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Dear Student,

This is a well thought out essay with interesting points/comments on quite a difficult topic. Just by perusing over your essay, I can tell that you have spent some time considering in-depth what procedural issues may arise from a “class action” litigation under the current legal paradigm. I enjoyed your discussion on opt-in/opt-out divergence, and I almost felt that you could have chosen that one point to write the whole essay – but perhaps in some more depth.

I thought I would share with you (briefly) three general pointers to improve your legal essay writing.

* Firstly, I think you could certainly make your essay clearer by using the paragraphs more effectively. As you will be able to see below, I have shifted a lot of your paragraphs around. The reason is that (a) you appear to use unnecessary amounts of segue – connecting one paragraph to the next. The result appears to be that you have one message in two separate paragraphs. The other reason is that (b) you could use the paragraphs to more effectively separate your critical analysis (i.e. pros vs. cons or for vs. against on separate paragraphs).
* Secondly, although this is a relatively short essay requiring the main crux of the essay to be at the critical analysis part, that doesn’t mean you should skip over basic foundations/skeletons of your essay – i.e. the basic law, the policy justification for the law (as evinced by second reading speeches), etc. If you set this foundation strong, it would be easier at the critical analysis part.
* Thirdly, I think you can improve significantly if you cut your sentences in half or a third – and let each portions be separate sentences. Short, succinct sentences are almost always more powerful. This will also mean that you will not use terms like “therefore” as often as you have per sentence – and when you use it, it will be more powerful for the reader.

I wish you well with your studies – and do let us know if there is anything we can assist you with to achieve your goals.

SJ Cho BPharm (Hons.), M.P.S, JD (Hons.)

Private Law Tutor

**Introduction**

A representative proceeding ~~class action~~ in civil litigation procedure allows the claims of many individuals against same defendant to be brought or conducted by a single representative.[[1]](#footnote-1) ~~allow individuals to combine their claim with a class of people who have been harmed by the same defendant.~~ In Australia, such proceeding was initially available under equity, which was later subject to law reform[[2]](#footnote-2) and consequently legislated.[[3]](#footnote-3) Policies of access to justice and efficiencies in terms of costs and court time were considered by the ALRC and the legislature as overriding drivers in making this form of litigation available in civil suits. ~~Thus, there is potential to alleviate some financial and emotional hardship associated with private litigation.~~ Despite law reform, there are nevertheless procedural difficulties when a representative proceeding is invoked. The aim of this essay is to critically discuss these procedural difficulties ~~experienced class actions~~. This discussion will begin by defining what a class action is. The essay will then analyse two controversial aspects of class action: (1) the “opting out” procedure; and (2) the court’s ability to strike out a representative proceeding when persuaded by the defendant. ~~defendant’s ability to have the court strike the claim out~~. It will be asserted that despite inherent procedural difficulties, the “opting out” procedure, ~~despite some procedural difficulties~~, when compared to the alternative “opting in” procedure adhered to in the American legal system, ~~American class action system~~ is better geared to achieving a more reasonable and flexible result for the plaintiffs. ~~reasonably flexible for the plaintiff.~~ However, the “striking out” procedure will be concluded as ~~having~~ (possibly) causing significant procedural difficulties for ~~the~~ plaintiffs due to the ~~because of the~~ broad wording of the legislation that fails to consider the possibility of plaintiffs being essentially struck out from a proceeding, ~~that enables the plaintiff to defeat their claim and potentially leave the plaintiff~~ without any hope of a remedy for their harm.

**1) What is a Representative Proceeding or a “Class Action”?**

A class action is the representation of a group of people with a common grievance against a party that has caused them harm.[[4]](#footnote-4) Introduced in Victoria as of 2000, class actions are a more affordable means of representation because of the sharing of costs amongst parties as compared to the burdens of independent litigation.[[5]](#footnote-5) The extremely popular movement saw lawyers advertise this service in mainstream media such as newspapers and radio on a no win, no fee basis.[[6]](#footnote-6) Class actions have multiple names because of the various types of claims that are actionable against a defendant.[[7]](#footnote-7)

Cashman explains that the ubiquitous labeling of class actions is attributed to the various mechanisms that are available to plaintiffs under this scheme.[[8]](#footnote-8)

Individuals wishing not to be involved, ~~perhaps because of not wanting to be bound by a group decision,~~ may “opt out” of the class action ~~since~~ because consent is not required for that person to be grouped amongst the class in the proceeding.[[9]](#footnote-9) For a class action to be formed, the law sets out the criteria that must be met for its existence. ~~this to exist~~.[[10]](#footnote-10) However, as it will not be considered in depth, the opting out and longevity of a class action characterises some of the procedural difficulties that may arise.

**2. To opt in or out?**

~~According to Morabito~~ In Australia, the class action proceeds as an action on behalf of all persons claimed to be represented until a person decides that he or she does not want to be covered or alternatively, that he or she will participate as a party.[[11]](#footnote-11) This can be compared to America where an opt- in system is used, where a person only becomes one of the represented parties if he or she makes a deliberate decision to be counted amongst those represented.[[12]](#footnote-12) ~~makes no stipulation that requires a party to expressly be included amongst a class action[[13]](#footnote-13) while in America there is.~~

On the one hand, Coffee states that an Australian type of opting- out mechanism can result in “opportunistic” opting out; this is where members to parties abandon the class action if and when they learn of the claim as being eventually unsuccessful or otherwise more profitable if pursued independently.[[14]](#footnote-14) Furthermore, ~~he~~ Coffee asserts that contrary to an “opt-out”, an “opt-in” system as used in America may combat free riding.

On the other hand, Coffee ~~acknowledges that~~ postulates that the American ~~class actions~~ system may carry limited utility for plaintiffs suffering from personal harm that is of ~~are limited in supporting those whose personal harm may be of a~~ latent nature, such as asbestos infection where symptoms may only become apparent after a significant passing of time.[[15]](#footnote-15) Furthermore, Coffee ~~further~~ postulates that the narrow drafting enables the wording to be weaponised by defendants in allowing them to defeat class actions rather than serve its intended purpose of assisting courts relocate the case to a more suitable forum.[[16]](#footnote-16)

~~Therefore,~~ In similar vien, ~~in support of an opting out procedure,~~ Miller criticises the American opt-in requirement as being created from the prolonged criticism ~~against~~ that the courts ~~for~~ are lacking a sufficiently egalitarian framework for clients who cannot afford independent representation.[[17]](#footnote-17) Thus, Miller describes the “opt-in” requirement as a ‘convenient scapegoat’ because of its upstream operation contrary to the intentions of the 1966 amendment, which introduced the “opt-in” provision.[[18]](#footnote-18)

To support his argument, Miller reasons that the amendment ~~as set out in the legislation itself~~ was intended to improve the functionality of litigation and case management ~~for improved functionality of cases~~ by improving their definition type, making their running more streamlined and therefore more cost effective.[[19]](#footnote-19) ~~Similarly to Coffee,~~ Miller argues that the wording of this section does more to improve the defendant’s defence rather than providing a more financially viable alternative for those who do not want to pursue their claims independently.

Therefore, despite the merits of Coffee’s initial criticism, Australia’s “opt-out” provision appears to allow~~s~~ for greater operation in scope and opportunity for those who struggle with access to the law, lack knowledge of their personal harm or ~~of~~ with the law itself. Hence, it is difficult to consider the discussed procedural difficulties of the “opt-out” provision in the Victorian Legislation as being “significant” when compared to the flaws of the mandatory “opt –in” requirement of the American class action system.

This is why Clark and Harris describe the opting out element of the Australian class action system as being of pivotal importance.[[20]](#footnote-20) In their opinion, to remove the “opt-out” provision would result in a reduction of access to justice because it may ~~defeat~~ remove a chance of obtaining a remedy by being encompassed amongst a class action that is less emotionally and financially less arduous as compared to independent representation.[[21]](#footnote-21)

Clark and Harris therefore conclude that altering the class action procedure to include an “opt-in” requirement would leave vulnerable parties completely unrepresented. Therefore, although there are some procedural difficulties involved in the opting out aspect of class actions, it is a more flexible and operable component of class actions in Australia. ~~However, despite a flexible inclusion provision for Australians in class actions, there are some significant procedural problems when attempting to keep a class action running.~~

**3) Invalidating a Class Action.**

It is argued here that the broad wording of the Australian law provides ~~the~~ an unnecessary leverage for ~~the~~ defendants to defeat ~~the~~ claims made against them in a class action.[[22]](#footnote-22) Under the law, the Court may, on application of the defendant, order that a proceeding no longer continue as a class action if it is satisfied that it is in the interests of justice. [[23]](#footnote-23) ~~sets out~~ ~~a number of criteria required for defendants to persuade the court that a proceeding should be ceased as a class action.~~ The provision sets out specific circumstances in which such interest of justice is infringed by the class action.[[24]](#footnote-24) According to Hollingsworth J, this legislative mechanism is:

“…concerned with the interests of justice and the practical utility of continuing the proceeding as a group proceeding.”[[25]](#footnote-25)

Weiss and Beckerman positively appraise this provision in that the legislation ~~can~~ may help to reduce the opportunism of small groups or attorneys who see it as an avenue to receive a pay out from a large corporation.[[26]](#footnote-26) This particular aspect of class actions received much outcry from the business community in the fear class actions could provide an opportunity for large, scattergun type claims from various factions within the Australian community.[[27]](#footnote-27)

~~Ironically~~, On the other hand, Murphy and Cameron points out that this provision could have the effect of curtailing ~~curtail~~ a successful class action. They postulate that ~~in exercising this power,~~ ~~as stated by Murphy and Cameron,~~ the broad wording of the legislation may save the court time but ironically ~~also~~ provide the defendant with a loophole, especially where they are wagering on the claim being defeated ~~if~~ when argued independently as oppose to via a class action.[[28]](#footnote-28)

For example, the commentary in *McLean v Nicholson[[29]](#footnote-29)* testifies the flexibility of these terms. ~~Where~~  In this case, Bongiorno J ~~stated~~ concluded that if it can be proven under section 33N(1)(b)[[30]](#footnote-30) that all of the group members in a class action could obtain relief other than via a group proceeding, ~~as set out under 33N(1)(b)[[31]](#footnote-31)~~ then this alone may be ~~is~~ sufficient to strike out the class action. This type of judgment reflects the ~~concerns of~~ aforementioned concerns made by Murphy and Cameron that ~~when stating that section 33N~~ it may have the effect of ~~can~~ expressly denying an opportunity for those plaintiffs who may be ~~are~~ happy to be bound by a group decision – rather than to endure the stress and financial burden of independent litigation.[[32]](#footnote-32)

Hence, the procedural problem of this provision is revealed: with one hand, the law revokes an opportunity to claim damages ~~opposite~~ ~~to~~ from the hand that had initially offered it. Class actions similar to the 2009 Black Saturday bushfire in Marysville may be at risk of such judicial striking out. The Marysville class action was brought against an electricity company where it was alleged their power lines were the cause of the fatal disaster.[[33]](#footnote-33) The claim was potentially at the peril of the Victorian Supreme Court Act as follows:

“The Court may, on application by the defendant,

order that a proceeding no longer continue under

this Part if it is satisfied that it is in the interests of justice to do so because—it is **otherwise inappropriate** that the claims

be pursued by means of a group proceeding.”[[34]](#footnote-34) (Emphasis added)

This broad wording may have allowed the defendant to argue that due to the 161 lives claimed amongst the large geography of affected areas in Marysville, that ~~that was affected,~~ it was not possible for the electricity company to be single handedly accountable: ~~since~~ other factors such as weather, terrain conditions and various intervening causes could have also contributed or worsened the fires. Therefore, it may be argued that the class action could be “otherwise inappropriate” because the destruction of property or death of loved ones may have resulted from causes other than the defendant’s negligence. ~~It would~~ Arguably, it would be more costly, more stressful and take far more time for individuals to bring a claim against the defendant when taking these factors into account. ~~Consequently, the issue is created by the procedural problem that exists within section 33N.~~

**Conclusion:**

From the areas of law discussed with respect to class actions, there are significant procedural difficulties. ~~Firstly,~~ Although the opting out scheme had its share of flaws, it was a stronger approach to class actions than the American “opt-in” requirement. However, the ability for the defence to strike out a claim may undermine the purpose of the class action system in Australia.

1. *Carnie v Esanda Finance Corporations Ltd* (1995) 182 CLR 398, at 3 as per Mason CJ, Deane and Dawson JJ [↑](#footnote-ref-1)
2. Report No 46 of the Australian Law Reform Commission *Grouped Proceedings in the Federal Court,* 1988 [↑](#footnote-ref-2)
3. Under Part IV A of the Federal Court of Australia Act 1976 (Cth) pursuant to Federal Court of Australia Amendment Act 1991 (Cth), which was thereby followed in Victoria under Part 4A of the *Supreme Court Act 1986 (Vic)* and O 18A of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic).*  [↑](#footnote-ref-3)
4. Class Actions In Australia: The Year in Review 2011, *King & Wood Mallesons* < <http://www.mallesons.com/Documents/ClassActions_2012_FINAL.pdf> > 6. [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)
6. Class Actions In Australia: An Overview, *Clayton UTZ* < <http://www.claytonutz.com.au/docs/Class%20Actions_Aug04.pdf> > 1. [↑](#footnote-ref-6)
7. *Carnie v Esanda Finance Corporation* (1995) 182 CLR 398, at 3-4. [↑](#footnote-ref-7)
8. Cashman, page 1. – FIND FULL CITATION(?) [↑](#footnote-ref-8)
9. *Victorian Supreme Court Act 1986* (Vic) section 33E(1). [↑](#footnote-ref-9)
10. Ibid, section 33C. [↑](#footnote-ref-10)
11. *Carnie v Esanda Finance Corporation Ltd* (1996) 38 NSWLR 465 at 469 as per Young J [↑](#footnote-ref-11)
12. *Federal Civil Procedure Rules*, s. 23. [↑](#footnote-ref-12)
13. Vince Morabito, ‘Clashing Classes Down Under – Evaluating Australia’s Competing Class Actions Through Empirical and Comparative Perspectices’ (2012) 27 *Connecticut Journal of International Law* 205, 215. [↑](#footnote-ref-13)
14. John C. Coffee, Jr, ‘Class Wars: The Dilemma of the Mass Tort Class Action’ (1995) 95 (6) *Columbia Law Review* 1343, 1452. [↑](#footnote-ref-14)
15. Ibid,1 446. [↑](#footnote-ref-15)
16. Ibid 10, 1447. [↑](#footnote-ref-16)
17. Arthur R. Miller, ‘Of Frankenstein Monsters and Shining Knights: Myth, Reality, and The “Class Action Problem”’ (1979) 92 *Harvard Law Review* 664, 674. [↑](#footnote-ref-17)
18. Ibid, 668. [↑](#footnote-ref-18)
19. Ibid 13, 669. [↑](#footnote-ref-19)
20. Stuart Clark and Christina Harris, ‘The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?’ (2008) 32 *Melbourne University Law Review* 775, 782. [↑](#footnote-ref-20)
21. Ibid, 794. [↑](#footnote-ref-21)
22. Ibid 6, s. 33N. [↑](#footnote-ref-22)
23. Ibid. [↑](#footnote-ref-23)
24. Ibid. [↑](#footnote-ref-24)
25. *Hall v Australian Finance Direct Ltd (No 2)* [2007] VSC 233, at 51. [↑](#footnote-ref-25)
26. Elliott J. Weiss and John S. Beckerman, ‘Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions’ (1995) 104 *The Yale Law Review* 2053, 2074. [↑](#footnote-ref-26)
27. Ibid 16, 776. [↑](#footnote-ref-27)
28. Bernard Murphy and Camille Cameron, ‘Access to Justice and the Evolution of Class Action Litigation in Australia’ (2006) 30 *Melbourne University Law Review* 399, 417-418. [↑](#footnote-ref-28)
29. [2002] VSC 446 at 12. [↑](#footnote-ref-29)
30. Ibid 6. [↑](#footnote-ref-30)
31. Ibid 6. [↑](#footnote-ref-31)
32. Ibid, 23. [↑](#footnote-ref-32)
33. Darren Grey and Madeleine Heffernan, ‘Bushfire Class Action’, *The Age* (Online) 8 August 2012 < [http://www.theage.com.au/victoria/bushfire-class-action-20120806-23qfe.html#](http://www.theage.com.au/victoria/bushfire-class-action-20120806-23qfe.html) > 20 April 2013. [↑](#footnote-ref-33)
34. Ibid 6, s.33N(1)(d). [↑](#footnote-ref-34)