

Group Litigation in Australia - “Desperately Seeking” Effective Class Action Regimes

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1. As background for consideration of the context within which your country’s group litigation operates, please briefly describe your civil litigation system (e.g. common law, civil law)?

Australia’s legal systems and laws are based on the common law of England. Australia has a federal system comprising the federal (or Commonwealth) government, six states¹ and two self-governing territories.² Consequently, in addition to a hierarchy of courts in each state and territory (“headed” by the Supreme Court) there exists the Federal Court of Australia which deals with matters over which the Commonwealth has constitutional power. Australia’s highest court is the High Court of Australia.

Proceedings in Australia are conducted pursuant to the adversarial model. The vast majority of civil proceedings are heard by a judge without a jury. The author is not aware of juries being employed in any Australian class actions and/or representative proceedings.

2. What formal rules for representative or non-representative group litigation have been adopted in your country?

Traditional Representative Proceedings in every Australian State and Territory

Order 6 rule 13 of the *Federal Court Rules* provides that “where numerous persons have the same interest in any proceeding the proceeding 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”. Similar provisions may be found in the rules of procedure that govern litigation in each Australian state and territory.³ Proceedings brought pursuant to these rules are commonly referred to as representative proceedings/actions. The rules governing representative proceedings have remained substantially the same over the last 100 years or so that they have been in operation.⁴

Quasi-Class Proceedings in South Australia

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¹ Victoria, New South Wales, Queensland, South Australia, Western Australia and Tasmania.

² Australian Capital Territory and Northern Territory.

³ These provisions are conveniently reproduced in D Grave and K Adams, *Class Actions in Australia* (Lawbook Co; 2005), 578-584.

⁴ See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161, 205 (per Callinan J). However, as noted below, in November 2007 significant provisions were added to the rule governing representative actions in New South Wales.

Rule 80(1) of the *Supreme Court Civil Rules 2006* (SA), which came into operation on 4 September 2006, provides that where a group of persons “has a common interest in the subject matter of an action or proposed action and a member of the group is authorised in writing by the other members of the group to bring or defend the action as representative of the group, the person may bring or defend the action as representative of the group”. The written authorisations, by members of the represented group, to represent them must be filed by the class representative when filing the originating process.⁵ Rule 80(5) empowers the Court to terminate, at any time, the right of a representative plaintiff or defendant to represent the relevant group of plaintiffs or defendants.

Rule 81 implements, with respect to representative actions brought under Rule 80, Australia’s only certification regime. In fact, Rule 81(1) empowers the Court to authorise a plaintiff to bring an action as representative of a group with a common interest in questions of law or fact to which the action relates. An application for this judicial authorisation must be made within 28 days after the time allowed for the defendant to file a defence.⁶ This authorisation is not to be refused on the ground that (a) damages that would require individual assessment are sought by way of remedy; or (b) the action is based on separate contracts or transactions between individual members of the group and the defendant.⁷

A judicial order authorising a class representative to proceed with a representative action must: (a) define the group on whose behalf the action is brought; (b) define the nature of the claims made on behalf of the members of the group and specify the remedy sought; (c) define the common questions of law or fact that are to be determined in the action; and (d) give directions about the determination of other issues raised in the action that are not common to all members of the group.⁸

The origins of this rather unique South Australian regime - which seeks to address some of the major shortcomings of the traditional rules governing representative actions but in a less detailed manner than the Federal and Victorian class action regimes - may be traced back to a report on class action reform that was released by the Law Reform Committee of South Australia in 1977.⁹ In this report, a reasonably detailed legislative class action regime was recommended. This recommendation was never implemented by the South Australian legislature. But in 1987 Rules 34.01-34.06 of the *Supreme Court Rules 1987* (SA) came into operation. When, in September 2006, the new *Supreme Court Civil Rules 2006* (SA) came into operation these rules were replaced by Rules 80 and 81 described above. The most significant difference between the current rules and their 1987 predecessors is that whilst the latter were silent as to whether an opt out or an opt in regime was to apply, the 2006 rules, as noted above, make it clear that a class representative may only act on behalf of those claimants who provide the aspiring representative with written authorisations to represent them in the proposed representative action.

The author is not aware of any proceedings that have been instituted pursuant to the new Rules 80 and 81. The only known proceeding commenced in reliance of Rules 34.01-34.06 was *Abrook v Paterson*.¹⁰ In this case, Burley J indicated that:

⁵ Rule 80(2).

⁶ Rule 81(3).

⁷ Rule 81(4).

⁸ Rule 81(5).

⁹ Law Reform Committee of South Australia, *Report Relating to Class Actions* (Report no 36; 1977) (“LRCSA Report”).

¹⁰ (1995) 181 LSJS 24.

As far as I am aware, there are no decided cases on the scope and operation of SCR 34.01. If it provides for “class actions”, its lack of detail is in marked contrast to the provisions contained in Part IVA ...

In applying the approach taken by the High Court in *Carnie* to SCR 34, it is clear that, notwithstanding the lack of detail in the rule, the court is able to address the sometimes complex series of considerations any given representative action may give rise to.¹¹

The High Court of Australia’s decision referred to above by Burley J, which is discussed later in the report, dealt with the construction of the NSW representative action rule rather than one of Australia’s class action regimes. This fact, together with the non-employment of this quasi-class action regime, would appear to suggest that the intended goal of removing in South Australia the barriers that are faced by multiple claimants who wish to commence a representative action has not been attained. A detailed legislative class action regime would thus appear to constitute a more intelligent strategy. As already noted, this was the strategy recommended by the Law Reform Committee of South Australia back in 1977.

Class Proceedings in the Federal Court of Australia and the Supreme Court of Victoria

In February 1977, the Australian Law Reform Commission (“ALRC”) was asked by the Federal Attorney-General to report on the adequacy of the existing law relating to class actions in the Federal Court and other courts whilst exercising federal jurisdiction or in courts exercising jurisdiction under any law of any Territory.¹² It was not until December 1988 that the ALRC’s report was tabled in Parliament. As noted by Senator Durack, “I am unaware of any other report that took such a long time as the one on the subject of class actions. It is quite clear that the [ALRC] was considerably divided on the subject”.¹³ This report contained a proposal to introduce in the Federal Court a new grouped proceeding model. A major rationale for the introduction of the grouped proceeding model was the need to avoid the problems that had prevented victims of mass wrongs from utilising the representative action procedure to gain access to the courts.

The availability of this procedure had been significantly restricted as a result of the narrow judicial construction of the “same interest” prerequisite¹⁴ and the failure of the rules governing this procedure to provide guidance to the courts and litigants with respect to the numerous and complex issues raised by multi-party proceedings. The ALRC’s regime addressed this problem: (a) by providing more liberal and precise requirements for the commencement of a grouped proceeding; (b) by making it clear that a number of judicial principles, which significantly restricted the circumstances in which the “same interest” requirement could be adhered to, could

¹¹ Ibid 6 and 12.

¹² Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report no 46; 1988), para 1 (“ALRC 1988 Report”).

¹³ Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3019 (Senator Durack). Senator Durack also referred to the ALRC’s report on class actions as “one of those rather loony proposals that come up from time to time from commissions like the [ALRC]”: Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3019.

¹⁴ In *Markt and Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021, the English Court of Appeal held that the “same interest” requirement, under the traditional representative action procedure, meant that the procedure was unavailable in actions where separate and individual contracts were involved or in cases where damages were claimed. For a colourful description of the disastrous effect which this judicial pronouncement has had on the ability of similarly situated claimants to seek access to justice, see *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382, 394-395 (per Kirby P).

not be applied to restrict access to the new regime;¹⁵ and (c) by providing courts with extensive powers to deal with the various phases of group litigation.¹⁶

The ALRC was of the view that the introduction of the grouped proceeding procedure, that it recommended, would advance “the objectives of access to the courts and judicial economy, while providing safeguards against possible abuse”.¹⁷ This is because:

Such a procedure could enable people who suffer loss or damage in common with others as a result of a wrongful act or omission by the same respondent to enforce their legal rights in the courts in a cost effective manner. It could overcome the costs and other barriers which impede people from pursuing a legal remedy. People who may be ignorant of their rights or fearful of embarking on proceedings could be assisted to a remedy if one member of a group, all similarly affected, could commence proceedings on behalf of all members. The grouping of claims could also promote efficiency in the use of resources by enabling common issues to be dealt with together. Appropriate grouping procedures are an essential part of the legal system’s response to multiple wrongdoing in an increasingly complex world.¹⁸

In December 1989, Senator Janine Haines, the then leader of the Australian Democrats, adopted the ALRC’s proposed legislation and introduced it into the Senate as a private member’s Bill.¹⁹ The Federal Government took no action in relation to the ALRC’s proposals until 12 September 1991 when the Federal Court of Australia Amendment Bill 1991 was unveiled in the Senate. This Bill contained Part IVA. It was passed without any amendments and Part IVA came into operation in March 1992.²⁰ The objectives of Part IVA were described as follows by the then Federal Attorney-General:

The Bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person’s loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action [the access to justice goal of the class action device].

The second purpose of the Bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions [the judicial economy goal of the class action device].²¹

¹⁵ ALRC 1988 Report, above n 12, paras 132-138.

¹⁶ Ibid chs 4-7.

¹⁷ Ibid para 2.

¹⁸ Ibid para 69.

¹⁹ See Commonwealth, *Parliamentary Debates*, Senate, 11 December 1989, 4233. As noted in Grave and Adams, above n 3, 44, this “Bill eventually lapsed upon the prorogation of Parliament and the Bill was not renewed”.

²⁰ This approach attracted the criticism that “the fact that general proposals have been around for some time does not excuse the need for specific legislation to be able to be examined in greater detail”: see R Baxt, “Class Action Legislation - A Mirage for the Consumer?” (1992) 66 *Australian Law Journal* 223, 224.

²¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Mr Duffy – Federal Attorney-General). Similar reasoning was embraced by the Victorian Attorney-General, Mr Hulls, when he introduced in the Legislative Assembly of the Victorian Parliament, Part 4A: Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2000, 1252. See also *Bright v Femcare Ltd* (2002) 195 ALR 574, 605 (per Finkelstein J).

In Victoria, a report, which evaluated the Victorian law on multi-party litigation and which was commissioned by the Victorian Attorney-General's Law Reform Advisory Council ("Victorian Council"), was completed in August 1995.²² After consulting many groups within both the legal profession and the wider community, the Victorian Council adopted, two years later, the report's principal proposal and recommended to the Victorian Government that a legislative regime similar to Part IVA be introduced in Victoria. There was no response by the Victorian Government to the Victorian Council's recommendation. This legislative inactivity prompted the Supreme Court of Victoria to take the initiative.²³ In fact, the Supreme Court added a new Order 18A to the *Supreme Court (General Civil Procedure) Rules 1996*. This new Order introduced in Victoria, from January 2000, a class action regime which was virtually identical to Part IVA. However, shortly after Order 18A came into operation, a challenge to its validity was launched. Essentially, the challenge was based on the argument that Order 18A exceeded the power conferred upon the Court by the Victorian Parliament to draft rules of court. The challenge was rejected by three of the five justices of the Court of Appeal of Victoria.²⁴ The defendant sought leave to appeal to the High Court of Australia. The fear that the High Court might declare Order 18A invalid prompted the Victorian Parliament to introduce a legislative framework for class actions very similar to the regime created pursuant to Order 18A and thus Part IVA.²⁵

While Part IVA and Part 4A²⁶ use the terms representative proceedings and group proceedings, respectively, to describe the proceedings that they authorise and regulate, such proceedings are commonly referred to by commentators as class actions/proceedings.²⁷ There have been no amendments to the Victorian regime and there has only been one amendment to Part IVA. In October 1992 the Law and Justice Legislation Amendment Bill (No 4) 1992 (Cth) was introduced in the House of Representatives (the lower House of the Australian Parliament).²⁸ This Bill added a new s 43(1A) to the *Federal Court of Australia Act 1976* (Cth). Section 43(1A) reads as follows:

In a representative proceeding commenced under Part IVA or a proceeding of a representative character commenced under any other Act that authorises the commencement of a proceeding of that character, the Court or Judge may not award costs against a person on whose behalf the proceeding has been commenced (other than a party to the proceeding who is representing such a person) except as authorised by:

²² V Morabito and J Epstein, *Class Actions in Victoria – Time for a New Approach* (Report commissioned by the Victorian Attorney-General's Law Reform Advisory Council; published in 1997).

²³ *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545, para 9 (per Brooking JA).

²⁴ *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545 (per Ormiston, Phillips and Charles JJA; Winneke P and Brooking JA dissenting).

²⁵ Victoria, *Parliamentary Debates*, Legislative Council, 4 October 2000, 431 (Mr Thomson – Minister for Small Business).

²⁶ The provisions of both regimes are conveniently reproduced in Grave and Adams, above n 3, 505-524. See also R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford; Hart Publishing; 2004), 481-490.

²⁷ The Scottish Law Commission has described the class action procedure "as a sophisticated and improved version" of the representative action procedure: Scottish Law Commission, *Multi-Party Actions* (Report no 154; 1996), para 6.1 ("SLC Report"). See, generally, R Mulheron, "From Representative Rule to Class Action: Steps Rather than Leaps" (2005) 24 *Civil Justice Quarterly* 424.

²⁸ See Justice DM Ryan, "The Development of Representative Proceedings in the Federal Court" (1993) 9 *Australian Bar Review* 131, 143; and V Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 *Monash University Law Review* 231, 239.

- (a) in the case of a representative proceeding commenced under Part IVA - section 33Q or 33R; or
- (b) in the case of a proceeding of a representative character commenced under another Act - any provision in that Act.²⁹

The need for s 43(1A) was explained as follows by the Commonwealth Government:

The Bill will amend the Federal Court of Australia Act 1976 to make it clear that a person represented in a representative proceeding under Part IVA of that Act or in a proceeding of a representative character authorised by another Act cannot be ordered to pay costs except in special circumstances. This amendment reaffirms a long line of judicial authority which was said to be wrong in a recent judgment of the Supreme Court of Victoria in respect of statutory provisions in that State dealing with the power of that Court to award costs. The amendment will remove any doubts that may have been created by that decision for proceedings of this kind.³⁰

In 2001, the Federal Government made an amendment to another Federal Act which had a direct impact on the availability of the Part IVA regime. In fact, since October 2001, s 486B(4) of the *Migration Act 1958* (Cth) provides that representative or class actions are not permitted in or by a migration proceeding.³¹

Legislative regimes that permit group proceedings with respect to conduct that is alleged to be in contravention of certain statutory provisions

Group procedures are also provided for, under both Federal and State legislation, in a number of areas of law, including trade practices, discrimination, industrial relations and privacy.³² An example is provided by s 87(1B) of the *Trade Practices Act 1974* (Cth), which reads as follows:

The [Australian Competition and Consumer] Commission may make an application under paragraph (1A)(b) on behalf of one or more persons identified in the application who:

- (a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E), IVA, IVB, V or VC; and
- (b) have, before the application is made, consented in writing to the making of the application.³³

²⁹ The two exceptions to the rule governing costs in Part IVA (and Part 4A) proceedings dictated by s 43(1A) (and its Victorian counterpart) are ss 33Q and 33R. Section 33Q provides that if it appears to the Court that determination of issues common to all group members will not finally determine the claims of all, the Court may give directions in relation to the determination of the remaining issues, including directions establishing a sub-group consisting of those group members, and appointing a person to be the sub-group representative party on their behalf. Section 33Q(3) provides that “where the Court appoints a person other than the representative party to be a sub-group representative party, that person, and not the representative party is liable for costs associated” with the sub-group. Section 33R(1) authorises the Federal Court to permit an individual group member to appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member. In such a case, s 33R(2) provides that the individual group member, and not the representative plaintiff, is liable for costs associated with the determination of the issue.

³⁰ Commonwealth, *Parliamentary Debates*, Senate, 9 November 1992, 2534 (Senator McMullan).

³¹ A migration proceeding is essentially defined as all proceedings in the High Court, the Federal Court or the Federal Magistrates Court that raise an issue in connection with visas, deportation or removal of an unlawful non-citizen. See, generally, S Harris, “Another Salvo Across the Bow: Migration Legislation Amendment Bill (No 2) 2000 (Cth)” (2000) 23 *University of New South Wales Law Journal* 208.

³² See, generally, P Cashman, *Class Actions – Law and Practice* (Federation Press; 2007), ch 9.

Justice Mansfield of the Federal Court has recently revealed that “the necessity for the consent of the complainants provides the assurance of knowing that they do not wish to prove facts in support of the claim for compensation that is different from the facts as found in the action. If that were the case, the consent would be withheld and they (or any of them) could bring separate proceedings for compensation”.³⁴

In the corporations law arena, s 1324 of the *Corporations Law* is pertinent. Subsection (1) of this provision reads as follows:

Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:

- (a) a contravention of this Act;
- (b) attempting to contravene this Act:

...

the Court may, on the application of the [Australian Securities and Investments] Commission, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction on such terms as the Court thinks appropriate, restraining the first mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring a person to do any act or thing.

Pursuant to s 1324 (10), where the court has power under subs (1) to grant an injunction, the court “may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person”.³⁵

Test case, joinder and consolidation

Where the class action and representative action procedures are not available or are not employed, three, extremely unsatisfactory, alternatives exist to deal with legal disputes involving multiple claimants. One alternative is to join all of the plaintiffs with a common claim in one action. Another approach is to commence a separate action for each claimant, and then try “test cases” to determine the common issues. The third alternative is to consolidate existing non-group proceedings that relate to the same dispute with respect to the same defendants. Each of these alternatives will be explored.

Joinder of Parties

³³ It is interesting to note that the government responsible for the enactment of s 87(1B) emphasised that this provision was not intended to introduce a class action device: see *Explanatory Memorandum* to the Trade Practices Revision Bill 1986, paras 188-192. See, generally, CW Butcher, “Representative Applications under the Trade Practices Act: Do They Obviate the Need for Consumer Class Action for Damages?” [1987] *Australian Business Law Review* 354. For an example of a recent and successful employment of this regime, see *Australian Competition and Consumer Commission v Keshow* [2005] FCA 989.

³⁴ *Australian Competition and Consumer Commission v Keshow* [2005] FCA 989, para 6.

³⁵ Emphasis added. In 1989, Professor Baxt noted that “another interesting part of [s 1324] which seems to have gone unnoticed for many years is the possibility of a ‘class action’ that may be brought in relation to proceedings that are initiated under [it]”: R Baxt, “Will Section 574 of the Companies Code Please Stand Up! (And Will Section 1323 of the Corporations Act Follow Suit)” (1989) 7 *Company and Securities Law Journal* 388, 390.

An illustration of the way in which the joinder of parties procedure operates in Australia is provided by Rule 9.02 of Victoria's *Supreme Court (General Civil Procedure) Rules 1986*. Pursuant to this rule two or more persons may be joined as plaintiffs in any proceeding where: (a) if separate proceedings were brought by or against each of them, some common questions of law or fact would arise in all the proceedings; and (b) all rights to relief claimed in the proceeding (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions; or (c) where the court, before or after the joinder, gives leave to do so.

As pointed out by the ALRC, "joinder of claims by a number of applicants provides a useful means of enabling common questions to be determined in a single proceeding. It is also likely to result in some savings in costs".³⁶ But a number of problems exist with this procedure, as a device for dealing with legal disputes involving numerous claimants. One problem has been explained as follows by the Ontario Law Reform Commission:

Clearly, joinder ... will be of minimal assistance to individuals with small claims. While some small claims may be transformed by joinder ... into claims that are individually recoverable - because the cost of proving certain issues can be shared - most such claims will continue to be individually nonrecoverable. The reasons for this are quite straightforward. The individual litigant will be liable to pay his own lawyer's fees, whether the action succeeds or fails. Moreover, if the action fails, he likely will be ordered to pay a portion of the defendant's costs. Consequently, most small claims, even though they be aggregated, will remain individually nonrecoverable.³⁷

Problems are encountered even where the claims are individually recoverable. All of the obligations of the ordinary rules of procedure apply to each of the joined plaintiffs as they are parties in the strict sense. Some obvious obligations are that each of the parties must exchange pleadings with each defendant and must submit to discovery and interrogatories.³⁸ Each named plaintiff may request the same of the defendant and to be given notice of, and participate in, any interlocutory steps. This means that, as highlighted by the Manitoba Law Reform Commission, the use of the joinder device "can result in cumbersome and expensive proceedings - precisely what class proceedings legislation is designed to avoid".³⁹ The existence of this scenario also means that those who are risk adverse, litigation shy, receive inadequate information or are deterred by psychological factors from coming forward and consenting to act as a plaintiff may be left with no legal remedy.⁴⁰ Furthermore, those in a continuing relationship with the defendant may fear victimisation if they consent to be named as a plaintiff.⁴¹

³⁶ ALRC 1988 Report, above n 12, para 49.

³⁷ Ontario Law Reform Commission, *Report on Class Actions* (Report no 48; 1982), 85 ("OLRC Report").

³⁸ In *Western Canadian Shopping Centres Inc v Bennett Jones Verchere* (2001) 201 DLR (4th) 385, 407 (per McLachlin CJ), the Supreme Court of Canada highlighted the fact that "one of the benefits of a class action is that discovery of the class representatives will usually suffice and make unnecessary discovery of each individual class member".

³⁹ Manitoba Law Reform Commission, *Class Proceedings* (Report no 100; 1999), 13 ("MLRC Report"). See also Centre for Legal Process of the NSW Law Foundation and Public Interest Advocacy Centre, *Proposal for a New Supreme Court Rule on Representative Proceedings in NSW* (1998), para 1.3 ("NSW Law Foundation").

⁴⁰ See, generally, M Tilbury, "The Possibilities for Class Actions in Australian Law" (Paper presented at the 1993 Australian Legal Convention in Hobart), 6; OLRC Report, above n 37, 85-86; *Dolgow v Anderson* 43 FRD 472, 484 (EDNY 1968); Lord Woolf, *Access to Justice - Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996), 225; Justice Stephen Charles, "Class Actions in Australia" (Paper presented at the Australian Bar Association Conference, San Francisco, 1996), 30; J Donnan, "Class Actions in Securities Fraud in Australia" (2000) 18 *Company and Securities Law Journal* 82, 85; J Kellam and SS Clark, "Multi-Party Actions in Australia" in C Hodges (ed), *Multi-Party Actions* (2001) 269, paras 15.11-15.12; *Chace v Crane Canada Inc* (1997) 14 CPC (4th) 197, 205-206 (per

Two other factors ensure that not all potential claimants are brought before the Court pursuant to the joinder procedure. First, there is no duty on the defendants to aid plaintiffs who are joining together by providing any information regarding the identity of potential plaintiffs with claims identical to or similar to those already named as plaintiffs. Second, there will invariably be individual plaintiffs who, for various reasons such as own choice of lawyers or commencement time or choice of jurisdiction or venue, will not participate in the action. The outcome will thus “be a multiplicity of proceedings, with the concomitant risk of inconsistent verdicts, additional expense for the parties, and a greater burden on the courts”.⁴²

Two other problems with the joinder device should also be mentioned. One problem is that “joinder is not satisfactory where the interests of claimants differ”.⁴³ A further problem is that it is not clear how damages are to be determined.⁴⁴ If the judge is responsible for calculating damages for individual plaintiffs in complex matters, this would entail a wastage rather than a saving of judicial time.

In the Australian context further problems have been created by the 1981 decision of the High Court of Australia in *Payne v Young*.⁴⁵ In that case, the Court was required to construe the phrase “in respect of or arise out of the same transaction or series of transactions”. It was held that the latter phrase “series of transactions” is to be read as modified by the word “same”, that is, “same series of transactions”. In *Payne* the claimants who sought to rely on the joinder procedure were all abattoir owners who were contesting the validity of an impost placed upon by the Western Australian Government. The fees imposed on each owner were found by the Court to be calculated according to a different scale and that differing amounts of payments were made to different defendants. Therefore, according to the Court, the transactions could not be said to be the same series of transactions even though they were similar. As a result, the attempted joinder was disallowed. In a strong dissent, Murphy J protested that the construction embraced by the Court was too restrictive. Indeed, it has been generally thought to impede the goals of judicial economy and the avoidance of multiplicity of actions.

Test Cases

The ALRC has explained that the term “test case” is sometimes used to describe proceedings “brought by a single applicant in circumstances where many other people may have the same or similar claims. This may be done by the unilateral action of the claimant”.⁴⁶ The term “test case” is also employed to describe the following scenario:

In certain instances, many actions have been commenced by different plaintiffs against the same defendant based on similar allegations of fact, and one action is selected as a test action. In these cases, on the plaintiffs’ application orders have been made that the proceedings in all actions be

Cumming, Newbury and Huddart JJA); *Bouchanskaia v Bayer Inc*, 2003 BCD Civ J LEXIS 1154, at 64-65 (per Gray J); and Ryan, above n 28, 133.

⁴¹ See V Morabito, “Class Actions and the Right to Opt Out under Part IVA of the *Federal Court of Australia Act 1976* (Cth)” (1994) 19 *Melbourne University Law Review* 615, 631.

⁴² OLRC Report, above n 37, 86.

⁴³ Lord Woolf, above n 40, 225.

⁴⁴ Charles, above n 40, 30.

⁴⁵ (1981) 45 CLR 609.

⁴⁶ ALRC 1988 Report, above n 12, para 52.

stayed until after the trial of the “test” action, notwithstanding that there might be differences of proof in each action.⁴⁷

An illustration of the test case device is provided by the recent Hong Kong case of *Ho & Lam v Hong Kong Housing Authority*.⁴⁸ In this case, two tenants of the Hong Kong Housing Authority (“Authority”) successfully argued that the Authority was under a legal duty to review rents downwards in a deflationary environment. Whilst only two tenants were named plaintiffs in these proceedings, the outcome of the litigation was obviously of direct benefit to all tenants of the Authority as the legal duty in question encompassed all tenants and not simply the two named plaintiffs. Another advantage of the test case device is that it may lead to the efficient resolution of the other cases through settlement or may clarify and/or narrow the issues that are litigated in subsequent cases.⁴⁹

But a number of significant problems exist with this device as a mechanism for dealing with mass claims. The test case litigation is not, unlike a class proceeding, binding on the claimants who are not named plaintiffs.⁵⁰ It is true that the outcome of the test case may influence the outcome of any future proceedings initiated by the other claimants. However, as the Law Reform Commission of Ireland has recently indicated:

The extent to which the test case serves as a benchmark for subsequent proceedings varies depending upon the nature of the action and the prevalence of common claims among the putative plaintiffs. The matter is straightforward where the original ruling declares a legislative or administrative act to be unconstitutional and, at the other end of the scale, considerably more complicated where there is a need for individualised assessments of damages.⁵¹

Furthermore, as French J of the Federal Court of Australia has explained, even in straightforward situations a class proceeding is still to be preferred.⁵² Another fundamental problem with this device is that it “is essentially an individualised means of resolving collective grievances”.⁵³ This problem was described as follows by the Manitoba Law Reform Commission:

The plaintiff does not owe any legal obligation to have regard to the impact of their case on future litigation by others, and the lawyer is bound to obtain the most favourable result for the client – even if such a result may create a precedent which is not useful, or is potentially harmful, to other similar

⁴⁷ Willinston and Rolls, *The Law of Civil Procedure* (Vol 1; 1970), 415 as quoted in OLRC Report, above n 37, 86.

⁴⁸ HCAL 174/2002 and HCAL 198/2002; Hon Chung J; High Court of the Hong Kong Special Administrative Region; 11 July 2003.

⁴⁹ *Bennett v Lord Bury* (1880) 5 CPD 339, 343-344 (per Lindley J); *Amos v Chadwick* (1878) 9 Ch D 459, 462-463 (per Jessel MR); and ALRC 1988 Report, above n 12, para 53.

⁵⁰ See MLRC Report, above n 39, 11; *Lacroix v Canada Mortgage and Housing Corp* [2003] OJ No 2610, para 61 (per Charbonneau J); ALRC 1988 Report, above n 12, para 54; DR Hensler, “Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation” (2001) 11 *Duke Journal of Comparative and International Law* 179, 191; OLRC Report, above n 37, 88; NSW Law Foundation, above n 39, para 1.3; Kellam and Clark, above n 40, para 15.14; and Donnan, above n 40, 85.

⁵¹ Law Reform Commission of Ireland, *Consultation Paper on Multi-Party Litigation (Class Actions)* (Consultation Paper no 25; 2003), para 1.31 (“LRCI Report”).

⁵² “Where the lawfulness of a policy is contested by an individual, that test case may, pending an appeal, establish the law. However, it does not provide as firm a bulwark against re-litigation of the same point in like cases as does the determination in [class] proceedings which directly binds the decision-maker and members of the group”: *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 118 ALR 165, 184.

⁵³ LRCI Report, above n 51, para 1.32.

litigants. Furthermore, test cases are often settled on terms favourable to the plaintiff without a resolution of the underlying issues (such as admissions of liability, amendments of legislation, or changes in government programming) that gave rise to the litigation in the first place.⁵⁴

Another unsatisfactory aspect of this device is that the commencement of the test case does not suspend the operation of the statute of limitations with respect to the claims of the other claimants.⁵⁵ Another limitation of the test case device is that it does not actually reduce the number of individual proceedings. The reasons for this state of affairs were aptly explained by the Law Reform Commission of Ireland:

The test case approach may be less of a boon in terms of judicial economy than popularly imagined. The benchmark provided by a test case clearly reduces the length and cost of subsequent proceedings principally by narrowing the range of disputed issues and promoting settlement. However, the test case does not obviate the need for each subsequent plaintiff to file an action which is then processed by the courts in the conventional way. In other words, although subsequent cases may be simplified, their number is not reduced; in fact, one might argue that the publicity surrounding a test case invites litigation and raises unrealistic expectations on the part of potential litigants.⁵⁶

Test cases do not address the inability to gain access to the courts where the claims of each of the relevant claimants are individually non-recoverable.⁵⁷ Attention should also be drawn to the difficulty of finding a plaintiff willing to run a test case given that he/she has no right to be indemnified for costs by the other litigants and in light of the fact that the costs that may be recovered from the defendant (in the event of the plaintiff's victory in the test case) may actually exceed the amount of damages awarded to the plaintiff.⁵⁸

Consolidation

Again, the Victorian rules provide a good illustration of the principles governing this procedure. Rule 9.12 of these rules provides that where several proceedings are pending, the court may order those proceedings to be consolidated, or tried at the same time, or tried one immediately after another, or may order them to be stayed until the determination of any of them. This power may only be exercised where it appears to the court:

- that some common questions of law or fact arise in both or all of them;
- that the rights to relief claimed therein are in respect of, or arise out of, the same transaction or series of transactions; or
- that for some other reason it is desirable to make an order under the rule.

Grave and Adams have aptly drawn attention to the fact that this procedure represents “a means of dealing with proceedings which have already been commenced and which raise common questions. It does not assist in achieving the policy objective [of enhancing access to justice] where the cost of litigation or other factors are a barrier to the bringing of proceedings”.⁵⁹

⁵⁴ MLRC Report, above n 39, 10. See also A Conte and H Newberg, *Newberg on Class Actions* (4th ed; 2002; Vol 2), 253.

⁵⁵ See Kellam and Clark, above n 40, para 15.15; and *Chace v Crane Canada Inc* (1996) 5 CPC (4th) 292, 298-299 (per Mackenzie J).

⁵⁶ LRCI Report, above n 51, para 1.34.

⁵⁷ ALRC 1988 Report, above n 12, para 56; and OLRC Report, above n 37, 87.

⁵⁸ Conte and Newberg, above n 54, 256; and ALRC 1988 Report, above n 12, paras 55-56.

⁵⁹ Grave and Adams, above n 3, 19.

PLEASE NOTE THAT, IN LIGHT OF THE ANALYSIS ABOVE, IN THE REMAINDER OF THIS REPORT ONLY AUSTRALIA’S STATUTORY CLASS ACTION REGIMES AND THE RULES GOVERNING REPRESENTATIVE PROCEEDINGS WILL BE CONSIDERED

3. For each litigation mechanism identified above, please provide a general description of the process contemplated by the formal rules.

Class Action Regimes

Both regimes deal expressly with many of the issues that are raised by the institution, conduct and termination of class proceedings. A proceeding may be brought under Part IVA and Part 4A as long as three threshold requirements, articulated in the answer to question 4 below, are satisfied. Neither regime employs a certification device. However, the Court may terminate a proceeding, as a class proceeding, if upon an application by the defendant⁶⁰ it is satisfied that the litigation does not satisfy the threshold requirements mentioned above. Even where it is judicially held that there has been compliance with these requirements, the Court is empowered to discontinue the proceeding, as a class proceeding, where certain scenarios exist. These powers are explored in the answer to question 4 below.

As explained in the answer to question 4 below, an opt out regime was preferred by the drafters of both regimes. As a consequence, we have 33ZB. This provision, which has been described by the Full Federal Court as the “pivotal provision of Part IVA”,⁶¹ provides that a judgment handed down in a class proceeding “binds all such persons [described or otherwise identified in the judgment] other than any person who has opted out of the proceeding”.

Extensive “managerial” powers are conferred upon trial judges. As noted by the ALRC, “without active court management, the interests of unidentified parties may not be taken properly into account”.⁶² The provisions of Australia’s class action regimes have incorporated the recommendations of the ALRC, which stem from the above mentioned proposition, as trial

⁶⁰ It should be noted that in the Federal Court of Australia defendants are known as respondents. However, in this report the more conventional term of defendants will be employed when referring to those persons and entities against whom a proceeding is brought whether in Victoria’s Supreme Court or in the Federal Court.

⁶¹ *Femcare Ltd v Bright* (2000) 172 ALR 713, para 25 (per Black CJ, Sackville and Emmett JJ). See also, *Jenkins v NZI Securities Australia Ltd* (1994) 52 FCR 572, 576-577 (per Beaumont, Gummow and Carr JJ) where the Full Federal Court of Australia explained that “the discretion to make a declaratory order ... will miscarry if there is a failure to consider its impact upon group members whose substantive rights will be bound by it. One purpose of s 33ZB is to make it plain on the face of the record that such matters have entered into the decision-making process leading to the grant of such a declaratory order”. See further J Basten, “Representative Proceedings in New South Wales - Some Practical Problems” (1996) 34(2) *Law Society Journal* 45, 47; *Fernando v Ruddock* [2000] FCA 1151; and *Zhang de Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 118 ALR 165, 185-186 (per French J) (“[as a result of s 33ZB], in a case in which the group members have not raised individual claims but have been defined into the group on their related circumstances and the common issue, it is necessary that care be taken to ensure that claims based on individual circumstances of which the court knows nothing are not prejudiced”).

⁶² ALRC 1988 Report, above n 12, para 157. See also Lord Woolf, above n 40, 231-232; SLC Report, above n 27, para 4.85; OLRC Report, above n 37, 446; and MLRC Report, above n 39, 86-88.

judges are empowered to take an active role in protecting the interests of parties not before the Court.⁶³ In fact, the Court has been vested with the (already mentioned) broad power to order the discontinuance of a properly instituted class proceeding,⁶⁴ to substitute a representative plaintiff who is not adequately representing the interests of the class members⁶⁵ and to establish, in the case of issues common to the claims of only some of the class members, a sub-group and appoint a person to be the sub-group representative party on behalf of the sub-group members.⁶⁶ The Court needs to give its approval before a class action can be settled or discontinued⁶⁷ and before settlement of the representative plaintiff's individual claim can take place.⁶⁸

Further examples of the interventionist role which the Federal Court and Victoria's Supreme Court are expected to assume are provided by s 33X(5) which allows the Court "at any stage, [to] order that notice of any matter be given" to class members and by the Court's direct involvement in "administering and distributing monetary relief".⁶⁹ But perhaps the most important provision is s 33ZF(1) which empowers the Court to make "any order... [it] thinks appropriate or necessary to ensure that justice is done in the proceedings".

Representative Proceedings

The numerous provisions governing class proceedings in the Federal Court and Victoria's Supreme Court stand in stark contrast to the brevity of the rules governing representative proceedings brought before Australian courts. As noted in August 2006 by Gummow, Hayne and Crennan JJ of the High Court of Australia, with respect to the NSW representative action rules:

It is to be noted that [the NSW rules] contained few provisions equivalent to those found in the more elaborate regulation of representative proceedings provided by Part IVA ... In particular, there are no provisions of the [NSW] rules that are immediately equivalent to the provisions of s 33C(1)(a) (requiring that seven or more persons have claims against the same person for the procedures of Part IVA to be engaged), s 33J (providing for group members to opt out of representative proceedings), s 33T (empowering the Court to substitute another group member for a representative party not able adequately to represent the interests of the group) or s 33V (in so far as it requires the approval of the Court for settlement or discontinuance of the proceedings).⁷⁰

In fact, the rules governing traditional representative proceedings expressly deal only with: (a) the conditions that need to be satisfied before a representative proceeding may be brought; (b) the discretion of trial judges to terminate properly instituted representative proceedings; and (c) the issue of whether a judgment entered or an order made in a representative proceeding may be enforced against a member of a represented group. However, as explained in the answer to

⁶³ "The other main feature of the Bill [which introduced Pt IVA] is the comprehensive powers given to the Court to ensure that the proceedings are not abused": Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3175 (Mr Duffy – Federal Attorney-General).

⁶⁴ Part IVA, ss 33L, 33M, 33N and 33P and Part 4A, ss 33L, 33M, 33N and 33P.

⁶⁵ Part IVA, s 33T and Part 4A, s 33T. Chief Justice Gleeson of the High Court of Australia has explained that this power does not constitute "a mechanism for the plaintiff to be replaced on the application of group members who disagree with the way the case is being run": *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161, para 5.

⁶⁶ Part IVA, s 33A and Part 4A, s 33A.

⁶⁷ Part IVA, s 33V(1) and Part 4A, s 33V(1).

⁶⁸ Part IVA, s 33W(1) and Part 4A, s 33W(1).

⁶⁹ ALRC 1988 Report, above n 12, para 158.

⁷⁰ *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 ALR 58, para 47. See also *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382, 388 (per Gleeson CJ).

question 4 below, since November 2007, the relevant New South Wales rule also deals with other aspects of representative actions.

With respect to issue (a), the Australian rules usually require compliance with two requirements that may be referred to as the numerosity and commonality requirements. The first requirement entails demonstrating the existence of either “numerous” claimants or a specified number of claimants. The commonality requirement usually entails the claimants in question having the same interest in the proceeding. With respect to issue (b), it is commonly provided that, once the prerequisites mentioned above have been satisfied, a representative proceeding may be commenced and continued “unless the Court otherwise orders”. Finally, the Australian rules provide that whilst a judgment entered or an order made in a representative proceeding is binding on the members of the represented group they may not be enforced against any of them except with the leave of the Court.

It is fascinating to note that despite their brevity, Australia’s representative action rules authorise proceedings not envisaged/permitted by the more sophisticated and detailed class action regimes, namely, proceedings against a defendant as a representative of a group of defendants. That is to say, in Australia whilst you may be able to institute a defendant representative proceeding, you are not permitted to file a defendant class proceeding.⁷¹ This interesting scenario is attributable to the following recommendation contained in the ALRC’s 1988 report:

Representative defendant actions have the potential to impose direct liability on a member of the group. There is a strong argument for personal notice to be given to members of a defendant group. There may also be stronger arguments for ensuring that group members have general rights to opt out or intervene. These differences suggest that special rules may be needed to meet particular issues arising for defendant class actions. The issues merit separate study. The Commission makes no recommendations with respect to defendant classes in this report. The existing representative procedure should, however, be retained to enable defendant representative actions to be brought in appropriate circumstances.⁷²

Equally fascinating is the fact that the author’s review of the reported decisions on Australia’s representative actions clearly suggests that proceedings brought against representative defendants are more frequent than proceedings instituted on behalf of a group of claimants.

4. In representative litigation, who may come forward to represent groups of claimants, in what circumstances? Must class members all come forward individually (“opt in”) to join the litigation, in some or all circumstances?

➤ Class Representatives

As already noted, a proceeding may be brought under the Federal and Victorian regimes as long as the proceeding in question satisfies three “threshold”⁷³ requirements.⁷⁴ The first requirement is that seven or more persons have claims against the same person. The second requirement is that

⁷¹ The benefits that may be secured through defendant class actions are actually very similar to the policy goals of plaintiff class actions: see V Morabito, “Defendant Class Actions and the Right to Opt Out – Lessons for Canada from the United States” (2004) 14 *Duke Journal of Comparative and International Law* 197, 197-200 and the references cited therein.

⁷² ALRC 1988 Report, above n 12, para 6.

⁷³ See *Wong v Silkfield Pty Ltd* (1999) 165 ALR 373, 381 (per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); and *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, 514 (per Sackville J).

⁷⁴ Part IVA, s 33C(1) and Part 4A, s 33C(1).

the claims are in respect of, or arise out of, the same, similar or related circumstances. The final prerequisite is that the claims of the group give rise to a substantial common issue of law or fact.

Adherence to these prerequisites enables the commencement of a class proceeding by one of the seven or more claimants “as representing some or all of them”. Section 33C(2)(a) provides that a class suit may be commenced whether or not the relief sought is, or includes, equitable relief; consists of, or includes, damages; includes claims for damages that would require individual assessment; or is the same for each person represented. Section 33C(2)(b) provides that a proceeding may be brought as a class proceeding whether or not the proceeding is concerned with separate contracts or transactions between the defendant in the proceeding and individual group members; and whether or not it involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.⁷⁵

Section 33D(1) of both regimes provides that:

A person referred to in paragraph 33C(1)(a) who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding against that other person on behalf of other persons referred to in that paragraph.

This provision thus confirms the existence of the requirement that emerges from the terms of s 33C(1), namely, that the class representative needs to be one of the seven or more persons, mentioned in s 33C(1)(a), who have claims against the defendant. The unsatisfactory nature of this approach may best be illustrated by considering its inconsistency with the access to justice goal of Australia’s class action regimes, referred to above. Broadly speaking, there are two types of barriers that impede persons with a legal grievance from pursuing a legal remedy, and which the class action device is intended to overcome: financial barriers and non-financial barriers. As succinctly noted by the Ontario Law Reform Commission, “many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers”.⁷⁶

Where no member of the relevant group of claimants is able to overcome both types of barriers, no class proceeding will be instituted on behalf of the relevant group. As noted by a Canadian commentator, “is it reasonable to expect that, of those afraid to sue for themselves, one will emerge to sue for all?”⁷⁷ This means that the class action device will not be employed precisely in those circumstances where it is needed the most and where it is intended to operate. If, on the other hand, class proceedings could be commenced by well-resourced “ideological” plaintiffs, such as, for instance, consumers associations or environmental associations, then this problem may be addressed, at least in some circumstances.

Fortunately, the Federal Court of Australia has held that in order to have a “claim” for the purposes of s 33C(1), and thus be able to institute a class proceeding, it is not necessary to have

⁷⁵ See *Wong v Silkfield Pty Ltd* (1999) 165 ALR 373, 376 (per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

⁷⁶ OLRC Report, above n 37, 139. See also *1176560 Ontario Ltd v The Great Atlantic & Pacific Co of Canada Ltd*, 2002 Ont Sup CJ LEXIS 2263, at 34 where Justice Winkler of the Ontario Superior Court of Justice explained that “although class proceedings serve a primary purpose of permitting meritorious, non-economic claims to be litigated, there are cases where economic considerations are not the only barriers to litigation”.

⁷⁷ HP Glenn, “Class Actions in Ontario and Quebec” (1984) 62 *Canadian Bar Review* 247, 267 n128.

suffered personally from the relevant conduct of the defendants. All that is necessary is that the representative plaintiffs have standing to sue. This requirement may, in turn, be satisfied through legislative provisions which allow any member of the public (or specified persons or entities) to institute legal proceedings with respect to certain types of illegal conduct.⁷⁸ This approach appears to be dictated by a judicial recognition of the important role that ideological plaintiffs can play in the operation of the class action device. It is unlikely that the class proceedings in *Chats House* and *Golden Sphere*, analysed below, would have been initiated by one of the members of the relevant classes of claimants. But even if this conclusion is incorrect, it appears reasonable to assert that the resources and expertise of the Australian Competition and Consumer Commission were at least equal to the resources and expertise of any individual member of the relevant group. It is, therefore, not difficult to agree with the following observations of the Ontario Law Reform Commission:

a particular individual, because of some special ability or experience, may be not only an adequate class representative but the most adequate class representative. This may be the case even though he himself has not suffered any injury, has no individual standing to sue the defendant and, *a fortiori*, is not a member of the class.⁷⁹

➤ Opt Out Regimes

The Commonwealth and Victorian Parliaments, acting on the recommendations of the ALRC,⁸⁰ “opted” for an opt out scheme in relation to class actions brought under Part IVA and Part 4A. In fact, s 33E of both regimes provides that the consent of a person to be a group member in a representative proceeding is not required unless that person is the Commonwealth, a State or Territory, or a Minister, officer or certain agencies of the Commonwealth, a State or a Territory.⁸¹ In order to accommodate the opt out model, it is provided that an application commencing a class proceeding, in describing or otherwise identifying class members to whom the suit relates, need not “name, or specify the number of, the group members”.⁸² The other crucial provision is s 33J which governs the manner in which the right to opt out may be exercised. It provides that:

⁷⁸ See V Morabito, “Ideological Plaintiffs and Class Actions - An Australian Perspective” (2001) 34 *University of British Columbia Law Review* 459.

⁷⁹ OLRC Report, above n 37, 349. See also DA Crerar, “The Restitutionary Class Action: Canadian Class Proceedings Legislation as a Vehicle for the Restitution of Unlawfully Demanded Payments, Ultra Vires Taxes, and Other Unjust Enrichments” (1998) 56 *University of Toronto Faculty of Law Review* 47, 92: “the most important modern Canadian jurisprudence has come about as a result of social and political organizations exercising a watchdog role through litigation. Similarly, there exist many consumer and taxpayer organizations that would be well-motivated to launch a suit even where individual recovery would be slight”.

⁸⁰ ALRC 1988 Report, above n 12, para 1.

⁸¹ This exception is justified in the Explanatory Memorandum, with respect to Part IVA, on the ground that “the activities of governments, government agencies, Ministers and officials may be subject to legislative and other restraints which make inappropriate the inclusion of such persons in a representative proceeding without consent”: *Explanatory Memorandum to the Federal Court of Australia (Amendment) Bill 1991 (Cth)*, para 14. A similar rationale has been put forward by the ALRC: ALRC 1988 Report, above n 12, para 128. See also *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424; and *CPSU, Community & Public Sector Union v Commonwealth* [1999] FCA 653.

⁸² Part IVA, s 33H(2) and Part 4A, s 33H(2). As explained by Lehane J of the Federal Court in *Bright v Femcare Ltd* [2000] FCA 1179, para 19: “it is an inevitable aspect of proceedings under Pt IVA, I should think, that in many cases a substantial number of members of the represented group will be unknown”. See also *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424, 428 (per O’Loughlin J).

- The Court must fix a date before which a class member⁸³ may opt out of a class proceeding.
- A class member may opt out of the class proceeding by written notice given under the Rules of the Court⁸⁴ before the date so fixed.
- The Court, on the application of a class member, the representative party or the defendant in the proceeding, may fix another date so as to extend the period during which a class member may opt out of the class proceeding.⁸⁵
- Except with the leave of the Court, the hearing of a class proceeding must not commence earlier than the date before which a class member may opt out of the proceeding.

Notice is required to be given to class members of the commencement of the proceeding and of the right of the group members to opt out of the proceeding before the date fixed by the Court pursuant to s 33J(1).⁸⁶ However, the Court is empowered not to require notices to group members where the relief sought on behalf of the class does not include damages.⁸⁷ The form and content

⁸³ “Group member” is defined in s 33A as “a member of a group of persons on whose behalf a representative proceeding has been commenced”. It is interesting to note that one of the few differences between Part 4A and Part IVA is s 33KA of the Victorian regime. This provision empowers the Supreme Court to order, at any time, whether before or after judgment, that a person cease to be a group member or that a person not become a group member. This power may be exercised where the Court is of the opinion that the person does not have sufficient connection with Australia to justify inclusion as a group member or where for any other reason it is just or expedient that the person should not be or should not become a group member. The purpose of this provision is “to reflect common law principles regarding the Court’s capacity to exercise jurisdiction over the parties and subject matter of proceedings”: *Explanatory Memorandum to the Courts and Tribunals Legislation (Miscellaneous Amendments) Bill 2000*, 7. See also *Dagi v Broken Hill Proprietary Company Limited* [2000] VSC 486; and J Beach, “Representative Proceedings - Some Current Issues” (paper presented at a seminar on Recent Developments in Class Actions held in Melbourne in October 2000), paras 8-9.

⁸⁴ Order 73 rule 6 of the Federal Court Rules provides that an opt out notice “may be in accordance with Form 131”. In *Australian Competition and Consumer Competition v Chats House Investment Pty Ltd* (1996) 142 ALR 177, 180 Branson J noted that “O 73 r 6 of the Federal Court Rules assumes that a notice given under s 33J(2) ... must be filed in the Court. In my view this assumption accurately reflects the intention of s 33J(2). The date fixed pursuant to s 33J(1) is a date before which a group member may opt out of the representative proceeding by filing at the court an appropriate notice in writing”. In *Jonsandi Transport Pty Ltd v Paccar Australia Pty Ltd* [1999] FCA 876, para 6, Heerey J of the Federal Court commented that “the requirements of Form 131 might be a little confusing for recipients of the notices, who would be unlikely to be legally trained. They are expected to apprehend that it is addressed to three separate recipients and, presumably from their own resources, make several photocopies and dispatch them to the three addresses”.

⁸⁵ In *Australian Competition and Consumer Competition v Chats House Investment Pty Ltd* (1996) 142 ALR 177 Branson J noted that an order made under s 33J(3) could be employed to rectify a defect of a formal nature in the opt out notices issued in the Part IVA proceeding..

⁸⁶ Part IVA, s 33X(1)(a) and Part 4A, s 33X(1)(a). See also *King v GIO Australia Holdings Limited* (2000) 100 FCR 209, para 3 (per Moore J): “subsection (6) of [s 33X] requires that notice be given as soon as practicable after the happening of the event to which the notice relates. In so far as the notice concerns the commencement of the proceeding (and the right to opt out) then the notice must be given as soon as practicable after the proceeding has commenced. This, in my opinion, tends to indicate that the focus of the notice ... would be on the circumstances existing at or comparatively shortly after the proceeding was commenced”.

⁸⁷ Part IVA, s 33X(2) and Part 4A, s 33X(2).

of the notice must be approved by the Court.⁸⁸ The Court is also empowered to determine who is to bear the costs of the distribution/publication of such notices.⁸⁹

The issue of precisely what restrictions, if any, an opt out regime places on the way in which the class representative defines the class/group on whose behalf a class proceeding is brought has recently come to the fore in Australia and has resulted in conflicting judicial pronouncements. What prompted this development was the so-called “MBC criterion”, a mechanism employed by Maurice Blackburn Cashman Pty Ltd (“MBC”) (now called Maurice Blackburn Lawyers) – the law firm that has acted in many Part IVA and Part 4A proceedings – pursuant to which the group represented in (and thus bound by the outcome of) a number of class proceedings was limited only to those victims of the allegedly illegal conduct of the defendants who were also clients of MBC.

In the *Dorajay Pty Ltd v Aristocrat Leisure Limited* shareholder Part IVA action, Justice Stone of the Federal Court explained that, pursuant to the mechanism governing the MBC criterion in that proceeding, MBC only accepted instructions to act for the aggrieved shareholders upon such shareholders entering into a retainer agreement with MBC. A term of this retainer agreement, in turn, imposed the requirement that the class members also enter into a funding agreement with Insolvency Litigation Fund Pty Ltd (“ILF”).⁹⁰ As a result of this funding agreement, ILF was responsible for “all legal costs and disbursements ... incurred by the Solicitors ... for the sole purpose of the commencement, and prosecution, of the proceedings”,⁹¹ as well as any adverse costs orders (including orders that the class representative provide security for costs).⁹² ILF was entitled to receive, in the event of a victory by the plaintiff class, reimbursement of its expenditures as well as the payment of between 20% and 40% of the compensation that the class members were entitled to receive from the litigation.⁹³

The use of this MBC criterion provoked the following strong reaction from Justice Stone in a judgment handed down in the *Aristocrat* proceeding in October 2005:

I find that the requirement that group members opt in to the proceeding to be inconsistent with the terms and policy of Part IVA. It is inappropriate that the proceeding continue under Part IVA while the MBC criterion is part of the description of the representative group. I also find that, in the way in which the MBC criterion subverts the opt out process, it is an abuse of the Court’s processes as established by Part IVA.

The second, perhaps even more fundamental, objection to the MBC criterion is that it dictates who should represent group members. I find it an extraordinary proposition that the definition of the representative group should be used to confine a representative group to the clients of one solicitor,

⁸⁸ Part IVA, s 33Y(2) and Part 4A, s 33Y(2). Order 73 rule 5 of the Federal Court rules provides that an application for an order involving notice must be made by notice of motion. This motion must (a) have attached a supporting affidavit that sets out to the best information, knowledge and belief of the applicant: (i) the identity or description of the group members; and (ii) the whereabouts of the group members; and (iii) the means by which a notice ordered by the Court is most likely to come to the attention of the group members; and (b) be served on all other parties.

⁸⁹ Part IVA, s 33Y(2) and Part 4A, s 33Y(2).

⁹⁰ *Dorajay Pty Ltd v Aristocrat Leisure Limited* (2005) 147 FCR 394, para 76.

⁹¹ *Ibid* para 14.

⁹² *Ibid* para 77; and B Slade, “Australian Shareholders and Extraterritorial Class Actions” (paper presented at the International Class Actions Conference; Melbourne; December 2005), para 9.3.

⁹³ *Dorajay Pty Ltd v Aristocrat Leisure Limited* (2005) 147 FCR 394, para 77 (per Stone J).

however narrowly the group is otherwise defined. In my view there is no support in principle or authority for this proposition and it is repugnant to the policy of the Act.⁹⁴

The analysis of Stone J was adopted by Hansen J of the Supreme Court of Victoria in a Part 4A proceeding⁹⁵ where again MBC sought to represent only those victims who signed a funding agreement with a commercial litigation funding company and a fee and retainer agreement with MBC. A different conclusion, regarding the compatibility of class narrowing mechanisms with opt out devices, was recently arrived at by Justice Finkelstein of the Federal Court in *P Dawson Nominees Pty Ltd v Multiplex Limited*. Like several commentators who considered this issue after Stone J's ruling, Finkelstein J placed reliance on, among other things, the significant barriers that are faced by aspiring class representatives as well as the crucial fact that s 33C of both regimes provides that where there has been compliance with the three commencement criteria, a proceeding may be brought on behalf of "all or some" of the claimants.⁹⁶

The second thing to observe is that the only persons excluded from the group are free riders, that is persons who make no direct or indirect contribution toward the costs of the action. In my opinion, this is not inconsistent with Part IVA. When Parliament rejected the [ALRC's] recommendation that the represented group should include all persons with common claims, it must have had in mind the likelihood that the represented group would be selected by criterion that bore no necessary relationship to the causes of action being pursued. ... [A] group that excludes free riders cannot be criticised. On the contrary, there are economically rational reasons to establish such a group. The most obvious is that it provides each potential group member with an incentive to agree to contribute. It also keeps the cost or the burden of purchasing the costs down for each individual. There are other advantages in keeping group numbers down. For one thing, it is probably easier to settle a smaller claim. For another, there is a greater prospect of obtaining a higher percentage of the amount claimed by way of compromise. Even respondents may benefit from the prospect of a smaller payout. Indeed, it is odd to hear a complaint from a defendant that there are too few plaintiffs.

While consent to bring an action is not required by Part IVA, it is not forbidden. In effect the question raised by the respondents is whether a class action can be commenced consensually by a self elected group that has decided to exclude others who also have claims against the respondents. The basis for the selection seems to be irrelevant. I see no reason why that course should not be permitted.

⁹⁴ Ibid paras 125-126 (per Stone J).

⁹⁵ *Rod Investments (Vic) Pty Ltd v Clark (No 2)* [2006] VSC 342.

⁹⁶ See, for instance, V Morabito, "Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors" (2007) 29 *Sydney Law Review* 5, 13 and 22 ("this aspect of s 33C is significant for a number of reasons. The first is that it demonstrates, quite clearly, that there is no requirement to the effect that a class proceeding needs to be brought on behalf of each and every person whose claim satisfies the three commencement prerequisites. On the contrary, we have an express legislative conferral, upon class representatives, of the discretion to exclude from the ambit of class proceedings some of the potential claimants. The second, and more general, principle that emerges from s 33C is that Part IVA and Part 4A do not seek to dictate the manner in which the representative group is defined/described and which of the potential claimants are included in the group. This is an issue that is left entirely to the discretion of the representative plaintiff. ... But what if the effect of the judicial rejection of the MBC criterion is that it will substantially decrease the employment of the class action device and thus render more difficult the attainment of the desirable goals of access to justice and judicial economy? In such a scenario the use of the MBC criterion may be said to represent the lesser of two evils as a class proceeding that benefits a limited number of victims is better than no class proceeding at all"). See also P Cashman, "Class Actions on Behalf of Clients: Is This Permissible?" (2006) 80 *Australian Law Journal* 738.

[A]ll that Part IVA requires (assuming for the moment that it is not permissible to contract out of s 33J) is that a group member can opt out of a group proceeding. That is what these group members can do. In other words, if a group member decides that he does not want to be bound by any judgment in the action there is nothing preventing him from opting out at the appropriate time.⁹⁷

The mechanism controlling the description of the represented group in *Multiplex* differed in two minor ways from the mechanism rejected by Stone J in *Aristocrat*. The inclusion of potential claimants in the *Multiplex* proceeding expressly depended on the execution of a funding agreement with the commercial litigation funders rather than on the execution of a fee and retainer agreement with the class representative's solicitors. The other difference between the *Multiplex* mechanism and the MBC criterion employed in *Aristocrat* was that in the former, the relevant prerequisite needed to be satisfied "as at the commencement of the proceeding", whilst in *Aristocrat* it could be satisfied at any time during the course of the proceeding. The Full Federal Court will express its view on this issue, in the *Multiplex* litigation, early next year.

What interests and organisations have availed themselves of the procedure?

Class proceedings have been instituted in Australia with respect to a diverse range of claims and by different types of individuals and entities. Taxpayers, shareholders, employees, consumers, purchasers of apartments, businesses and those who have suffered personal injury as a result of defective products and/or contaminated food and water have been involved in class proceedings. Class proceedings have also been brought with respect to, among others, environmental claims, the operation of the *Migration Act 1958* (Cth), the interruption of gas supply in Victoria and anti-competitive behaviour such as price fixing and market sharing arrangements.⁹⁸

Until approximately four years ago, the most frequent class proceedings were for personal injury for negligence or breach of the *Trade Practices Act 1974* (Cth) as a result of food poisoning or defective products. The "substantive" developments which have made these types of class proceedings less appealing to plaintiff solicitors have been accurately described by Bernard Murphy, chairman of MBC:

[As a result of the] so called "tort reform" legislation passed in 2003 and 2004 in each Australian State or Territory, and also by amendment to *Trade Practices Act 1974* (Cth), the ability of claimants to bring such claims has been severely curtailed. Unless the victims suffer from a serious long term injury, no general damages are payable. In a class action context, mass food poisoning outbreaks often cause diarrhea, vomiting and short term hospitalisation, but a long term injury sequelae only arises in a small number of such cases. Class actions of this type will effectively cease as a result of these changes ...

The "tort reforms" will also operate to reduce access to justice for the thousands of victims of defective products who had used the class action regime to successfully obtain damages. For example, the level of injury suffered by most of the victims in the pacemaker lead cases would not satisfy the new thresholds. ... Even if some injuries are sufficiently serious to continue to be able to be maintained, the changes create a level of complexity in that only those who can satisfy the guidelines have a viable claim and can therefore be within a class definition. The requirement to ascertain which potential class members might be included within the class is difficult and expensive, and reduces the utility of the regime.⁹⁹

⁹⁷ *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061, paras 48-50.

⁹⁸ See generally Grave and Adams, above n 3, 26-28; B Murphy, "Current Trends and Issues in Australian Class Actions" (paper presented at the International Class Actions Conference; Melbourne; December 2005), paras 2.1.1-2.1.7; Cashman, above n 32, ch 8; and Mulheron, above n 26, 13.

⁹⁹ Murphy, above n 98, 3-4.

Now the most common types of class actions are the so-called shareholder class actions instituted with respect to losses suffered by shareholders and investors as a result of allegedly misleading conduct by companies, directors or company advisers.¹⁰⁰

What roles have public justice officials and private lawyers played in prosecuting cases?

To the author's knowledge, there has been no involvement by public justice officials in prosecuting class proceedings. It is, however, worth drawing attention to the institution of several Part IVA proceedings by Australia's consumer "watchdog", the Australian Competition and Consumer Commission ("ACCC"). In *Australian Competition and Consumer Commission v Chats House Investment Pty Ltd*,¹⁰¹ for instance, the ACCC commenced a Part IVA proceeding seeking injunctive relief against the defendants and the payment of damages to the group members other than the ACCC. The first defendant had held itself out to the public as being willing and able to act for members of the public in respect of foreign exchange trading. The ACCC sought to represent members of the public who had paid moneys to the first defendant for investment. The ACCC claimed that the first defendant misled its clients into believing that they were engaging in foreign exchange trading when, in fact, no such trading was taking place. In commencing this proceeding, ACCC relied on the standing conferred upon it by s 80 of the *Trade Practices Act 1974* (Cth) ("TPA").¹⁰²

In *Australian Competition and Consumer Commission v Golden Sphere International*¹⁰³ the three defendants were alleged to have promoted, or have taken part in the promotion of, a pyramid selling scheme to which s 61(2A) of the TPA¹⁰⁴ applied. The ACCC instituted the proceeding on its own behalf but also on behalf of those persons who had participated in the pyramid selling scheme. The representative plaintiff sought injunctive relief against the three defendants. It also sought, on behalf of the other group members, a declaratory order that those members who had participated in the scheme were entitled to be repaid any money that they had paid in respect of the scheme. In both cases the Court awarded substantial damages to the class members other than the ACCC: \$550,000 in *Golden Sphere* and \$822,803 in *Chats House*.¹⁰⁵

➤ **Barriers to the Employment of the Class Action Device – The Costs and Funding of Class Actions**

¹⁰⁰ See generally C Waters, "The New Class Conflict: the Efficacy of Class Actions as a Remedy for Minority Shareholders" (2007) 25 *Company and Securities Law Journal* 300.

¹⁰¹ (1996) 142 ALR 177.

¹⁰² Section 80 of the TPA essentially allows the ACCC "or any other person" to seek injunctive relief with respect to conduct that is alleged to be in contravention of the restrictive trade practices or consumer protection provisions of the TPA.

¹⁰³ (1998) 83 FCR 424.

¹⁰⁴ Section 61(2A) prohibits the promotion by a company of a scheme under which a payment is made by a person who participates in a scheme to or for the benefit of, among others, the company and the inducement for making the payment is the holding out to the person who makes the payment the prospect of receiving payments from other persons who may participate in the scheme.

¹⁰⁵ As Grave and Adams, above n 3, 149 have indicated, "it is notable that there are no reported decisions involving the ACCC as the representative party in a representative proceeding commenced after 1999. It may thus be inferred that the ACCC has resolved to make less use of its power under Part IVA to commence representative proceedings for unlawful conduct within its purview".

Class members are bound by the outcome of a class proceeding without being formal parties to the litigation.¹⁰⁶ This confers upon them an immunity from adverse cost awards. This state of affairs is expressly confirmed by s 43(1A) of Part IVA and s 33ZD of Part 4A. In the absence of fee and retainer agreements, entered into between individual class members and the lawyers hired by the class representatives, class members are not liable for the costs and fees incurred in running the proceeding on the plaintiff's side. The term "free riders" has thus been used on a regular basis to describe the position of class members.¹⁰⁷ In many circumstances, it would not be financially rational for aspiring class representatives to institute class actions, unless they are able to shift to others the liability for (a) the fees and disbursements of the class representative's lawyers; (b) any costs awarded to the defendants in the event of a loss for the class; and (c) any security for costs orders granted to the defendants. This state of affairs was aptly described as follows by Justice Wilcox of the Federal Court of Australia:

The problem is that a representative party is exposed to the risk of an order to pay the costs of a respondent or respondents (the amount of which will usually be increased by the very fact that the proceeding is a representative one), without gaining any personal benefit from the representative role. So there is little or no incentive for a person to act as a representative party. Unless the person's potential costs are covered by someone else, there is a positive disincentive to taking that course.¹⁰⁸

Where the class representative's individual claims would not warrant individual litigation, it would make little sense for such claimants to bear the financial burden of a far more costly and complex type of litigation, namely, a class proceeding.¹⁰⁹ The validity of this latter description may be gauged by considering the costs entailed in furnishing to class members opt out notices, that is, notices that advise class members of the commencement of the class proceeding, the claims being pursued on behalf of the class, the description of the represented group and the right of the members of such group to exclude themselves from the litigation. Such notices are frequently published in newspapers and, as explained in the answer to question 7 below, are rather costly. In light of these and other significant costs entailed in running a class suit, the commencement of a traditional proceeding, where the individual claim of the claimant in question is individually recoverable, would again constitute a more appealing option than acting on behalf of a group of similarly situated claimants.

In its 1988 study of the class action procedure, the ALRC recognised that the general rules governing litigation costs, if applied unaltered to class actions, could constitute "a disincentive to bringing grouped proceedings and might in fact create yet another barrier to access to legal remedies of the kind which the recommended procedure itself aims to overcome".¹¹⁰ To address these problems, the ALRC recommended that the financial burdens be shifted from the class representatives to a class action fund and to their solicitors.

¹⁰⁶ *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 166 ALR 731, 738 (per Merkel J); and *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161, 175 (per Gaudron, Gummow and Hayne JJ).

¹⁰⁷ See Morabito, above n 28, 235-239 and the references cited therein.

¹⁰⁸ *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139, 145. See also MP Abdelkerim, "Class Counsel's Ethical Obligations" (2004) 18 *Windsor Review of Legal and Social Issues* 105, 110.

¹⁰⁹ Murphy and Watson have drawn attention to the fact that whilst "class actions are expensive to conduct ... they are not as expensive as running hundreds or thousands of separate claims by the victims of mass civil wrongs": B Murphy and A Watson, "Shareholder Class Actions and the Duties and Discretions of Superannuation Trustees" (paper presented at the 5th Annual ACSI Conference; Melbourne; June 2006), 9.

¹¹⁰ ALRC 1988 Report, above n 12, para 252. See also OLRC Report, above n 37, 647; LRCSA Report, above n 9, 6; and Lord Woolf, above n 40, 239.

With respect to the former strategy, the ALRC proposed the creation of a special fund to provide for the costs of parties involved in class proceedings.¹¹¹ This fund would apply a merit test to any application for financial assistance. The ALRC was of the view that “while there may be special cases where means should be taken into account, the focus of any special fund should be to provide funding based on merit”.¹¹² This fund would be used to “provide support for the applicants’ proceedings and to meet the costs of the respondent if the action is unsuccessful”.¹¹³

The other strategy proposed by the ALRC was that class representatives should be allowed to execute conditional fee agreements pursuant to which the class solicitor charges nothing if the case is lost and a higher than scale fee if the case is successful. This strategy would provide a means of financing group litigation and of overcoming the costs disincentives to the institution of class actions.¹¹⁴ Under the ALRC’s proposed regime, such arrangements could not come into effect until approved by the Court. Before giving this approval, the Court would need to be satisfied that the method of calculating the fees was fair and reasonable.¹¹⁵ Before the Court commenced its assessment of fee agreements, notice would be given of the fee agreement to the class members in order to provide them with the opportunity to appear before the Court and to argue against approval.¹¹⁶

Both proposals were rejected by the Federal legislature. No explanation was provided as to the reasons that prompted the rejection of the public fund recommendation. The non-implementation of the conditional fee recommendation was explained as follows by Senator Tate, the then Minister for Justice and Consumer Affairs, during the Second Reading of the Federal Court of Australia Amendment Bill 1991:

I do not believe this particular proposal will lead Australia to go down the United States road – as it is sometimes referred to – and become an overly litigious society ... I do not think we are going down that road by means of this proposal because we have set our face firmly against some features of the American legal system, such as contingency fees, which appear, from my observations over there recently, to drive the American legal system rather than the merits of the issues themselves.¹¹⁷

It is important to remember that, contrary to what Senator Tate indicated in the passage quoted above, the ALRC *did not* recommend the employment of contingency fees pursuant to which solicitors acting for the class representatives would be entitled to receive a percentage of the proceeds won on behalf of the class. The rejection of this recommendation provides an illustration of the drafters of Part IVA (and thus Part 4A) being unduly influenced by the strong attacks launched on the ALRC’s 1988 report and Part IVA, at the time they were unveiled, by the

¹¹¹ ALRC 1988 Report, above n 12, para 309.

¹¹² *Ibid* para 310.

¹¹³ *Ibid* para 308.

¹¹⁴ *Ibid* para 286.

¹¹⁵ *Ibid* para 293.

¹¹⁶ *Ibid*.

¹¹⁷ Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3025. Similarly, a number of US commentators have advocated the termination of the employment of contingency fee agreements in class actions: see L Brickman, “ABA Regulation of Contingency Fees: Money Talks, Ethics Walks” (1996) 65 *Fordham Law Review* 247, 299-315. On the other hand, the US Supreme Court has recognised that such agreements may enable the vindication of the rights of classes of similarly situated claimants: *Deposit Guaranty National Bank v Roper* 445 US 326, 338 (1980). See also FG Hawke, “Class Actions – The Negative View”, 1998 *Torts Law Journal Lexis* 7, at 16 where it is noted that “if society wants a class action facility it must also accept some form of contingent fee or other lawyer-finance arrangement to make it work”.

Liberal Party (then in Opposition), Australia's biggest law firms, the Business Council of Australia and several legal commentators.¹¹⁸

The rejection of the conditional fee recommendation has been superseded by the enactment, in some Australian States, of legislation that authorises such arrangements in most proceedings, including class proceedings. Pursuant to such conditional fee arrangements, class representative's lawyers are the ones that underwrite the high costs of the class proceedings in the hope that a successful outcome for the class will ensue. In Australia's first shareholder class action - *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)*¹¹⁹ - for instance, approximately 13 months before a settlement agreement was executed by the parties and approved by the Court, Justice Moore of the Federal Court revealed that the "[class representative's law firm] is not a party to the proceeding though it has not sought to disguise the fact that it is underwriting the costs of the litigation brought by Mr King [the class representative] which, to date, amount to almost five million dollars".¹²⁰ Furthermore, as noted by Murphy, "there is massive expenditure on barristers, experts and solicitor time involved and these expenses have to be carried for five to six years before payment. If the case is unsuccessful, that expenditure is lost".¹²¹ As already noted, in meeting these costs, no reliance may be placed on public funding.

Until recently, this has been the principal mechanism for financing class proceedings in Australia. However, in the last few years commercial litigation funders have entered Australia's class action arena. In *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*,¹²² the High Court of Australia held in August 2006 (by a 5:2 majority) that such involvement does not constitute an abuse of process. The restriction of the representative group to those claimants who are willing to enter into funding agreements with litigation funders (as well as fee and retainer agreements with the class representative's solicitors) has been an integral part of their involvement in class proceedings. The reasons for this strategy have recently been described as follows by the Victorian Law Reform Commission:

¹¹⁸ See, for instance, Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3019-3022 (Senator Durack); Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1991, 3284-3290 (Mr Peter Costello); DJ Harland, "Group Actions in Civil Procedure: Class Actions, Public Actions, *Parens Patriae* and Organisation Actions" in A E-S Tay (ed), *Australian Law and Legal Thinking – Between the Decades* (a collection of 33 Australian Reports to the 13th International Congress of Comparative Law presented in McGill University, Montreal on 18-24 August 1990) 101, 115; and W Pengilly, "Class Actions - A Legislative Hammer to Crack a Nut?" (1988) 26 (October) *Law Society of New South Wales Journal* 28.

¹¹⁹ [2003] FCA 980.

¹²⁰ *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 191 ALR 697, para 10 (per Moore J).

¹²¹ Murphy, above n 98, para 3.5.2.

¹²² (2006) 229 ALR 58. The Standing Committee of Attorney-Generals is currently considering whether legislative intervention is required with respect to litigation funding. During a conference on international class actions organised by MBC and held in Sydney in October 2007 Lindgren J of the Federal Court of Australia revealed that "the Council of Chief Justices of Australia and New Zealand has referred to a committee the question whether harmonised rules of court should be made relating to, relevantly, litigation funding. I think you can take it that one thing is clear: if there are to be such rules at all, they will be introduced at the same time and in a harmonised form by all the superior courts throughout Australia, that is, the Federal Court and all the State and Territory Supreme Courts. That is to say, either all courts will make the rules or none will": Justice KE Lindgren, "Class Actions and Access to Justice" (Keynote Address given at the International Class Actions Conference 2007 organised by Maurice Blackburn Lawyers in Sydney – 25-26 October 2007), 11.

Some commercial funders are prepared to finance the litigation, meet any obligations to provide security for costs and provide an indemnity in respect of any adverse costs order. This is usually in consideration of agreement by the assisted parties to pay to the litigation funder a specified percentage of the amount recovered if the litigation is successful.

However, such agreement cannot be entered into by the representative party on behalf of the class. Thus, in order to secure a legal entitlement to share in the amount recovered by class members litigation funders usually endeavour to get individual class members to enter into contractual litigation finance arrangements. Moreover, litigation funders are usually only agreeable to fund litigation on behalf of those individual class members who have agreed to enter into litigation finance agreements.

These commercial considerations have led to a proliferation of class actions where the defined classes are limited to persons who have agreed to enter into litigation funding arrangements with commercial litigation entities.¹²³

Where litigation funders are not involved, the immunity from adverse cost awards enjoyed by class members may also create problems for class action defendants as it creates an incentive to appoint, as class representatives, impecunious persons. Indeed, Clark and Harris have expressed the view that “plaintiffs’ lawyers are often careful to nominate as the representative party a person of straw – that is to say, someone who has no assets and who is therefore incapable of satisfying any significant order for costs made in favour of the defendant”.¹²⁴ To address this potential problem Grave and Adams contend that “legislative reform is desirable to permit the courts to order costs against a group member in appropriate circumstances in accordance with the principles applicable to non-representative proceedings”.¹²⁵ In recent times, Australian Courts have dealt with this problem by making security for costs orders against class representatives. But, as recently noted by Waters, “there is a risk that the availability of security for costs in class action proceedings may create issues of access to justice”.¹²⁶

➤ **Barriers to the Employment of the Class Action Device – The *Philip Morris* principle**

Significant problems have been generated by the way in which s 33C(1) has been judicially interpreted with respect to the following question: can a proceeding against more than one defendant be brought, as a class proceeding, where not all of the class representatives and class members have an individual claim against each of the defendants? This question is of great practical significance in light of the fact that, more often than not, illegal conduct that affects adversely a class of persons is engaged in by more than one person/entity. In fact, the author’s empirical study has revealed that in over 52% of all Part 4A proceedings there were multiple defendants.

¹²³ Victorian Law Reform Commission, *Civil Justice Review Draft Proposals* (2007), 49-50 (“VLRC Report”). See also Slade, above n 93, para 7.5.

¹²⁴ SS Clark and C Harris, “Multi-Plaintiff Litigation in Australia - A Comparative Perspective” (2001) 11 *Duke Journal of Comparative and International Law* 289, 303.

¹²⁵ Above n 3, 482.

¹²⁶ Above n 100, 306. See also V Morabito, “Class Actions in the Federal Court of Australia – The Story So Far” (2004) 10 *Canterbury Law Review* 229, 249-257; Mulheron, above n 26, 370-373; and B Murphy and C Cameron, “Access to Justice and the Evolution of Class Action Litigation in Australia” (2006) 30 *Melbourne University Law Review* 399, 420-422.

The Full Federal Court has considered this issue on two occasions, in 2000 and 2003. On the first occasion, the Court unanimously held, in *Philip Morris (Australia) Ltd v Nixon*,¹²⁷ that a multiple defendant proceeding may not be brought under Part IVA unless each class representative and each class member has an individual claim against each of the defendants. As a result of *Philip Morris*, a number of Federal and Victorian proceedings brought against multiple defendants were not allowed to proceed, as class proceedings, thereby precluding access to justice to the relevant claimants.¹²⁸

A differently constituted Full Federal Court considered this issue again in 2003 in *Bray v F Hoffmann-La Roche Ltd*.¹²⁹ Justices Carr and Finkelstein rejected the principle, enunciated in *Philip Morris*, that compliance with s 33C requires, in litigation involving more than one defendant, each class member making a claim against each defendant. The remaining justice, Justice Branson, was of the view that *Philip Morris* should be followed unless and until it is overruled by the High Court. But Justice Branson also made some comments, concerning what compliance with *Philip Morris* entails, which clearly suggested a far less strict approach, to standing in multiple defendant proceedings, than that embraced by the Court in *Philip Morris*. The approach followed by the majority justices in *Bray* brings the Australian law on this issue closer to the principles formulated by Courts in Ontario and British Columbia and to the approach that had been followed by several single justices of the Federal Court itself before *Philip Morris*.¹³⁰ But, more importantly, it facilitates the attainment of the policy goals of access to justice and judicial economy.¹³¹

Unfortunately, Justice Hansen of the Supreme Court of Victoria¹³² and a majority of Federal trial judges have held that *Philip Morris*, rather than *Bray*, represents the law governing this issue.¹³³ An additional dimension to this unsatisfactory state of affairs was generated by the recent enactment of proportionate liability legislation by, among others, the Commonwealth and Victorian legislatures. The requirements of this legislation and its adverse impact on multiple defendant class actions, as a result of *Philip Morris*, have been aptly described by Grave and Adams:

The legislation provides for the apportionment of liability so that the concurrent wrongdoer's liability is limited to the proportion of the damage the court considers just having regard to the extent of the concurrent wrongdoer's responsibility for the loss ... The defendants to an apportionable claim are not liable to contribute to the contribution recovered from another concurrent wrongdoer ... For a plaintiff to recover in full in one proceeding the plaintiff must join all possible wrongdoers or risk the court apportioning some damage to a non-party and the need for further proceedings. This is particularly problematic for [class] proceedings if each group member is required to have a claim against each respondent.¹³⁴

¹²⁷ (2000) 170 ALR 487.

¹²⁸ See, for instance, *Bright v Femcare Ltd* [2000] FCA 742, para 81 (per Lehane J); *Batten v CTMS Ltd* [2000] FCA 915; *Hunter Valley Community Investments Pty Ltd v Bell* [2001] FCA 201 and [2001] FCA 1148; *Sereika v Cardinal Financial Services Ltd* [2001] FCA 1715; *Milfull v Terranora Lakes Country Club Limited* [2002] FCA 178; and *Cook v Pasmenco Ltd* [2000] VSC 534. The Victorian Law Reform Commission has recently drawn attention to the fact that this restrictive judicial principle causes significant problems in product liability cases and investor class action litigation: VLRC Report, above n 123, 39-40.

¹²⁹ (2003) 200 ALR 607.

¹³⁰ See V Morabito, "Standing to Sue and Multiple Defendant Class Actions in Australia, Canada and the United States" (2003) 41 *Alberta Law Review* 295, 305-319.

¹³¹ See V Morabito, "Class Actions Against Multiple Respondents" (2002) 30 *Federal Law Review* 295.

¹³² *Rod Investments (Vic) Pty Ltd v Clark (No 2)* [2006] VSC 342.

¹³³ See Grave and Adams, above n 3, 103.

¹³⁴ *Ibid* 111-112.

➤ **Barriers to the Employment of the Class Action Device – “Interlocutory Warfare”**

One of the most significant issues that needed to be determined by the Victorian and Commonwealth legislatures, when drafting Parts 4A and IVA, was whether a certification regime should be implemented to ensure that only those proceedings that comply with the commencement requirements are allowed to be brought and conducted pursuant to the class action device. As noted by a Canadian commentator, “the first issue in any proposal for class action legislation is whether there is a need for a preliminary step in the process called ‘certification’ or ‘authorisation’”.¹³⁵ Under a certification regime those proposing to assume the role of representative plaintiffs are required to seek the authorisation of the Court before being able to avail themselves of the class action regime.

Unlike the vast majority of law reform entities that have considered class action reform, the ALRC recommended against the employment of the certification device. In so doing, the ALRC considered closely how this device had worked in Quebec – the only Canadian jurisdiction that had in place a detailed class action regime in 1988 when the ALRC completed its report – and in the US. The ALRC’s review of these regimes led it to conclude that:

The preliminary matter of the form of the proceedings has often been more complex and taken more time than the hearing of the substantive issues. Because the court’s discretion is involved, appeals are frequent, leading to delays and further expense. These expenses are wasteful and would discourage use of the procedure. There is no need to go to the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure at any time.¹³⁶

The rejection of a certification model was also based on the ALRC’s conclusion that, where the claims of the class members are individually non-recoverable, the denial of certification, on the basis that the interests of the class members would not be adequately protected, would represent a grossly unsatisfactory measure. This is because, by definition, the class action device constitutes the only means by which persons, with those types of claims, may seek access to legal remedies.¹³⁷

The drafters of the Commonwealth and Victorian regimes implemented this recommendation. Unfortunately, this desired scenario – of not expending excessive time and resources on deciding whether the use of the class action device is appropriate – which prompted the ALRC’s rejection of the certification procedure, has not been attained. In many class proceedings, defendants have sought to persuade the Court that the proceedings should not proceed as class proceedings because of a failure to comply with the commencement criteria or, alternatively, because it was appropriate for the Court to exercise its power to terminate properly constituted class proceedings. This strategy, together with challenges to other aspects of class proceedings, such as pleadings, have been primarily responsible for an undesirable scenario which was recently described as follows by Justice Finkelstein, sitting as a member of the Full Federal Court:

¹³⁵ R Rogers, “A Uniform Class Actions Statute” (Appendix O to the Proceedings of the 1995 Meeting of the Uniform Law Conference of Canada), 4 (available at <http://www.law.ualberta.ca/alri/ulc/95pro/e95o.htm>).

¹³⁶ ALRC 1988 Report, above n 12, para 146.

¹³⁷ Ibid para 147.

there is a disturbing trend that is emerging in representative proceedings which is best brought to an end. I refer to the numerous interlocutory applications [lodged by defendants], including interlocutory appeals, that occur in such proceedings. This case is a particularly good example. The respondents have not yet delivered their defences yet there have been approximately seven or eight contested interlocutory hearings before a single judge, one application to a Full Court and one appeal to the High Court. I would not be surprised if the applicants' legal costs are by now well in excess of \$500,000. I say nothing about the respondents' costs. This is an intolerable situation, and one which the court is under a duty to prevent, if at all possible. One possible approach in these types of cases (that is, product liability or mass torts claims) is to bring the action on for speedy determination. By giving appropriate directions the court can ensure that the parties get on with the litigation and do not become bogged down in what are often academic or sterile arguments about pleadings, particulars, practices and procedures. It is not unknown for respondents in class actions to do whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful.¹³⁸

Justice Finkelstein's comments were recently considered by another justice of the Federal Court, Lindgren J:

I ... readily join with Justice Finkelstein in bemoaning the problem. I am not sure, however, that I agree with his Honour's suggested solution of simply bringing the action on for speedy determination. In my experience, respondents often have a good point (or many good points). I suspect that class action lawyers are often too impatient in launching and prosecuting proceedings. The tasks of defining the represented "group" and of specifying the common issues (or questions) of fact and law required of a class action pose traps for the unwary.

I would strongly urge class action lawyers and litigation funders to be patient in the present respect, and to brief counsel with the capacity to appreciate the subtleties of the demands made by ss 33C and 33H of [Part IVA] ... at the earliest time to settle the form of application and statement of claim. Great care and attention to detail are required. If you can meet the statute's requirements at the outset, even if this means some delay in filing, ultimately your access to justice will be quicker, smoother and less costly. Too often it is a case of "more haste less speed!"¹³⁹

It is interesting to note that in July 2007 Justice Finkelstein again touched on this issue by commenting that "experience of class actions suggests that the absence of a certification process is itself the cause of numerous interlocutory applications with resultant expense and delay".¹⁴⁰

¹³⁸ *Bright v Femcare Ltd* (2002) 195 ALR 574, 607. In July 2003, Finkelstein J again indicated that "many class actions become bogged down by interminable and expensive interlocutory applications and protracted and even more expensive appeals from interlocutory orders": *Bray v F Hoffmann-La Roche Ltd* (2003) 200 ALR 607, 660. See also *Milfull v Terranora Lakes Country Club Limited (In Liquidation)* [2004] FCA 1637, paras 1 and 17 (per Kiefel J) ("this matter has a lengthy history. Proceedings were instituted on 25 August 1995. As is unfortunately common in representative proceedings, there followed a considerable number of interlocutory applications which principally concerned the applicant's pleading ... In the present case over \$700,000.00 has been spent by the applicant from monies contributed to by group members in the nine years since the proceedings were commenced"); and Justice Lindgren, above n 122, 2 ("it is a familiar feature of representative proceedings in the Federal Court that the respondent attacks the form of the application or statement of claim or both").

¹³⁹ Justice Lindgren, above n 122, 3. See also Clark and Harris, above n 124, 303 and 314-316; Grave and Adams, above n 3, 182 ("a number of factors make it almost inevitable that respondents to Part IVA proceedings will make an attack on the applicant's pleadings. These include the complexity associated with pleading group members' claims in a representative proceeding, the absence of a universal formula as to the degree of precision required and the flexibility of the courts bearing in mind the subject matter of the claim and the general objectives of Part IVA. Such attacks tend to focus on whether the individual elements of s 33H have been satisfied ... and whether the criteria specified by s 33C ... can be plainly demonstrated on the face of the pleading").

¹⁴⁰ *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061, para 18. See also Mulheron, above n 26, 27-28: "it is arguable that one preliminary hearing to determine whether the formal requirements for a

➤ **Barriers to the Employment of the Class Action Device - The Conferral Upon Trial Judges of Extremely Broad Powers to Terminate Properly Instituted Class Actions**

In Canada and in the US, once proceedings are certified as class actions, the power of the Court to stop the proceedings from progressing as class proceedings, is limited to a judicial determination that the certification prerequisites no longer exist or never existed. That is to say, certification regimes do not empower Courts to terminate properly constituted class actions pursuant to criteria or factors that are different from those that are considered during the certification hearing. In some Canadian jurisdictions, this power to decertify may not be exercised by the Court on its own motion.¹⁴¹ Australia's Courts can bring to an end Part IVA and Part 4A proceedings, where they accept the arguments of the defendants that the threshold criteria have not been satisfied. Part IVA and Part 4A also vest trial Courts with broad powers to terminate proceedings which have adhered to the commencement prerequisites. In fact, these termination powers, unlike the power of US and Canadian Courts to decertify, are not dependent on a finding that the commencement prerequisites no longer exist or never existed. Instead, these powers are based on additional criteria, some of which confer on the Court a very broad power.

Section 33L of both regimes provides that where, at any stage of the class proceeding, it appears likely that there are fewer than seven class members, the Court is empowered to order (a) that the proceeding continue as a class proceeding or (b) that the proceeding no longer continue as a class proceeding. Another relevant provision is s 33M which empowers the Court to order the termination of a class proceeding where the cost to the defendant of identifying the class members and distributing to them the damages won by the representative plaintiff would be excessive, having regard to the likely total of those amounts. This power may only be exercised upon an application by the defendant. Section 33M implements a recommendation of the ALRC. The ALRC justified the power to terminate group litigation - where the cost of identifying class members and distributing amounts awarded would be excessive having regard to the likely total of those amounts - on the basis that "a primary goal of the proposed procedure is that of achieving legal redress where this can be done efficiently, rather than imposing punishment on a respondent".¹⁴²

Section 33M has been criticised because it leaves class members without remedy just because they are disparate and their individual claims are relatively small. This is inconsistent with the access to justice aim of Parts 4A and IVA. This scenario also hinders the ability of class

class action have been complied with would do away with some of the many interlocutory applications which are manifesting under Part IVA. It would also potentially avoid the possibility of a purported class action coming on for trial when significant procedural steps in the conduct of the action which were legislatively envisaged for the absent class members had not occurred (especially a problem when the defendant does not actively defend the case)".

¹⁴¹ See V Morabito, "The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions" (2004) 42 *Osgoode Hall Law Journal* 473.

¹⁴² ALRC 1988 Report, above n 12, para 151. See also Donnan, above n 40, 86. This philosophy was also embraced by the government responsible for Part IVA. See Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3035 (Senator Tate – Minister for Justice and Consumer Affairs): "if for one reason or another ... compensation cannot be easily paid ..., the defendant should not be disadvantaged".

proceedings to enforce the law and discourage unlawful behaviour.¹⁴³ What is commonly referred to as behaviour modification has been regarded by many commentators,¹⁴⁴ law reform entities¹⁴⁵ and Courts¹⁴⁶ as one of the benefits that should result from the employment of the class action device. As recently noted by the Supreme Court of Canada,¹⁴⁷ “class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public”.¹⁴⁸ The general philosophy underlying the behaviour modification goal is that:

the function of a legal system is not limited to its role in providing individuals with a mechanism by which to resolve disputes and redress grievances. Law also serves as a standard of the conduct which the community or the society expects from its members and by the same token, the judicial system should provide realistic sanctions which the community can invoke in order to enforce obedience to its prescribed values and rules of conduct. It seems clear, therefore, that if sellers and manufacturers are, for whatever reason, in practical effect immune from the sanctions of the present legal structure with respect to some claims which might be brought against them, the community has to that extent lost its ability to compel obedience to the standards of conduct it has established.¹⁴⁹

It is interesting to note that when Part IVA was debated in the Federal Parliament the Australian Democrats proposed amendments to s 33M. Under their proposed scheme, the scenario described in s 33M would not authorise the termination of a proceeding as a Part IVA proceeding. Instead, the Court would have the discretion to direct that the class members in question not be paid. However, the representative plaintiffs could apply to the Court to have those funds transferred to

¹⁴³ Public Interest Advocacy Centre, *Representative Proceedings in New South Wales - A Review of the Law and a Proposal for Reform* (Report prepared for the Coalition for Class Actions (NSW); 1995), 20 and 30-31 ; and Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3025 (Senator Spindler).

¹⁴⁴ See, for instance, JS Emerson, “Class Actions” (1989) 19 *Victoria University of Wellington Law Review* 183, 187-189; GD Watson, “Class Actions: The Canadian Experience” (2001) 11 *Duke Journal of Comparative and International Law* 269, 271; Note, “Developments in the Law - The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives” (2000) 113 *Harvard Law Review* 1806, 1809-1810; and SL Sumnick, “California Corporation Code Section 25530(b): Government Agency Suit versus the Private Class Action” (1975) 27 *Hastings Law Journal* 265, 288.

¹⁴⁵ See, for instance, OLRC Report, above n 37, 140-146; *Report of the Attorney-General’s Advisory Committee on Class Action Reform* (Toronto; 1990), 18; and LRCI Report, above n 51, para 3.14.

¹⁴⁶ See, for instance, *Abdool v Anaheim Management Ltd* (1995) 21 OR (3d) 453, 461 (per O’Brien J); *Hochschul v GD Searle & Co* 82 FRD 339, 343 (ND Ill 1978); *Akerman v Oryx Communications Inc* 609 Fupp 363, 377 (SDNY 1984); and *Blackie v Barrack* 524 F2d 891, 903 (9th Cir 1975).

¹⁴⁷ *Hollick v Toronto (City)* (2001) 205 DLR (4th) 19, 28-29 (per McLachlin CJ).

¹⁴⁸ The Alberta Law Reform Institute has noted that “one effect of class actions in the US has been to cause corporations to review their financial and employment practices and manufacturers to pay closer attention to their product design decisions”: Alberta Law Reform Institute, *Class Actions* (Report no 85; December 2000), para 115 (“ALRI Report”). See also JC Kleefeld, “Class Actions as Alternative Dispute Resolution” (2001) 39 *Osgoode Hall Law Journal* 817, 838.

¹⁴⁹ MG Jones and BB Boyer, “Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies” (1971-72) 40 *Geo. Wash. L. Rev.* 357, 361. See also R Nordh, “Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reform, and a Forthcoming Proposal” (2001) 11 *Duke Journal of Comparative and International Law Journal* 381, 385-387; and M Taruffo, “Some Remarks on Group Litigation in Comparative Perspective” (2001) 11 *Duke Journal of Comparative and International Law* 405, 407-410. For criticisms of the behaviour modification goal see, K Scott, “Two Models of the Civil Process” (1975) 27 *Stanford Law Review* 937, 937-939; W Simon, “Class Actions - Useful Tool or Engine of Destruction” (1972) 55 FRD 375, 392; and C Hodges, “Multi-Party Actions: A European Approach” (2001) 11 *Duke Journal of Comparative and International Law* 321, 340-342.

a Federal, State or Territory legal aid fund.¹⁵⁰ An alternative option would be to divert those funds to a public fund to finance class actions. As noted below, such funds have been recommended, not only by the ALRC, but also by the Victorian Law Reform Commission.

The most significant, and troublesome, termination power is contained in s 33N(1). It allows the Court to order that the proceeding no longer continue as a class proceeding where it is satisfied that it is in the interests of justice to do so because: (a) the costs that would be incurred if the proceeding were to continue as a class proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; (b) all the relief sought can be obtained by means of a proceeding other than a class proceeding; (c) the class proceeding will not provide an efficient and effective means of dealing with the claims of class members; or (d) it is otherwise inappropriate that the claims be pursued by means of a class proceeding.

This termination power may be exercised by the Federal Court, following an application by the defendant or of its own motion. Instead, s 33N of the Victorian regime may not be activated by the Supreme Court of Victoria on its own initiative. Section 33P provides that where the Court orders the discontinuance of a class suit, under ss 33L, 33M or 33N, the proceeding may be continued as a proceeding by the representative party on their own behalf and on the application of a person who was a group member for the purposes of the proceeding, the Court may order that the person be joined as a named plaintiff in the proceeding.

The drafters of Australia's class action regimes were clearly influenced by the strong opposition to class action regimes by some sectors of both the legal community and the wider community. In fact, no counterparts to paras (b), (c) and (d) of s 33N may be found in the regime proposed by the ALRC. The enactment of these provisions provides a vivid illustration of an attempt on the part of the Commonwealth and Victorian legislatures to demonstrate that strong measures, in addition to those proposed by the ALRC, were included in order to prevent the potentially undesirable effects of class action legislation. In fact, the rationale behind "termination" powers such as s 33N was described by the then Commonwealth Attorney-General as the conferral on class action Courts of "comprehensive powers ... to ensure that the proceedings are not abused".¹⁵¹

But Part IVA, and Part 4A, already contain sufficient powers to prevent abuse of the class action device and these powers were based on the recommendations of the ALRC. The effect of these extremely wide termination powers has instead been the discontinuance of class actions in circumstances where the institution and continuance of such proceedings were dictated by the access to justice and judicial economy goals of Part IVA and Part 4A. A striking illustration of this unsatisfactory judicial stance is provided by *Murphy v Overton Investments Pty Ltd*.¹⁵² The class representative in this Part IVA proceeding sought to persuade the Court not to accede to the defendant's request for a s 33N order by drawing attention to the fact that most of the class members were residents of a retirement village. Accordingly, it was reasonable to presume that most, or at least some, of them might not be able to assume the burdens associated with being a named plaintiff in a Court proceeding. Emmett J dismissed this proposition in the following manner:

¹⁵⁰ Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3034.

¹⁵¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3175 (Mr Duffy – Federal Attorney-General).

¹⁵² [1999] FCA 1123.

That is not a weighty consideration to be taken into account in determining the inappropriateness or otherwise of the claims being pursued by means of representative proceedings. Procedures are available, for example, whereby guardians *ad litem* can be appointed for incapacitated or disabled parties.¹⁵³

A different and preferable approach was followed in *Rumley v British Columbia* by the Supreme Court of Canada. The Court upheld a certification order, partly on the basis of the following considerations:

It is necessary to emphasise the particular vulnerability of the plaintiffs in this case. The individual class members are deaf or blind or both. Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members.¹⁵⁴

This unfavourable scenario recently prompted Justice Finkelstein, sitting as a member of the Full Federal Court in *Bright v Femcare Limited*, to remind trial judges of the following important fact:

whether or not it is in the interests of justice to make [a s 33N] order has to be weighed against the public interest in the administration of justice that favours class actions. That requires one to consider the principal objects of the class action procedure. They are: (1) To promote the efficient use of court time and the parties' resources by eliminating the need to separately try the same issue; (2) To provide a remedy in favour of persons who may not have the funds to bring a separate action, or who may not bring an action because the cost of litigation is disproportionate to the value of the claim; and (3) To protect defendants from multiple suits and the risk of inconsistent findings.¹⁵⁵

➤ Representative Proceedings

(a) Opt in or Opt out?

As already noted, the rules governing representative proceedings do not expressly vest Courts with the power to allow represented persons to exclude themselves from the representative proceedings and thereby avoid being bound by the outcome of such proceedings.¹⁵⁶ The traditional approach to this issue has been to deny to members of plaintiff classes the ability to opt out.¹⁵⁷ Class members who did not wish to be represented by the representative plaintiff or

¹⁵³ Ibid para 120.

¹⁵⁴ (2001) 205 DLR (4th) 39, 57 (per McLachlin CJ).

¹⁵⁵ (2002) 195 ALR 574, 605. See also *ibid* 576 (per Lindgren J) and *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061, para 63 (per Finkelstein J).

¹⁵⁶ See also ALRC 1988 Report, above n 12, para 5; ALRI Report, above n 148, para 445; and *Femcare Ltd v Bright* (2000) 172 ALR 713, para 87 (per Black CJ, Sackville and Emmett JJ) (“the representative procedure stemming from the practice of the Court of Chancery did not make provision for a represented party to opt out”). See, however, R York, “All Together Now: Standard Term Contracts and Representative Actions” (1996) 10 *Journal of Contract Law* 85, 92: “an ‘opt-out’ procedure may actually be required by the words of rule 13(1) [of the NSW Supreme Court Rules]. The rule allows a representative action to be continued on behalf of ‘all except one or more of’ the represented persons. This clause, at least, requires the court to consider any application from a represented person who independently seeks to opt out of a representative action”.

¹⁵⁷ *Chippewas of Sarnia Band v Canada (Attorney General)* (1996) 29 OR (3d) 549, 568 (per Adams J); ALRC 1988 Report, above n 12, para 100; N Andrews, “Multi-Party Proceedings in England: Representative and Group Actions” (2001) 11 *Duke Journal of Comparative and International Law* 249, 252; OLCRC Report, above n 37, 469; and *Carnie v Esanda Finance Corp Ltd* (1996) 38 NSWLR 465, 472

who opposed the proceeding could apply to the Court to be appointed as a defendant in the action¹⁵⁸ or to be represented by a representative defendant.¹⁵⁹ The rationale for this regime was described as follows by an English judge, Megarry J, in 1969: “it seems to me that the important thing is to have before the court, either in person or by representation, all who will be affected; provided that the issue will be fairly argued out”.¹⁶⁰

A similar approach has been followed in the context of defendant representative proceedings.¹⁶¹ As was indicated by Staughton LJ of the English Court of Appeal in *Irish Shipping Ltd v Commercial Union*:

The legal advisers of Commercial Union and Alliance [the representative defendants] are capable of arguing that point; and I am confident that the foreign insurers [some of the defendant class members] would trust them to argue it. If I am wrong about that, one or more of the foreign insurers can apply to be joined as defendants.¹⁶²

The judicial approach described above appears to have been abandoned by several contemporary Courts. In Australia, in the 1996 case of *Carnie v Esanda Finance Corp Ltd*,¹⁶³ Young J of the Supreme Court of New South Wales indicated that the traditional approach - of not allowing class members to exit the proceedings - was appropriate when proceedings involved a joint right or a general right. But, in other cases, the proper approach to apply was to choose between an opt in model¹⁶⁴ and an opt out model.¹⁶⁵ Young J of the NSW Supreme Court considered that in the

(per Young J) (“the old equity procedure did not involve opting in or opting out”). See also *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021, 1039 (per Fletcher Moulton J) (“the plaintiff is the self-elected representative of the others. He has not to obtain their consent. It is true that consequently they are not liable for costs, but they will be bound by the estoppel created by the decision”); *Sykes v One Big Union* (1936) 43 Man R 542, 550 (per Trueman JA); and JA Kazanjian, “Class Actions in Canada” (1973) 11 *Osgoode Hall Law Journal* 397, 422.

¹⁵⁸ *Wilson v Church* (1878) 9 Ch D 552, 558-559 (per Jessel MR); *Watson v Cave (No 1)* (1881) 17 Ch D 19, 21 (per James LJ); *Hancock v Scattergood* [1955] SARS 1, 20 (per Reed J); *John v Rees* [1969] 2 All ER 274, 284 (per Megarry J); *May v Newton* (1887) 34 Ch D 347, 349 (per Kay J); and *Fraser v Cooper Hall & Co* (1882) 21 Ch D 718, 719 (per Fry J).

¹⁵⁹ *Fraser v Cooper* (1882) 21 Ch D 718, 719 (per Fry J); *Hancock v Scattergood* [1955] SARS 1, 20 (per Reed J); and *John v Rees* [1969] 2 All ER 274, 284 (per Megarry J). At the same time, Courts have displayed a willingness to “redefine the class to exclude any persons where there is evidence, either at trial or before, that indicates that such a person may be prejudiced if included in the class”: *Ranjoy Sales and Leasing Ltd v Deloitte, Haskins and Sells* (1984) 16 DLR (4th) 218, 230 (per Philp JA of the Manitoba Court of Appeal). See also *Anderson Exploration Ltd v Pan-Alberta Gas Ltd*, 1997 CarswellAlta 730, para 29 (per Moore CJCB); 53 Alta LR (3d) 204; 12 CPC (4th) 59.

¹⁶⁰ *John v Rees* [1969] 2 All ER 274, 284 (per Megarry J). See also OLRC Report, above n 37, 469: “the practice sanctioned by these English decisions is an apparent attempt to recognise the interests of dissentient class members”. See, however, *Smith v Cardiff Corporation* [1954] 1 QB 210, 222 (per Evershed MR).

¹⁶¹ See, for instance, *Clark v University of Melbourne* [1978] VR 457, 477 (per Kaye J).

¹⁶² [1989] 3 All ER 853, 862 (per Staughton LJ). See also *Parr v Lancashire and Cheshire Miners' Federation* [1913] 1 Ch 366, 375 (per Neville J): “what is wanted is a sufficient representation, and if the executive committee or if the trustees had desired to be added as defendants in this action, there is no question that upon application they could have been added as defendants”.

¹⁶³ (1996) 38 NSWLR 465.

¹⁶⁴ As was explained by Young J, “with opt-in, a person does not become one of the represented parties unless he or she makes a deliberate decision to be counted amongst those represented”: (1996) 38 NSWLR 465, 469.

plaintiff representative proceeding before him, an opt in procedure was appropriate.¹⁶⁶ In the same year, another justice of the same Court, Bryson J, indicated that an opt in regime would, in most cases, be preferable to an opt out regime.¹⁶⁷ Similarly, in 1997, Sackville J of the Federal Court of Australia made the following comments in relation to a defendant representative proceeding:

It seems to me that, before a representative order could be made (assuming this was ultimately considered to be the appropriate course), an appropriate effort should be made to ascertain whether the Agencies [the represented persons] themselves consider it appropriate to be joined in the proceedings through a representative order and whether they accept that their interests are the same as the State [the representative defendant] and other Agencies.¹⁶⁸

(b) Significant Barriers to the Employment of this Procedure

As already noted, when the ALRC released its report on class action reform in 1988, the crucial requirement of “same interest” constituted a formidable barrier to the use of this procedure. This undesirable scenario was attributable to the adherence by Australian courts to the principle enunciated, in 1910, by the English Court of Appeal in *Markt and Co Ltd v Knight Steamship Co Ltd*.¹⁶⁹ In this case, it was held that the “same interest” requirement meant that the procedure was unavailable in actions where separate and individual contracts were involved or in cases where damages were claimed.¹⁷⁰ However, in 1995, in *Carnie v Esanda Finance Corporation Ltd*¹⁷¹ the

¹⁶⁵ “Whatever its origin, the opt-in or opt-out procedure has now been accepted in most of the common law world which has adopted class actions as being a convenient system in order to notify people of proceedings in the court which might affect them”: (1996) 38 NSWLR 465, 472.

¹⁶⁶ Young J was of the view that an opt in procedure should be employed “when one has the situation that there is a potential liability on the member of the group”: (1996) 38 NSWLR 465, 473. He also indicated that notices should be sent to all represented persons, in order to allow the Court to make an informed decision as to whether or not it should order the discontinuance of the representative proceeding: *ibid*. See also R Trigge, “Representative Actions under the Uniform Civil Procedure Rules” (2001) 21 *Queensland Lawyer* 110, 112 and 114-115; Basten, above n 61, 48; *Cauvin v Philip Morris Ltd* [2002] NSWSC 736, para 37 (per Windeyer J); J Wilkin, “Representative Proceedings in Victoria – No Change in Contract Cases?” (1996) 70(8) *Law Institute Journal* 36, 38-39; and NSW Law Foundation, above n 39, para 4.3.3.

¹⁶⁷ *Shepherd v Australia and New Zealand Group Ltd* (1996) 20 ACSR 81, 100-101: “the court should only decide that some person who has not clearly stated his position should be involved in proceedings where it is impractical to obtain a decision from that person for some reason such as minority or incapacity, or where there is an overwhelming probability that such a person would wish to be involved. If it possible to consult them, the court should not make any paternalistic assumption about its capacity to decide on behalf of others that proceedings are to be brought on their behalf. I would think there would be few occasions when what was referred to as an ‘opt out’ notice would be appropriate”. See, however, *Rugby Union Players Association Inc v Australian Rugby Union Ltd*, 1997 NSW LEXIS 959, at 45 (per Giles CJ): “the parties adverted to the adoption of an ‘opt-in’ or ‘opt-out’ procedure ... Given the paucity of relevant evidence, an ‘opt-out’ procedure should certainly not be adopted, and even an ‘opt-in’ procedure whereby the fifth defendant represented Players who consented to being represented would, it seems to me, leave an unacceptable risk that the different positions of consenting Players would not be adequately exposed”.

¹⁶⁸ *BT Australasia Pty Ltd v State of New South Wales*, 1997 AUST FEDCT LEXIS 1068, at 87 (per Sackville J). See also *Morgan’s Brewery Company v Crosskill* [1902] 1 Ch 898, 900 (per Buckley J): “I am not prepared to decide the questions raised in the absence of the other members of the [defendant] class, so as to bind them, unless the class has been consulted”.

¹⁶⁹ [1910] 2 KB 1021.

¹⁷⁰ See Morabito and Epstein, above n 22, ch 4. Judicial hostility towards class actions often produced harsh assessments of the motives of representative plaintiffs: “it is entirely contrary to the spirit of our judicial process to allow one person to interfere with another man’s contract where he has no common interest” (*Markt and Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021, 1040, per Fletcher Moulton LJ) and

High Court held that “it has now been recognised that persons having separate causes of action in contract or tort may have ‘the same interest’ in proceedings to enforce those causes of action”.¹⁷²

Carnie did not result, to the author’s knowledge, in a marked increase in the employment of this device. This is attributable to the other major shortcoming of Australia’s representative action rules, namely, their failure to address most of the issues raised by group litigation.¹⁷³ Furthermore, the recent judgment of White J of the Supreme Court of New South Wales, if applied by other Australian courts, would lead to a return to the pre-*Carnie* era, as far as the construction of the term “same interest” is concerned. Justice White held that:

In my view, the effect of the decision of the majority of the justices of the High Court in *Fostif* ... is that it is not sufficient to show that the proceedings give rise to some question of law or fact in which all represented persons have a common interest. Rather, to show that all such persons have the same interest in the proceedings relief must be claimed which is “beneficial to all”, that is, the relief claimed must be common to all.¹⁷⁴

Cashman has persuasively argued that “this conclusion is problematic and would appear to reverse the trend of modern authorities, in England, Canada and Australia, to take a liberal view of the requirements of the representative action rule”.¹⁷⁵ Equally significant is the fact that White J’s interpretation of the 2006 judgment of the High Court of Australia in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* is, with respect, erroneous. In *Fostif* the High Court held, by a 5:2 majority, that the representative action before them did not satisfy the “numerous” claimants requirement. This conclusion was, in turn, due to the fact that, in the view of the majority justices, the class representative only sought to represent those claimants who would be willing to execute a funding agreement with the litigation funders that were funding the proceedings. This strategy sought to be implemented by the class representative meant, according to the majority justices, that at the time the proceeding was filed there was no claimant other than the class representative and therefore the “numerous” claimants requirement had not been satisfied.

It becomes apparent from this very brief description of *Fostif* that any comments made by the majority justices in *Fostif*, with respect to the “same interest” requirement and upon which great reliance was placed by White J, did not form part of the ratio of their judgments. This scenario stands in stark contrast to the already mentioned 1995 judgment in *Carnie* where the meaning of same interest was the primary issue considered by the High Court and where each of the Court’s seven justices clearly rejected a narrow construction of this crucial prerequisite including the judicial imposition of the “relief which is beneficial to all” requirement which has now been embraced by White J.

“they [the representative plaintiffs] are seeking to intermeddle in the commercial relationship between Esanda [the defendant] and its customers” (*Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382, 404, per Meagher JA).

¹⁷¹ (1995) 182 CLR 398.

¹⁷² *Ibid* 404 (per Mason CJ, Deane and Dawson JJ). Similar comments appear in the judgments of Brennan J (at 408); Toohey and Gaudron JJ (at 420-1); and McHugh J (at 430).

¹⁷³ See P McMurdo, “Litigation – Class Actions” (paper presented at the Twilight Seminar Conference; Brisbane, 24 October 2001), para 11 (“in my experience this extensive State jurisdiction to hear at least some [representative] actions is not widely recognised, and is certainly not exercised much, if at all. Undoubtedly one reason is the absence of specific provision in legislation or in the rules for the conduct of such proceedings, which Gleeson CJ, in the Court of Appeal in *Carnie*, thought were necessary to make these procedures ‘manageable and effective’”).

¹⁷⁴ *O’Sullivan v Challenger Managed Investments Limited* [2007] NSWSC 383, para 41.

¹⁷⁵ Cashman, above n 32, 84.

A practical effect of the High Court's decision in *Fostif* has been to render more difficult the involvement of commercial litigation funders in representative actions. This scenario was recently described as follows by the Law Council of Australia:

[*Fostif*] has the effect of requiring the class of plaintiffs to be identified at the commencement of proceedings or otherwise defined as an open class for which relief is sought. ... [This] frustrates any attempt to capture the class so as to limit the group to those who agree to a funder's terms. To this degree the decision is as frustrating for [litigation funders] as were [the rulings of Stone J in *Aristocrat* and of Hansen J in *Rod Investments*].¹⁷⁶

In November 2007 important amendments were made to Rule 7.4 of the *Uniform Civil Procedure Rules 2005* (NSW), the NSW rule governing representative actions. Some of these amendments were clearly prompted by *Challenger*. In fact, Rule 7.4(1) now provides that this rule applies to any proceedings concerning:

- (a) any matter in which:
 - (i) numerous persons have claims against the same person, and
 - (ii) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and
 - (iii) the claims of all those persons give rise to a substantial common issue of law or fact, or
- (b) any matter in which numerous persons have the same liability.

Rule 7.4(2A)(a) provides that a representative action may be commenced whether or not the relief sought is, or includes, equitable relief; consists of, or includes, damages; includes claims for damages that would require individual assessment; or is the same for each person represented. Rule 7.4(2A)(b) provides that a representative proceeding may be brought whether or not the proceeding is concerned with separate contracts or transactions between the defendant in the proceeding and individual group members; and whether or not it involves separate acts or omissions of the defendant done or omitted to be done in relation to represented persons.

The new Rule 7.4(4C) provides that “a represented person, whether or not joined as a party, is taken to have brought proceedings on the day on which the person became a represented person on all of the person's causes of action that may be determined by judgment in the proceedings”. This provision was also prompted by *Challenger* given that White J made obiter comments to the effect that it was “at least seriously arguable” that, in the representative action before him, the limitation period in respect of the damages actions was not suspended by the commencement of the representative action.¹⁷⁷

Other provisions, included in the November 2007 amendments, whilst not prompted by *Challenger*, are nevertheless significant as they evince a judicial intention to bring the representative action rules closer to Part IVA and Part 4A. In fact, Rule 7.4(4A) provides that “if it appears to the court that determination of the issue or issues common to all the represented persons will not finally determine the claims of all the represented persons, the court may give directions in relation to the determination of the remaining issues” whilst Rule 7.4(4B) provides

¹⁷⁶ Law Council of Australia, *Litigation Funding* (submission to the Standing Committee of Attorney-Generals; 14 September 2006), paras 56-57.

¹⁷⁷ *O'Sullivan v Challenger Managed Investments Limited* [2007] NSWSC 383, para 53. See generally V Morabito, “Statutory Limitation Periods and the Traditional Representative Action Procedure” (2005) 5 *Oxford University Commonwealth Law Journal* 113.

that “without limiting subrule (4A), the court may direct that notice be given to some or all of the represented persons in the proceedings in respect of any matter”.

5. In non-representative group litigation, who may initiate group litigation, and in what circumstances?

N/A

6. How many lawsuits have proceeded in each litigation form over the past 5 years?

The author is currently conducting the first empirical study of Part 4A which will be followed by a study of Part IVA. The Victorian study has revealed that, since September 2002, only 13 Part 4A proceedings have been instituted and no Part 4A proceedings have been brought since December 2005. There is no data (or even an estimate) as to the number of proceedings that have been brought under Australia’s representative action rules. In December 2005, Black CJ of the Federal Court revealed, during a conference on international class actions organised by MBC, that 166 proceedings had been brought, under Part IVA, since this regime came into operation in March 1992.¹⁷⁸

7. In representative litigation, must possible class members be informed of the initiation of the litigation and, if so, how?

Extensive powers are conferred upon trial judges to order that notice be provided to class members of, among other things, the commencement of the litigation, their opt out right, an application by the class representative and the defendants of an application for approval of a settlement (as required by s 33V), an application by the defendant for the dismissal of the proceeding on the ground of want of prosecution and an application by the class representative seeking leave to withdraw as class representative. However, the Court is empowered not to require notices to group members where the relief sought on behalf of the class does not include damages.¹⁷⁹ The form and content of the notice must be approved by the Court.¹⁸⁰

The Court must also specify who is to give the notice and the way in which it is to be given.¹⁸¹ The Court may, under s 33Y(4), require that notice be given by means of press advertisement, radio or television broadcast, or by any other means. The Court may order that notice be given personally to each member only where it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.¹⁸² The central purpose of opt out notices is:

to inform group members of the right to opt out conferred by s 33J, when that right must be exercised and the consequences of exercising or not exercising that right. A necessary incident of satisfying that purpose would be to inform group members of the nature of the proceedings.

¹⁷⁸ See M Drummond, “ASIC Talks Up Class Actions”, *Australian Financial Review*, Monday 5 December 2005, 5.

¹⁷⁹ Part IVA, s 33X(2) and Part 4A, s 33X(2).

¹⁸⁰ Part IVA, s 33Y(2) and Part 4A, s 33Y(2).

¹⁸¹ Part IVA, s 33Y(3) and Part 4A, s 33Y(3). Justice Merkel of the Federal Court of Australia has explained that “one reason why the opt out notice required to be given under s 33X must be approved by the Court under s 33Y is to ensure that group members are given such information as is appropriate and necessary to enable them to make an informed decision whether to opt out of the proceeding”: *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167, 172.

¹⁸² Part IVA, s 33Y(5) and Part 4A, s 33Y(5).

However while the terms of the notice must be readily comprehensible and clear, it is important ... to ensure that the central purpose is not obscured by matters of detail.¹⁸³

That is to say, opt out notices must “ensure that group members can make an informed decision concerning their rights”.¹⁸⁴ The failure of a class member to receive or respond to a notice does not affect a step taken, an order made or a judgment given in a Part IVA or Part 4A proceeding.¹⁸⁵

Plaintiff classes in Australia are usually much smaller than groups of claimants in the US. Consequently, contrary to the US scenario, providing individual notice to class members, where the identities and addresses of these class members are known, by sending the notice to them has been a far less costly means of advising class members of the commencement of the class proceeding and of their right to opt out than non-individual notification methods such as, for instance, placing an advertisement in one or more newspapers. Australian judges have consequently required class representatives to incur the significant expense of publishing opt out notices in newspapers only where there were real doubts as to the identities and/or whereabouts of all or some of the class members.

The high costs entailed in requiring that notice be given to class members of the commencement of the litigation and the right of class members to opt out, by placing advertisements in newspapers, become apparent from Australia’s largest class action, the so-called Longford class action. In September 1998 a Part IVA proceeding was instituted against Esso Australia Pty Ltd and Esso Australia Resources Ltd. Compensation was sought with respect to financial loss caused by the interruption to the supply of gas in Victoria in September and October 1998 following the explosion at the Longford gas facility on 25 September 1998. Justice Merkel of the Federal Court ordered that notice of the proceeding and of the opt out right be given by placing newspaper advertisements, before 19 August 1999, in the following manner: (a) a full-page advertisement containing the notice in the *Herald Sun* and *The Age* (two Melbourne newspapers); and (b) a quarter-page advertisement containing the notice in the *Herald Sun* and *The Age*, eight daily regional newspapers as well as several foreign language newspapers. Two years later, Gillard J of the Supreme Court of Victoria revealed that the costs of this advertising ordered by Merkel J in the Longford proceeding “were somewhere in the vicinity of \$150,000”.¹⁸⁶

The author’s study of Part 4A provides data as to the current costs of publishing opt out notices in newspapers. In the *Rod Investments (Vic) Pty Ltd v Clark* Part 4A proceeding, an affidavit was filed by the class representative’s solicitor in May 2007 where it was revealed that:

According to the quotes, the cost of placing one weekday and one weekend advertisement in each of *The Australian*, *The Age* and *The Sydney Morning Herald* will be:

- (a) for advertisements 24 cm x 4 columns of the newspaper in black and white - \$281,096.64; or
- (b) for advertisements 28 cm x 5 columns - \$409,932.60.

¹⁸³ *King v GIO Australia Holdings Limited* (2000) 100 FCR 209, para 3 (per Moore J). See also ALRI Report, above n 148, para 257; *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1, 5; *Gagarimabu v Broken Hill Proprietary Co Ltd* [2001] VSC 304, para 19 (per Hedigan J); and Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System* (Report no 89; 2000), para 7.103 (“ALRC 2000 Report”) (“unidentified group members need to be notified of the existence of the action so that they are able to make a decision about whether to opt-out or remain and be bound by the decision”).

¹⁸⁴ *King v GIO Australia Holdings Limited* [2001] FCA 270, para 15 (per Sackville, Hely and Stone JJ).

¹⁸⁵ Part IVA, s 33Y(8) and Part 4A, s 33Y(8).

¹⁸⁶ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2001] VSC 284, para 29.

On 30 May 2007 I obtained further quotes ... regarding the cost of placing advertisements on a single weekend day. According to the further quotes, the cost will be:

- (a) for advertisements 24 cm x 4 columns of the newspaper in black and white - \$167,797.24; or
- (b) for advertisements 28 cm x 5 columns - \$244,704.31.¹⁸⁷

No studies have been conducted in Australia with respect to the crucial issues of the extent to which opt out notices come to the attention of class members and, if so, the extent to which they are understood by them.

With respect to the role played by class members in class action litigation, Gaudron, Gummow and Hayne JJ of the High Court of Australia have explained that:

A group member is not a plaintiff. It is right to say that a judgment obtained in the proceeding would bind those who had not opted out but to say that such persons had no “control” over their part in the proceeding falls well short of fully describing the way in which Part 4A works.¹⁸⁸

But, as aptly pointed out by Grave and Adams, “the group member has limited express powers to affect the conduct of a representative proceeding. Indeed a group member may not participate at all unless or until it becomes necessary to prove individual issues associated with the claim”.¹⁸⁹ Section 33R(1) deals with this stage of the litigation by authorising the Court to permit an individual class member to appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member. In such a case, s 33R(2) provides that the individual class member, and not the representative plaintiff, is liable for costs associated with the determination of the issue.

The reasons for this general non-involvement by class members are well known. For most class members the cost of monitoring the class lawyer exceeds the value of his/her own claim¹⁹⁰ and, in any event, “any increase in the settlement award derived from close supervision of the attorney must be shared with all other class members, making it unlikely that the benefits of supervision will outweigh the costs”.¹⁹¹ Indeed, an American Court has explained that “the purpose of [the class action procedure] would be subverted by requiring a class member who learns of a pending suit involving a class of which he is a part to monitor that litigation to make certain that his interests are being protected”.¹⁹² Even where it is financially rational for the class members to closely supervise the activities of class counsel, they lack the expertise to do so in an effective manner.¹⁹³

¹⁸⁷ See also Affidavit of Bernard Michael Murphy, dated 31 March 2005, filed in the *Dorajay Pty Ltd v Aristocrat Leisure Limited* No N362 of 2004 Part IVA proceeding, 12-13 where it is noted that if newspaper advertising is limited to one State it will cost at least \$20,000 whilst, if the advertising is undertaken nationally, as is frequently the case, it will cost at least \$100,000.

¹⁸⁸ *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161, para 50.

¹⁸⁹ Grave and Adams, above n 3, 155-156.

¹⁹⁰ This is especially the case where the claims of the class are individually non-recoverable: see Note, “Developments in the Law - Class Actions” (1976) 89 *Harvard Law Review* 1318, 1356 (“a claim is individually nonrecoverable if it would not justify the expense to an individual of independent litigation but would justify the lesser expenditure required to obtain a share of a class judgment”).

¹⁹¹ SR Lazos, “Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations” (1985) 84 *Michigan Law Review* 308, 319.

¹⁹² *Gonzales v Cassidy* 474 F2d 67, 76 (5th Cir 1973).

¹⁹³ See, for instance, MK Kane, “Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer” (1987) 66 *Texas Law Review* 385, 394 (“the complexity of the litigation ... is difficult if not impossible to explain to the layperson”); *In re WICAT Securities Litigation* 671 FSupp 726, 741 (D Utah 1987) (“class litigation is a process that seems strange to many class members and participation in that process would

As canvassed in the answer to question 10 below, settlement agreements executed by the parties to two class proceedings were rejected by trial judges. In each of these two cases some of the class members advised the court of their objections to the settlement agreements in question. However, the author's empirical study has revealed that objections to class action settlements, lodged by class members, are extremely rare.

8. In non-representative group litigation, must the named parties be informed that the litigation is proceeding in group form? Can parties/lawyers whose cases are similar to others that are proceeding in group litigation form exclude themselves from the group litigation and proceed independently, and if so how?

N/A

9. In group litigation, are there special case management procedures (e.g. case pleadings, scheduling, development of evidence, motion practice, test cases, preliminary issues)?

Section 33Q(1) of both class action regimes empowers the Court to give directions in relation to the determination of issues which have been left unresolved by the determination of the common issues. Section 33Q(2) allows the Court to establish sub-groups so as to deal with issues common to the claims of some only of the group members.¹⁹⁴ Justice Gillard has explained that:

[section 33Q] gives a wide power to the Court to give directions in relation to questions. In my view, the wide power given in sub-s 1 is not made subject to sub-s 2. Sub-section (2) merely indicates that the Court may, if it so desires, include directions establishing a sub-group. But that does not seem to me to qualify or read down the wide power given to the Court to decide other questions, which will not finally determine the claims of all group members.¹⁹⁵

The ALRC provided the following example of the circumstances in which subgroups may need to be created:

in a principal proceeding claiming damages for a breach of the Trade Practices Act 1974 (Cth) s 52, some group members may have relied on a representation made by the respondent in relation to a product while others may claim only that the product was not of merchantable quality. A further principal applicant may need to be appointed to represent those group members who do not have claims under the Trade Practices Act 1974.¹⁹⁶

seem to be fairly intimidating”); and NC Scott, “Don’t Forget Me! The Client in a Class Action Lawsuit” (2002) 15 *Georgetown Journal of Legal Ethics* 561, 582.

¹⁹⁴ See *Report of the Attorney-General’s Advisory Committee on Class Action Reform* (Toronto; 1990), 33: “sub-classing is a process by which the larger class is divided into more distinct and representative groups. A sub-class will have an issue of law or fact common to itself and therefore requires separate representation in order to protect interests that it has separate from the larger class. Inherent in sub-classing is the need to ensure that the sub-class is not prejudiced by being in conflict with the larger classes’ interests”.

¹⁹⁵ See *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* [2001] VSC 372, para 37.

¹⁹⁶ ALRC 1988 Report, above n 12, 178. See also See *Explanatory Memorandum* to the Federal Court of Australia (Amendment) Bill 1991 (Cth), para 26: “in some cases determination of the common issues in a representative proceeding will still leave some issues relating to the particular claims of group members to be determined. This section [s 33Q] enables the Court to provide for the most convenient method of resolving such issues by giving directions”.

As already noted, s 33R(1) allows individual group members to appear in the class proceeding for the purpose of determining an issue that relates only to the claims of that member. Section 33S comes into play where an issue cannot properly or conveniently be dealt with under s 33Q or s 33R. Section 33S(a) provides that if the issue concerns only the claim of a particular member, the Court may give directions relating to the commencement and conduct of a separate proceeding by that member; whilst s 33S(b) provides that if the issue in question is common to the claims of all members of a sub-group, the Court may give directions relating to the commencement and conduct of a representative proceeding in relation to the claims of those members. In the Explanatory Memorandum to the Part IVA Bill it was explained that:

after determining the common issues in a representative proceeding it may not be appropriate, in some cases, to deal with remaining issues in the same proceeding. An example would be a case where, after a determination of liability is made, there are remaining issues in relation to one or more group members which are complex and diverse. In such cases it may be more efficient for separate proceedings, limited to those remaining issues, to be brought either by individual group members or as a separate representative proceeding. This section [s 33S] enables the Court to give directions relating to the commencement and conduct of such an individual proceeding or representative proceeding.¹⁹⁷

Grave and Adams have drawn attention to the fact that there have been a number of decisions in Part IVA and Part 4A proceedings in which it has been determined that there first be a separate trial as to:

- Issues in the representative proceeding between applicant and respondent;
- Evidence at that trial being called in regard to common issues of law and fact between applicant and respondent, with any fact relevant to those issues peculiar to the applicants or to a particular group member being deferred until a later trial; and
- A separate trial of issues between respondent and any cross-respondent with the cross-respondents bound by findings of fact and law made at the first trial.¹⁹⁸

As already noted, the rules governing representative proceedings provide no guidance with respect to how such proceedings are to be managed by the Court and there is no available information as to how Australian courts have in fact managed such group litigation. This is of course attributable to the fact that representative proceedings have usually been permitted only where non-monetary relief was sought.

Are there features of your country's civil litigation system that either facilitate or hinder the development of cases that proceed in representative or non-representative group form?

A troubling “feature” of Australia’s civil litigation system is that a not insignificant number of Australian judges have interpreted and applied the provisions of Part IVA and Part 4A in a fairly narrow manner thereby preventing the attainment of the policy goals that these devices were intended to secure and which were spelt out above. A striking illustration of this judicial hostility towards the concept of class actions is provided by the comment made by Justice Spender of the Federal Court with respect to a Part IVA proceeding brought with respect to smoking-related diseases. His Honour described it as the “Ben Hur of ambulance chasing”.¹⁹⁹ Similarly, the

¹⁹⁷ Explanatory Memorandum to the Federal Court of Australia (Amendment) Bill 1991 (Cth), para 28.

¹⁹⁸ Above n 3, 281.

¹⁹⁹ See P Gordon and L Nichols, “The Class Struggle” (2001) 48 *Plaintiff* 6, 10; and Murphy, above n 98, para 3.4. See also *Bray v F Hoffmann-La Roche Ltd* (2003) 200 ALR 607, 660 (per Finkelstein J) (“the

following comments made in 2002 by Justice Callinan of the High Court of Australia, whilst considering the constitutional validity of Part 4A, evince a significant dose of judicial scepticism as to the benefits that flow to the public from the availability of class proceedings:

The question here is not whether, by their nature, group or class proceedings are oppressive to defendants, give rise to entrepreneurial litigation, in fact proliferate and prolong court proceedings, undesirably substitute private for public law enforcement or are contrary to the public interest, with disadvantages outweighing a public interest in enabling persons who have been damnified but who would not, or could not bring the proceedings themselves, to be compensated for their losses ...

the problems to which I have just referred are likely to be aggravated by the increasingly competitive entrepreneurial activities of lawyers undertaking the conduct of class or group actions, in which, in a practical sense, the lawyers are often as much the litigants as the plaintiffs themselves, and with the same or even a greater stake in the outcome than any member of a group.²⁰⁰

This extremely negative approach towards (a) group litigation and (b) those who initiate such proceedings was unfortunately embraced by Heydon and Callinan JJ in *Fostif*.²⁰¹ In light of this scenario Justice Charles of Victoria's Court of Appeal was entitled to observe that:

Class actions are unlikely to flourish in Australia without a change in attitudes, both in the profession and the judiciary ... Many Australian judges may still view class actions as predatory litigation instituted for the advantage of entrepreneurial lawyers.²⁰²

The so-called *Philip Morris* principle, the rejection by some judges of the MBC criterion, the inappropriate exercise of the s 33N termination power and the extremely narrow judicial construction of the "same interest" requirement may reasonably be regarded as the product of this opposition, by some Australian judges, to group litigation. Young CJ of the Supreme Court of Victoria has persuasively argued that:

the ordinary rules cannot be applied to a representative proceeding without adaption. In my view the Court must be careful to ensure that the Rules of Court are adapted as necessary, and must not allow their use to impede the proper resolution of the proceeding. In a representative proceeding I would be prepared to disregard or adapt any Rule the application of which did not produce a just or convenient result.²⁰³

Unfortunately, not all Australian judges, managing class proceedings, have adhered to this approach and have instead sought to assimilate class actions to ordinary litigation. A vivid illustration of this problem is provided by the fact that Australian judges have usually declined to intervene where the class action defendants and/or their solicitors have contacted directly those class members, who did not retain the services of the class representative's solicitors, for the purpose of settling their individual claims. This approach is attributable to the conclusion that

solicitor does stand to benefit from the action (especially as regards the additional fee) if the action is ultimately successful, as the solicitor will then be able to recover his costs").

²⁰⁰ *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161, paras 172 and 183.

²⁰¹ As aptly noted by Kirby J, the judgments of Heydon and Callinan JJ in *Fostif* "disclose an attitude of hostility to representative procedures that is a left-over of earlier legal times. They are incompatible with the contemporary presentation of multiple legal claims. And, more importantly, they are fundamentally inconsistent with the rules made under statutory power and the need to render those rules effective": (2006) 229 ALR 58, para 148. See also Mulheron, above n 26, 27 where attention is drawn to "the chagrin which the Australian judiciary has displayed towards the conduct of litigation under Part IVA".

²⁰² Charles, above n 40, 32.

²⁰³ *Zentahope Pty Ltd v Toycorp Ltd* (Unreported; Supreme Court of Victoria; Young CJ; 14 June 1991), 5.

whilst the solicitors hired by the class representative owe a fiduciary duty to all class members there is no solicitor-client relationship between those class members who did not instruct the class representative's solicitors to act for them and such solicitors.²⁰⁴

10. In group litigation, what proportion of cases is resolved through party/attorney negotiation and settlement, and what proportion is resolved through judicial or jury decision?

➤ **Empirical Study of Part 4A**

The author's empirical study has revealed that 22 proceedings have been instituted in the Supreme Court of Victoria since January 2000, pursuant to Part 4A or its predecessor, Order 18A. Two Part 4A proceedings are currently in progress. The other 20 Victorian class proceedings were resolved as follows:

- Ten proceedings were settled.²⁰⁵
 - One proceeding was stayed and subsequently consolidated with another Part 4A proceeding with respect to the same dispute, namely, the Longford gas explosion. This was the class proceeding that was transferred to the Supreme Court from the Federal Court pursuant to an order of Merkel J.
 - Two proceedings were terminated, as class proceedings, by the Court.
 - Two proceedings were ordered, by consent, to be transferred to the Federal Court following a challenge by the defendants to the Supreme Court's jurisdiction.
 - A trial was held in one proceeding. The judgment handed down at the end of the trial provided the plaintiff class with some of the non-monetary relief that it sought.
 - Two proceedings were discontinued, as class proceedings, by the representative plaintiff.²⁰⁶
 - One proceeding was dismissed for want of prosecution.
 - One proceeding was discontinued by the representative plaintiff.
- **Class Action Settlements**²⁰⁷

Section 33V of Part IVA and s 33V of Part 4A provide that a proceeding commenced under these regimes may not be settled or discontinued without the approval of the Court. They also empower the Court to make such orders as are just with respect to the distribution of any money paid under a settlement or paid into Court. Justice Bongiorno of the Supreme Court of Victoria has revealed that:

[The principles upon which the requirement of judicial approval of class action settlements is based] might be said to be those of the protective jurisdiction of the Court, not unlike the principles which

²⁰⁴ See generally V Morabito, "Judicial Supervision of Individual Settlements with Class Members in Australia, Canada and the United States" (2003) 38 *Texas International Law Journal* 664.

²⁰⁵ In the Longford litigation, the settlement was executed soon after a judgment was handed down by Gillard J, following a trial that lasted over 40 days.

²⁰⁶ In one of these two discontinued proceedings, the decision to discontinue was made by the class representative after being advised by the trial judge that the proceeding should be converted to an orthodox proceeding and the class members should be provided with an opportunity to be appointed as co-plaintiffs.

²⁰⁷ This discussion draws upon the analysis found in V Morabito, "An Australian Perspective on Class Action Settlements" (2006) 69 *Modern Law Review* 347.

lead the Court to require compromises on behalf of infants or persons under a disability to be approved.²⁰⁸

Subject to one exception, Part IVA and Part 4A do not provide any guidance on the procedural aspects of both seeking judicial approval of a settlement pursuant to s 33V and determining a s 33V application. The exception in question concerns settlement notices. In both Part IVA and Part 4A, we find s 33X(4) which provides that, unless the Court is satisfied that it is just to do so, an application for approval of a settlement under s 33V must not be determined unless notice has been given to the class members. Notice may be given by means of press advertisement, radio or television broadcast, or by any other means chosen by the Court.²⁰⁹ The Court may order that notice be given personally to each class member only where it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.²¹⁰ However, no legislative guidance is provided as to “what are the relevant matters the Court must consider and take into account in relation to ... the giving of notice”.²¹¹

Notice has been provided in the vast majority of settlements. This is usually done through the placement of an advertisement in metropolitan, regional and/or national newspapers²¹² or by sending the settlement notice directly to those class members whose identities are known to the litigants.²¹³

No right to opt out of settlements is expressly extended to class members. This scenario is attributable to the fact that the ALRC did not envisage class members being able to avoid the binding effect of a settlement that has been judicially sanctioned. The Federal Court and Victoria’s Supreme Court have, nonetheless, usually provided class members with an opportunity to opt out of settlements.²¹⁴ Justice Sackville of the Federal Court has explained that this practice enables those class members “who are dissatisfied with the proposed settlement to opt out of the proceedings in order to pursue their own claims”.²¹⁵

The extension of a right to opt out has frequently been accompanied by a request that class members opt in by a specified date if they desire to receive any of the benefits that are made available under the settlement scheme. An illustration of this judicial technique is provided by the

²⁰⁸ *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457, para 4. See also J Cox, “Information Famine, Due Process, and the Revised Class Action Rule: When Should Courts Provide a Second Opportunity to Opt Out?” (2004) 80 *Notre Dame Law Review* 377, 385.

²⁰⁹ Part IVA, s 33Y(4) and Part 4A, s 33Y(4).

²¹⁰ Part IVA, s 33Y(5) and Part 4A, s 33Y(5).

²¹¹ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 4)* [2004] VSC 466, para 15 (per Gillard J).

²¹² See *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104; *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399, para 8 (per Goldberg J); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 4)* [2004] VSC 466, para 16 (per Gillard J); and *Petrusevski v Bulldogs Rugby League Club Limited* [2004] FCA 1712, para 6 (per Gyles J).

²¹³ See *Courtney v Medtel Pty Limited (No 4)* [2004] FCA 1233, para 16 (per Sackville J); *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457, para 8 (per Bongiorno J); *Wong v Silkfield Pty Ltd* [2000] FCA 1421, paras 26-29 (per Spender J); *Neil v P & O Cruises Australia Limited* [2002] FCA 1325, para 8 (per Weinberg J); *Reiffel v ACN 075 839 226 Pty Limited (No 2)* [2004] FCA 1128, para 6 (per Gyles J); and *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980, para 11 (per Moore J).

²¹⁴ See, for instance, *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104; *Verschuur v Vynotas Pty Ltd* [2004] VSC 130, para 49 (per Mandie J); and *Courtney v Medtel Pty Limited (No 4)* [2004] FCA 1233, para 15 (per Sackville J).

²¹⁵ *Courtney v Medtel Pty Limited (No 4)* [2004] FCA 1233, para 15.

Part 4A proceeding brought against the Melbourne Aquarium where the settlement notice advised class members that:

The only Group Members who can participate in the settlement are those who complete the attached Settlement Participation Form ... and send it to the post office box shown on the Form by 8 March 2004 ...

If you do not complete and return the Settlement Participation Form as required in this Notice, you will not be able to participate in the settlement.

If you do **not** wish to participate in the settlement, **and** instead you wish to bring your *own* claim for compensation against the Defendants, you **must** file with the Court ... a Notice stating that you “opt out” of the proceedings. You must do this ... **on or before 17 August 2004.**²¹⁶

Those class members who opt in are then usually asked to substantiate their claim or loss by a specified date.²¹⁷

The fairness and reasonableness of the settlements proposed by named parties to a class proceeding are normally considered at a formal hearing commonly referred to as a fairness hearing. The role that lawyers acting for the class representative are expected to play at these hearings was explained as follows by Justice Finkelstein of the Federal Court:

There would be few cases where the Court can properly exercise its power under s 33V without evidence from the solicitor [acting for the class representative] supported by counsel that the proposed compromise is in the interests of the group members. I appreciate that, on occasion, this will place the solicitor and counsel in a difficult position. The interests of their client will not always be coincident with the interests of the members of the group. But, in my view, that is no more than a necessary consequence of their client instituting a representative action.²¹⁸

Another unique characteristic of fairness hearings is that they lack the adversarial feature of litigation that Australian judges (and common law judges in general) are so dependent and accustomed to. This is attributable to the fact that both adversaries are united in their desire to have the Court approve the agreement that they themselves have negotiated and executed.²¹⁹

²¹⁶ This notice is reproduced in Grave and Adams, above n 3, 613-615.

²¹⁷ See, for instance, *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, para 12 (per Finkelstein J).

²¹⁸ *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, para 16 (per Finkelstein J). For a rare instance of a fairness hearing where there was no evidence from the class representative’s lawyers concerning the appropriateness of the settlement see *JF Yandle & Co Pty Limited v CSN Pty Limited* [2000] FCA 1823, para 6 (per Hill J).

²¹⁹ See JR Macey and GP Miller, “The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform” (1991) 58 *University of Chicago Law Review* 1, 46; SP Koniak and GM Cohen, “Under Cloak of Settlement” (1996) 82 *Virginia Law Review* 1051, 1104; DR Hensler, B Dombey-Moore, B Giddens, J Gross, EK Moller and NM Pace, *Class Action Dilemmas - Pursuing Public Goals for Private Gain* (Report; RAND Institute for Civil Justice; Santa Monica; 2000), 89-90 (“Hensler Report”); EH Cooper, “Class Action Advice in the Form of Questions” (2001) 11 *Duke Journal of Comparative and International Law* 215, 240; KA Lambert, “Class Action Settlements in Louisiana” (2000) 61 *Louisiana Law Review* 89, 90; P Spender, “Securities Class Actions: A View from the Land of the Great White Shareholder” (2002) 31 *Common Law World Review* 123, 158; MJ Legg, “Judge’s Role in Settlement of Representative Proceedings: Lessons from United States Class Actions” (2004) 78 *Australian Law Journal* 58, 70; and SM Kim, “Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?” (1998) 66 *Tennessee Law Review* 81, 126.

Further potential problems are generated by the role played by defendants in the negotiations concerning class action settlements:

Defendants understand how valuable class settlement can be: liability and transaction costs can be minimised and finality achieved. Moreover, defendants care only about the total amount they must pay out in settlement, not how the payoff is distributed between class members and the class lawyer. Thus they are well-positioned and well-motivated to propose a deal that gives class counsel a huge slice (high attorney's fees) of a small pie (a low overall settlement for the class) and pretty well-assured that class counsel will accept it, given how expensive and risky it can be to get a class action certified and ready for trial.²²⁰

It is therefore disappointing to note that contradictors have rarely been employed by Australian judges in fairness hearings. One such instance was in the *King* proceedings:

When nearly 1,000 people sought to join the settlement after it was publicised there was a conflict between their interests and the interests of existing group members. The Court was informed of the existence of the conflict and a process devised whereby each objector had the opportunity to present his or her concerns assisted by a QC as a contradictor (paid for by the applicant's solicitors) to contest the submissions of the applicant's solicitor.²²¹

Settlement agreements that have been executed by the parties to class proceedings in Australia have usually dealt with, not just the relief that is to be made available to class members, but also the remuneration of the lawyers hired by the class representatives. Surprisingly, the simultaneous negotiation and agreement on the compensation that is to be made available to both the class lawyers and members of the plaintiff class has not attracted adverse comments from Australian judges.

In its 1988 report on grouped proceedings, the ALRC recommended that in determining whether to approve a settlement proposed by the parties to the grouped proceedings, the Court should take into account the following factors:

- The nature and the likely cost and duration of the proceedings if approval or leave were not given.
- The amount offered and the likelihood of success in the proceeding.
- Whether the settlement is in the interests of group members, having regard to the views, if they are made known to the Court, of the group members.
- Whether satisfactory arrangements have been made for the distribution of money to be paid to the group members.²²²

Broadly similar recommendations have been made by several other law reform bodies.²²³ But, unfortunately, no guidance is provided by s 33V as to the criteria that ought to be considered by

²²⁰ Koniak and Cohen, above n 219, 1111-1112. This potential problem was expressly referred to by Justice Sackville of the Federal Court in *Courtney v Medtel Pty Limited (No 5)* [2004] FCA 1406, para 38 (per Sackville J).

²²¹ Murphy, above n 98, 23. See *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 1420, para 15 (per Moore J).

²²² ALRC 1988 Report, above n 12, para 222. This recommendation was reiterated by the ALRC in 2000: see ALRC 2000 Report, above n 183, para 7.108.

²²³ LRCI Report, above n 51, para 4.88; MLRC Report, above n 37, 96; Lord Woolf, above n 40, 246; and ALRI Report, above n 148, para 328.

trial Courts when considering a s 33V application.²²⁴ The general approach that is applied in relation to s 33V applications by Australian Courts is that the Court is to determine whether the proposed settlement is fair and reasonable, having regard to the claims of the class members who will be bound by the settlement.²²⁵ The fairness and reasonableness of the settlement are, in turn, usually determined by the application of the following criteria, enunciated by Justice Goldberg of the Federal Court in 2000:

The amount offered to each group member, the prospects of success in the proceeding, the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer, the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding, the likely duration and cost of the proceeding if continued to judgment, and the attitude of the group members to the settlement.²²⁶

Justice Goldberg also noted that the nine factors formulated by the US Court of Appeals for the Third Circuit were equally useful:

(1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of the attendant risks of litigation.²²⁷

To the author's knowledge, there have been no s 33V applications with respect to settlements that provided only coupons to class members.²²⁸ This does not mean that there have been no instances of Australian class lawyers receiving significant sums of money pursuant to class action settlements. In the already mentioned *King* proceeding, brought on behalf of over 67,000 shareholders, for instance, over \$15 million were paid by the defendants to the representative plaintiff's lawyers. There have also been s 33V orders with respect to settlement agreements where the payments to the plaintiff's lawyers exceeded the total fund earmarked for the class members.²²⁹

However, attention should also be drawn to the fact that frequently class lawyers have been awarded less than what they would have been entitled to receive pursuant to the conditional fee

²²⁴ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 4)* [2004] VSC 466, para 15 (per Gillard J); and Morabito and Epstein, above n 22, para 6.39. A similar approach has been adopted by the drafters of the class action regimes that currently operate in eight Canadian jurisdictions: see Mulheron, above n 26, 397.

²²⁵ See, for instance, *Lukey v Corporate Investment Australia Funds Management Pty Ltd* [2003] FCA 1602, para 7 (per Emmett J); *Tongue v Council of the City of Tamworth* [2004] FCA 972, para 22 (per Allsop J); and *Courtney v Medtel Pty Limited (No 5)* [2004] FCA 1406, para 39 (per Sackville J).

²²⁶ *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, para 19. See also *Wong v Silkfield Pty Ltd* [2000] FCA 1421, para 18 (per Spender J); *Neil v P & O Cruises Australia Limited* [2002] FCA 1325, paras 6-9 (per Weinberg J); *Tongue v Council of the City of Tamworth* [2004] FCA 972, para 22 (per Allsop J); *Lukey v Corporate Investment Australia Funds Management Pty Ltd* [2003] FCA 1602, para 7 (per Emmett J); and *Crawford v Bank of Western Australia Ltd* [2005] FCA 949, para 20 (per Lee J).

²²⁷ *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation* 55 F3d 768, 785 (3rd Cir 1995).

²²⁸ This is not to say that there have been no s 33V applications with respect to settlements that did not entail money sums being offered to the class members: see *Verschuur v Vynotas Pty Ltd* [2004] VSC 130; and *Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd* [2004] FCA 1114, paras 7 and 11 (per Crennan J).

²²⁹ See, for instance, *Courtney v Medtel Pty Limited (No 5)* [2004] FCA 1406; and *Lukey v Corporate Investment Australia Funds Management Pty Ltd* [2005] FCA 298, para 10 (per Emmett J).

agreements that they executed with the representative plaintiffs and some of the class members.²³⁰ It is also interesting to note that in the settlement of a recent Part IVA proceeding it was revealed that the relevant conditional fee agreement imposed a ceiling on the total solicitor-client costs that could be deducted from amounts recovered as a result of the class proceedings. This cap was set at one third of the total amount recovered for the class.²³¹

There have also been a number of settlements approved under s 33V where the total compensation extended to the class exceeded the remuneration paid to its legal representatives. It is again useful to refer to the *King* settlement. The over \$15 million paid to the lawyers were rather insignificant when compared with the total sum set aside for the benefit of the class members, namely, \$97 million.²³² It would thus appear reasonable to conclude that Australia's plaintiff lawyers have not, generally speaking, been overly compensated for their involvement in class actions.

There are few reported instances of Australian judges declining to approve a settlement proposed by the parties to Part IVA and Part 4A proceedings. Two such instances are canvassed below. The settlement agreement executed by the class representative and the defendant in the *Tongue v Council of the City of Tamworth*²³³ class proceeding was rejected by Allsop J of the Federal Court. This Part IVA proceeding was based upon an allegation of failure to maintain the Dungowan Dam, constructed by the defendant, with the result that the supply of water from the Dam was not fit for domestic and stock watering purposes. The claim for relief, sought on behalf of the class, included a mandatory order that the defendant provide consumers with potable water and/or water fit for human consumption and a claim for damages.²³⁴ The settlement scheme executed by the class representative and the defendant envisaged compensation to the class members for the following types of losses:

Damage to pipes, household fittings, fixtures, clothing including discolouration thereof; gastric problems, skin irritations, nausea, chlorine burns, and staining and ruining of various items of property. In so far as stock were concerned alternative water supplies had to be installed, as was the case with household consumption, to cater for the breaches by the Respondent.²³⁵

At the fairness hearing, senior counsel appeared on behalf of 23 of the 53 class members to object to the proposed settlement. It was claimed on behalf of these 23 class members that the losses suffered by the class members also included (a) loss of income as a result of alleged destocking; (b) loss of rental income on properties and (c) diminution of property values. With respect to these three categories of losses, damages in excess of \$2 million were claimed by the objectors.²³⁶ Justice Allsop of the Federal Court was of the view that it was inappropriate to identify the settlement sum but revealed that "there is great disparity as to the quantum claimed by the objectors and what the applicant says is recoverable".²³⁷

²³⁰ See, for instance, *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399, para 19 (per Goldberg J); and *Courtney v Medtel Pty Limited (No 5)* [2004] FCA 1406, para 36 (per Sackville J).

²³¹ *Petrusevski v Bulldogs Rugby League Club Limited* [2004] FCA 1712, para 12 (per Gyles J). See also *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)* [2003] VSC 212, para 121 (per Gillard J).

²³² [2003] FCA 980, para 14. See also *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, para 11 (per Finkelstein J); and *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399.

²³³ [2004] FCA 972. See also Hensler Report, above n 219, 486.

²³⁴ [2004] FCA 209, paras 11-22 (per Allsop J).

²³⁵ *Ibid* para 21.

²³⁶ *Ibid* paras 35-40.

²³⁷ [2004] FCA 972, para 18.

Justice Allsop declined to approve the settlement. In doing so, his Honour gave “considerable weight ... to the fact that such a large portion of the class oppose the settlement, considering it to be inadequate”.²³⁸ Another contributing factor was the existence of “a real fear in the respondent that it would see itself paying a not trivial sum of money and remain or be potentially liable to parties with a cognate grievance”.²³⁹ This finding was based on the fact that shortly after the process of seeking an order under s 33V was initiated the defendant purported to terminate the settlement agreement.²⁴⁰ One of the arguments relied on by the defendant to justify this termination was that the information provided to it at the time of the settlement, with respect to the extent of the claims of the class members and their opposition to the proposed settlement, was grossly inaccurate.²⁴¹

The settlement proposed by the parties to a Part 4A proceeding was rejected by Mandie J of the Supreme Court in *Verschuur v Vynotas Pty Ltd.*²⁴² This Part 4A proceeding was brought on behalf of all persons, other than the defendants, “who own or have at any time owned, any lot on registered plan of subdivision No 324041E”.²⁴³ The representative plaintiff was seeking, on behalf of the class, damages in negligence and contract in respect of, among others, design and construction defects in the residence constructed on the land comprised in the relevant registered plan of subdivision.²⁴⁴

The settlement scheme executed on behalf of the plaintiff class did not extend any benefits to original owners who were no longer current owners in the development. Only one class member - Hannan’s Star - also a past owner, filed an objection to the settlement. The essence of the objection, made on behalf of Hannan’s Star by senior counsel, was that past owners had suffered loss and damage and the proposed settlement was thus unfair and inequitable for not providing any compensation or benefit to such class members.²⁴⁵ Justice Mandie rejected the class representative’s submission that there was no injustice involved in denying compensation to past owners who had shown no interest in obtaining compensation after being given a number of opportunities to object or put in a claim.²⁴⁶

It would be unreasonable to disregard the possible claims of other formal original owners merely because they had taken no positive action (or, for that matter, had opted out). A major aspect of the Court’s role with regard to the settlement of group proceedings is to protect the interests of unrepresented group members.²⁴⁷

The attainment of the essential goal described above by Justice Mandie compelled the judicial rejection of the proposed deed of settlement given that it was clear that “the causes of action of subsequent owners are based upon a much shakier foundation than that of the original owners”.²⁴⁸ The approach adopted by Justice Mandie is similar to the response of a majority of American

²³⁸ Ibid para 24.

²³⁹ Ibid para 23.

²⁴⁰ [2004] FCA 209.

²⁴¹ Ibid para 10.

²⁴² [2004] VSC 130.

²⁴³ Ibid para 4.

²⁴⁴ Ibid para 5.

²⁴⁵ Ibid para 69.

²⁴⁶ Ibid para 64.

²⁴⁷ Ibid para 84.

²⁴⁸ Ibid para 85.

Courts when faced with class action settlements that discriminated against certain categories of class members.²⁴⁹

The assessment of the fairness and reasonableness of a class action settlement also entails a review of how different categories or sub-groups of class members are treated pursuant to the proposed settlement arrangement.²⁵⁰ The discussion below will reveal that, unfortunately, s 33V orders have been issued by trial judges despite the fact that the agreements in question denied, without any legitimate reason, any benefits to some categories of class members. This unsatisfactory aspect of the operation of s 33V is vividly illustrated by Justice Goldberg's approval of the settlement proposed by the parties to the Part IVA proceeding in *Williams v FAI Home Security Pty Ltd (No 4)*.²⁵¹

The s 33V application in *Williams* entailed a proposal pursuant to which only represented class members would be both bound by the settlement agreement and entitled to receive the compensation made available under it. This exclusion of unrepresented class members was justified essentially on the ground that "it was very difficult to take their interests into account because one does not know what their instructions would be on the individual elements of their claim" and that, in any event, as the claims of these class members were not extinguished by the settlement, they could simply institute fresh proceedings against the class action defendants.²⁵²

Justice Goldberg ordered that a settlement notice be published in a number of regional and metropolitan newspapers. This notice advised unrepresented class members that if they desired to object to the settlement or the proposed orders, they could appear before the Court on 28 March 2001 and advise the Court of their objections.²⁵³ Eighty-eight class members contacted the solicitors for the plaintiff to advise them that they objected to the proposal to amend and settle the proceeding. The basis of this objection was that no settlement offer had been made to them.²⁵⁴ Once these 88 class members were added as beneficiaries of the settlement, the settlement was approved by Justice Goldberg.²⁵⁵

The procedure implemented by Justice Goldberg meant that unrepresented class members were required to take positive action in order to have some chance of receiving any compensation

²⁴⁹ See, for instance, *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation* 55 F3d 768, 808 and 818 (3rd Cir 1995); *Piambino v Bailey* 610 F2d 1306, 1329 (5th Cir 1980); *Piambino v Bailey* 757 F2d 1112, 1140 (11th Cir 1985); *National Super Spuds Inc v New York Mercantile Exchange* 660 F2d 9, 18-19 (2nd Cir 1981); *Holmes v Continental Can Co* 706 F2d 1144, 1148 (11th Cir 1983); *Petruzzi's Inc v Darling-Delaware Company Inc* 880 FSupp 292, 299 (MD Pa 1995); *In re Ford Motor Co Bronco II Prods Liability Litigation* as discussed in Conte and Newberg, above n 54, 140; and *In re General Motors Corp Engine Interchange Litigation* 594 F2d 1106, 1128 (7th Cir 1979).

²⁵⁰ See Legg, above n 219, 70; *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation* 55 F3d 768, 809 (3rd Cir 1995); *In re General Motors Corp Engine Interchange Litigation* 594 F2d 1106, 1136 (7th Cir 1979); *Petruzzi's Inc v Darling-Delaware Company Inc* 880 FSupp 292, 300 (MD Pa 1995); Hensler Report, above n 219, 486; *National Super Spuds Inc v New York Mercantile Exchange* 660 F2d 9, 19 (2nd Cir 1981); *Reynolds v King* 790 FSupp 1101, 1105 (MD Ala 1990); and *Courtney v Medtel Pty Limited (No 5)* [2004] FCA 1406, para 38 (per Sackville J).

²⁵¹ (2000) 180 ALR 459.

²⁵² *Ibid* para 32.

²⁵³ *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399, para 8.

²⁵⁴ *Ibid* para 9. There was no precise information as to the total number of unrepresented class members. But the class solicitors estimated that the number of sale contracts for the alarm system in question during the relevant period "could be as high as 100,000": *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, para 13 (per Goldberg J).

²⁵⁵ *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399, para 27.

under the settlement scheme. This opt in procedure²⁵⁶ was therefore based on the philosophy that those unrepresented class members who did not respond to the notice were not interested in becoming beneficiaries of the proposed settlement and it was thus not unfair to deny them any compensation. But this philosophy embraced by Goldberg J runs counter to the philosophy that underpins the class action device in general and the opt out model in particular. As already noted, the major policy objective of class action devices is to provide access to the Courts for those claimants who are unable to initiate individual proceedings, to enforce their legal rights.

When cases are tried, some of the class members may give evidence. As explained by Gillard J of the Supreme Court of Victoria in the Longford proceeding:

[I]t is open to a plaintiff to call a witness who may give evidence of factual matters, which do not assist that plaintiff's claim but do raise for consideration and determination, a question of fact or law which is common to some or all members of a group.²⁵⁷

11. What remedies are available in representative and non-representative group litigation? When group litigation is resolved with the payment of monetary damages, how are damages allocated among claimants?

In determining a matter in a class proceeding, trial judges have been empowered to do any one or more of the following: (a) determine an issue of law; (b) determine an issue of fact; (c) make a declaration of liability; (d) grant any equitable relief; (e) make an award of damages for class members, sub-class members or individual class members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies; (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual class members; and (g) make such other order as the Court thinks just.²⁵⁸

In making an order for an award of damages, the court is required to make provision for the payment or distribution of the money to the class members entitled.²⁵⁹ The court may not exercise the power to award “damages in an aggregate amount without specifying amounts awarded in respect of individual group members” unless a reasonably accurate assessment can be made of the total amount to which class members will be entitled under the judgment.²⁶⁰ An example of the exercise of this judicial power to award damages in an aggregate amount is provided by the already mentioned *Golden Sphere* Part IVA proceeding. The ACCC had proposed to O’Loughlin J that damages be based on the sum of \$50 per class member which would have resulted in a total award of \$600,000. His Honour awarded instead \$550,000 after making the following comments:

If the respondents properly considered that the figure was excessive, the remedy was in their hands to submit the contradictory evidence; this is a case where it would be appropriate to place an evidentiary bonus on the respondents because of their possession of the information that would allegedly refute the applicant’s claims. They have made no effort to do that.²⁶¹

²⁵⁶ See B Lipp, “Mass Tort Class Actions under the Federal Court of Australia Act: Justice for All or Justice Denied?” (2002) 28 *Monash University Law Review* 360, 393.

²⁵⁷ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* [2001] VSC 372, para 49.

²⁵⁸ Part IVA, s 33Z(1) and Part 4A, s 33Z(1).

²⁵⁹ Part IVA, s 33Z(2) and Part 4A, s 33Z(2).

²⁶⁰ Part IVA, s 33Z(3) and Part 4A, s 33Z(3).

²⁶¹ (1998) 83 FCR 424, 428.

The Court is empowered to give such directions as it thinks just in relation to: (a) the manner in which a class member is to establish his or her entitlement to share in the damages; and (b) the manner in which any dispute regarding the entitlement of a class member to share in the damages is to be determined.²⁶² The court may provide for the constitution and administration of a fund consisting of the money to be distributed and either the payment by the defendant of a fixed sum of money into the fund or the payment by the defendant into the fund of such instalments, on such terms, as the court directs to meet the claims of the class members as well as entitlements to interest earned on the money in the fund.²⁶³ Where the court orders the constitution of a fund, the order must: (a) require notice to be given to class members in such manner as is specified in the order; (b) specify the manner in which a class member is to make a claim for payment out of the fund and establish his or her entitlement to the payment; (c) specify a day (which is 6 months or more after the day on which the order is made) on or before which the class members are to make a claim for payment out of the fund; and (d) make provision in relation to the day before which the fund is to be distributed to class members who have established an entitlement to be paid out of the fund.²⁶⁴

The Part IVA proceeding in *McMullin v ICI Australia Operations Pty Ltd* and the already mentioned Longford litigation provide excellent illustrations of how damages are determined and allocated among claimants. In *McMullin v ICI Australia Operations Pty Ltd*²⁶⁵ a Part IVA proceeding was initiated by Mr and Mrs McMullin against ICI Australia Operations Pty Ltd and its related companies. The proceeding concerned losses allegedly suffered as a result of the accumulation of chlorfluazuron in tissues of cattle. The contamination was said to have occurred when the cattle were fed cotton waste that had been sprayed with an insecticide called Helix. The applicants carried on business as farmers and graziers in New South Wales. They represented other persons, such as graziers and abattoirs, who suffered the losses described above. The trial judge, Justice Wilcox of the Federal Court, found in favour of the class. He then proceeded to hear the claims of seven class members, created 16 subgroups consisting of those claimants who claimed less than \$100,000 and delegated to a judicial registrar the task of determining these claims.²⁶⁶ His Honour described the progress and outcome of this class proceeding as follows:

The trial on liability occupied 20 days. When I gave judgment on that issue, I set aside a week to hear the many cross claims. However, before the end of the second day, they had all been settled (mainly by abandonment). All the damages claims were different and their assessment threatened to be extremely time-consuming.

However, the parties selected a few cases that raised major points of principle. These were heard over a few days and rulings made. The parties then entered into negotiations in relation to individual cases, exchanging information in accordance with directions made by the Court and with mediation of many cases by a Court officer. Two or three cases were not resolved by agreement. The damages in those cases had to be determined by a judge. All the rest were agreed.

Towards the end of the process of negotiating settlements, the Court ordered publication of advertisements in newspapers circulating amongst graziers notifying group members that they must submit outstanding claims by a particular date, or be excluded from the benefit of the judgment. By the time that date arrived, 499 claims had been received. After the last of them was resolved, the total payout reached some \$100 million. Total court time for the whole operation was only about 30 days.

²⁶² Part IVA, s 33Z(4) and Part 4A, s 33Z(4).

²⁶³ Part IVA, s 33ZA(1) and Part 4A, s 33ZA(1).

²⁶⁴ Part IVA, s 33ZA(3) and Part 4A, s 33ZA(3).

²⁶⁵ (1997) 72 FCR 1.

²⁶⁶ Grave and Adams, above n 3, 323.

I spent about eight days in court on damages issues. A judicial registrar ... probably spent a little longer. ... In terms of court time, it seems to me this represents a good advertisement for the procedure.²⁶⁷

On 20 February 2003 Gillard J handed down his judgment in the Longford proceeding.²⁶⁸ He held that the only class members who were entitled to compensation were business users of gas who: (a) suffered physical damage to property (such as damage to equipment, machinery, tools or raw materials; spoilage of stock or food etc) caused by the interruption of the supply of gas following the September stoppage; and (b) suffered economic loss resulting from that damage to property (such as loss of profit on the sale of spoiled stock or food; the cost of disposing of spoiled stock etc). In June 2003 Gillard J approved a notice to class members which advised them of the claim procedure. This notice advised business users of gas that they were required to give notice of their claim to the Prothonotary of the Supreme Court by 1 September 2003. The notice contained the form which class members could employ for the purpose of making their claims. This form required business users of gas to provide a brief description of the claim and the circumstances giving rise to the claim including the nature of the property damage and the consequential economic loss resulting from damage to property. The notice advised class members that “if you do not give notice by 1 September 2003 you will lose all your rights to compensation for losses you suffered as a result of the interruption of the gas supply ...”. Justice Gillard has revealed that 472 class members filed a notice of claim.²⁶⁹

12. Who funds group litigation: the state, legal services organizations, NGOs, private lawyers, or the claimants themselves?

As indicated above, solicitors acting for class representatives have effectively funded class proceedings through the execution of no win-no fee agreements with class representatives and class members. More recently, litigation funders have assumed the financial burdens of class proceedings in several extremely costly and complex shareholder class actions. As already noted, *Fostif* renders the employment of opt in devices difficult in representative actions which, in turn, makes such litigation far less appealing to such funders. If, in *Multiplex*, the Full Federal Court prefers to adopt Stone J’s and Hansen J’s approach towards class narrowing mechanisms rather than Finkelstein J’s approach there will also be an exit by funders from class action litigation. If that were to happen, victims of illegal conduct that affects multiple persons will be largely dependent on the willingness of Slater & Gordon and MBC - to institute and fund a class proceeding - in order to secure access to the courts. In fact, the author’s empirical study of the Victorian regime has revealed that no firm, other than MBC and Slater & Gordon, has acted for class representatives in more than one Part 4A proceeding. This finding appears to confirm the accuracy of the following assessment made by the Law Council of Australia:

it is generally not viable for most law firms to fund representative proceedings on a conditional basis. ... The price of failure is high, too high for many to risk it again. Only major firms with significant capital reserves have the financial capacity to fund large-scale commercial litigation – and generally not more than one at a time, due to the high risk and cost involved. While law firms

²⁶⁷ Letter by Justice Wilcox to the author dated 17 July 2006 and Justice Wilcox, “Class Actions in Australia” (paper presented to the Commonwealth Law Conference, Melbourne, 2003), 7-8 as cited in Grave and Adams, above n 3, 323.

²⁶⁸ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27.

²⁶⁹ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 4)* [2004] VSC 466, para 9.

are able to facilitate access to justice for some, this work is but a fraction of the overall assistance required for plaintiffs in this area.²⁷⁰

13. Costs and benefits.

Surprisingly, Australia's class action regimes do not, subject to one exception, deal with the crucial issue of the payments that solicitors acting for the plaintiff class are entitled to receive. The exception is s 33ZJ which provides that in successful class suits seeking monetary relief, if the Court is satisfied that the costs reasonably incurred in relation to the class proceeding by the representative plaintiff are likely to exceed the costs recoverable by that plaintiff from the defendant, the Court may order that an amount equal to the whole or part of the excess be paid to the representative plaintiff out of the damages awarded. The philosophy underlying this provision has been explained as follows in the Explanatory Memorandum to the Bill that contained Part IVA and by Wilcox J of the Federal Court respectively:

the new Part [IVA] does not affect the application of the ordinary costs rules applicable in the Federal Court for proceedings generally. However, where the representative party or a sub-group representative party is successful and secures a monetary award in favour of group members or sub-group members, as the case may be, it is appropriate that those group members contribute towards the amount by which the representative will be out of pocket for costs after recovering costs from the respondent. This section allows the Court to make an order for a contribution from group members in these circumstances.²⁷¹

Section 33ZJ authorises the Court to make an order that an amount equal to the whole, or a part, of the difference between the costs incurred in a representative proceeding and the costs recoverable from the respondent be paid out of the damages awarded. This provision was obviously intended to ensure a solicitor is covered for costs reasonably incurred, while allowing the Court an opportunity to ensure there is no exploitation of group members.²⁷²

In light of the comments above, it is clear that s 33ZJ is based on the "common fund" doctrine enunciated by the US Supreme Court. The effect of, and the policy underpinning, this doctrine were explained as follows by the American Court:²⁷³

[the Court] has recognised consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole ... The [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to court costs are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.²⁷⁴

²⁷⁰ Law Council, above n 177, para 33. See also Murphy and Cameron, above n 126, 405 ("there are only two firms in Australia that frequently act for applicants in this area – even though the procedure has been available for over 14 years. Given the ability of lawyers to locate and practise in profitable areas, this is a good indicator of how difficult it is to run class action litigation").

²⁷¹ *Explanatory Memorandum to the Federal Court of Australia Amendment Bill 1991*, para 55.

²⁷² *McMullin v ICI Australia Operations Pty Ltd (No 6)* (unreported; Federal Court of Australia; Wilcox J; 27 November 1997), 3.

²⁷³ See also, C Silver, "A Restitutionary Theory of Attorneys' Fees in Class Actions" (1991) 76 *Cornell Law Review* 656; AR Golbey, "Attorney's Fees, Unclaimed Funds, and Class Actions: Applications of the Common Fund Doctrine" (1979) 48 *Fordham Law Review* 370; and JP Dawson, "Lawyers and Involuntary Clients: Attorney Fees from Funds" (1974) 87 *Harvard Law Review* 1597.

²⁷⁴ *Boeing Co v Van Gemert* 444 US 472, 478 (1980).

Another relevant provision is s 33V(2) which permits the Court to make such orders “as are just with respect to the distribution of any money paid under a settlement or paid into Court”. This provision has enabled the judicial authorisation of the payment of the class solicitor’s costs and disbursements from the funds received as a result of the settlement of the class proceeding itself.²⁷⁵ Furthermore, it appears that class members – who have not executed contingency fee agreements with class counsel and who have settled their individual claims directly with the defendant – may be required by the Court to apply some portion of their settlement funds to satisfy the costs of the class lawyer.²⁷⁶

Unlike in the US, in Australia conditional fees may not be calculated as a percentage of the amount recovered on behalf of the client. Only uplift fees may be charged.²⁷⁷ In Victoria, for instance, the *Legal Profession Act 2004* (Vic) provides that a costs agreement may provide for uplift fees being a premium not exceeding 25% of the legal costs (excluding unpaid disbursements) otherwise payable.²⁷⁸ These costs agreements may be conditional on a successful outcome of the matter to which those costs relate.²⁷⁹ However, the execution of conditional costs agreements involving uplift fees is not allowed “unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely”.²⁸⁰

Section 3.4.29 of this Victorian legislation expressly prohibits costs agreements pursuant to which the amount is calculated by reference to the value of any property or of any transaction involved in the matter to which the costs agreement relates or by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates. As already highlighted, no similar prohibition - on receiving a percentage of the amount recovered by a litigant - has been held to apply to entities that conduct the business of providing funding to parties to litigation for the purposes of the litigation.²⁸¹

Attention should also be drawn to two important matters. Australians normally regard the English legal system/establishment as being excessively conservative. And yet the 25% uplift fee allowed in Victoria pales into insignificance when compared with the 100% uplift allowed in England.²⁸² It is therefore not surprising that several commentators, including those who normally act for class action defendants, have recommended an increase in the uplift fees that may be charged by Australian solicitors.²⁸³ The second point to note is that, as noted by Grave and Adams, “the legislative pendulum in respect of conditional uplift costs agreements appears to have swung in the opposite direction with the New South Wales Parliament’s decision [which came into effect in

²⁷⁵ See, for instance, *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 166 ALR 731, 735 (per Merkel J); and *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, para 47 (per Goldberg J).

²⁷⁶ *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 191 ALR 697, 715-716 (per Moore J); and *Courtney v Medtel Pty Limited* (2002) 122 FCR 168, para 72 (per Sackville J).

²⁷⁷ See ALRC 2000 Report, above n 183, para 5.21; Spender, above n 219, 142-143; Lipp, above n 256, 388; Law Reform Commission of Hong Kong, Conditional Fees Sub-Committee, *Conditional Fees* (Consultation Paper; September 2005), ch 5; Mulheron, above n 26, 476; and Legg, above n 219, 63.

²⁷⁸ Section 3.4.28.

²⁷⁹ Section 3.4.28(1).

²⁸⁰ Section 3.4.28(4).

²⁸¹ In M Legg and G Williams, “The High Court Gives Litigation Funding Legitimacy, Yet Questions Remain” (2006) 44(9) *Law Society Journal* 53, 55-56, it is contended that “the legitimacy that the High Court has given to litigation funding may see advocacy for the removal of the current prohibition on lawyers charging a contingency fee. On one view, if litigation funding is not against public policy then the more highly regulated solicitor should also be able to charge a contingency fee”.

²⁸² See s 58(6) of the *Courts and Legal Services Act 1990* (UK).

²⁸³ See, for instance, Grave and Adams, above n 3, 482.

2005] to prohibit uplift [fees] for damage claims”.²⁸⁴ The practical effect of this legislative amendment in NSW has been accurately described as follows by the Law Council: “it must be noted that access to justice in NSW has been significantly curtailed by the ... ban on uplift fees in damages claims. This has effectively removed the capacity of law firms to incorporate the risk of accepting cases on a ‘no win, no fee’ basis into their fee structure, making speculative damages claims virtually untenable in that jurisdiction, to the significant detriment of impecunious plaintiffs”.²⁸⁵ Consequently, the Law Council has recommended that this ban be repealed.²⁸⁶

The major features of the retainer agreements that have been executed with Part IVA lawyers by class members have been described as follows by the Federal Court:

Group members will not be charged professional costs unless there is a successful outcome for them in the proceeding. In those circumstances the fee and retainer agreements make provision for the calculation of the fees to be paid to the applicants’ solicitors on an hourly scale with an increase of the hourly rates of up to 25% for conducting the case on a no-win no-charge basis.²⁸⁷

The group member is liable for individual costs and disbursements incurred in working on the group member’s particular claim ... as well as for a “reasonably” apportioned share of the fees for services rendered to the group as a whole in the conduct of the representative proceeding.²⁸⁸

The agreements provide, *inter alia*, for hourly charge out rates for lawyers and paralegals, standard fees for photocopying and other ancillary services, interest to be charged at the rate of one per cent per month on the value of work carried out (charged from the end of the month in which the work is carried out, whether or not an account is rendered) and an “uplift” factor of 25 per cent.²⁸⁹

The recent judgment of Finkelstein J in the *Multiplex* Part IVA proceeding provides some insights as to the retainer agreements that class members are required to execute, in order to fall within the ambit of the proceeding, where litigation funders are involved:

No fees, costs or disbursements are payable by the group members. They are to be paid by ILF [the litigation funding company] on the members’ behalf. The group member is entitled to terminate the retainer on seven days written notice. The retainer terminates automatically if, in the case of a class action, the group member opts out before the opt out date set by the court. The retainer also terminates automatically if the group member settles his or her claim against Multiplex otherwise than in a group settlement. In the event of termination MBC is still entitled to its costs from ILF. MBC promises not to recover from the group member any professional fees and disbursements that ILF refuses to pay.²⁹⁰

The discussion above on class action settlements has revealed that significant payments, in favour of the class representative’s lawyers, have generally been authorised by Australian judges when approving class action settlements under s 33V. It is reasonable to assert that - whilst the same regimes apply, with respect to solicitor’s fees and disbursements, regardless of whether the litigation in question is a class proceeding or an orthodox proceeding - no similar payments are generally available to plaintiff solicitors when acting on a no win-no fee basis in non-group

²⁸⁴ Ibid.

²⁸⁵ Law Council, above n 177, para 32.

²⁸⁶ Ibid para 99.

²⁸⁷ *Williams v FAI Home Security Pty Ltd (No 3)* [2000] FCA 1438, para 13 (per Goldberg J).

²⁸⁸ *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 166 ALR 731, 737 (per Merkel J). See also B Slade, “Class Actions: Watch Out for the Details” (2002) 16(3) *Commercial Law Quarterly* 3, 5.

²⁸⁹ *Courtney v Medtel Pty Limited (No 5)* [2004] FCA 1406, para 56 (per Sackville J).

²⁹⁰ *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061, para 31.

litigation. Whether or not this constitutes a desirable scenario requires a fairly subjective evaluation. Some may view this as evidence that plaintiff solicitors, rather than class members, are the primary beneficiaries of the class action device. Others may, instead, point to the high costs of running complex class proceedings as the reason for the usually large payments made to plaintiff solicitors when a positive outcome is secured on behalf of the class. Data in this area was recently provided by Finkelstein J with respect to the *Multiplex* proceeding:

It will come as no surprise to learn that this action will be very expensive to run. But just how much it will cost will likely shock most lay persons and some lawyers to boot. Each side has several lawyers, including multiple counsel, working on the case, some probably on a full-time basis. ... MBC's initial estimate of the cost of running the action was in excess of \$7.5 million (the actual estimate is confidential). Their current estimate may be much higher. The respondents' lawyers have made an estimate of their clients' costs for the purpose of a still extant motion for security for costs. They estimate the costs to the completion of discovery to be \$24,137,672, of which \$13,963,837 is for discovery. For the time being P Dawson Nominees does not seek general discovery and has asked for discovery of a limited class of documents. This has reduced the cost of discovery to \$6,429,737, so it is claimed.²⁹¹

The author's empirical study will hopefully provide a more objective basis, upon which to draw conclusions, by providing data as to how funds made available by class action defendants are distributed between plaintiff solicitors and class members.

14. Is the burden that group litigation places on the court more, the same, or less, than in comparable non-representative, non-group litigation? What is the average time to dispose of a group case, and how does this compare to comparable non-representative non-group litigation?

The author's empirical study of Part 4A has revealed that the average duration of the 19 Part 4A proceedings that have been completed is approximately 18 months whilst the median duration is 14 months. This data is broadly similar to the data contained in the annual reports of the Supreme Court of Victoria, with respect to the duration of non-group proceedings instituted in that court.

It is useful to divide Part 4A proceedings into two broad categories: the first category comprises those proceedings which came to a conclusion following either a judicially approved settlement or a judgment that was handed down at the end of the trial. The second category includes those proceedings which were, voluntarily or involuntarily, (a) discontinued; (b) discontinued as class proceedings; or (c) transferred to another jurisdiction.

- The average duration of the first category of Part 4A proceedings is just over 26 months whilst the median duration is 17 months.
- The average duration of the second category of Part 4A proceedings is just over 6 months.

15. What are the current debates in your jurisdiction over the application of collective litigation rules and their consequences?

In 1994 a committee established by Australia's Federal Parliament, the Access to Justice Advisory Committee, concluded that "fair and efficient [class] action procedures should be

²⁹¹ Ibid para 28.

available in all Australian jurisdictions. The Commonwealth provision for [class] actions in the Federal Court is, we think, a suitable model”.²⁹² Attainment of this desirable goal does not appear imminent or likely as no Australian State Government is currently considering (or planning to consider) class action reform. This represents a very odd scenario when one considers that the experience with the Federal²⁹³ and Victorian class action regimes has shown that the vigorous criticisms of the class action device that, as already noted, were put forward by the Liberal Party, leading law firms, the Business Council of Australia and some legal commentators, when the introduction of Part IVA was considered, were largely unfounded. This state of affairs becomes even more difficult to comprehend when one considers that there are Labor Governments in each of the six Australian States. Furthermore, as already highlighted, the rules governing representative actions are clearly deficient, a fact that has also been recognised by defendant solicitors:

The use of the representative proceeding in the modern age of class actions is like requiring the parties to use a penny-farthing to travel on a freeway. Not surprisingly, some riders fall off, as happened with the plaintiff in *Fostif*. Appropriate legislation or rules of court that draw on the experience of other jurisdictions with class actions should be implemented. Legislation is perhaps more appropriate considering the large policy issues at stake.²⁹⁴

So, why are comprehensive class action regimes available in only two Australian jurisdictions, a diametrically opposed scenario to the Canadian class action landscape? In simple terms, embracing class action reform, in Australia’s extremely conservative society, does not constitute a politically popular strategy. This scenario is, in turn, largely due to the fact that Australia’s media frequently depicts class action litigation as one of the principal causes of the overly-litigious US society which benefits only the solicitors who institute them and which damages the business sector and thus threatens economic prosperity. An extreme example of this grossly unsatisfactory scenario is provided by an article which appeared in July 2007 in a national newspaper, *The Australian*. This article provided commentary on the draft proposals that the Victorian Law Reform Commission (“VLRC”) had issued a month earlier. As explained below, these draft proposals seek to remove some of the more significant barriers to the employment of the Part 4A regime. Phase 1 of this inquiry, into Victoria’s civil justice system, is headed by Dr Peter Cashman, a member of the ALRC when its 1988 report was issued and one of Australia’s leading class action plaintiff solicitors. In the article in question the following astonishing comments were found:

Had Dr Cashman simply provided that the Victorian Government mainline money into the veins of Maurice Blackburn Cashman, the law firm he co-funded, or fellow plaintiff firms such as Slater & Gordon, the effect would have been pretty much the same as the VRC proposals.

And with what benefits for average Victorians? ... The net result of these proposals would ... be that one class of scarcely undernourished workers – plaintiff lawyers – will grow rich and fat at the expense of the unemployed. If your child leaves school hoping to get a job at a bright new enterprise started by a new entrepreneur, he or she can forget it – unless he or she is prepared to move interstate. Because no employer who has any choice about where to locate new jobs will contemplate Victoria. Except, of course, law firms.²⁹⁵

²⁹² Access to Justice Advisory Committee, *Access to Justice – An Action Plan* (1994), para 2.105.

²⁹³ ALRC 2000 Report, above n 183, para 7.92.

²⁹⁴ Legg and Williams, above n 281, 56.

²⁹⁵ J Albrechtsen, “Get set for class action chaos”, *The Australian*, 15 July 2007.

A balanced and accurate description of the current debates with respect to Part IVA and Part 4A may be provided by considering the recommendations for reform that were made, with respect to Part IVA, by the ALRC in 2000, and by the VLRC, with respect to Part 4A in June 2007.

The ALRC made the following important recommendations with respect to Part IVA:²⁹⁶

- The Federal Court should consider drafting guidelines or a practice note, relating to the practices of lawyers and parties in Part IVA proceedings, addressing in particular: (a) the choice of the representative party, who should not be chosen primarily as a “person of straw”; (b) the procedures to be followed to ensure fair cost agreements between class members, the representative party and lawyers; (c) the obligations of lawyers to the representative party and each class member with respect to competing interests of class members and the class, class closure and settlement agreements; and (d) the arrangements for communication between defendant lawyers and class members.
- The Federal Court should promulgate additional rules for class proceedings in relation to issues such as: (a) criteria for selecting the appropriate class action and the class representative amongst competing applications; (b) notification procedures; and (c) proposed settlements, including global settlements.
- Part IVA should be amended to: (a) require class closure at a specified time before judgment; and (b) enable the Court to approve fee agreements between the class representative and/or class members with the class representative’s lawyers.
- The Federal Attorney-General should commission a review of Part IVA.
- The profession should include rules governing lawyers’ responsibilities to multiple claimants and in class proceedings in professional practice rules.

Unfortunately, none of these recommendations have been implemented.

In June 2007 the VLRC made the following draft proposals concerning Part 4A, as part of Phase 1 of its study of Victoria’s civil justice system:²⁹⁷

- There should be no requirement that all class members should be required to have individual claims against all defendants in class action proceedings involving multiple defendants. Part 4A should be amended to make it clear that in cases where there is at least one defendant against whom all class members have individual claims, additional defendants may be joined even if only some members of the class have individual claims against such additional defendants.
- Part 4A should be amended to make it clear that the Part 4A regime is able to be utilised by a group or groups of individuals who are aggregated together, including where such individuals or entities consent to the pursuit of proceedings on their behalf.
- The Supreme Court of Victoria should be empowered to order *cy pres* remedies where: (a) there has been a proven contravention of the law; (b) a financial or other pecuniary advantage (“unjust enrichment”) has accrued to the person or entity contravening the law as a result of such contravention; (c) a loss suffered by others is able to be quantified; and (d) it is not possible, practicable or cost effective to identify and compensate some or all of those who have suffered the loss.²⁹⁸

²⁹⁶ ALRC 2000 Report, above n 183, para 7.128.

²⁹⁷ VLRC Report, above n 123, 38-50.

²⁹⁸ An excellent and recent study of this complex and important area may be found in R Mulheron, *The Modern Cy-pres Doctrine: Applications and Implications* (University College London Press; 2006).

- The establishment of a new funding body, the Justice Fund, which would: (a) provide financial assistance to parties with meritorious civil claims; (b) provide an indemnity in respect of any adverse costs order; and (c) meet any requirements imposed by the court in respect of security for costs. The proposed body would, in consideration of providing the abovementioned financial support, receive an agreed percentage of the amount recovered in successful cases. The body would seek to be self funding (through income derived from success fees in funded cases, through costs recovered from unsuccessful parties and through payments into the funds which the court would be empowered to order pursuant to the *cy pres* remedies referred to above).

The VLRC's final proposals will be issued by March 2008.

16. Overall, how would you evaluate the mechanism(s) success in achieving major changes in behavior, activities or policy, relative to the costs incurred by public and private actors?

This question, as the author understands it, requires a determination as to whether the behaviour modification goal of class actions, canvassed in an earlier part of this report, has been attained and then a comparison of this outcome with the public and private costs incurred in achieving this outcome. In the author's view, it is both inappropriate and impossible to provide this evaluation with respect to Australia's class action regimes.

It is inappropriate to assess the effectiveness of Part IVA and Part 4A, through a determination of whether they have attained the behaviour modification goal of class actions, given that these legislative regimes were clearly drafted on the basis that such an outcome was not intended. Such evaluation is also not possible given the current lack of any empirical data as to the broader impact of class action litigation, that is, its impact beyond those persons and entities that are involved in such proceedings. This scenario has resulted in vastly different conclusions by those who have considered this question. Mills, for instance, has concluded that the threat of shareholder class actions has motivated directors and officers to strictly observe their corporate obligations.²⁹⁹ Conversely, other commentators have warned that "if the business community fails to lobby for legislative change at the federal, state and territory level class actions will become much more of an impediment to doing business in Australia".³⁰⁰

²⁹⁹ M Mills, "Case for an Eye on Litigation Funders", *The Age*, 9 October 2006.

³⁰⁰ S Clark and G Williams, "Class Actions – A Growing Threat", *Australian Financial Review*, 11 March 2004, 79.