

Class actions in PNG

Chair: Fiona Lubett, class actions barrister, QLD Bar

Presenters:

Dale Bampton, Tribunal Member, former class actions barrister, NSW and QLD Bar

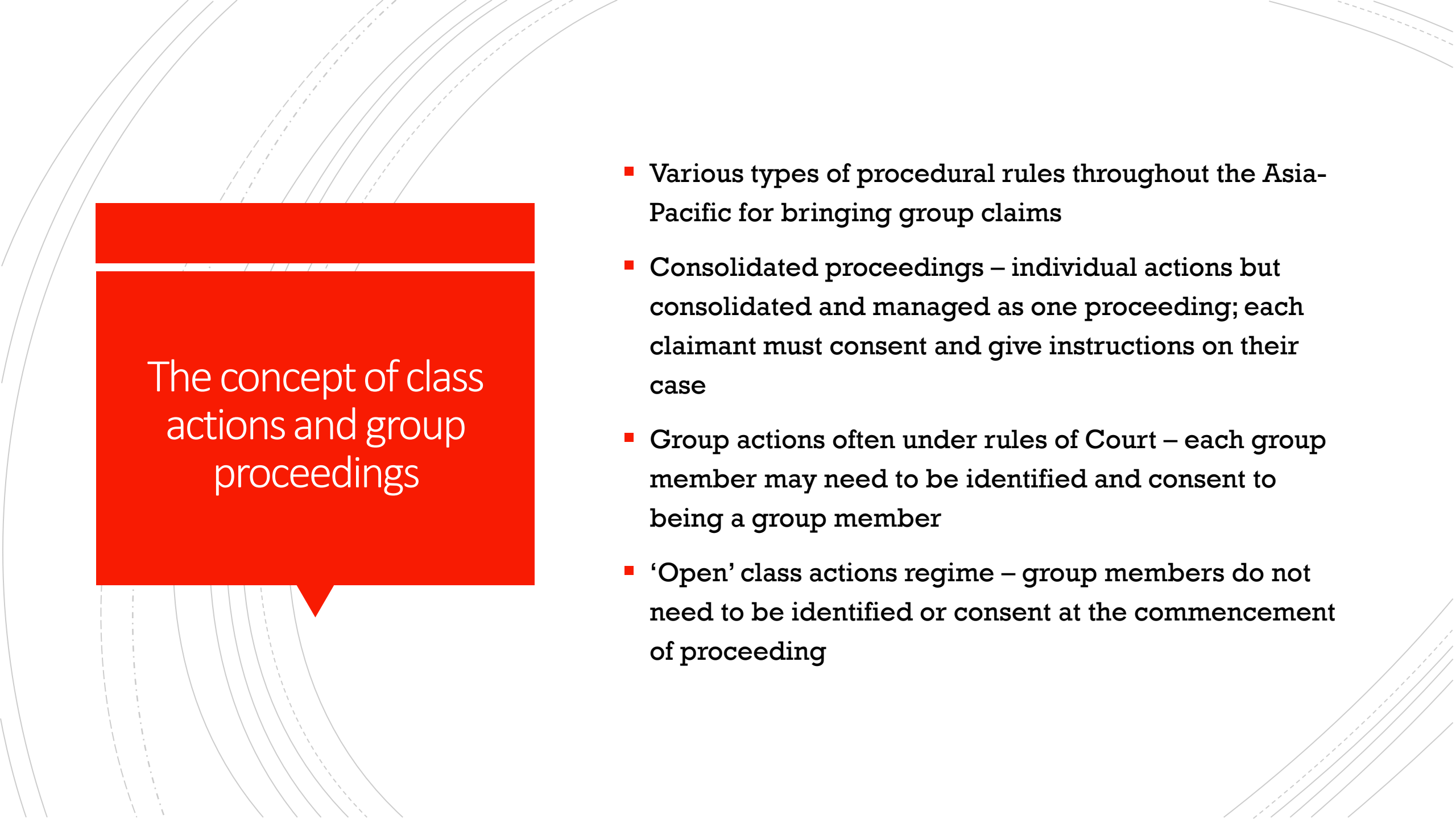
Max Walker, class actions barrister, QLD Bar

Why this topic? Why now?

- Experience of PNG and its neighbours – approach to group actions varies
- Consideration of limitations of traditional group claims – where consent of each represented party is actively required versus a ‘class actions’ regime
- Need to consider the many perspectives on class actions - a ‘blessing or a curse’ to a country’s legal system?
- Need to address the realities of class actions – taking into account benefits and drawbacks across the perspectives
- What could a class actions regime look like in PNG, in light of all this?

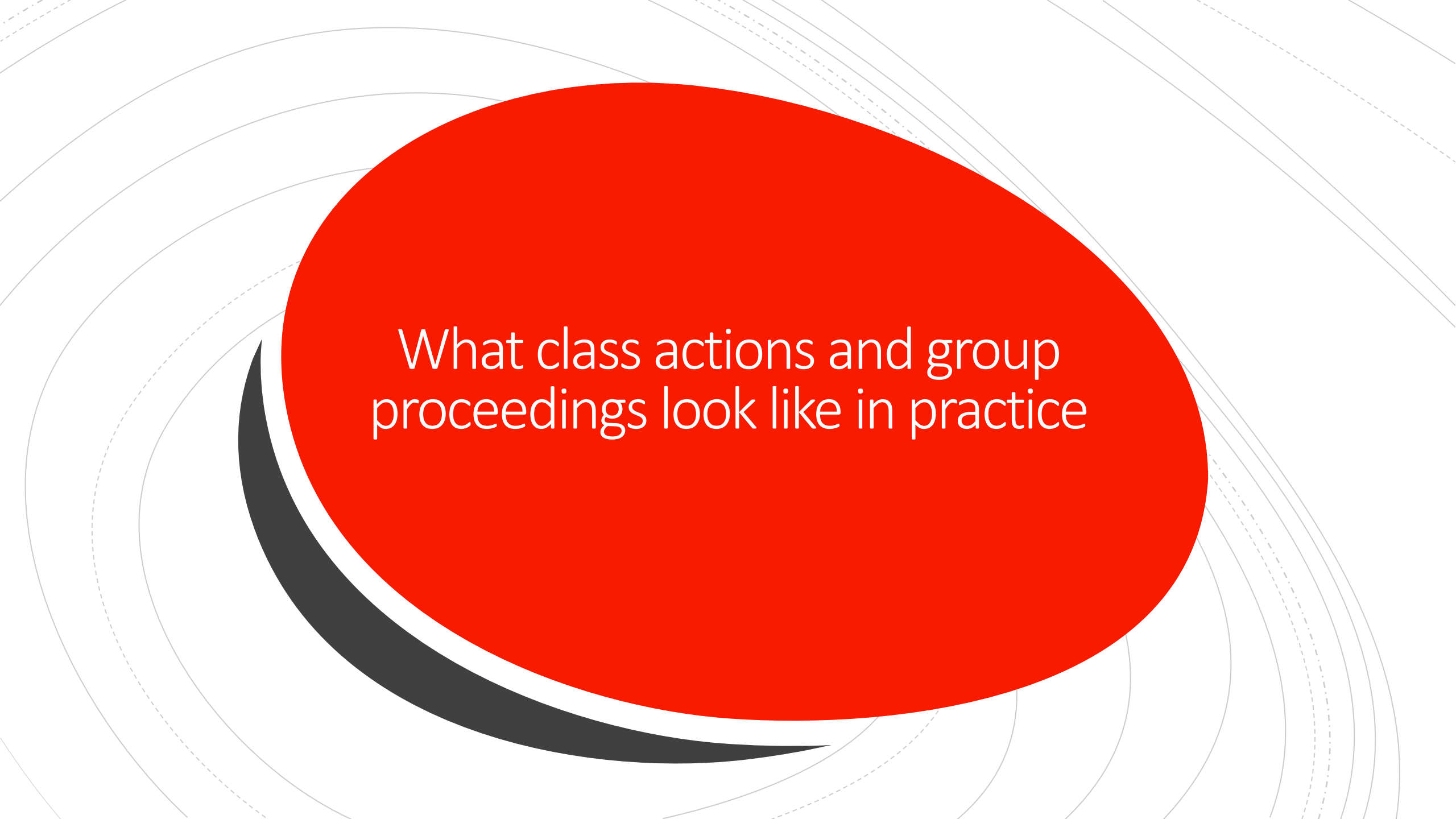
Overview

- Class actions as a concept and recent examples (Dale Bampton)
- History of class actions proceedings (Max Walker)
- The present position in PNG (Max Walker)
- The Australian comparison (Max Walker)
- Blessing or curse – shifting perspectives on class actions (Dale Bampton)
- The reality of class actions in practice – issues to consider (Dale Bampton)

The background of the slide features a series of thin, curved lines in shades of grey and white, creating a sense of motion and depth. A large, solid red rectangle is positioned on the left side, containing the title text in white. The text is centered within the red box and is written in a clean, sans-serif font. The overall design is modern and professional.

The concept of class actions and group proceedings

- Various types of procedural rules throughout the Asia-Pacific for bringing group claims
- Consolidated proceedings – individual actions but consolidated and managed as one proceeding; each claimant must consent and give instructions on their case
- Group actions often under rules of Court – each group member may need to be identified and consent to being a group member
- ‘Open’ class actions regime – group members do not need to be identified or consent at the commencement of proceeding

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What class actions and group
proceedings look like in practice

CLASS ACTIONS HISTORY

Carnie v Esanda Finance Corp Ltd (1995) 182 CLR 398 at 415

- **First**, Courts of Chancery (equity courts), developed a rule that the presence of all parties interested in an equitable controversy had to be before the Court.
- **Second**, an exception or relaxation developed – too many interested people = claims impossible. So the first “class actions” were exceptions to this rule of equity procedure.
- **Third**, the Courts of common law and equity merged in the 1870s in the UK and the “relaxation” practice in chancery merged across, ultimately becoming the O. 15, r. 12(1) of the English Rules of the Supreme Court.
- **Fourth**, the diaspora of UK-based legal systems adopted the English Rules of the Supreme Court. E.g:
 - Pt 8, r. 13(1) of the Supreme Court Rules 1970 (NSW)
 - Order 5, Rule 13 of the National Court Rules PNG
 - Similar in Fiji, Kiribati, Nauru, Solomon Islands are similar.
- **American** Samoa , Federated States of Micronesia, Guam, American Samoa, Palau, Vanuatu follow an American system.

The Rule:

13. Representation; current interests (8/13)

- (1) Where **numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued**, by or against any one or more of them as representing all or as representing all except one or more of them.
- (2)
- (3)
- (4) A **judgement entered or order made in proceedings pursuant to this Rule shall be binding on all the persons** as representing whom the plaintiffs sue or the defendants are sued, as the case may be, but shall **not be enforced against any person not a party to the proceedings except with the leave of the Court**.
- (5) An application for leave under sub-rule (4) shall be made by motion, notice of which shall be served personally on the person against whom it is sought to enforce the judgement or order.
- (6) Notwithstanding that a judgement or order to which an application under Subrule (5) relates is binding on the person against whom the application is made, **that person may dispute liability to have the judgement or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from the liability**.
- (7) This Rule does not apply to proceedings concerning—
 - (a) the administration of the estate of a deceased person; or
 - (b) property subject to a trust.

INTERPRETATION OF THE RULE

China Harbour Engineering Co (PNG) Ltd v Aloysius [2024] PGSC 151 at [24]-[29]

1. all intended plaintiffs (those who he claims to represent) must be named in the originating process;
2. each and every intended plaintiff must give specific instructions (evidenced in writing) to their lawyers to act for them;
3. any person who commences proceedings and claims to represent other intended plaintiffs must produce an authority to the court to show that he was authorised by them to file proceedings as a class representative.

CHAMPERTY AND MAINTENANCE

- Champerty and maintenance = common law rule against non-parties funding and taking a share of the proceeds of litigation.
- Recent decision of National Court that it is prohibited in Papua New Guinea: Miriori v Rio Tinto Ltd [2025] PGNC 354 at [40].
- Subject to appeal: Supreme Court 152/2025 (Miriori v Rio Tinto Ltd & Bougainville Copper Ltd)

Australian Model (e.g. Federal Court of Australia Act)

- Group Members **described** but **not named**: s 33H
- Group Members **do not need to consent** (s 33E) but can **opt out** (s 33J).
- **Notices** must be issued to Group Members (s 33X). Court can order advertisements to tell Group Members about the proceeding and that if they opt out, they are not bound.
- **Settlement** binds the class by description, even if their names are not known, but must be **approved by the Court**. Protective role in making sure settlements are fair and reasonable (s 33V). Settlement advertised / notice given and Group Members can object (s 33X).
- **Judgments bind Group Members by description**, even if their names are not known (s 33Z and 33ZB).
- **Time limits stop** while the class action is progressing (s 33ZE).
- The Court can make orders that (s 33V) :
 - a funder can take a cut of the proceeds of judgment or settlement and that costs come out of the proceeds of judgment or settlement– See *Street v State of Western Australia* [2024] FCA 1368 - avg is around 20% of gross proceeds – see Schedule 1 in Street.
 - Costs get repaid out of judgment or settlement to the funder: \$27.5m in *Street*.

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A blessing or a
curse? The
perspectives to
consider.

- In determining a country's approach to group litigation, there are many perspectives to consider
- For plaintiffs
- For potential defendants/corporations (and their insurers and investors)
- For lawyers
- For the courts
- For third parties, including litigation funders

Open class actions in practice

- Impact on Court
 - more efficient than individual proceedings, but
 - often lengthy, complex actions placing large burden on court resources and individual judges
- Impact on lawyers
 - can bring considerable long-running, financially beneficial work, but
 - can overwhelm law firms, leading to poorly run litigation
- Impact on defendants/corporations
 - considerable international threat of litigation – a class actions regime may increase threat felt by potential defendants, but
 - clarity for potential defendants/corporations on state of law and nature of class actions regime allow for calculated decision-making

Open class actions in practice

- Impact on litigants/group members
 - may allow claimants to obtain a legal remedy that they could not pursue individually, but
 - may be frustrated by delay, small size of settlement/judgment sum, costs taken by lawyers and funders
- The reality of litigation funding
 - can be seen as predatory and profiteering, but
 - may allow 'access to justice' – litigation to run for the benefit of many that could not otherwise run, with significant risks of litigation taken by the funder
- Other considerations
 - considerations of whether key litigation impacting population may be litigated offshore
 - power of class actions regime to regulate corporate conduct (environmental, human rights, workplace, competition, corporate governance)
 - access to justice considerations - may raise country-specific issues



Conclusions