THE SECURITIES CLASS ACTION LAW SUIT: CANE TOAD OF UNITED STATES LEGAL PROCEDURE?

by

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Introduction

In 1935, Australian cane farmers imported slightly more that one hundred members of the toad family, *bufo marinus*, to help in controlling two insect pests, the grey backed cane beetle and the frenchie beetle, which at the time were infesting the cane fields of Queensland. It was thought that predation by these toads, native to South America but also imported into Hawaii, would be preferable to insect control through extensive use of pesticides The population of the imported toads was increased through breeding in Australia (to approximately 60,000 within six months) before the imported population was released into the sugar cane fields of Northern Queensland. Although the cane toad proved totally unsuitable for controlling the insect pests, they themselves supplanted the insects as the most significant pest in the sugar cane growing area of Australia within a short time. They are now considered to be one of greatest ecological disasters in Australian history, competing for honors in this regard with such other notable imports to Australia as the rabbit, the fox, the camel, the water buffalo, the American cockroach, the European wasp and, most recently, the fire ant.[1] The cane toad, which once mature produces a toxic substance from glands in its head, has spread through much of northern Australia. It is found in plentiful numbers in the in the backyards of Queensland and New South Wales suburbs as well as in such unique natural settings as the Daintree rainforest and the outskirts of Kakadu National Park.[2] In its wake, the cane toad has caused significant population decline to smaller native animals upon which it feeds and to similar species, such as native frogs, which it has effectively supplanted. It has also caused disturbance to populations of many predators (snakes, goannas, birds, and domestic dogs) whose deaths result from the ingestion of the toads' toxic glands or whose severe sickness may be caused by the spray which emanates from them.[3]

Distribution of the Cane Toad in Australia, 2005

The introduction of the cane toad to Australia may bring to mind thoughts of international environmental law; however, the brief description of the havoc wreaked by this creature is used in this paper as an analogy for potentially disastrous legal transplants from one country to another. The legislation of one country has served as a model for legislation in other countries on a number of occasions, with various degrees of success or failure. Recently, academic interest has turned to the question whether such transplants are useful or likely to be successful. Professor Alan Watson, for example, has been an advocate of the beneficial value of such transplants.[4] Based upon his observations that much of Western Europe's laws are borrowings from Roman law, he asserts that borrowings are the most fruitful source of change in the Western world.[5] In an oft-cited article expressing concern about the process,[6] Professor Otto Kahn-Freund indicated that such transplants were only likely to be successful in the circumstances where the forces resisting such transplantation (differentiation on economic or political grounds) were not significant. Pierre LeGrand has expressed similar views;[7] however, academic literature now abounds with examples supportive of Watson's views.

In the United States, the class action was an extremely popular proceeding in corporate law, enabling shareholders to seek redress for a number of various complaints against their corporation and its management. Prospectus failures, continuous disclosure failures and corporate governance deficiencies could all potentially lead to actions by a group of shareholders with dire consequences for their corporation and individual directors. Misuse of these actions eventually led to Congressional intervention to prevent the worst abuses of class actions in their application to corporate and securities regulation. With moves for tort reform, the class action was further constrained in the United States through various interventions of the Federal Government.

Australia, on the other hand, has been a relative newcomer to class actions. Because certain features of the Australian legal system (found in much of the common law world aside from the United States) are not conducive to speculative lawsuits, these actions have not been as well used in Australia as in the United States. Nevertheless, tort reform in Australia, as in the United States, has had an impact upon the growing use of the class action, reducing both its attractiveness and usefulness for such things as consumer litigation. Somewhat by coincidence, at the same time that class actions for torts were being subjected to greater control in Australia, judicial developments in corporate law may mean that class actions in relation to corporate securities may soon be the new growth area in Australian litigation.

This paper reviews the class action procedures in both the United States and Australia. It considers the abuses which have led in the United States to legislation addressing the misuse of class actions both in relation to corporate securities and in relation to tort litigation generally. The paper then considers the Australian class action environment explaining the features in the Australian legal system which have made the use of class actions less popular there than in the United States. The paper then reviews the recent judicial authority moderating Australian corporate law in a way likely to see greater use of class actions in relation to prospectus liability. The paper concludes with an analysis of whether it is likely that class actions will spread, like the cane toad, in plague proportions throughout Australia.

A Brief Outline of Class Actions in the United States

The class action as we currently know it evolved uniquely in the United States. Its antecedents, however, can be found in the English common law, which was faced with the difficulty of finally determining the rights of a multitude of parties, some of whom were unable to be joined in the action.[8] Since it is a principle of common law justice that those who are not parties to a legal action should not be bound by any purported determination of their rights, certain matters would not be possible to resolve in the absence of particular parties to the dispute.

The English Courts of Chancery evolved methods for dealing with such contingencies in the seventeenth and eighteenth century. The Bill of Peace was used in order to resolve disputes with a group presenting common issues, such as property disputes.[9] Other examples of actions with a multitude of potential litigants that were permitted by the Courts of Chancery included creditor claims against a debtor's estate legatees' claims against a testamentary estate, and concerning unincorporated associations. These actions, involving representatives of the those with common rights or burdens, enabled the resolution of the common issues presented without the necessary participation of all parties. While initially absent parties were not bound by such decisions, eventually a number of decisions affirmed that absent parties could bound by a determination so as to avoid a multiplicity of litigation. These procedures originally developed unsystematically. However, when the common law and equity courts were merged England in 1873, the new rules of procedure attached as a schedule to the Supreme Court of Judicature Act 1873 (Eng.)[10] adopted the chancery practice (addressed in greater detail in the section dealing with Australian class actions, below). Lord Macnaghten, in *Duke of Bedford v. Ellis*,[11] summarized the policy objectives of the rule in the following terms:

> The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience; for the sake of convenience it was relaxed.[12]

Similar issues as those faced in the English Courts were also being addressed in the United States, and the practice of the English Chancery Court found resonance with Justice Joseph Story in his authoritative text on pleadings in equity.[13] In this treatise, Justice Story indicated that all persons materially interested in the subject matter of a suit should be joined as parties; however, he further indicated that where the parties were so numerous as to make it impractical to join all the parties, joinder could be dispensed with if it could be done without injury to the persons not actually before the court. The evolution in the United States Federal Equity Courts of multi-party litigation proceeded in somewhat contradictory ways through the development of the common law (e.g. *Smith v. Swormstedt*[14] and *Supreme Tribe of Ben-Hur v. Cauble*[15]) and through the promulgation of procedural rules, which allowed for such actions.[16]

The principles applying to class actions in the United States did not achieve precise clarification despite the work of commentators in the late nineteenth and early twentieth century.[17] As in England, the procedures which developed in the Courts of Equity to deal with class actions were normally allowed for Courts which were newly able to exercise both law and equity jurisdiction. The procedures adopted in 1938 for the United States federal courts upon this event[18] were largely based upon the work of Justice Story. Reflective of the classification developed by Justice Story,[19] the Federal Rules of Civil Procedure adopted in 1938 provided for three categories of class actions:

1. true class actions, which were suits involving joint rights;
2. hybrid class actions, which were suits involving rights in a specific property involving a strong identity of interests among the class members; and
3. spurious class actions, which necessitated only that the class shared a common question of law or fact.[20]

The first two types of action were relatively limited in their application. The third type of class action (the spurious class action) was not binding upon absent members of the class, and was consequently somewhat unattractive.[21] As a result, class actions, though permitted in the United States for the sake of convenience in multi-party litigation, were not frequently used

prior to the amendment of the class action rules in 1966. At that time, the Federal Rules of Civil Procedure were amended to modernize the procedures applicable to class actions in the United States Federal Courts (with numerous of the States eventually adopting similar procedures).

Class actions are now governed by Rule 23 of the Federal Rules of Civil Procedure. The prerequisites to bringing a class action are enumerated in Rule 23(a):

One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable,
(2) there are questions of law or fact common to the class,
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
(4) the representative parties will fairly and adequately protect the interests of the class.

The procedure applicable to actions which meet the prerequisites above depend partially upon their characterization into one of three types of action:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[22]

Significantly, the third classification introduced in 1966 contemplated its use for litigation involving damages. It is this significant change in emphasis which led both to increased popularity of class actions subsequent to 1966 and calls, both domestically and internationally, for constraints upon its use. In ascertaining whether the matter fits within a type (3) class action, the two critical issues are:

- whether common questions of law and fact predominate; and
- whether a class action is the superior procedure to use.

In making these determinations, the following matters are specifically enumerated as relevant:

- the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- the difficulties likely to be encountered in the management of a class action.[23]

Once a class action is brought pursuant to the procedures outlined above, the Court is required to determine – at an early practicable time – whether to certify the action as a class action.[24] If the action is certified as a class action, the class must be defined[25] along with the class claims, issues or defenses. Further, a class counsel must be appointed pursuant to the procedures provided in the rules.[26]

One important feature of the class actions in the United States is the provision for class members to "opt out" and to seek their own individual redress. For class actions of the certified under Rule 23(b)(3), class members must be provided by the best notice practicable under the circumstances,[27] the following information:

- the nature of the action,

- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desire,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members.

The class action procedure further allows for the class action to proceed in relation to particular issues or the action may be divided into subclasses. A judgment in such a class action, whether or not favorable to the class, shall include and specify or describe those to whom the notice was provided and who did not request exclusion, and whom the court finds to be members of the class.

In order to inhibit the misuse of class actions, the procedures provide for continuing judicial supervision of the action and involvement of class members in any settlement, voluntary dismissal, or compromise:

- The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class;
- The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise;
- The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

The parties proposing the settlement, dismissal, or compromise must file a statement identifying any agreement made in connection with the proposal, and any class member may object to a proposed settlement, voluntary dismissal, or compromise.[28]

Controlling United States Securities Class Actions

The use of class actions to compensate numerous plaintiffs for failures relating to securities regulation was one of the consequences of the United States class action regime. While this may have had positive effects in deterring culpable activity, assuring that numerous small claimants would not be injured without remedy, and efficiently dealing with a multitude of claims, misuse of the system also developed.

Prior to 1995, securities class actions in the United States were subject to a number of abuses attributable to elements both of the class action itself and to litigation practices in the United States procedure system, such as the existence of contingency fees and the lack of any method for requiring reimbursement of costs from unsuccessful litigants.[29] Because defendant corporations bore the major share of the costs relating to the litigation (particularly the discovery costs), they were faced with the inevitability of incurring great costs relating to the litigation with no possible offsetting benefit. Further, such discovery could possibly reveal information which was not within the contemplation of the plaintiffs at the time of the original action. From the corporation's perspective, there was no possible upside – a successful defense leaving the corporation out of pocket for the costs of litigation, as well as the disturbance which such litigation caused to the internal functioning of the business.

The abuses that developed as a result of the class action system in the United States relating to securities have been frequently discusses in the academic literature, and are often referred to as "strike suits."[30] Lawyers representing the first plaintiffs in a class action would be in a preferred position to control the litigation and to reap any benefits from a contingency fee upon recovery or settlement.[31] As a consequence, potential plaintiffs, often with nominal share investment, would liaise with lawyers who were accustomed to managing such class actions so as to enable a quick filing of a suit when events (such as a drop in the share price of a corporation) indicated that the corporation had failed to disclose all material particulars to its shareholders or the market. Most actions were commenced within ten days of such events.[32]

Due to the disincentives that the defendant corporations faced when opposing the class action claims, settlement of the action was often preferable to continued litigation, which would involve great expense and possible further litigation exposure. On the other side, plaintiff lawyers were faced with the decision of a quick settlement and an immediate collection of fees (set without reference to the length of the action or the total effort undertaken), or a prolonged litigation with significant time and cost for the plaintiffs as well as the defendant corporation.[33] Not surprisingly, many of these actions were settled prior even to the completion of discovery based on a cost benefit analysis undertaken by the defendant corporation and the lawyers representing the plaintiffs.[34] The plaintiffs received their compensation only after payment of lawyers' fees. For those plaintiffs who remained shareholders in the defendant corporation, their investment in the corporation itself suffered as a result of the necessary payment.[35] Although such private action could be seen to encourage

appropriate behavior by corporate management, many began to question whether, in light of the potential abuses, this was the most efficient way to assure appropriate action by corporate management. [36]

Addressing the growing complaints about the misuse of class actions "strike suits" relating to securities, Congress enacted the Private Securities Litigation Reform Act in 1995.[37] This Act attempted to end the use of abusive "strike suits" by

- imposing higher standards in relation to the pleadings for private securities claims to deter the filing of baseless claims and encourage plaintiffs to undertake a proper investigation before filing suit,[38]
- preventing plaintiffs from abusing the discovery process in order to induce settlements,[39]
- providing Court control over the determination of lead plaintiff,[40] and
- enhancing the penalties for actions brought for an improper purpose.[41]

Although these changes were intended to affect a rebalancing the litigation process in relation to securities, concerns continued with the impact of class actions more broadly even after the passage of the legislation.[42] In particular, class actions under the laws of various states do not replicate the limitations imposed upon class actions in the Federal Courts. In consequence of these limitations, State jurisdiction over class actions (primarily tort related class actions) continued to be attractive to potential litigants. Congress was concerned that plaintiffs were choosing amenable States for the determination of lawsuits of national scope and interest.

The first attempt to prevent misuse of state based class actions for securities suits occurred in 1998 with the passage of the Securities Litigation Uniform Standards Act.[43] This Act attempts to pre-empt state securities law in favor of federal regulation. This is accomplished by:

- providing exclusive federal jurisdiction for actions in which the plaintiff alleges either an untrue statement or omission in connection with the purchase or sale of securities listed on the New York Stock Exchange, the American Stock Exchange, NASDAQ, or any other national exchange with similar listing rules;[44] and
- providing exclusive federal jurisdiction for actions in which the plaintiff alleges that the defendant used a manipulative or deceptive device in connection with the purchase or sale of such securities.[45]

The recent Supreme Court case of *Merrill Lynch Pierce, Fenner & Smith, Inc. v. Dabit,*[46] bolstered the effect of this legislation by determining that "holders" (those neither buying nor selling but induced to hold as a result of the culpable action) are also covered.

The concern about flight from federal class action controls was further addressed by The Class Action Fairness Act passed in 2005.[47] This Act did not attempt to modify the applicable Federal class action procedures,[48] but rather made the use of State class actions more difficult by expanding federal diversity jurisdiction over interstate class actions and by broadening the powers to remove an action to Federal Court and limiting the ability to have the action remanded. The Act permits class actions to be brought in, or removed to Federal Court if:

- at least $5 million is in controversy (excluding interest and costs); and
- at least one plaintiff and one defendant are citizens of different states or of a state and a foreign country.[49]

Despite the general limitation of class actions affected by the Class Action Fairness Act, securities litigation was specifically "carved out" from its operation.[50] Nevertheless, the Class Action Fairness Act provides further evidence that control of class action litigation is continuing in the United States.[51]

It is clear that class actions in the United States have been a very useful device for litigating issues involving a multitude of claims, including claims which would result in the award of damages. The excesses which class actions may be perceived to have instigated have been addressed both in relation to securities class actions and in relation to class actions generally.[52] Nevertheless, the history of the excesses of class actions in the United States continue to plague the ready acceptance of class actions in the rest of the common law world. Aside from the adoption of class actions in Canada,[53] Australia, and its State of Victoria[54] and South Australia[55] have thus far proved to be the common law jurisdictions outside North America which have been most receptive to class actions in the United States model.

Australia: A Class Action by Any Name

The procedures for dealing with multiple parties to an action in Australia until recent times generally duplicated those found in the United Kingdom. In tracing the history of the representative action in Australia in *Carnie v. Esanda Finance Corp. Ltd.*,[56] the High Court of Australia commenced its discussion with a summary of the iconic representative action case, *Duke of Bedford v Ellis*.[57] Considering whether it was appropriate for a number of plaintiffs to sue on behalf of themselves and all other growers of fruit, flowers, vegetables, roots and herbs in Covent Garden to enforce their rights to stands in that

market, Lord Macnaghten, with whom the majority in the case concurred, identified the three criteria which must be satisfied before the representative rule could apply:

> Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.[58]

In the view of the Court, there was a common interest among these growers, and it was irrelevant that the group consisted of membership that fluctuated and was thus difficult to identify and catalogue at any particular time. Further, even though the plaintiffs were claiming separate and different rights, this did not prevent them from using the representative procedure.

While the criteria mentioned by Lord Macnaghten would have provided ample opportunity for representative actions in the United Kingdom (and Australia) to develop, the English Court of Appeal, in the case of *Markt & Co. Ltd. v Knight Steamship Co. Ltd.*[59] limited the scope of the concept of "common interest" significantly. In that case, shippers sought damages for the loss of goods on a ship that was sunk during the Russo-Japanese war. The majority in the Court of Appeal determined that the shippers did not have a common interest because each contract of carriage was different from others, with potentially different defenses. As a result of this case, it was accepted that the representative action should exclude those cases where several damages were claimed and where individual contracts were involved.[60]

Although the cases of *Prudential Assurance Co Ltd v Newman Industries Ltd*.[61] and *Irish Shipping Ltd. v. Commercial Assurance Co. Plc*[62] addressed the issue of the "same interest" required for a representative action and seemed to relax this requirement to some extent, there was not general acceptance of that a representative action[63] could be brought where the relief sought was several damages. This particular constraint on the usefulness of the representative action, which distinguishes that action from the United States style class action, has been subject both to academic criticism[64] and to innovative judicial responses, neither of which have fully succeeded in the United Kingdom.

Due to the perceived deficiencies in relation to representative action, the Law Reform Commission of Australia recommended in 1988 that changes to the group proceedings for the Australian Federal Court be allowed so as to enable actions similar to the United States class action. As a result of this recommendation, Part IVA of the Federal Court Act was introduced.[65] The general objectives of Part IVA were identified in the second reading speech for the Federal Court of Australia Amendment Bill, 1991, (Austl.):

> The Bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.
>
> The second purpose of the Bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.[66]

An action can be brought under the expanded Part VIA:

> [W]here:
>
> (a) 7 or more persons have claims against the same person;
>
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
>
> (c) the claims of all those persons give rise to a substantial common issue of law or fact;
>
> a proceeding may be commenced by one or more of those persons as representing some or all of them.[67]

Comment [U1]:

The person who brings the action must have, in order to bring the representative action, a sufficient interest to commence a proceeding on his or her own behalf.[68] Group members must be notified of the commencement of the proceeding and they must also be notified of their right to opt out of the proceedings.[69] Generally, a person's consent to be a group member in a representative proceeding is not required.[70] Nevertheless, a group member may "opt out" of the representative proceeding by written notice given prior to a date fixed by the Court.[71]

Once an action commences, the Court has significant latitude in its control of the proceedings. It may order that a representative proceeding no longer continue where it is satisfied that it is in the interests of justice to do so.[72] If the

determination of the issue or issues common to all group members will not finally determine the claims of all group members, the Court may give directions concerning the determination of the remaining issues.[73] The Court may substitute another group member as a representative party and may make such other orders as it thinks fit if a representative party is not able to represent adequately the interest of the group members.[74]

Finally, the Court has broad powers in relation to the dispute. It can do any one or more of the following things:

- determine an issue of law;
- determine an issue of fact;
- make a declaration of liability;
- grant any equitable relief;
- make an award of damages for group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;
- award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;
- make such other order as the Court thinks just.[75]

However, the Court generally must not make an award of damages in an aggregate amount. Rather it must specify amounts awarded in relation to each group member.[76]

Although the class action procedure in Australia would appear to provide great scope for use in securities litigation, until recently it has primarily been used for tort litigation. Due to failures in the insurance industry in the late 1990s, however, the Federal government responded to calls for tort reform so as to limit claims and tighten the use of class actions for tort litigation. In consequence of these changes, Australian litigation specialists have turned their energies to securities litigation, a field of endeavor which, unlike the United States, has largely remained unexplored in Australia.

Australian Abandonment of *Houldsworth v City of Glasgow Bank*

For numerous years, the English case of *Houldsworth v. City of Glasgow Bank*[77] ("*Houldsworth*") has prevented much security litigation in Australia. In that case, decided in 1880, the House of Lords determined that the corporate law of both England and Scotland did not permit an action for misrepresentation or deceit by a subscribing shareholder against the company in which the shares were issued unless that shareholder first rescinded the subscription contract.

The decision in *Houldsworth* was based upon two principles. The principal basis for the decision was that to allow a claim for damages by a member against his company would be inconsistent with the implied term of the statutory contract between a member, his company, and all the other members which the constituent documents (known in Australia since the late 1990s as the Constitution, and generally known in the United States as the Articles and Bylaws) represent. This contract know finds its statutory its statutory basis in s 140 of the Corporations Act, 2001, (Austl). That statutory contract, among other things, indicates that the capital which the member has subscribed should be applied only in payment of the debts and liabilities of the company[78]. Indicating that to allow a shareholder to seek damages for any misrepresentation or deceit when becoming a shareholder would be inconsistent with their obligations as a shareholder both to the company and to other shareholders, Earl Cairns, Lord Chancellor, stated:

> But he has contracted, and his contract remains, that these assets and contributions shall be applied in payment of the debts and liabilities of the company, among which, as I have said, this [claim] could not be reckoned. The result is, he is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide; in other words, he is in substance if not in form taking the course which is described as approbating and reprobating, a course which is not allowed either in Scotch or English Law.[79]

The decision in *Houldsworth* was additionally justified by the notion that shareholders' capital was committed, in the event of liquidation, until creditors had been fully paid. Consequently, to allow a claim for damages against a company by a subscribing shareholder without rescission of the subscription contract would be tantamount to reversing the general concept of subordination of shareholders' claims to return of capital to the claims of creditors. In the recent case of *Soden v. British Commonwealth Holdings Plc*,[80] Lord Brown –Wilkinson restated this principle in the following terms:

> The relevant principle is that the rights of members as member come last, i.e. rights founded on the statutory contract are, as the price of limited liability, subordinated to the rights of creditors based on other legal causes of action. The rationale of the section is to ensure that the rights of members as such do not compete with the rights of the general body of creditors.[81]

Adding further difficulty to any shareholder seeking redress against the company was the principle that once winding up of a company commenced (bankruptcy in United States terminology), rescission of the subscription contract was no longer permissible.[82] Where rescission was not possible or where affirmation of the contract had occurred, an action in deceit provided an alternative. According to House of Lords decision in *Derry v Peek*,[83] one of the primary elements of such an action was the knowledge of the person making the representation that is was untrue. This required a showing either (1) the defendant knew or believed the statement in question to be false;[84] or (2) he did not believe it to be true; or (3) he made it in reckless ignorance of whether it was true or false.[85] In applying these requirements to companies, there was a difference of opinion as to its application. One view indicated that a company could not be made liable for fraud, since that was a quality attributable only to a natural person,[86] while the opposing point of view was that the fraud of an agent could make a company vicariously liable.[87]

In order to eliminate the uncertainty surrounding the liability of the company's agents for their role in misleading investors, Section 3 of the Directors Liability Act, 1890, (Eng.)[88], the forerunner of the Australian prospectus liability provisions, was enacted. Under this legislation, every director, promoter and other person who authorised the issue of a prospectus was, subject to certain exceptions, made liable to pay damages that a subscriber suffered "by reason of any untrue statement in the prospectus." Although this had the effect of providing a statutory cause of action without the uncertainties surrounding an action for deceit, neither it nor the Australian statute modelled upon it specifically created a cause of action against the company on whose behalf the prospectus had been issued.[89]

The uncertainty surrounding liability for false statements in a prospectus has now been resolved in the United Kingdom. The common law eventually clarified when a company would be responsible for the misrepresentations or fraudulent acts of the company's agents. More importantly, however, the rule in *Houldsworth* has been statutorily abrogated. Section 111A of the Companies Act, 1985, (UK)[90] now provides:

> A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company or any right to apply or subscribe for shares or to be included in the company's register in respect of shares.

In contrast to the position in the United Kingdom, *Houldsworth* continued with vitality in Australia, since there has been no equivalent enactment in Australia similar to the United Kingdom enactment of section 111A quoted above. As a consequence of this, *Houldsworth*, representing as it does longstanding English precedent of continuing effect in Australia, operated to prevent a shareholder from pursuing claims against the company in which he or she holds shares so long as there is no statutory abrogation of that rule in that case.

At several times in recent years, the Australian judiciary has had to consider whether statutory enactments have abrogated the rule in *Houldsworth*. The most authoritative decision on the matter was decided by the High Court of Australia in the case of *Webb Distributors (Aust.) Pty. Ltd. v. Victoria,*[91] which determined an appeal from the Victorian judgment of *Victoria v Hodgson & Ors.*[92]

In *Webb*, the High Court considered whether the Trade Practices Act, 1974, (Austl.), an piece of innovative consumer-type legislation intended, among other things, to prevent misleading and deceptive conduct, could be seen as abrogating the *Houldsworth* decision when the misleading and deceptive conduct was in relation to the subscription for shares. Despite the broad statutory scheme providing for liability for such conduct generally, the High Court refused to accept that an action by a shareholder under Trade Practices Act could proceed in such circumstances:

> It was the appellant's contention that the Trade Practices Act provided its "own code of remedies, unfettered."
>
> The Trade Practices Act is unquestionably a piece of innovative legislation. But it is not to be seen as eliminating, "by a side-wind", the detailed provisions established for more than a hundred years to govern the winding up of a company.[93]

The decision in *Webb* indicated that specific common law principles were unlikely to be overturned unless the Australian Parliament indicated a clear intention that the common law be overturned, what would be sufficient evidence of such Parliamentary intent remained uncertain. In late 2005, the Federal Court of Australia considered the continuing vitality of *Houldsworth* in Australia in light of the specific provisions of the Corporations Act, 2001, (Austl.) which provides for liability for a defective prospectus in the case of *Cadence Asset Management Pty. Ltd. (as trustee for Cadence Capital) v Concept Sports Ltd.*[94] (*'Cadence'*).

Concept Sports Ltd sought to raise $12 million by issuing a prospectus offering 24 million ordinary shares at an issue price of $0.50 each. The prospectus contained financial information about the company, including forecast sales revenue and forecast earnings before interest and tax. The prospectus also contained statements about Concept Sports' activities, the

strength of its business and the future prospects for that business. In addition, there appears to have been several implicit representations in the prospectus, to the effect that all material information had been disclosed and that all reasonable investigations had been undertaken to ensure that the information in the prospectus was accurate.

The plaintiff subscribed for shares in Concept Sports allegedly on the strength of the prospectus; however, the plaintiff asserted that:

(a) the prospectus did not contain all of the information which by statute it was required it to contain[95];

(b) the forecasts for sales revenue and earnings and the statements about the company's outlook were misleading and deceptive; and

(c) certain implied representations in the prospectus were false.

The plaintiff did not rescind the contract of subscription, but rather sold the shares to a third party at a loss. The plaintiff then sought to recover its loss (initial price ($0.50) less average sale price ($0.115)) from Concept Sports Ltd. under the liability provisions of the Corporations Act, 2001, (Austl.).[96]

The operative Australian provision covering liability on a prospectus indicates that if a prospectus omits information that is required by statute, or if it contains misleading or deceptive statements that are materially adverse from the point of view of an investor, the person making the offer will have committed an offence. Any person who suffers loss or damage as a result may, subject to certain defences, recover that loss or damage from a number of persons, including the company making the offer.[97]

Concept Sports Ltd argued that the principle espoused in *Houldsworth* precluded any claim by the plaintiff. To claim any damages while avoiding the effect of the rule in *Houldsworth*, it would have been necessary, according to Concept Sports Ltd, for the plaintiff to rescind the agreement to subscribe for the shares pursuant to the prospectus so as to recover the full amount of the purchase price rather than on-sell the shares to a third party and recoup the loss made on the sale.

At first instance, Justice Finkelstein of the Australian Federal Court ruled that the rule in *Houldsworth* had not been abrogated by the enactment of the prospectus liability provision.[98] Relying upon the High Court decision in *Webb*, Justice Finkelstein noted the following reasons for his conclusions that the reasons for denying the plaintiff's request for relief were to be preferred over an interpretation that would allow relief. The factors that Justice Finkelstein found persuasive were that:

(a) parliament could have, but did not explicitly overturn *Houldsworth* (as had been the case in the United Kingdom);

(b) parliament was aware of *Houldsworth* and its consequences, and would have been able to overturn the implications of the case if it had wished to;

(c) the High Court of Australia had considered a similar argument in *Webb* and had rejected, in that case, the proposition that Parliament had intended to abrogate *Houldsworth*; and

(d) certain aspects of *Houldsworth* (postponing claims of shareholders in their capacity as shareholders to claims of creditors) had been enacted by statute,[99] and to overturn Houldsworth would thus seem to be contradictory to that provision.

Also critical to this decision were that fact that the judgement in *Victoria v Hodgson,*[100] and the High Court appellate decision, *Webb*, were decisions by which Justice Finkelstein felt bound.

On appeal to the Full Federal Court, the same arguments about Parliamentary intent resulted in a determination that Parliament had, in fact, intended to abrogate *Houldsworth.* The Full Federal Court, consisting of Justices Merkel, Weinburg, and Kinney, concluded that the specific provision for liability on a prospectus did intend to supplant *Houldsworth*. The Full Federal Court found that supporting material pointed strongly away from any qualification of the statutory remedies. In coming to this conclusion, the Full Federal Court construed the language of section in its natural and ordinary meaning, having regard to its context. This context included other provisions of the enactment, its history and the state of the law at the time of the enactment as well as the purpose which the enactment sought to achieve.

Referring to the Explanatory Memorandum accompanying the Bill which had reformulated the prospectus provisions in 1998, the Full Federal Court indicated that it provided useful commentary, stating the purpose of the sections as:[101]

> 'to ensure that issuers continue to provide full disclosure in the associated prospectus, issuers will be liable to investors in relation to the prospectus'

In the view of the Full Federal Court, one of the rationales for the *Houldsworth* rule was to prevent shareholders, directly or indirectly, from receiving back any part of their contribution to the capital of the company, thereby defeating the interests of creditors. In contrast to the views of Justice Finkelstein at first instance, the appellate Court indicated that this was now provided for in the subrogation of shareholders' claims to those of creditors. As a result, the need for a prohibitive rule such as *Houldsworth* was no longer critical to the achievement of that objective.[102]

Accordingly, the Full Federal Court found no reason for qualifying by application of the *Houldsworth* rule a claim to damages against a company for a deficient prospectus. In consequence of this, the claim for damages by the plaintiff could proceed even though the plaintiff had not rescinded its subscription contact and was no longer capable of doing so.

Will Securities Class Actions Now Flourish in Australia?

It would appear that removing the barriers to damage suits against Australian corporations would make class actions based upon defective prospectuses quite attractive. Undoubtedly, the aggregation of such claims into a class action would assure that members of the class of plaintiffs who had suffered loss insufficient to warrant individual action would, through use of a class action, be able to participate in any recovery. For straightforward disclosure failures, the benefits of having one litigation would seem obvious. Concentrating upon the hypothetical case where a number of shareholders have all suffered loss as a result of misleading and deceptive statements in a prospectus, a class action would clearly advance the articulated policy objectives supporting the Australian class action:

- It will provide access to the courts for shareholders despite that fact that each shareholder's loss may be small and not economically viable to recover in individual actions.
- It will allow the Courts to deal efficiently with the situation and will allow that group of shareholders, even if the damages were large enough to justify individual actions, to obtain redress and do so more cheaply.[103]

While the advantages of the class action in such circumstances is clear, a more difficult questions is whether abuse of the class action in Australia will see it turned from a saviour to a pest, resulting in frivolous actions instigated by entrepreneurial lawyers. Such actions, it is feared, might be brought merely for the prospect of settlement by defendant corporations to avoid litigation costs and to avoid court sanctioned "fishing expeditions" where plaintiff lawyers troll through vast amounts of material seeking information which would justify their actions. The fear of entrepreneurial advocates is widespread, and was recently expressed by Justice Callinan of the High Court of Australia:

> The problems to which I have just referred are likely to be aggravated by the increasingly competitive entrepreneurial activities of lawyers undertaking the conduct of class or group actions, in which, in a practical sense, the lawyers are often as much the litigants as the plaintiffs themselves, and with the same or even a greater stake in the outcome than any member of the group. This reality is likely to be productive of a multiplicity of group actions throughout the country.[104]

Unlike the cane toad, which found itself relocated to a countries whose ecosystem was ideally suited for a population explosion, the class action has in Australia, been cast upon a legal environment which is not conducive to misuse of the litigation process or exploitation by opportunistic plaintiff lawyers. As in the United Kingdom and the remainder of the common law world, Australia does not provide for contingency fee litigation.[105] Like the United Kingdom, three of the Australian States have allowed for uplift factors to compensate for actions which are somewhat speculative, these factors are allowed to exceed the standard hourly fees by a smaller percentage than is allowed in the United Kingdom.[106] The fees are not calculated by reference to the amount of recovery or settlement, but rather on the standard rates charged by the legal practitioner. Even these uplift factors are under review, with New South Wales eliminating its approval of uplift factors for actions involving damages last year.

Also mitigating against a cane toad-like explosion of class action litigation in Australia is the system of awarding costs against the losing party (known in the United States as the "English rule").[107] Whereas in the United States, unsuccessful plaintiffs may incur no legal fees if they have engaged their lawyers on a contingency fee basis, the same would not always be true in Australia (although various plaintiff law firms do occasionally operate on a no win no fee basis). More importantly, the legal fees of the opposing party (as verified by independent assessors based upon a costing schedule), may be recovered from the party which has lost the action. For this reason, unnecessary or burdensome litigation activity will eventually be borne by the unsuccessful party to the litigation, including potentially the plaintiffs to the class action. Further adding to the discouragement of frivolous class actions is the ability of defendants to seek security for costs, thereby requiring plaintiffs to provided financial undertakings sufficient to cover the litigation costs of defendants should the defendants succeed in their defence.[108]

A final impediment to a more extensive use of class actions in Australia is a somewhat antagonistic attitude of many of the Australian judiciary to its use. This attitude has been reflected in interpretations which make the use of class actions much more difficult than might be expected. For example, in *King v. General Insurance Office*[109] the Australian class action procedure was interpreted to require that the lead plaintiff in a class action and each of its members would have to plead a claim against each and every respondent. Another example of this unreceptive attitude toward class action can be seen in the judicial response to one attempt by plaintiff lawyers to overcome the difficulties of bringing a class action. An assertion that a class of plaintiffs could be limited to those members represented by one law firm (intended to ease the difficulties of

funding the litigation and meeting possible costs awards) was rejected as inappropriate.[110] Finally, Australia has not adopted any method, other than individual proof of reliance, that statements known to the market at large where misleading to individual investors.[111] As a result of such developments, it is easy to understand why it might be said that Australia, at least in relation to class actions, is "heading back in the direction of 1852."[112]

It is clear from these differences that the class action will be unlikely in Australia to become the tool of unworthy litigants willing to bring actions without any genuine prospects of success. Other United State legal transplants have proved to be more successful than might originally have been anticipated,[113] but one can only hope that the legal environment for litigation in Australia will keep the spread of entrepreneurial class actions in check.

Footnotes:

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[1] Aside from the insect examples, which were introduced unintentionally, all of the other species were introduced intentionally.

[2] See the website of the Melbourne Zoo, from which the distribution map originates, for more information: http://www.zoo.org.au/animal_page.cfm?area_id=26&zoo_id=1&animal_id=139

[3] See I. R. Straughan, *The Natural History of the "Cane Toad" in Queensland*, 15 AUSTRALIAN NATURAL HISTORY 230 (1966); J. Covacevich & M. Archer, *The distribution of the Cane Toad, Bufo marinus, in Australia and its effects on indigenous vertebrates* 17 MEMOIRS OF THE QUEENSLAND MUSEUM 305 (1975).

[4] Alan Watson, *Legal Transplants* (1974); Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1993); Alan Watson, *Failures of the Legal Imagination* (1988); Alan Watson, *Law Out of Context* (2000); Alan Watson, *Legal Change: Sources of Law and Legal Culture* 131 U. PA. L. REV. 1121 (1983); and Alan Watson, *Legal Transplants and Law Reform* 92 L. Q. REV. 79 (1976).

[5] Alan Watson, *Legal Transplants and European Private Law* (Ius Commune Lecture, Maastricht, Metro 2000).

[6] Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

[7] Pierre LeGrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. AND COMP. L. 111 (1997).

[8] *See* Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 687-699 (1997) and Geoffrey Hazard, John Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits* 146 U. PA. L. REV. 1849 (1998) for a description of the historical development of group actions.

[9] Zechariah Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932).

[10] 36 and 37 Vic., c. 66. Rules of Procedure, rule 10.

[11] [1901] A.C. 1.

[12] *Id.* at 8.

[13] JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS (1838).

[14] 57 U.S. 288, 16 How. 307 (1853).

[15] 255 U.S. 356 (1921).

[16] These contradictory developments are discussed in Hazard, Gedid and Sowle, *supra*. n. 8, 1897- 1902. While *Swormstedt* and *Ben-Hur* indicated that the decree in the case would be binding upon all in the class represented including those who were absent (57 U.S. at 302), Rule 48 of the Federal Equity Rules of 1842 stated:

> Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties. Hazard, Gedid, & Sowle, f 232.

[17] JOHN NORTON POMEROY, TREATISE ON EQUITY JURISPRUDENCE (1881); THOMAS A. STREET, FEDERAL EQUITY PRACTICE (1909). A discussion of their attempts at synthesis of class action jurisprudence can be found in Hazard, Gedid and Sowle, *supra*. n. 8, 1917-1923.

[18] By the Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (1934), Congress authorized the Supreme Court to promulgate rules of procedure for the district courts. The Federal Rules of Civil Procedure (1938), abolished the distinction between law and equity. 308 U.S. 645, 663 (1939). *See* Alexander Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 CALIF. L. REV. 127 (1943); Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); and Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003).

[19] Hazard, Gedid & Sowle, *supra*. n. 8, 1938 – 1940, citing James W. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 308-311 (1937).

[20] Fed. R. Civ. P. 23, 308 U.S. 689 (1938).

[21] Hazard, Gedid & Sowle, *supra*. n. 8, n 407, citing James W. Moore & Marcus Cohn, *Federal Class Actions – Jurisdiction and Effect* , 32 ILL. L. REV. 555, 561-562 (1938).
[22] Fed. R. Civ. P. 23(b).
[23] *Id.* 23(b)(3).
[24] *Id.* 23(c)(1)(A).
[25] *Id.* 23(c)(1)(B).
[26] *Id.* 23(g) indicates that an attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class. In appointing class counsel, the court must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

The Court may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class and may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and non-taxable costs.
[27] *Id.* 23(c)(2)(B). This may include individual notice to all members who can be identified through reasonable effort.
[28] *Id.* 23(e). This has proved to be a problem elsewhere as well. See Vince Morabito**,** *Judicial Supervision of Individual Settlements with Class Members in Australia, Canada and the United States*, 38 TEX. INT'L. L.J. 663 (2003).
[29] John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877(1987); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000); William J. Lynk, *The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class-Action Litigation*, 23 J. LEGAL STUD. 185 (1994).
[30] Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988); James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497 (1997).
[31] John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000).
[32] *See* B. Scott Daugherty, *Uncharted Waters: Securities Class Actions in Texas after the Securities Litigation Uniform Standards Act of 1998*, 31 St. Mary's L.J. 143, 161 fn. 83 (1999), citing JAMES HAMILTON, FED. SEC. L. REP., PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995, at 144 (1996)
[33] These excesses are described in Tiffany Wong, *Defendant's Standing to Oppose Lead Plaintiff Appointment under the Private Securities Litigation Reform Act*, 2003 U. CHI. LEGAL F. 833, 834-837 (2003).
[34] See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991)
[35] Tim Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 DICK. L. REV. 355 (1994).
[36] Robert. B. Thompson & Hillary A. Sale, *Securities Fraud as a Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859 (2003).William S. Larach, *Achieving Corporate Governance Enhancements through Litigation*, 24 T. JEFFERSON L. REV. 1 (2001).
[37] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104- 67, 109 Stat. 737 (1995).
[38] *See* 15 U.S.C. § 78u-4(b)(1)-(2) (2000).
[39] *See id.* § 78u-4(b)(3)(B).
[40] *See id.* § 78u-4(b)(3)(A). This also provides limitations on the number of times a plaintiff may be lead plaintiff within a three year period, thereby inhibiting professional litigants.
[41] *See id.* § 78u-4(c). *See also*, Fed. R. Civ. P. 11.
[42] See Damian Moos, *Pleading Around the Private Securities Litigation Reform Act: Reevaluating the Pleading Requirements for Market Manipulation Claims*, 78 S. CAL. L. REV. 763 (2005)
[43] Pub. L. No. 105-353, 112 Stat. 3227 (1998).
[44] 15 U.S.C. § 77p (2000).
[45] 15 U.S.C. § 78bb (2000).
[46] 126 S.Ct. 1503, 164 L.Ed. 2d. 179, 74 U.S.L.W. 4167 (2006).
[47] Pub. L. No. 109-2, 119 Stat. 4 (2005).
[48] Fed. R. Civ. P. 23.
[49] *See* 28 U.S.C. § 1332(d) (2000).
[50] Class Action Fairness Act of 2005 § 4(a)(2), 28 U.S.C.A. § 1332(d)(9)(A) (2005) indicates that diversity jurisdiction allowed for in the Act (Section 1332(d)(2)) does not apply to class actions involving claims which only concern securities, and § 5(a), 28 U.S.C. § 1453(d)(1) exempts such class actions from removal to federal district court under § 1453.

[51] See Jeffery T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action under the Federal Securities Laws*, 55 AM. U. L. REV. 621 (2006).
[52] Myriam Gilles, *Opting Out of Liability: the Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 422-425 (2005)
[53] Code of Civil Procedure of Quebec, R.S.Q., ch. C-25 (1994), operating from January 1979; Class Proceedings Act, S.O., ch. 6 (1992) (Ont.), from January 1993; Class Proceedings Act, R.S.B.C., ch. 50 (1996) (B.C.), from August 1995; Class Actions Act, R.S.S., ch. C-12.01 (2001) (Sask.), from January 2002; Class Actions Act, R.S.N., ch. C-18.1 (2001) (Nfld.), from April 2002; Class Proceedings Act, S.M., ch. 14 (2002) (Man.), from January 2003; Federal Court Rules, S.O.R./98-106, R. 299.1-299.42 (1998) (Can.), from November 2002; and Class Proceedings Act, S.A. ch. C-16.5 (2003) (Alta.), from April, 2004. See Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269 (2001).
[54] Supreme Court Act, 1986, Part 4A (Vict.). This legislation was passed after an evaluation prepared in August, 1995, for the Victorian Attorney-General's Law Reform Advisory Council. See V. Morabito and J. Epstein**,** *Class Actions in Victoria--Time for a New Approach* (Victoria: Attorney-General's Law Reform Advisory Council, 1997). After legislative inaction, the Supreme Court of Victoria added a new Order 18A to the Supreme Court (General Civil Procedure) Rules, 1996 (Vict.). This new order was challenged as beyond the judicial power of the Supreme Court, but the challenge was rejected in *Schutt Flying Academy (Austl) Pty. Ltd.* v. *Mobil Oil Austl. Ltd.* (2000) 1 V.R.. 545. Before that determination could be appealed to the High Court of Australia, the Victorian Parliament enacted the abovementioned legislative framework for class actions similar to the regime under Order 18A.
[55] Supreme Court Rules, 1987, Rule 34 (South Austl.), from January 1987.
[56] (1995) 182 C.L.R. 398.
[57] [1901] A.C. 1. The High Court's discussion is found at (1995) 182 C.L.R. 398, 416.
[58] [1901] A.C. 1, 8.
[59] [1910] 2 K.B. 1021 (C.A.)
[60] *Id.* at 1040-41.
[61] [1981] Ch. 229 (per Vinelott J.)
[62] [1991] 2 Q.B. 206 (C.A.)
[63] *For example*, Elec., Elec., Telecomm. and Plumbing Union v. Times Newspapers Ltd., [1980] Q.B. 585, 601.
[64] Rachel Mulheron, *From Representative Action to Class Action: Steps rather than Leaps*, 24 CIV.JUS.Q. 424 (2005).
[65] Part IVA was inserted into the Federal Court of Australia Act, 1976, (Austl.) in 1991 by the Federal Court of Australia Amendment Act, 1991, (Austl.), which commenced on 4 March 1992.
[66] Australia, House of Representatives, *Debates* (1991), pp 3174-3175. This is statement of purpose is referred to by the High Court in *Wong v Silkfield Pty. Ltd.* (1999) 199 CLR 255 at 264; 165 ALR 373 at 379 and in *Carnie v. Esanda Fin. Corp. Ltd.*, (1995) 182 C.L.R. 398.
[67] Federal Court of Australia Act, 1976, pt. IVA, § 33C (Austl.).
[68] *Id.* § 33D.
[69] *Id.* § 33X . The method of notification is dealt with in § 33Y. In subsections (5) and (8), this section provides:

> (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.
>
> (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 a proceeding.

The date by which the opt out must occur is to be fixed by the Court according to s. 33J (1).
[70] Federal Court of Australia Act, 1976, pt. IVA, § 33E(1),(2) (Austl.).
[71] Federal Court Rules, 1979, (Austl.) s 33J.
[72] Federal Court of Australia Act, 1976, pt. IVA, § 33N (Austl.) provides particular reasons why a Court my reach that conclusion.
[73] *Id.* § 33Q(1).
[74] *Id.* § 33T.
[75] *Id.* § 33Z(1).
[76] *Id.* § 33Z(3).
[77] (1880) 5 App. Cas. 317.
[78] Houldsworth v. City of Glasgow Bank (1880) 5 App. Cas. 317 , 325 per Earl Cairns LC; *Re* Addlestone Linoleum Co. (1887) 37 Ch. D. 191 , 205-206 per Lindley LJ.
[79] (1880) 5 App. Cas. 317 at 325.
[80] [1998] A.C. 298.
[81] *Id.* at 324.
[82] Oakes v. Turquand (1867) LR 2 HL 325.
[83] (1889) 14 App Cas 337.

[84] This required a direct and positive untruth. An omission would not suffice unless the omission rendered that which was said to be false: Oakes v Turquand (1867) L.R. 2 H.L. 325; Peek v. Gurney (1873) L.R. 6 H.L. 337.
[85] (1889) 14 App. Cas. 337.
[86] *See* Lord Bramwell's speech in *Abrath v. North Eastern Ry. Co.* (1886) 11 App. Cas. 247 , 250-251.
[87] LINDLEY, A TREATISE ON THE LAW OF COMPANIES (5th ed, 1889) 74, 216-219.
[88] 53 & 54 Vict., c. 64 (Eng.).
[89]However, legislative changes were made in 1998 which arguably had such an effect. These are discussed in the commentary concerning *Cadence Asset Mgmt. Pty Ltd (as trustee for Cadence Capital) v Concept Sports Ltd.* (*'Concept Sports'*).
[90] Inserted by the Companies Act, 1989, (UK).
[91] (1993) 179 CLR 15.
[92] [1992] 2 VR 613.
[93] (1993) 179 CLR 15, 37.
[94] (2005) 147 F.C.R. 434.
[95] Corporations Act, 2001, § 710 (Austl.).
[96] The facts of the case are taken from the Judgment of Justice Finkelstein, (2005) 55 ACSR 145, 146-48.
[97] Corporations Act, 2001, § 729 (Austl.).
[98] [2005] FCA 1280, (2005) 55 ACSR 145, *rev'd* [2005] 147 F.C.R. 434.
[99] *Id.* § 563A.
[100] [1992] 2 VR 613.
[101] (2005) 147 F.C.R. 434, 444, citing para. 8.1 of the Explanatory Memorandum accompanying the Corporate Law Economic Reform Program Act, 1999, (Austl.).
[102] (2005) 147 F.C.R. 434, 446.
[103] These objectives were stated in the Reading Speech, *supra.*, n 66.
[104] Mobil Oil Australia Pty Ltd v. Victoria (2002) 211 C.L.R. 1 at 77..
[105] See Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261 (1998); Gregory E. Maggs & Michael D. Weiss, *Progress on Attorney's Fees: Expanding the "Loser Pays" Rule in Texas*, 30 HOUS. L. REV. 1915 (1994)
[106] In New South Wales, conditional costs agreements may provide for a 25% uplift, but this no longer applies to actions for damages, Legal Profession Act, 2004, s. 324 (N.S.W.). Victoria continues to allow a 25% uplift on conditional cost agreements, Legal Practice Act , 2004, s. 97 (Vic.). Queensland allows the greatest uplift factor in Australia, Queensland at 50%, Queensland Barristers' Rules 102A(d). England and Wales now allow for a 100% uplift, *see* Courts and Legal Services Act 1990, s.58 (Eng.); *see also* Keith Ashby & Cyril Glasser, *The Legality of Conditional Fee Uplifts*, 25 CIV. J.Q. 130 (2005); Peter Malamed, *An Alternative to the Contingent Fee? An Assessment of the Incentive Effects of the English Conditional Fee Arrangement*, 27 CARDOZO L. REV. 2433 (2006).
[107] Philip J. Havers, *Take the Money and Run: Inherent Ethical Problems of the Contingency Fee and Loser Pays Systems*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 621, 633 (2000)
[108] *See, e.g.*, I.M.F. (Austl.) Ltd. v. Sons of Gwalia Ltd. (Admin. Apptd.) (2005) 143 F.C.R.274 and Bray v. Hoffman LaRoche Ltd. (2003) 130 F.C.R. 317.
[109] (2000) 100 F.C.R. 209.
[110] Dorajay Pty. Ltd. v. Aristocrat Leisure, (2005) F.C.R. 394, 431, wherein Justice Stone described such a proposed class definition as repugnant to the policy of the Act.
[111] This is in contrast to the United States concept of misleading the market established in *Basic v. Levinson*, 485 U.S. 224 (1988).
[112] The comments of Justice Finkelstein in *Bray v. Hoffman LaRoche Ltd.* (2003) 130 F.C.R. 317, 373, concerned the requirements of *King v. Gen. Ins. Office, supra.* n 109. The issue of defining a class by its legal representative was not being commented upon.
[113] See Paul von Nessen, *The Americanization of Australian Corporate Law*, 26 SYRACUSE J. OF INTL. L. AND COMM. 239 (1999).