

1. PRE-INITIATION OF PROCEEDINGS

STANDING

PURPOSE: Standing is the right of a plaintiff to be considered an appropriate party to initiate a particular proceeding.

POWER: AG can initiate proceedings w.r.t. a public wrong or grant a fiat to allow a private person to sue. Relator:

- person granted the AG's fiat;
- liable for the costs of the action.
- Depends upon AG's consent to the proceedings being initiated and this discretion is unfettered and not reviewable by the courts.

PROCEDURE: Standing is an issue when: (1) proceedings enforce public rights or duties arising under legislation; (2) proceedings that test the constitutional validity of legislation or proceedings for the review of decisions of inferior courts and administrators.

TEST: General rule: a party, invoking the jurisdiction of a court in respect to an alleged interference with a public right, must show either that:

- Private right: Some private right of that party has been interfered with at the same time, or
- Special Interest Test: Such party has suffered "special damage peculiar to himself: [Truth About Motorways v Macquarie \(2000\)](#)

JOINDER OF CAUSES OF ACTION

PURPOSE: Common law favours resolution of particular disputes between parties by bringing a single action rather than successive proceedings; ie. incentive to join all causes of action and parties in same proceedings in the public interest to minimise litigation and prevent parties raising old issues anew: [Dow Jones & Co v Gutnick \(2020\)](#)

General principles of *res judicata* 'a matter already judged':

- The interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions
- The interest of litigants in being protected from the vexatious repetition of civil actions or criminal proceedings: [Rogers \(1994\)](#)

POWER: For joinder of causes of action, see UCPR rr 6.18, 6.22; or joining of parties, see UCPR rr 6.19 – 6.29.

- **Joinder of causes of action**
 - **R 6.18 Causes of action** – plaintiff may claim relief against defendant for > 1 cause of action
- **Joinder of parties**
 - **R 6.19 Common questions of law or fact** – arising out of the same transaction or series of transactions.
 - R 6.20 Joint entitlement
 - R 6.21 Joint or several liability
 - **R 6.29 Removal of parties**
- **General rules**
 - **R 6.22 Separate trials** – Court may order separate trials if joinder of party or cause of action may embarrass, inconvenience or delay the conduct of proceedings.
 - **R 6.32 Future conduct of proceedings** – court may make orders it thinks fit for future conduct of proceeding including orders for service, amendment of documents, entering appearances, filing defence by persons joined, substitution of parties.
 - Other: rr 6.23 (misjoinder) , 6.24 (proper / necessary), 6.26 (excl. cost recovery); 6.27 (third party); 6.28 (commencement date on order or specified).

PROCEDURES:

- **Res judicata:** applies when a court has delivered judgment; prevents re-litigation of claims made in earlier proceedings between same parties in respect of the same subject matter.

TEST:

Select type of res judicata

1. **Cause of action estoppel:** applies where cause of action has been litigated to judgment; cannot be raised again in another action or prosecution: *Chamberlain v Deputy Commissioner of Taxation* (1988)
2. **Issue estoppel:** when court decides on issues of fact or law which may become issues in later litigation b/w same parties involving a different cause of action, the first court determines that a cause of action does/does not exist, then that fundamental determination will issue estop the parties in later litigation: *Blair v Curran* (1939).
 - Privity principle – For issue estoppel to apply the privy must make its claim "under or through" the person of whom it is said to be privy: *Tomlinson v Ramsey Food Processing Pty Ltd* [2015]
3. **Merger in judgment:** if, in earlier action, the cause of action was sustained it will have merged in that judgment and cease to exist. The very right or cause of action claimed has already passed into judgment: eg. *Trawl Industries v Effem Foods* (1992)
4. **Anshun estoppel:** Prevents re-litigation of an issue where this would be an abuse of process based on court's inherent jurisdiction; *Port of Melbourne Authority v Anshun Pty Ltd* (1981)
 - Unreasonableness Test: Whether or not it is unreasonableness depends on the particular circumstances:
 - a. It must have been possible to raise the cause of action in the earlier proceedings.
 - b. It must appear that the same, or substantially the same facts will arise for consideration in the second as in the first proceedings: *Gibbs v Kinna* [1999]Eg. if a judgment might conflict with a judgment in earlier proceedings.
 - Extends to parties in subsequent proceedings: eg. accountants where purchasers of business first took legal action against vendors for breach of contract and misrepresentation and subsequently alleged financial statements were misleading: *Rippon v Chilcotin* (2001)
 - Not abuse of court process: focus on unreasonableness: *Champerslife v Manojovski* (2010)
 - Anshun estoppel available where:
 - Unreasonableness - matter relied on in defence of second action so relevant to first action that it would be so unreasonable not to rely on it
 - Inconsistent rights – ie. two judgments appear to declare inconsistent rights with respect to same transaction.
 - Same parties – if later proceedings would be oppressive and an abuse of process
 - Different parties – unreasonableness must be either considered not conclusive, or understood as involving unreasonableness such that later proceedings against different parties would be an abuse of process.
 - Three party contract – stronger argument that plaintiff ought to have brought the proceedings in the first round: *Redwood v Link Market Services* [2007]

REPRESENTATIVE PROCEEDINGS & CLASS ACTIONS

PURPOSE: Enables claims of a number of persons against a person to be determined in the one suit. Brought by a 'representative plaintiff' who sues on his/her own behalf and on behalf of the class or 'group members.'

- Group members have claim same or similar to claim of representative plaintiff on common questions of law and fact.
- Class members bound by the outcome of the litigation on common issues, even if outcome not favourable and they have no active role.
- Objectives: access to justice, resolves disputes efficiently, allows respondents/defendants to avoid multiple suits, reduces risk of inconsistent findings, saves cost.

POWER: CPA ss 157(1)-(2).

- **S 157(1) Class action proceeding commencement** – Proceedings may be commenced by a representative plaintiff if:
 - 7 or more persons have claims against the same person AND
 - The claims are in respect of, or arise out of, the same, similar or related circumstances AND
 - The claims of all those persons give rise to a substantial common question of law or fact
- **S 157(2) Group members cases may be different** – Representative proceedings may be commenced whether or not the relief sought is the same for each person and whether or not they are concerned with separate transactions between the defendant and individual group members or involve separate acts or omissions of the defendant in relation to individual group members

PROCEDURE:

- **Substantial common question of law or fact:** 'substantial' directed to issues which are 'real or of substance'; not 'large' or 'special significance' or 'major impact on litigation': *Wong v Silkfield Pty Ltd (1999)*
- **Standing - who may commence:**
 - S 158(1) Standing – person has sufficient interest to commence representative proceedings against another person if the person has standing to commence proceedings on person's own behalf
 - S 158(2) Irrespective of claim against every defendant – person can commence proceedings against more than one defendant *irrespective* of whether or not the person and each of the group members have a claim against *every* defendant.
 - S 158(3) Standing even if no claim – representative plaintiff retains standing to continue the proceedings and bring an appeal even if plaintiff ceases to have a claim against *any* defendant.
 - S 171 Substitute representative plaintiff – Court has power to substitute another group member as representative plaintiff where it appears that the person is unable to adequately represent the interests of group members.

TEST:

- **Originating process:** S 161 CPA and Practice Note SC Gen 17 set out requirements for the content of the originating process:
 - Must describe or otherwise identify the group members
 - Description must be such as to enable a person, with the assistance of a lawyer if necessary, to ascertain whether he or she is a group member: *Petrusevski v Bulldogs Rugby League Club*
 - Group definition will satisfy this requirement if it contains 'objective criteria by reference to which membership or non-membership can be established: *Wright Rubber Products Pty Ltd v Bayer AG [2010]*
 - Must specify the nature of the claims made on behalf of the group members and the relief claimed
 - Must specify the common questions of fact and law
- **Pleadings:**
 - Purpose of pleadings: to provide opposing party w/ sufficient outline of the case so they have an opportunity to understand/assess the case and respond
 - BUT the NSWSC accepts that it might be sufficient for class action pleadings to be **more general** – ie. plaintiff can plead the case of each group member at a 'reasonably high level of generality' because the defendant does not need to know all the facts material to the claims of each group member to understand the case made on behalf of the group: *Rodriguez & Sons v Queensland Build Water Supply Authority [2014]*
- **Discontinuing a class action:**
 - Court may discontinue representative proceedings if:
 - S 164 Appears < 7 members – It appears likely, at any stage of the proceedings, that there are fewer than 7 group members

- S 165 Excessive cost to identify group members – The cost to the defendant of identifying the group members and distributing the amounts ordered to be paid to them would be excessive having regard to the likely total of the amounts
 - S 166(1) Interests of justice – It is satisfied that it is in the interests of justice to do so for one of the reasons set out in s 166(1), CPA – on defendant’s application or of Court’s own motion
 - (a) Cost from representative proceedings likely to exceed costs if each group member conducted separate proceedings; cf. *Bright v Femcare* (2002)
 - (b) All relief sought can be obtained by other means of proceedings.
 - (c) Not an efficient and effective means of dealing w/ group member claims; cf. *Giles* [2014]
 - (d) Representative party not able to adequately represent the interests of group members
 - (e) Otherwise inappropriate
 - S 167 Joinder of parties – If proceedings are discontinued by the Court, the representative plaintiff may continue the case on his/her own behalf and any group member maybe joined in that proceeding
- **Opting out:**
 - Where proceedings are commenced without express consent of the class members
 - All members who fall within the group definition are automatically part of the class action but can later opt out from the proceedings
 - Opt-out model is adopted in s 162, CPA
 - Court must fix a date before which a group member may opt out
 - Group member may opt out by written notice before that date
 - Unless the Court grants leave, the hearing must not commence before that date
- **Settlement:**
 - S 174, CPA – representative proceedings cannot be settled (or discontinued) without the approval of the Court
 - No express criteria for approving settlement (contrast with Federal Court – criteria for approving settlement set out in Federal Court Practice Note CM17)
 - Principles applicable in FC / SC: *Pharm-a-Care Laboratories v Commonwealth of Australia (No 6)* [2011]:
 - Court must determine whether a proposed settlement is ‘fair and reasonable’ – is the settlement within the range of fair and reasonable outcomes?
 - Relevant factors – amount offered to each group member, prospects of success, terms of any advice received from counsel, likely duration and cost of proceedings if continued to judgment attitude of group members, lawyers’ fees fair and reasonable.
- **Miscellaneous:**
 - S 182 Limitation period – that applies to the claim of a group member is suspended on the commencement of any representative proceedings and does not begin to run again unless the member opts out and any appeal is determined without finally disposing of group member’s claim
 - S 183 General Power to Ensure Justice is done – Court has the general power to make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings
 - S 181 Costs – Despite s 98, CPA, Court may not award costs against a group member (other than representative plaintiff) except as authorised by ss 168,169 (determination of non-common and individual questions)