Review Essay

The Universality of Class Action Dilemmas

The Australian Class Action: A 30-Year Perspective by Michael Legg and James Metzger (eds) (2023) Federation Press, 312 pp, ISBN 9781760024253

Jasminka Kalajdzic*

Abstract

This review essay considers the universality of dilemmas and tensions that arise in class action litigation, wherever practised. It does so by exploring the evolution of the Australian class action in its doctrinal, political and historical dimensions, as recounted in Michael Legg and James Metzger's edited collection of papers, *The Australian Class Action: A 30-Year Perspective*. While the book is rooted in the Australian experience, it lays bare common themes across jurisdictions, such as the unique role of the judge in a class action, the challenges to effective representation, and concerns about the commodification of litigation.

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* Professor, Faculty of Law, University of Windsor, Windsor, Ontario, Canada. Email: kalajj@uwindsor.ca; ORCID iD: https://orcid.org/0000-0002-0433-7634.

I Introduction

No form of litigation consumes as much legislative attention, press coverage or academic ink than the class action. Variously called group proceedings, collective redress or representative litigation, the class action aims to facilitate the efficient resolution of many, often small, claims that would otherwise be too costly to pursue individually. The ability of a representative plaintiff and their entrepreneurial counsel to hold public and private institutions to account is both its power and the source of its controversy. Although early versions of group proceedings can be found in 13th century England,[1] the modern class action was birthed in the United States in 1966, followed some 25 years later by second-generation models in Canada, Israel and Australia.[2] In a period when these other jurisdictions have recently reformed their statutes, and third-generation jurisdictions are grappling with their nascent regimes,[3] the timing of *The Australian Class Action: A 30-Year Perspective*[4] could not be more auspicious.

Michael Legg and James Metzger have edited a multidisciplinary and transnational collection of essays by practising lawyers, judges and academics that explores, like other books before it,[5] the evolution and the political and economic dimensions of class actions, but with a focus on the Australian experience. The aim of the book is to take stock of the developments in Australian class actions on the occasion of the 30th anniversary of their introduction, and to forecast and make recommendations about what is to come. In doing so, they also lay bare common themes across jurisdictions, such as the unique role of the judge in a class action, the challenges to effective representation, and concerns about the commodification of litigation. As I hope this review, written from the perspective of a Canadian class action scholar, will convey, the reader need not be a student or practitioner of Australian class action litigation to find the book equally useful and fascinating.

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1 Stephen Yeazell, *From Medieval Group Litigation to the Modern Class Action* (Yale University Press, 1987) 38.

2 Jasminka Kalajdzic, 'The State of Reform in First and Second Generation Class Action Jurisdictions' in Alan Uzelac and Stefaan Voet (eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer, 2021) 303.

3 In the past decade, 28 countries in the European Union have adopted some version of collective redress, although several countries developed earlier, albeit underutilised, class litigation models: see Linda S Mullenix, 'For the Defense: 28 Shades of European Class Actions' in Alan Uzelac and Stefaan Voet (eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer, 2021) 43.

4 Michael Legg and James Metzler (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023).

5 See, eg, Deborah R Hensler, Christopher Hodges and Ianika Tzankova (eds), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing, 2016); Stefan Wrbka, Steven Van Uytsel and Mathias Siems (eds), *Collective Actions* (Cambridge University Press, 2012).

II The Origins of Class Actions and Their Mission

Legg and Metzger's introductory chapter lays the groundwork for understanding the political and social forces that brought the class action device to Australia.[6] Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('*Federal Court Act*') was enacted in 1992, the same year the first common law province in Canada passed its class action legislation.[7] Unlike its Canadian counterpart, however, pt IVA has never been amended, despite major developments in class action practice that the drafters could not have envisioned, particularly issues resulting from the ubiquity of litigation funding and from competing class actions. Legg and Metzger trace these developments in detail, as do authors of several subsequent chapters. Their survey illustrates that judges in the early years of Australian class actions were preoccupied with settling the interpretation of the legislation, while the past two decades have been consumed by filling the many gaps in it. Building the common law in this fast-moving sector has been difficult; where does gap-filling end and legislative rewriting begin? The courts' competing decisions on the availability of a common fund order illustrate this tension.[8] On other issues — notably carriage decisions and settlement fairness criteria — the Federal Court has drawn on US and Canadian authorities to fill the gaps.[9] Legg and Metzger rightly predict that amendments to pt IVA will one day address litigation funding, common funds, oversight of settlements and procedures for addressing competing class actions. Perhaps not coincidentally, three of these four were the subject of legislative reform in Ontario in 2020.[10] Rachael Mulheron's detailed discussion of the *Paccar* appeal in the United Kingdom, however, strikes a cautionary note: even where lawmakers attempt to leave no gaps by resolving questions about common funds and litigation funding explicitly, considerable debate and uncertainty remain.[11]

Australian class actions were introduced with an explicit mission: to improve access to justice and to aid government regulators by deterring contraventions of the law. How well class actions achieve the first of these goals is the subject of Michael Legg's chapter on access to justice and compensation.[12] He explores the challenges

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6 Michael Legg and James Metzger, 'Thirty Years of Class Actions in Australia' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 1 ('Thirty Years of Class Actions').

7 *Class Proceedings Act*, SO 1992, c 6 ('*Ontario CPA*').

8 Legg and Metzger, 'Thirty Years of Class Actions' (n 6) 28. Peta Spender also investigates this tension using institutional theory in her chapter, 'Class Actions: Insights from Regulatory and Institutional Theory' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 170.

9 Legg and Metzger, 'Thirty Years of Class Actions' (n 6) 29–37.

10 Common funds have been permitted in Ontario since the inception of class actions, thus no amendment was needed. The amended statute does address litigation funding (s 33.1), settlement approval and administration (s 27.1) and competing class actions (s 13.1): *Ontario CPA* (n 7).

11 Rachael Mulheron, 'Third Party Funding, Class Actions and the Task of Statutory Interpretation' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 276. The UK Supreme Court delivered its decision in *Paccar* on 26 July 2023: *Paccar Inc v Road Haulage Association Ltd* [2023] UKSC 28.

12 Michael Legg, 'Access to Justice and Compensation Through the Class Action' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 40.

to achieving substantive access to justice by first defining the meaning of compensation in the common law ('put[ting] the injured person back in the position they were in prior to the contravention'[13]) and then discussing the features of class action litigation that complicate achievement of the principle. These include the high number of settlements, which are inherently compromises of one's rights; the agency problems that are also inherent due to class counsel's control of the litigation and the lack of incentives for the representative to monitor them; the presence of litigation funders which at a minimum reduces the sums available to class members; and the inability of courts to maximise compensation for the group. Yet, as Legg himself notes, most litigation of all types settles, and the presence of some court oversight in class actions is arguably better than none. The additional cost imposed by funders and the potential for self-dealing, however, are amplified in representative litigation, and the difficulty of assessing damages accurately for every member of a potentially vast class is a problem, but only if full compensation is the benchmark for success. Legg's discomfort with class members receiving 'second-hand justice' illustrates another recurring theme in the book: class actions are qualitatively and normatively different from bilateral litigation.

III Class Actions: Equal, but Different

The difficulties of adapting common law rules and procedures to large-scale actions are discussed in a number of chapters, starting with Justice Michael Lee and Emerson Hynard's essay on estoppel.[14] The cardinal focus of the common law is on achieving finality. The operation of statutory estoppel created upon judgment or settlement in a class action, however, is complicated; since class members do not control the proceeding or decide which claims are advanced, should they be estopped from litigating individual causes of action that were not included in the class action? Lee and Hynard do an admirable job discussing the complicated case law and delineating the tension between access to justice and procedural fairness on the one hand, and the importance of finality on the other. They offer possible solutions to prospective law reformers, including the requirement that members come forward with information about their individual claims before settlement, even in open classes. Canadian and American observers should take note of the salutary effects of such a system: with better information about the number of claimants and the nature of their claims, class counsel could more accurately estimate the size of the class and their damages, and could provide more direct notice of any subsequent settlement. As the authors rightly note,

> a group member is always going to have to bring forward the necessary information to advance their individual claim or take an active step to participate in the proceeds of a settlement or judgment. Stipulating a date earlier than judgement or settlement for a group member to take that active step does not deliver upon that group member any unfairness, but reflects an

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13 Ibid 45.

14 Justice Michael Lee and Emerson Hynard, 'A Tale of Two Interests: Access to Justice and Finality in Class Action Litigation' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 60.

> appropriate balance … between the interests of access to justice and the commercial reality of facilitating finality.[15]

The concept of open justice also proves uniquely problematic in class actions, as the chapter by Aaron Moss and Justices Jayne Jagot and Bernard Murphy reveals.[16] Although individuals in bilateral litigation are free to keep their settlements confidential (eg, to protect commercial secrets or business reputation interests), a class action affects persons who are not before the court and engages interests beyond the immediate parties. Moreover, class actions 'perform a public function, being employed to vindicate broader statutory policies or challenge actions of the executive which affect wide classes of persons'.[17] In this context, suppression orders in respect of legal opinions, retainer agreements or terms of a settlement undermine public confidence in the operation of class actions and the laws that are the subject of the actions. The authors astutely point out that the hold of common law traditions on judges is strong, and judges must be trained, therefore, to think differently about private disputes with important public interests in play. More than just judicial education about the particular legal issue (eg, the availability of suppression orders), they need training about judging in the non-adversarial context of settlement approval more generally.[18]

The tension between the public interest and the interests of individuals is the focus of Andrew Higgins' brilliant contribution, 'Due Process in Class Actions'.[19] Due process is a constitutional requirement flowing from ch III of the *Australian Constitution*. Higgins distinguishes between decisions made in the course of class action governance — the subject of considerable legal innovation by case management judges who must weigh competing interests — and the due process rights of litigants which the court must actively protect. He notes, as I have elsewhere,[20] that class members have few due process rights, but they are crucial: adequate representation, effective notice of key points in the proceeding, and opting out of the litigation.[21] Abrogating these rights delegitimises the class action. Higgins also touches on the now familiar theme of the uniqueness of class actions, not as 'a distortion of the "ideal" bipolar model of litigation', but as a necessary expansion of procedural tools to address the disputes that arise from mass production and mass marketing.[22] At the same time, he cautions against adopting a purely collectivist

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15 Ibid 85–86.

16 Justice Jayne Jagot, Justice Bernard Murphy and Aaron Moss, 'Open Justice and Class Actions: Including a Judicial Perspective' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 87.

17 Ibid 93.

18 Ibid 104.

19 Andrew Higgins, 'Due Process in Class Actions' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 113.

20 Jasminka Kalajdzic, 'Class Member Rights' in Janet Walker, H Michael Rosenberg and Jasminka Kalajdzic (eds), *Class Actions in Canada: Cases, Notes, and Materials* (Emond Publishing, 3rd ed, 2023) 223.

21 Higgins (n 19) 116–17. The right to object to proposed settlements is also on my list, a right Higgins would include subject to the qualification that any opportunity to participate 'cannot make the litigation so unwieldy that it undermines the public and private benefits of the class action procedure': at 134.

22 Ibid 114.

perspective, one which makes no room for individual rights. He argues persuasively that the individual right to due process may be different in class actions than in 'ordinary' litigation, but it is there.

Several chapters later, James Metzger offers a starkly opposing view of class actions and due process. The core of his provocative argument is that class actions do not reflect the democratic values of either the United States or Australia because 'the decision about whether and how a citizen's rights should be determined has been given over to entities unknown to many, most or essentially all of those citizens' — namely, the class attorney.[23] He also maintains that the class attorney as prime decision-maker for the class can and often does engage in self-interested behaviour that further distances the plaintiffs from the core purpose of the civil justice system — the determination of, and consequences for, a violation of a person's rights.[24] In keeping with his view that the primary aim of democratic governance is to preserve personal autonomy, Metzger states that the role of courts in constitutional democracies is to guard people's rights, and that people have the right to present their own cases and make their own litigation decisions. He rather ominously states that class action procedure is an 'example of how democratic values can be undermined in ways that might be imperceptible to the average citizen, but which have an impact upon the democratic order and the foundations of that order'.[25] He makes only a passing reference to the obvious response to his thesis: the ability of the citizen to opt out *is* an exercise of personal autonomy. Moreover, he does not comment on the lack of any practical alternatives to class proceedings, or on the impact that a culture of corporate and government impunity might have on the health of the body politic or democracy itself.

IV Political, Economic and Regulatory Dimensions

If Metzger's chapter is the most critical of class actions, Peter Cashman's reflective essay is the most laudatory.[26] As a class attorney, law commissioner and academic, Cashman has pioneered, studied and measured the many ways Australian class actions have facilitated greater access to justice. Still, he is clear-eyed about their shortcomings, most especially the high cost of commercial litigation financing of class actions. In his view, not only do funders take too large a share of the proceeds of litigation (an average of 23.4%, or roughly double the legal fees in settlements approved in 2020 and 2021[27]), but their proactive involvement and influence can lead to problematic settlements. Cashman provides a detailed list of reforms to improve the system, including a loosening of the prohibition against percentage fees for counsel and the introduction of a public funding mechanism modeled on Ontario's Class Proceedings Fund.

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23 James Metzger, 'Class Actions in a Democratic Society' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 225, 227.

24 Ibid. There is, however, no empirical data cited to support this central claim.

25 Ibid 243.

26 Peter Cashman, 'Financing and Funding Class Actions: Some Reflections from the Trenches and the Ivory Tower' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 136.

27 Ibid 161.

The partisan political discourse evident in some of the chapters is an almost inevitable feature of every discussion about class actions; because of the power they wield, class actions are the subject of assiduous politicking.[28] As Linda Mullenix explains in 'The Politics of Class Action Reform', numerous political actors sought legal reforms in the United States to promote constituent interests.[29] Defendants and the highly conservative US Chamber of Commerce directly lobbied Republican members of Congress to achieve sweeping legislative reforms at the turn of the century.[30] A little more than a decade later, they almost managed to pass a second statute, the *Fairness in Class Action Litigation Act of 2017*, that would have instituted severe restrictions on both class actions and multidistrict litigation proceedings.[31] Plaintiff-oriented efforts were similarly engaged at the rulemaking level under the auspices of the American Law Institute.[32] They proved less successful, due to the deliberative drafting and comment procedures of the Institute's *Principles of the Law of Aggregate Litigation* project. Thus, US institutions responsible for reform have, at least recently, been able to resist the 'extreme efforts of political actors who seek to revamp law to their own advantage'.[33] Recent experience with law reform in Ontario and Australia confirms the presence of partisan actors, including the US Chamber of Commerce.[34]

As mentioned above, in addition to judicial efficiency and access to justice, class actions also perform a deterrence function. Peta Spender leans on regulatory theory to help explain why the class action may be understood as a regulator.[35] Class actions 'regulate' in that they control, order and influence the conduct of corporations through monitoring (by class counsel), compliance and enforcement. Entrepreneurial class counsel aggregate the claims of right holders who may otherwise have no understanding of their entitlement to recourse. The effect of such legal mobilisation is to help enforce substantive law, though it may also be characterised as profit-driven rent-seeking. Both can be true. Spender's chapter and others employ terms such as 'rent-seeking' and 'agency costs' liberally. Indeed, one cannot escape the vocabulary of law and economics when critically appraising class

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28 Class actions are almost always attacked by corporate-friendly conservative political actors, although at least one academic has argued that class actions are, in fact, consistent with conservative principles: Brian T Fitzpatrick, *The Conservative Case for Class Actions* (University of Chicago Press, 2019).

29 Linda S Mullenix, 'The Politics of Class Action Reform: Reflections on the American Experience' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 245.

30 Ibid 256, citing the *Class Action Fairness Act of 2005*, 28 USC §§ 1332(d), 1453, 1711–15 (2005).

31 Ibid 269.

32 Ibid 258–64. Mullenix does not discuss the relative power and resources of defendant-led lobbying efforts versus those of plaintiff interests.

33 Ibid 247.

34 The Chamber's written submissions to the Law Commission of Ontario included, among others, recommendations for a more restrictive certification test and for codifying requirements for third party litigation funders: US Chamber of Commerce, Institute for Legal Reform, Submission to Law Commission of Ontario, *Review of the Ontario Class Proceedings Act* (May 2018). The Chamber also lobbied against class actions during the Victoria Law Reform Commission's 2017 project on Litigation Funding and Group Proceedings: US Chamber of Commerce, Institute for Legal Reform, Submission to Victoria Law Reform Commission, *Litigation Funding and Group Proceedings* (September 2017).

35 Spender (n 8).

actions. For this reason, Ben Chen and Michael Legg's chapter, 'The Law and Economics of Australian Class Actions', is an extremely useful primer on economic reasoning regardless of jurisdiction.[36] Undoubtedly, 'an understanding of Law and Economics helps to highlight and explain the fundamental factors that are likely to have a strong influence on the key players or values in a class action'.[37] The language of 'incentives', 'transaction and monitoring costs', 'cost internalisation' and 'information asymmetries' is replete in the literature, as well as in the case law of first- and second-generation class action jurisdictions. Basic economic theory provides intuitive explanations for how class actions might achieve their three objectives and, by extension, assist judges gauge the consequences of their choices.

V Conclusion

The Australian Class Action achieves what its editors set out to do: it reflects on the origins of pt IVA of the *Federal Court Act*, assesses 30 years of developments and proposes amendments to the Act in light of that experience. The book offers a good balance of doctrinal, critical and theoretical perspectives. Many chapters provide a detailed and useful account of the history and state of class actions, while others offer important critiques through political, regulatory and economic lenses. For these reasons, the collection will be a very useful addition to every law school's and jurist's library, both in Australia and wherever class actions are litigated.

The book also succeeds in highlighting that some of the tensions in Australian class proceedings are, in fact, universal. Balancing fairness and efficiency, protecting the interests of the class while incentivising class counsel (and funders) to undertake this complex litigation, giving effect to public goals by way of private litigation — all are matters that preoccupy judges and observers in the United States, Canada and elsewhere. In tackling these vexing issues, the authors shed light on another universal theme — the sui generis character of class actions that resists the neat application of rules designed for bilateral litigation of disputes between known parties. What do core concepts such as standing, open justice, compensation and due process mean in the context of a procedure that necessarily privileges the collective over the individual? As Higgins adroitly points out, 'very little of modern life is individually negotiated', and '[t]oday's *Donoghue v Stevenson* would likely be a class action based on contamination of a factory making identical drinks for multiple markets'.[38] That reality compels a different kind of procedure, one that can resolve questions of fact or law common to untold numbers of individuals. Fortunately, the challenges which this modern procedure generates are also common. Scholars, judges and practitioners in every class action jurisdiction would do well to learn from each other.

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[36] Ben Chen and Michael Legg, 'The Law and Economics of Australian Class Actions' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 202.

[37] Ibid 205.

[38] Higgins (n 19) 118, citing *Donoghue v Stevenson* [1932] AC 562.