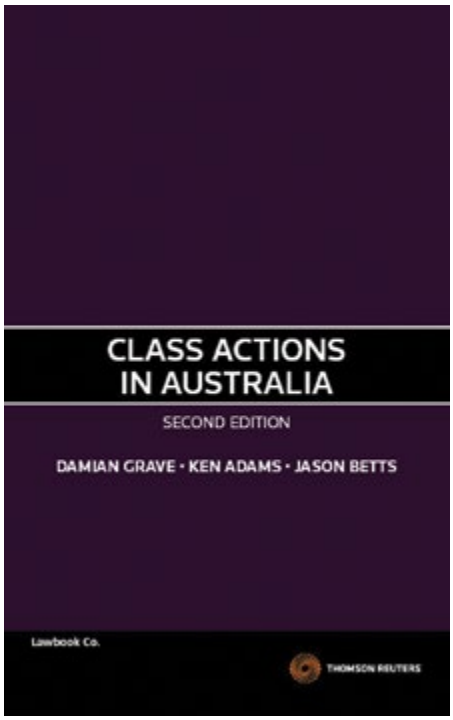
A manual for class warriors

Class actions in Australia (2nd edition).

by Roger Quick



Title:	*Class Actions in Australia* (second edition)
Author:	Damian Grave, Ken Adams, and Jason Betts
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Class actions may need a little introduction. They are distinguishable from representative proceedings, which may be described as those in which a plaintiff takes a consolidated proceeding on behalf of others as well as himself or herself.

The authors of *Class Actions in Australia* are three partners from Herbert Smith Freehills, two of whom published the first edition of this book in 2005. By then the need for a comprehensive reference for practitioners in class actions was becoming necessary and urgent, and the book was the first to meet this need.

The scope of the text

There are now 19 chapters, three of which are new, covering topics including distinctions, definitions and different types of class action (1); the legislative framework (2); choice of forum (3); threshold requirements for commencement (4); the role of the representative party (5); the status of group members (6); pleadings (7); opting out (8); competing representation and claims (9); security for costs (10); conduct of proceedings (11); trial (12); conclusion and appeals (13); settlement (14); court approval (15); costs and fee agreements (16); third party funding (17); limitation (18); and shareholder class actions (19).

The authors' purpose

The authors give their purpose as stating the law associated with one type of class action, namely the class action procedure under Part IVA of the *Federal Court Act*, Part 4A of the *Victorian Supreme Court Act* and Part 10 of the *New South Wales Civil Procedure Act 2005*. They disclaim an intention to consider in detail either class action procedures in other jurisdictions or the policies supporting or opposing them [Para 1-100].

Commentary

The text states the law as at 1 March 2012.

Kirby v Centro Properties Pty Ltd (2008), Federal Court of Australia, Proceeding VID 326 of 2008 (explained in particular at [5.330] and [12.295] of the text) went to trial on 5 March and, part heard, was settled in May 2012. The settlement obtained formal approval from Middleton J on 19 June 2012 who said that, had the case continued to a final determination, determination would have hinged on difficult and controversial questions of law with inevitable appeals. That is undoubtedly true and some of the future controversies the authors answer in the new chapter devoted to shareholder class actions (19).

The authors, like others, identify class actions law as a topic marked by unending controversy. It is to their credit therefore that they state and answer controversial questions in an incisive and practical way (see for example the statement of the four questions posed by s33C(1)(a) of the *Federal Court Act* [4.310] and their preferred answers at [4.157]).

The authors have also made courageous attempts to meet the creeping obsolescence which is an unavoidable feature of the printed book. For example, the lack of any regulation of litigation funding in the Australian marketplace may have ended on 12 June 2012 when *Corporations Amendment Regulation 2012 (No.6)* confirmed the interim relief that the Australian Securities and Investments Commission (ASIC) had previously provided.

What is of interest here is that the authors predicted the light-handed regulation we presently have, pending any further review.

The way the authors have sought to draw lessons for the future from jurisdictions which include the United Kingdom and Canada is of equal interest. They show a lively understanding of the importance of costs in class actions. Unlike the United States, both these jurisdictions are jurisdictions which rule that "costs follow the event". One criticism of the text is that because it considers only the United Kingdom's approach to litigation funding [17.135], there is no mention that prior to the reforms of Lord Woolf 'costs capping' had become common in UK group litigation and post the Jackson reforms, much more may be expected from the wider concepts of costs budgeting and of costs management under consideration. The aim of costs management is to control the costs of litigation in accordance with the 'overriding objective' and, as litigation which must be planned, representative litigation is particularly well suited to the application of this revolutionary initiative.

Although the authors will often act for the defendants to a class action, what they have given to us is not just a manual for the defence. The insightful scholarship shown in this text will be as important to plaintiffs' lawyers as it is to defendants' lawyers. A strategy which in the hands of a skilled 'class warrior' is a shield, another will quickly fashion into a sword.

In summary, these criticisms are carping criticisms. Overall this is a text which satisfies not only the authors' stated purpose but will also be a reference for Australian practitioners looking for answers to questions of practice and principle, past and future, in class actions.

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