of damages under subsection (1) (f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.
- (4) If the Court has made an award of damages, the Court may give such directions (if any) as it thinks just in relation to:
 - (a) the manner in which a group member is to establish the member's entitlement to share in the damages, and
 - (b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.

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178 Constitution etc of fund (cf s33ZA FCA)

- (1) Without limiting the operation of section 177 (2), in making provision for the distribution of money to group members, the Court may provide for:
 - (a) the constitution and administration of a fund consisting of the money to be distributed, and
 - (b) either:
 - (i) the payment by the defendant of a fixed sum of money into the fund, or
 - (ii) the payment by the defendant into the fund of such instalments, on such terms, as the Court directs to meet the claims of group members, and
 - (c) entitlements to interest earned on the money in the fund.
- (2) The costs of administering a fund are to be borne by the fund, or by the defendant in the representative proceedings, or by both, as the Court directs.
- (3) If the Court orders the constitution of a fund under subsection (1), the order must:
 - (a) require notice to be given to group members in such manner as is specified in the order, and
 - (b) specify the manner in which a group member is to make a claim for payment out of the fund and establish the group member's entitlement to payment, and
 - (c) specify a day (which is 6 months or more after the day on which the order is made) on or before which the group members are to make a claim for payment out of the fund, and
 - (d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.
- (4) The Court may allow a group member to make a claim after the day fixed under subsection (3) (c) if:
 - (a) the fund has not already been fully distributed or applied in accordance with an order under subsection (5), and
 - (b) it is just to do so.
- (5) The Court may by order, after the day fixed under subsection (3) (d), establish a scheme for any money remaining in the fund (or any part of it), that can not practicably be distributed to group members to be applied cy-pres.

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179 Effect of judgment (cf s 33ZB FCA)

A judgment given in representative proceedings:

- (a) must describe or otherwise identify the group members who will be affected by it, and
- (b) binds all such persons other than any person who has opted out of the proceedings under section 162.

Division 5 Appeals

180 Appeals (cf s 33ZC FCA)

- (1) The following appeals from a judgment of the Supreme Court in representative proceedings may (subject to the rules of court) themselves be brought in the Court of Appeal under section 101 of the *Supreme Court Act 1970* as representative proceedings:
 - (a) an appeal by the representative party on behalf of group members and in respect of the judgment to the extent that it relates to questions common to the claims of group members,
 - (b) an appeal by a sub-group representative party on behalf of sub-group members in respect of judgment to the extent that it relates to questions common to the claims of sub-group members.
- (2) The parties to an appeal in respect of the determination of a question that relates only to the claim of an individual group member are that group member and the defendant.
- (3) If the representative party or the sub-group representative party does not bring an appeal within the time provided for instituting appeals, another member of the group or sub-group may, within a further 21 days, bring an appeal as representing the group members or sub-group members, as the case may be.
- (4) If an appeal is brought from the judgment of the Court in representative proceedings, the Court of Appeal may direct that notice of the appeal be given to such person or persons, and in such manner, as it considers appropriate.
- (5) This Part (other than section 162) applies to any such appeal proceedings despite the provisions of any other Act or law.
- (6) The notice instituting an appeal in relation to questions that are common to the claims of group members or sub-group members must describe or otherwise identify the group members or sub-group members, as the case may be, but need not specify the names or number of those members.

consultation draft

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Bill 2010

Amendment of Civil Procedure Act 2005 No 28

Schedule 1

Division 6 Miscellaneous

181 Costs (cf s43 (1A) FCA)

Despite section 98, in any representative proceedings, the Court may not award costs against a person on whose behalf the proceedings have been commenced (other than a representative party) except as authorised by sections 168 and 169.

182 Suspension of limitation periods (cf s33ZE FCA)

- (1) On the commencement of any representative proceedings, the running of the limitation period that applies to the claim of a group member to which the proceedings relate is suspended.
- (2) The limitation period does not begin to run again unless either the member opts out of the proceedings under section 162 or the proceedings, and any appeals arising from the proceedings, are determined without finally disposing of the group member's claim.
- (3) However, nothing in this section affects the running of a limitation period in respect of a group member who, immediately before the commencement of the representative proceedings, was barred by the expiration of that period from commencing proceedings in the member's own right in respect of a claim in the representative proceedings.
- (4) This section applies despite anything in the *Limitation Act 1969* or any other law.

183 General power of Court to make orders (cf s33ZF FCA)

In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

184 Reimbursement of representative party's costs (cf s33ZJ FCA)

- (1) If the Court has made an award of damages in representative proceedings, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.
- (2) If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the representative proceedings by the person making the application are likely to exceed the costs recoverable by the person from the defendant,

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the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.

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

[3] Schedule 6 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Civil Procedure Amendment (Supreme Court Representative Proceedings) Act 2010

[4] Schedule 6, Part 5

Insert after clause 17:

**Part 5 Provisions consequent on enactment of
Civil Procedure Amendment (Supreme
Court Representative Proceedings) Act
2010**

18 Effect of enactment of Part 10 on existing proceedings

- (1) Except as provided by this clause or the regulations, nothing in the new Part affects the commencement or continuance of any action or proceedings of a representative character commenced otherwise than under the new Part before the commencement of that Part.
- (2) Subject to subclause (3), the new Part extends to proceedings commenced (but not finally determined) in the relevant court under Division 2 of Part 7 of the uniform rules before the commencement of that Part.
- (3) The relevant court may make such orders dispensing with or modifying the requirements of the new Part in relation to proceedings referred to in subclause (2) as the relevant court thinks appropriate or necessary to ensure that justice is done in the proceedings.
- (4) In this clause:
relevant court, in relation to actions or proceedings referred to in subclause (1), means the court or tribunal in which the action or proceedings commenced.
the new Part means Part 10 (as inserted by the *Civil Procedure Amendment (Supreme Court Representative Proceedings) Act 2010*).