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CLASS ACTIONS AND GOVERNMENT

The relationship between class actions and government makes for a nuanced and fascinating study. Government sets the scene by implementing and designing the regime, by choosing whether to act as a seed-funder for the regime, and by deciding to what extent it should regulate the regime against worldwide classes being litigated on its doorstep. It can then become a key player in the litigation itself. Government may be a representative claimant bringing the action, or a class member, or a potential financial beneficiary. Most commonly of all, it may be a defendant, being sued under the very regime which it enacted into law. With numerous opt-out class action regimes around the common law world in place, and others on the horizon, the book takes a comparative perspective throughout, and concludes with a series of recommendations, drawn from that comparative analysis of government's intricate interplay with class actions.

RACHAEL MULHERON is Professor of Tort Law and Civil Justice at Queen Mary University of London. She is widely published in the class actions field and is also the author of the textbook, *Principles of Tort Law* (Cambridge University Press, 2016, 2nd edn 2020). Professor Mulheron was academic member of the Civil Justice Council of England and Wales between 2009 and 2018 and, in that capacity, chaired various working parties, provided an empirical study on class actions, and served as principal author of various other reports and publications for the government. She also served as a member of the relevant rules-drafting committee in 2015 which prepared rules of court for the United Kingdom's first opt-out class action.

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over the years

and

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PREFACE

The relationship between class actions and government is a little like that of bees and flowers: one simply cannot survive and flourish without the other; they are mutually reliant. Yet, the interplay between the class action and government (in all of its guises) has not been much written upon in class actions scholarship to date. It is the purpose of this book to seek to fill that niche by adopting a comparative perspective towards the topic.

This book arose out of a confluence of my teaching, research, and law reform work in the class actions area. For example, I was intrigued by the willingness of North American and Australian law reformers to advocate, and implement, an opt-out class action device several decades ago when it may not have been as apparent that many suits against governments would eventuate under those regimes. That reality has been certainly readily apparent since, and it is hypothesised that this has had something of a ‘chilling effect’ upon procedural reform in some other jurisdictions.

Moreover, the battle (and it is, make no mistake, a battle) to achieve law reform in this area is highly dependent upon the way in which the political wind is blowing. The very willingness to enact legislation at all is oft-said to depend upon ‘evidence of need’, to which any law reformer will grimly smile at the notion of ‘proving a negative’, and will bite back the riposte (and draw the metaphor noted by various scholars and commentators in this context) that the voice in the cornfield who told Kevin Costner’s character in *Field of Dreams* (1989), ‘[i]f you build it, they will come’, was one worth listening to. Yet, there are now numerous opt-out class actions around the common law world in place, and others are possibly on the horizon or have been mooted.

Once enacted, government becomes a ‘key player’ in the litigation (‘the match’, as Part II’s heading notes). It may fulfil the roles of representative claimant; of class member; of defendant (as mentioned); and of beneficiary. The study of governmental interplay in class actions jurisprudence makes for a fascinating study. It is a field in which there are various

drafting options, and these are considered from a comparative perspective throughout the book.

As always, the production of this book has been a concerted team effort. The support, encouragement, wise counsel, and good humour provided by my parents, friends, and colleagues at Queen Mary University of London throughout the undertaking of this work are gratefully appreciated.

Moreover, grateful thanks are due to the British Academy which, by virtue of the award of a Mid-Career Fellowship, enabled me to undertake this work for a period which was free of teaching and administrative responsibilities. I will be forever grateful for this support and generosity that enabled me to enjoy such a reflective and quiet interlude in which to research and to write the manuscript.

Grateful thanks are also due to the editors, typesetters, and proofreaders at Cambridge University Press. The book has benefited tremendously from the proofreading undertaken by my parents; but, as ever, all remaining errors are solely my responsibility.

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Rachael Mulheron
London
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ABBREVIATIONS

General

[6]	paragraph 6
56	page 56
§ or s 21	section 21
r 12.3	rule 12.3
aff'd	affirmed
A-G or AG	Attorney-General
ALI	American Law Institute
ALRC	Australian Law Reform Commission
Alta	Alberta
Am	American
Ann	Annual
Ass	Assurance
Assn	Association
Aust or Aus	Australian
BC	Borough Council
BC	British Columbia
BIS	Department for Business, Innovation and Skills
Bull	Bulletin
c	chapter
CC	County Council
ch	chapter
CJ	Chief Justice
CJC	Civil Justice Council of England and Wales
cl, cll	clause/s
Co	Company or Corporation
Comm	Commission or Committee
Comp	Comparative
Comp	Competition
Commr	Commissioner
Corp	Corporation

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CP	Consultation Paper
CPR	Civil Procedure Rules
Cth	Commonwealth
DC	District Council
Dept	Department
Dist	District
Div	Division
DP	Discussion Paper
ed	editor
edn	edition
Euro	European
EWLC	England and Wales Law Commission
fn	footnote
GLO	Group Litigation Order
Govt	Government
Hosp	Hospital
Ins	Insurance
Intl	International
J	Journal
J, JJ	Judge or Justice, Judges or Justices
LBC	London Borough Council
Litig	Litigation
LJ	Lord Justice
LRC	Law Reform Commission
M	Million
MBC	Metropolitan Borough Council
MOJ	Ministry of Justice
MR	Master of the Rolls
NSW	New South Wales
NZ	New Zealand
OFT	Office of Fair Trading
OLRC	Ontario Law Reform Commission
P	President
Pt	Part
PD	Practice Direction
pp	pinpoint
Prod/s	Product/s
Q	Quarterly
QC	Queen’s Counsel
Qld	Queensland
reg/s	regulation/s
ref’d	refused

LIST OF ABBREVIATIONS

Rep	Report
Rev	Review
rev'd	reversed
s, ss	section/s
SC	Shire Council
SME	small and medium-sized enterprises
Soc	Society
Sys	System
U or Uni	University
UK	United Kingdom
US	United States
Vic	Victoria
WP	Working Paper

CA	Court of Appeal (of the jurisdiction referred to by the reporter series)
CAT	Competition Appeal Tribunal
Ch	Chancery Division of the High Court of England and Wales
DC	District Court (of the jurisdiction referred to by the reporter series)
Div Ct	Superior Court of Justice (Divisional Court of Ontario)
EWCA	Court of Appeal of England and Wales
EWHC	High Court of England and Wales
FCA	Federal Court of Australia
Full FCA	Full Bench of the Federal Court of Australia
Gen Div	Ontario Court of Justice (General Division)
HC	High Court (of the jurisdiction referred to by the reporter series)
HCA	High Court of Australia
HL	House of Lords
QB	Queen's Bench Division
SC	Supreme Court (of the relevant jurisdiction)
SCC	Supreme Court of Canada
SCJ	Superior Court of Justice (Ontario)
SDNY	United States District Court, Southern District of New York (sample jurisdiction)
2d Cir	United States Court of Appeals for the Second Circuit

CA 1998	Competition Act 1998 (UK)
CPA (Ont)	Class Proceedings Act, SO 1992, c 6

LIST OF ABBREVIATIONS

CPA (BC)	Class Proceedings Act, RSBC 1996, c 50
FCA 1976	Federal Court of Australia Act 1976
FRCP	Federal Rules of Civil Procedure (US)

Law Reports

AC	Law Reports, Appeal Cases (Third Series) (1891–)
ACWS (3d)	All Canada Weekly Summaries, Third Series
All ER	All England Law Reports
ALR	Australian Law Reports
Alta LR (3d)	Alberta Law Reports, Third Series
App Cas	Appeal Cases (1875–90)
BCJ	British Columbia Judgments
BCLR (3d)	British Columbia Law Reports, Third Series
Cal 2d	California Reports, Second Series
CCLT (3d)	Canadian Cases on the Law of Torts, Third Series
Ch	Law Reports, Chancery Division (Third Series) (1891–)
Ch D	Law Reports, Chancery Division (Second Series) (1875–90)
CLR	Commonwealth Law Reports
CPC (3d)	Carswell Practice Cases, Third Series
DLR (4th)	Dominion Law Reports, Fourth Series
ER	English Reports
F 2d	Federal Reporter, Second Series
F 3d	Federal Reporter, Third Series
FCR	Federal Court Reports (Australia)
FLR	Federal Law Reports (Australia)
FRD	Federal Rules Decisions
F Supp	Federal Supplement
F Supp (2d)	Federal Supplement, Second Series
IR	Irish Reports
KB	Law Reports, King’s Bench
Lloyd’s Rep	Lloyd’s Law Reports
NSWLR	New South Wales Law Reports
OAC	Ontario Appeal Cases
OJ	Ontario Judgments
OR (2d)	Ontario Reports, Second Series
OR (3d)	Ontario Reports, Third Series
QB	Law Reports, Queen’s Bench (1891–)
QBD	Queen’s Bench Division (1876–90)
SA	South African Law Reports
SASR	South Australian State Reports
SC	Session Cases (Scotland)

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SCR	Supreme Court Reports, Canada
SLT	Scots Law Times
Sol Jo	Solicitors' Journal
US	United States Supreme Court Reports
VLR	Victorian Law Reports
VR	Victorian Reports
WLR	Weekly Law Reports (UK)
WWR	Western Weekly Reports

NOTES ON MODE OF CITATION

Throughout this book, the following protocols are adopted:

- 1 In the footnotes, the order of preference of case law citations is as follows:
 - (a) where the case has been designated a neutral citation by the adjudicating court, the neutral citation is used;
 - (b) where the case has been reported in an authorised series of reports, the authorised citation is used in addition to the neutral citation;
 - (c) in the absence of (b), where the case has been reported in an unauthorised series of reports, the unauthorised citation is used in addition to the neutral citation;
 - (d) in the absence of (a)–(c), the case is cited in the following manner: (court, date of decision).
- 2 Paragraph numbers are used in preference to page numbers, where pinpoints from primary or secondary sources are required. Occasionally, where a primary or secondary source was accessed online and could not be located in hard copy feasibly or at all, so as to locate a pinpoint for a quotation, the following is noted: (accessed online, no pp available).
- 3 For each case, the court is referred to in parentheses in all instances where it is not obvious from the report series or citation which court made the decision.
- 4 The scholarship and opinion of many entities and persons are referenced throughout this book, and have been cited and pinpointed in accordance with British citation conventions. All reasonable efforts have been made to pinpoint as accurately and fulsomely as possible.
- 5 Wherever quotations appear from primary or secondary sources, in the interests of brevity, footnotes within those quotations have not be

reproduced unless otherwise shown; and the conventional usage of ‘footnotes omitted’ should be assumed throughout.

- 6 In the text and footnotes, references to the masculine gender should be taken to import the feminine gender, unless expressly indicated otherwise.