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Introduction

A About This Book

The relationship between government and class actions is a challenging one – combining leaps of faith, conflicts, tensions, and truly complex jurisprudence. Government may be the 'pursuer' in one class action, and the 'pursued' in another. It may (indirectly) fund one class action, and (indirectly) receive funding from another. It may draft one kind of class action regime, but actually implement a different type altogether. It may quite like the idea of its courts being at the hub of global class actions litigation, but hesitate (and actually legislate against) making that a reality for its own class action. These (and other) dichotomies and tensions make for an absorbing study. This book examines that relationship in detail, and in particular, analyses the following, and often controversial, roles of government: as class action enabler, as designer, as funder, as gatekeeper, as representative claimant, as class member, as defendant, and finally, as beneficiary.

At the outset, it is important to explain what is meant by 'government' and by 'class action' in this book, given its title and its subject matter.

1 The Meaning of 'Government'

The word 'government' is a Middle English word[1] which was originally derived from Old French,[2] from Latin,[3] and from Greek,[4] meaning 'to steer'

[1] See: *Oxford Dictionary of English* (2nd edn, revised, Oxford University Press, 2005) 749.
[2] ibid, from Old French '*governer*'.
[3] ibid, from Latin '*gubernare*'.
[4] ibid, from Greek '*kubernan*'.

or 'to rule'. It may not be susceptible to more than one pronunciation[5] – but, as a concept, it certainly gives rise to more than one meaning,[6] depending upon the context in which it is used. That reality is evident throughout this book. Depending upon the chapter and the context, 'government' may take on one or more of **four** possible meanings.

(a) Depending upon the Context

First, the term, 'government', it is used in the sense of ***the Ministers of the Crown for the time being, and of their government departments***, both of which are the organs of central government and which are responsible for various spheres of public administration, including legislative policy.[7] The relevant minister/s who head the departments are politically responsible for those policy decisions, as to what legislation will go forth for consideration in the Parliamentary chamber; whilst much of the 'finer detail' of drafting, consulting upon, and implementing law reform proposals is undertaken by the permanent civil servants who staff them.[8] Where the role of government as enabler, designer, funder, and gatekeeper is considered later in this book,[9] these organs of government are vital to that process. If class actions reform is sectoral[10] rather than generic,[11] then any one of a number of departments (and their relevant ministers) may 'carry the ball forth into the ruck' for their particular sector (and for none others). Indeed, the very unpredictability of the government organ from which class actions reform may emanate is one of the challenges of law reform in this area. For example, in the United Kingdom, whilst much attention was focused upon the prospect of promulgating a generic class action via the Ministry of Justice in

[5] Note the amusing anecdote by R Burchfield (ed), *New Fowler's Modern English Usage* (3rd edn, revised, 1998) 339: '[w]hile preparing my booklet *The Spoken Word* (1981) for the BBC, I found that this belonged to a small group of words that gave maximum offence to listeners if pronounced in a garbled manner, with the first *n* silent, i.e., as gavement, or even gavment'.

[6] See at least four different meanings attributed to the word in: *Oxford Dictionary of English* (n 1) 749.

[7] E Martin and J Law (eds), *Oxford Dictionary of Law* (6th edn, 2006) 243, 342; and J Penner, *The Law Student's Dictionary* (13th edn, 2008) 131.

[8] *Oxford Dictionary of Law*, ibid, 243.

[9] All of which are considered in Part I of the book.

[10] i.e., a class action regime which applies to one particular sector of the economy or society, to the exclusion of others which are not specified in the governing legislation.

[11] i.e., a class action which is capable of applying to all, or almost all, causes of action which arise across multiple sectors of economic or social activity and which apply to all or most affected parties, whether individual or corporate.

2010–11,[12] HM Treasury, quietly and without herald, published a consultation paper which proposed an opt-out class action solely for financial services claims,[13] and duly promulgated a bill by which to implement the reform.[14]

Secondly, the term 'government' is used in the sense of ***Parliament***, i.e., 'the supreme legislative power in a State',[15] or 'the highest legislature'.[16] The Parliament of any country is constituted according to its customs. For example, in the United Kingdom, Parliament consists of Her Majesty the Queen, the House of Commons, and the House of Lords;[17] whilst in Australia, federal Parliament practically consists of Her Majesty the Queen's representative, the Senate, and the House of Representatives.[18] The functions of any Parliament are, simply put, to enact legislation, to sanction taxation and public expenditure, and to scrutinise critically government policy and administration. In this guise, the role of Parliament is relevant in any chapter of this book in which regard is had to the detailed content of class actions legislation. Parliamentary debates, and the Hansard record of cross-party standing committees which may examine a bill during the course of its passage through Parliament, often reveal the extent of disagreement about either key drafting points or of wider policy, and occasionally signal that a particular provision in a draft bill was revised, or even deleted, in light of the scrutiny to which it was subjected. The principal exception to this is where class actions laws are delegated to rule-making bodies or committees. Such entities tend to have the power to make 'rules of court relating to practice or procedure'.[19] Hence, as a general rule, rule-making bodies cannot enact, alter or revoke substantive law, and any attempt

[12] Following from the law reform recommendation for a generic class action which was proposed by the Civil Justice Council, *Improving Access to Justice through Collective Actions: Final Report (A Series of Recommendations to the Lord Chancellor)* (November 2008). The Ministry of Justice formally responded: *The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'* (July 2009); and see too: the Rt Hon Bridget Prentice, *Justice: Collective Actions* (Written Ministerial Statement, 20 July 2009).

[13] HM Treasury, *Reforming Financial Markets* (Cm 7667, 2009).

[14] Financial Services Bill (Bill 51 09–10), introduced to Parliament on 9 November 2009. The chequered history of this Bill, which was ultimately enacted as the Financial Services Act 2010, c 28, but not with the class action sections included, is discussed in detail by the author in: 'Recent Milestones in Class Actions: A Critique and a Proposal' (2011) 127 *Law Quarterly Review* 288.

[15] *Law Student's Dictionary* (n 7) 131.

[16] *Oxford Dictionary of English* (n 1) 1280.

[17] *Oxford Dictionary of Law* (n 7) 381.

[18] *Butterworths Concise Australian Legal Dictionary* (1997) 74.

[19] See, e.g.: Civil Procedure Act 1997 (UK), s 1(1).

to do so will be *ultra vires* their rule-making powers which are delegated to those bodies by Parliament. The extent to which such delegation has occurred throughout various common law jurisdictions to date, either permissibly or impermissibly, has been discussed by the author elsewhere,[20] and will not be revisited herein.

Thirdly, 'government' may be used in the sense of ***the Crown***, as that body which is capable of suing or of being sued, to the extent that Parliament has permitted that course.[21] The Crown, albeit 'legally ill-defined',[22] does not mean 'the monarchy'[23] for the purposes of this book. Rather, it is taken to mean (and where appropriate from the context) that corporation sole[24] which represents 'the entire administrative edifice of the executive government';[25] or alternatively, 'the state in all its aspects ... such as Crown dependencies, provinces or states'.[26] As evident from the Table of Cases,[27] and depending upon the jurisdiction, the Crown may be denoted, in litigation, by terms such as 'the state', 'the State of [jurisdiction]', 'the Crown', 'the Crown in Right of [jurisdiction]', 'Her Majesty the Queen in Right of [jurisdiction]', or just by the relevant jurisdiction's name (e.g., 'Victoria'). The division between the Crown on the one hand, and the monarch (i.e., the sovereign who is filling the office of Crown or of the corporation sole at any given time) on the other, is necessary, precisely because it is not possible to sue the sovereign personally.[28] In that sense, it is said that 'the Crown never dies',[29] whereas the monarch inevitably will. As will be discussed in this book, the Crown may certainly constitute a class action claimant or defendant.

Finally, the term 'government' may, depending upon the context, refer to ***government agencies***, consisting of 'executive agencies'[30] or 'Crown corporations'.[31] These are typically statutory bodies corporate which are

[20] *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004) 38–42.
[21] Per, e.g.: Crown Proceedings Act 1947 (UK), ss 1, 2.
[22] As noted in the definition of 'the Crown' (*Wikipedia*, accessed 12 March 2019).
[23] As it is often defined, see, e.g.; *Oxford Dictionary of English* (n 1) 415.
[24] i.e., a corporation consisting of one person only, where that person constitutes an artificial legal person which has the capacity to sue or to be sued, and in which title to property may be vested: *Oxford Dictionary of Law* (n 7) 131.
[25] *Butterworths Legal Dictionary* (n 18) 99.
[26] Per definition of 'the Crown' (*Wikipedia*, accessed 12 March 2019).
[27] See pp xxi–xxxix.
[28] See, e.g., the discussion in: *Oxford Dictionary of Law* (n 7) 142.
[29] *Law Student's Dictionary* (n 7) 78.
[30] *Oxford Dictionary of Law* (n 7) 210.
[31] See: *Butterworths Legal Dictionary* (n 18) 99.

created by the Crown or which carry on duties on behalf of the Crown or the 'parent' government, but which do not have policymaking powers. They generally operate under delegated statutory powers in order to deliver public services (e.g., a Prisons Service, an industry regulator, or an Immigration Agency).[32] In particular, these bodies may also sue or be sued in class actions litigation, as later chapters discuss.

(b) What Does Not 'Count'

Although frequent references are made, throughout this book, to the recommendations of law reform commissions and to decisions issued by the judiciary, these entities are not considered to comprise part of 'government'. Whilst law reform commissions are frequently statutory corporations which are established by a legislative enactment, and fulfil the role of 'advisory public bodies' to keep the law of a jurisdiction under review and to recommend reform where required,[33] they are not an organ of 'government'. As one source explains, they are 'usually independent from governmental control, providing intellectual independence to accurately reflect and report on how the law should progress'.[34]

The judiciary is, likewise, that arm of authority, appointed by the Crown or by the state (depending upon the jurisdiction), which interprets laws and which adjudicates upon disputes of fact and/or law. To the extent that curial or extra-curial commentary by judges has been important in encouraging the implementation of class actions legislation – as an 'independent voice' from those of the policymaking and the legislative arms of government – that is duly noted in chapter discussion where relevant.[35] However, neither of these entities is part of 'government' for the purposes of the scholarly examination undertaken in this book.

2 *The Meaning of 'Class Action'*

Whilst the term, 'class action', may generically cover a wide array of group litigation mechanisms, the focus of this book is upon the *opt-out*

[32] *Oxford Dictionary of Law* (n 7) 210.
[33] See, e.g., the discussion of the Law Commission of England and Wales: '[t]he Law Commission is a statutory independent body that keeps the law under review and recommends reform where it is needed. . . . [it] is an advisory non-departmental public body, sponsored by the Ministry of Justice': 'Law Commission', available at: www.gov.uk/government/organisations/law-commission.
[34] Discussion of 'law reform' (*Wikipedia*, accessed 11 March 2019).
[35] See, in particular, Chapter 2 of this volume, 'Government as Class Actions Enabler'.

class action. The phrase of 'class action' will be used throughout this book in place of synonymous terms such as 'collective action', 'collective proceedings', or 'group actions' (unless those terms are specified within original quotations or legislative wording). The opt-out species of the class action is defined as follows:[36]

> A class action is a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ('representative claimant') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that pursued by the representative claimant, and who have claims that share questions of law or fact in common with those of the representative claimant ('common issues'). Only the representative claimant is a party to the action. The class members are not usually identified as individual parties but are merely described. Should they not wish to participate, class members are permitted to opt-out of the class action in the time and manner prescribed. Unless they opt-out, class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.

There are many other forms of class action other than that defined above, and indeed, many other collective redress mechanisms altogether, on the 'statute books' throughout the common law world, which facilitate, to a greater or lesser degree, the recovery of compensation.[37] These are summarised in Table 1.1 overpage.[38] Except to the extent that discussion of these

[36] Reproduced from: Mulheron, *The Class Action* (n 20) 3, drawing from a number of law reform commission reports, including those from: Australia, South Africa, Alberta, and Ontario.

[37] The vast array of collective redress mechanisms is evident from scholarly works such as: P Karlsgodt (ed), *World Class Action: A Guide to Group and Representative Actions around the Globe* (Oxford University Press, 2012); C Hodges, *Multi-Party Actions* (Oxford University Press, 2001), especially Pt II, and the case studies in Pt V; E Lein *et al* (eds), *Collective Redress in Europe: Why and How?* (BIICL, 2015); Ontario LRC, *Report on Class Action* (1982), chs 2 and 3; *Class and Group Actions 2019* (11th edn, Global Legal Group, 2018); A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Thomson Sweet and Maxwell, 2013), ch 12.

[38] The author has discussed these options in detail in the following sources, from which the summary in the Table is drawn: 'From Representative Rule to Class Action: Steps Rather than Leaps' (2005) 24 *Civil Justice Quarterly* 424; 'Some Difficulties with Group Litigation Orders – and Why a Class Action is Superior' (2005) 24 *Civil Justice Quarterly* 40; *Reform of Collective Redress in England and Wales: A Perspective of Need* (Research Paper for the CJC, 2008), Pt II; and 'Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers' (2010) 50 *Canadian Business Law Journal* 376, Section II.

Table 1.1 *Collective redress: the other options*

	The regime	A brief description
1.	an opt-in class action	all putative class members must take some prescribed step within a prescribed period in order to join the action, to be bound by any judgment or settlement on the common issues, and to receive compensation in the event of success. The class members are identified by name, rather than merely described by characteristics or event. However, the class members do not need to file individual proceedings; an entry of their names onto a group register, whether maintained by the representative claimant, the court, or other, is sufficient to signify membership of the class.
2.	group litigation	this is similar to an opt-in class action, except that each class member must file individual proceedings, whereupon the claims are then grouped, and case-managed, in the one action.
3.	a compulsory class action	all persons falling within the class description are bound by the class action, with no opportunity for the class members to exclude themselves from the action (also called a 'mandatory class'). Under some variations of the compulsory class action: either class members can opt out of the class action but only with judicial permission, or an otherwise opt-out class action can be rendered compulsory per judicial discretion in appropriate circumstances.
4.	a mixed-model class action	a number of variations on the opt-out class action exist, e.g.: a class action which can be formed on either opt-in or opt-out principles, depending upon judicial election, having regard to the circumstances; or an opt-in class is the primary legislatively-dictated model, unless the court deems an opt-out class to be better suited to the circumstances; or an opt-out regime is legislatively specified for the principal class, with an opt-in class also being legislatively specified for a particular sub-class or in particular circumstances.
5.	the representative rule	the longstanding rule (originating in equity and then embraced in court rules applying to common law courts too) which permits a proceeding by the

Table 1.1 (*cont.*)

	The regime	A brief description
		representative claimant on behalf of a class, where numerous class members (or 'two or more' class members) share the 'same interest' with the representative claimant. This is probably a compulsory class, although theoretically at least, exclusions from the class may be permissible.
6.	joinder	joinder typically describes a procedure in which two or more parties may be named in the one set of proceedings, on the basis that their claims may conveniently be disposed of in that one set of proceedings.[39] Each of the parties is a named party in those initiating proceedings.
7.	consolidation	this typically describes a procedure in which the court may combine two or more already-commenced proceedings, as part of its case-management powers, for the sake of efficiency and to avoid inconsistent outcomes, where those cases share sufficient commonality of fact or of law.[40] The parties are named parties in the separately issued proceedings.
8.	a test action	a proceeding which is instituted to establish the outcome on a point of law or fact, in order to establish a precedent for those similarly situated parties who have either instituted proceedings, or who have registered their name on a group register, or who are yet to institute proceedings. The outcome of the test action has precedential value for other similar cases, but it is not binding *res judicata* upon those other cases who are not parties to the test action.
9.	a lead action	a case which is chosen from a number of cases already instituted by similarly situated parties, with those other actions stayed, pending the outcome of the lead

[39] See, e.g.: CPR 7.3 (in general); CPR 19.2(2)(b) ('there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue'); and CPR 19.3 (where two or more persons are jointly entitled to a remedy).

[40] See, e.g., CPR 3.1(2)(g).

Table 1.1 (*cont.*)

	The regime	A brief description
		action. This term is often used interchangeably with the term, 'test case'.[41]
10.	a settlement-only class action	under this more limited model, the parties to a proposed collective settlement may jointly request the court to declare that settlement binding on all members of the class unless a member elects to opt out. The settlement will not be binding upon the class members until the court assesses the reasonableness and fairness of the proposal.[42]

devices is necessary to expound the background to, or the theory or practice of, opt-out class actions,[43] they will **not** comprise any focus of this book.

For three reasons, however, this book focuses upon *opt-out class actions*, and their interplay with government.

First, of all the aforementioned collective redress devices mentioned, it is the opt-out class action which is most evolving and considered by law reformers around the common law world. At the time of writing, there

[41] e.g., in the English Civil Procedure Rules, references to 'test case' encompass scenarios where a number of individual actions have been commenced, and one is selected from that cadre for litigation: CPR 19.13(b) and CPR 19.15.

[42] As implemented by the Collective Settlement of Mass Damage (Wet Collectieve Afwikkeling Massaschade) (WCAM), which entered into force in The Netherlands in July 2005, and which is contained in the Dutch Civil Code, arts 7:907–7:910. Under that regime, the settlement proceedings consist of four separate phases (as detailed, e.g., in: A Knigge and I Wijnberg, *Class/collective Actions in The Netherlands: Overview* (Class Actions Global Guide, Practical Law, updated as at 1 July 2018); and J Fleming and J Kuster, 'The Netherlands', in Karlsgodt (ed), *World Class Action* (n 37), ch 14. On 19 March 2019, the Dutch Senate passed legislation to facilitate an opt-out class action for either judgments or settlements, and which is not restricted to representative organisations. See further: H Schrama and M Sinnighe Damste, 'Class Action for Damages in the Netherlands' (*Loyens Loeff Newsletter*, 20 March 2019); C Van Rest and B Keizers, 'A Collective Action for Damages in the Netherlands is a Fact!' (*Hogan Lovells*, 2 April 2019). At the time of writing, the statute has not been proclaimed into force. An unauthorised copy of A Bill on Redress of Mass Damages in a Collective Action (Wet affwikkeling Massaschade in Collectieve Actie) is available at: www.houthoff.com/doc/English_translationbill_on_Redress_of_Mass_Damages_in_a_collective_action.pdf.

[43] See, e.g., discussion in Chapter 2.B, as to the perceived or actual problems and deficiencies with some of these devices as a 'prompter' for class actions reform.

are several law reform reports – e.g., in Hong Kong,[44] Western Australia,[45] the United Kingdom,[46] and South Africa[47] – whose recommendations for the implementation of opt-out class actions reform have gone unheeded by their respective governments. There are even jurisdictions which have ignored the much more modest recommendations for *opt-in* class actions reform.[48] In Scotland, and following two reviews of civil process which recommended an opt-in or opt-out (generic) regime,[49] depending upon judicial choice, the Scottish Parliament has finally enacted relevant legislation to that effect,[50] with relevant rules of

[44] LRC of Hong Kong, *Class Actions* (2012) [3.72], and Recommendation 2(1), p 106; and on an opt-out basis: Recommendation 3, p 122.

[45] LRC of Western Australia, *Representative Proceedings: Final Report* (Project 103, 2015), and Recommendations 1 and 2 (that 'Western Australia enact legislation to create a scheme in relation to the conduct of representative actions, and that the legislative scheme be based on Part IVA of the Federal Court of Australia Act 1976 (Cth)').

[46] CJC, *Improving Access to Justice: Final Report* (2008) (n 12), recommending that 'collective claims may be brought on an opt-in or opt-out basis, subject to court certification': Recommendation 3, p 5.

[47] South African Law Comm, *The Recognition of Class Actions and Public Interest Actions in South African Law* (Project 88, 1998), recommending the introduction of an opt-out class action, and drafting appropriate legislation (in ch 6) to give effect to that recommendation. In the absence of legislation, South African courts have judicially fashioned a class action on the basis of: the Constitution of the Republic of South Africa, 108 of 1996, ch 2, and s 38(c). See too: *Nkala v Harmony Gold Mining Co Ltd* [2016] ZAGPJHC 97, [238] ('South Africa does not have legislation governing class action claims. The rules governing class actions have been developed by the courts. In the absence of legislative regulation in South Africa, the courts are duty bound to continue the development of class action proceedings').

[48] LRC of Ireland, *Multi-Party Litigation* (Rep 76, 2005), with a recommendation that the class action 'would operate on the opt-in principle' (at [2.26]); of which it has been said that, '[t]his recommendation has yet to be implemented and does not form part of the government's current legislative programme': *The Class Actions Law Review: Ireland* (2nd edn, *The Law Reviews*, May 2018). See too: Scottish Law Comm, *Multi-Party Actions* (1996), with a recommendation that 'persons . . . who wish to be group members should be required . . . to elect to be members of the group' (at [4.55]).

[49] *Report of the Scottish Civil Courts Review* (2009), viii ('[w]e have identified further gaps of which the most important is the absence of an efficient procedure for multi-party actions . . . subject to suitable safeguards, multi-party litigations have a valuable role to play in modern civil justice'), and Recommendation 163, which recommended the introduction of a multi-party procedure, initially for the Court of Session only, and where it would be for the court to decide whether, in the particular circumstances of a case, an 'opt in' or 'opt out' model would be desirable. This recommendation was approved subsequently by Sheriff Taylor in: *Review of Expenses and Funding of Civil Litigation in Scotland* (2013), ch 12, [11]–[19].

[50] Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, s 20, permitting 'grouped proceedings' in the Court of Session: s 20(1), which may be brought as opt-in, opt-out, or either opt-in or opt-out proceedings: s 20(7).