



U.S. CHAMBER
Institute for Legal Reform

Ripe for Reform

*Improving the Australian
Class Action Regime*

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U.S. CHAMBER
Institute for Legal Reform

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Introduction

The Australian Federal class action regime, contained in Part IVA of the Federal Court of Australia Act 1976 (Cth) (Part IVA), commenced operation in March 1992 and largely (but not entirely) reflected recommendations made by the Australian Law Reform Commission (ALRC) in 1988.¹ Part IVA was intended to provide for the efficient resolution of multiple claims sharing common issues, increase access to justice for small claimants and safeguard the interests of group members and respondents alike.²

Through two decades of operation, a number of complications have emerged which were either not anticipated or not sufficiently appreciated at the time the class action procedure was designed and which have limited the extent to which Part IVA has fulfilled its original goals.³

First, the Part IVA model reflected a number of policy decisions, some of which have worked well and others of which (such as the decision to omit a certification process) require revisiting. Second, lacunae in the legislation have been exposed which have required judges to develop *ad hoc* solutions from case to case. This patchwork process of procedural development is unsatisfactory and has diminished the certainty and consistency that parties should rightly expect of a class action regime. Finally, as the regime was designed at a time when third party litigation financing (TPLF) was prohibited, it

is ill-adapted to deal with the conflicts of interest that funding may create between and among the funder, the funded parties, the unfunded class members and the lawyers for the class.

Part IVA has remained virtually unchanged since it was enacted, and the time is now due for review and reform of this model. This paper addresses a number of areas in which the class action system could be improved. These include:

- **Class certification:** The decision not to include a class certification process has failed the test of time. The introduction of such a procedure would reduce costs, reduce the risk of inappropriate actions and safeguard the interests of group members and respondents.⁴
- **Commonality:** A certification standard which requires that a class action could proceed only where common questions

“I don’t just consider myself to be a street sweeper. I want to know what’s really lying around and whether people’s interests or rights are being affected”⁵

– Justice Jessup, Judge of the Federal Court of Australia

of law or fact predominate over any questions affecting only individual members would result in the more efficient use of the class action process.

- **Class closure:** Australian class actions follow the “opt-out” model, in which claimants who meet the group definition are included unless they take affirmative steps to be excluded. Australian courts have yet to develop a coherent position on when and how a class should or can be “closed” so that all parties know the identity (and number) of group members. A mechanism that encourages opt-out and class closure at the earliest possible opportunity would increase certainty and facilitate settlement.
- **Competing actions:** Parallel and competing class actions in respect of the same subject matter complicate proceedings and settlement, inconsistent with the economic efficiency rationale for class actions. Consideration of the consolidation of parallel proceedings should be required at an early stage.
- **Scrutiny of settlements:** The rules that govern judicial approval of settlements are uncertain and largely discretionary. There should be greater clarity about the approach to be adopted by courts in approving settlements and, in particular, their powers to approve settlements which go beyond common issues and extinguish the rights of class members.

- **Discovery:** A huge burden and cost is imposed upon respondents in providing discovery in relation to class actions. As has been done in relation to certain commercial disputes, the obligation to provide discovery in relation to the substantive issues in the proceedings should not be imposed upon respondents to class actions until after the applicants have filed both a statement of claim and supporting evidence. This would enable disputes to be narrowed, or settled, before the burdensome and expensive task of discovery is undertaken and would eliminate speculative class actions.
- **Funding by lawyers:** TPLF is increasingly used in class actions in Australia. The funding of class actions through lawyer-owned TPLF vehicles is, however, controversial in Australia given the present prohibition on contingency fees. Regulation is required to ensure that the prohibition is not circumvented through a corporate or trust funding vehicle.

These reforms could be carried out either by targeted amendments or as part of a broader and more comprehensive review and reform of class action procedure in Australia. In either case, the implementation of such reforms would ensure that class action regimes live up to the original objectives: providing an efficient class action procedure, which increases claimants' access to justice while protecting all parties from the dangers of inappropriate or abusive actions.

Class Certification

Unlike nearly every other class action regime around the world (whether proposed or implemented),⁶ Australia's Federal class action procedure has no requirement that there be a preliminary certification hearing at which the Court determines whether the proceeding is suitable to proceed as a class action.

The ALRC recommended against the inclusion of a certification procedure on the basis that it would introduce additional costs and would be unnecessary in light of other proposed safeguards. Those justifications have not been borne out by the operation of Part IVA, and the decision not to include a certification procedure is considered by some as *"an experiment [which] has been singularly unsuccessful."*⁷

To reduce costs and delay while protecting group members and respondents alike from the dangers of inappropriate actions, a certification procedure should be introduced into Australian class action regimes.

The Current Formal Requirements of a Class Action

At present, the threshold requirements to the commencement of a class action under Part IVA are that:

- there must be a claim by seven or more persons, and the claims must be against the same person;
- the claims must arise out of the same, similar or related circumstances; and
- there must be a substantial common issue of law or fact.⁸

Further, the only additional matters that must be laid out in the originating pleading for a class action, as compared to unitary proceedings, are that it must:

- describe or otherwise identify the group members to whom the proceeding relates;
- specify the nature of the claims made on behalf of the group members and the relief claimed; and
- specify the questions of law or fact common to the claims of the group members.⁹

Under the present class action model, the onus (and the cost risk) of challenging non-compliance with any formal requirement rests with the respondent.

What is Certification?

Under the U.S. Federal Rules of Civil Procedure (U.S. Rules), litigation may proceed as a class action only if, as a threshold matter:

- (a) the class is so numerous that joinder of all members is impracticable (numerosity);
- (b) there are questions of law or fact common to the class (commonality);
- (c) the claims of the representative parties are typical of the claims of the class (typicality);¹⁰ and
- (d) the representative parties will fairly and adequately protect the interests of the class (adequacy).¹¹

In addition to those criteria, the U.S. Rules also require that one of the three following conditions is satisfied:¹²

- (a) the prosecution of separate actions risks either inconsistent adjudications which would establish incompatible standards of conduct for the defendants or would as a practical matter be dispositive of the interests of others;
- (b) defendants have acted or refused to act on grounds generally applicable to the class; or
- (c) there are common questions of law or fact that predominate over any individual class member's questions, and that a class action is superior to other methods of adjudication.

The third type of class action is most directly comparable to the Part IVA regime. While generally speaking these requirements reflect considerations similar

to the Australian class action regime, as outlined above, under the U.S. Rules:

- the applicant bears the onus of satisfying the Court that all requirements have been met; and
- the Court must determine whether to certify the proceeding as a class action "at an early practicable time" after filing.¹³

A certification order must:

- (a) define the class and the class claims and issues; and
- (b) appoint class counsel.¹⁴

Empirical studies in the United States have been reported as showing certification rates of between 56 and 67 percent, with certification rates decreasing in cases where defendants challenged the certification motion.¹⁵ There is real value in having a structured and formal occasion on which the class action is subject to scrutiny, such as is provided by the U.S. certification system.

The ALRC's Rationale For Not Having a Certification Process

In assessing certification, U.S. federal courts exercise a high degree of oversight at an early initial stage of the proceeding to ensure that it progresses efficiently going forward. The two main purposes of a certification hearing are to ensure that:

- (a) the criteria for commencing a class action have been fulfilled; and
- (b) the interests of the group members will be adequately protected by the representative applicant and adequately represented by counsel.

In considering whether or not to include a certification procedure in its proposed model, the ALRC acknowledged these purposes but considered that they would be sufficiently addressed by other safeguards.¹⁶ Specifically, the ALRC noted that:

- the respondent could seek to strike out the proceedings if the criteria for commencing a class action were not fulfilled in a particular case, or seek orders that the proceeding not continue as a class action;¹⁷
- group members could, upon receiving notice of the proceedings, opt out of proceedings¹⁸ or could seek to remove the representative applicant if they believed that their interests were not being adequately represented;¹⁹ and
- the Court can exercise its own discretion to prevent an abuse of process.²⁰

In these circumstances, the ALRC considered that certification hearings (and appeals therefrom) would involve unnecessary cost and delay, and therefore made no recommendation for a certification procedure.²¹

The ALRC's reasoning has not found favour with other law reform bodies, who have subsequently considered this issue, all of whom have been unwilling to implement a class action regime without a certification process.²²

A Failed Experiment

COST AND DELAY

Far from avoiding costs and delay, the absence of a certification process has instead increased the costs and delay

involved in representative proceedings. As noted by Professor Mulheron:

"Litigation under Pt IVA has been mired in numerous interlocutory applications about issues that could better have been addressed at a certification hearing."²³

To similar effect, Justice Finkelstein noted 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."²⁴

The proliferation of interlocutory applications has, to a large extent, been the product of deficiencies in the drafting of pleadings by representative applicants.²⁵ The existence of an early and mandatory certification hearing at which the pleadings would be scrutinised before the proceeding was allowed to continue as a class action, would ensure that representative claims are properly pleaded at the outset. The result thereby would avoid a process in which pleadings are repeatedly redrafted to satisfy deficiencies identified in a series of costly and time-consuming challenges by respondents.

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“Some claims have been commenced on little more than a wing and a prayer, barely meeting the basic requirements under Part IVA, in the hope that their case will be improved or supplemented at the discovery stage.”

Some claims have been commenced on little more than a wing and a prayer, barely meeting the basic requirements under Part IVA, in the hope that their case will be improved or supplemented at the discovery stage. For example:

- In 2009, a claim was commenced within 10 days of major bushfires in Victoria—well before any Royal Commission findings. More than two years later, it was brought to the Court’s attention that the proceedings had been commenced without the authority of the named applicant. While the Court permitted the claim to proceed under an alternative representative applicant, group members had their entitlement to interest restricted and the law firm involved was liable for costs up to that point.²⁶
- In October 2013, a shareholder class action was filed against Leighton Holdings Limited, one day after media reports concerning the conduct of certain of its officers. The respondent sought to have the pleading struck out for reasons, including the failure to properly plead the definition of the group on whose behalf the claim was brought and the time at which their loss arose (based on the numerous alleged non-disclosures). The applicant resisted

the application on the basis that the events and circumstances surrounding each event of non-disclosure giving rise to the different claims of group members were in the respondent’s knowledge, and sought discovery to ascertain “when (if ever) the market ... was properly informed.” While the respondent succeeded in having the pleading struck out, the Court indicated that it would have rejected such a discovery request as “fishing for a cause of action” and therefore impermissible.²⁷

As the Court has rightly stated, it is not to the point that a pleading complies with the requirements of the *Federal Court of Australia Act 1974* (Cth) (the Act), including Part IVA, because the group is comprised of seven or more persons, including the representative applicant, with claims against the respondent arising out of one or more events: “[s]omething more than technical compliance is necessary.”²⁸ As such, compliance with the requirements of the class action regime is a matter of substance not form, and should properly be the subject of Court scrutiny in each class action with the onus on the representative applicant.

PROTECTION OF GROUP MEMBERS

The ALRC's position was that adequate representation of group members by the representative applicant is ensured by the group members' right to opt out of the proceedings (under s 33J) and by their right to apply to substitute the representative applicant (under s 33T). Unfortunately, this has not been borne out by experience.

As a practical matter, most absent claimants are completely unaware of the proceeding when it is initiated. Even if they know about it, it is unrealistic to expect that most group members, who may have small claims and/or limited resources, will be able to effectively monitor and scrutinise the applicant's conduct on their behalf in order to determine whether or not to opt out. It is even more unrealistic to suggest that all but a handful of group members would ever be willing or able to take the drastic step of making a formal application to have the representative applicant removed. Indeed, we are unaware of any applications for the substitution of a representative applicant brought by a dissatisfied group member, indicative of the natural concern they may hold that such an application would be detrimental to the success of the class action as a whole.²⁹ The class action

procedure was designed to advance the interests of those who cannot otherwise afford to take individual legal action in order to protect their interests, and the suggestion that such group members can adequately protect their interests in class actions by taking significant steps in those proceedings is illogical.

The need for a certification hearing at which the Court can assess whether the applicant will be able to adequately represent the interests of group members is all the greater given the involvement of TPLF providers. Ordinarily, a Court can rely "on the congruence of [group members'] interests with those of the representatives as the incentive for effective representation" because "the self-interest of the representative... drives the active party."³⁰ This assumes, however, that the representative applicant (and not their lawyer or their funder) is in fact "the active party." Where the representative applicant has contracted away a degree of control of the proceedings to a funder or has otherwise been chosen by the funder (or their lawyer) on the basis that they are likely to be compliant or deferential, congruence of interest provides little assurance of effective representation.

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The insertion of a certification procedure into Part IVA would provide an early opportunity at which the appropriateness of the representative applicant could be scrutinised, and conflicts between group member interests identified. This would deter funders and class action lawyers from deliberately selecting applicants with small claims and few resources in the expectation that they will not in fact play an active role in the conduct of proceedings.

Several recent decisions provide further support for a model in which potential sources of conflict are identified and considered at the beginning rather than at the end of proceedings so as to best protect the interests of group members. For example:

(a) In May 2013, the Court declined to approve a settlement made by the representative applicant in the *Vioxx* litigation for reasons including that the settlement failed to differentiate adequately between the respective strengths of group member claims. Significantly, the representative applicant, Mr. Peterson, had failed to make out his own individual claims as he exhibited independent risk factors for heart attacks. Notwithstanding this, under the proposed settlement he entered into with the respondent pharmaceutical company, \$2,000 would be paid to living group members (including Mr. Peterson) and \$1,500 to the estates of deceased group members, provided that they could establish that they suffered heart attacks (or sudden cardiac death) within a certain period of consuming Vioxx tablets. For those, like Mr. Peterson,

who exhibited independent risk factors for heart attacks, the settlement would represent a windfall taken at the expense of those with more deserving claims. Further, a term of the settlement was that the respondent would waive any entitlement to costs as against Mr. Peterson. In the course of the approval hearing, Justice Jessup expressed scepticism about the fairness of the settlement scheme:

*"I don't just consider myself to be a street sweeper."*³¹

(b) In August 2013, the corporate regulator, the Australian Securities and Investments Commission (ASIC), successfully challenged a first instance (trial) decision approving the settlement of a class action against Macquarie Bank in relation to the collapse of Storm Financial. In those proceedings, no TPLF provider was involved; rather, a number of group members funded the proceedings. The Full Federal Court found that allocation of 35 percent of the settlement sum to those funding group members (which included the representative applicant) as a "funder's premium" (in addition to their individual recoveries), in circumstances where the funding group members had contributed varying amounts to fund the class action, was neither fair nor reasonable. The Court did not state that the provision of a differential return to funding group members would never be fair and reasonable. Rather, it stated that on the fact of this case the differential allocation, in circumstances where the claims made by *all* group members were relevantly identical, was not fair and reasonable given that:

- (i) group members were not given an equal opportunity to share in the premium, with this inequality being heightened by the *ex post* offer of highly attractive terms to the small group of funding group members after the settlement was announced; and
- (ii) the calculation of the 35 percent premium by reference to success fees taken by TPLF funders was not justifiable.³²

A certification hearing—in which the Court would be required to determine whether the named applicant could adequately represent all group members—would necessarily involve the consideration of potential sources of conflict and would provide a convenient occasion to determine what, if any, steps need be taken to address such conflicts.³³

What Form Should a Certification Process Take?

A certification hearing should occur at an early stage of proceedings. Before the Court certifies that a proceeding may continue as a class action, the Court should be satisfied that:

- (a) the threshold requirements to the commencement of a class action have been complied with;
- (b) the pleaded allegations are not deficient and have a proper basis as a matter of substantive law—i.e., the representative applicant is not “fishing” for a cause of action;

- (c) the representative applicant(s) and their legal representatives can represent appropriately the interests of all group members;
- (d) the questions of law or fact common to group members predominate over any questions affecting only individual members (discussed further in the following section); and
- (e) a representative proceeding will provide the most efficient and effective means of dealing with the claims of group members.

In light of the significant powers wielded by a representative applicant to determine outcomes for group members and the impact a class action can have on the rights of non-party group members, the onus of establishing each of these matters should be on the applicant.

The introduction of a certification step could eliminate many of the interlocutory applications which currently beset class action proceedings, as well as deal with competing class actions (see further below). In their place would be a structured occasion on which key issues concerning the legitimacy and conduct of proceedings could be determined and the interests of group members safeguarded from inadequate representation.

Commonality

The “commonality” threshold that must be met in order to commence a representative proceeding in Australia is much less stringent than the criteria in foreign jurisdictions. This has allowed representative proceedings to be commenced where the applicant is not well suited to represent the interests of group members. A more robust commonality criterion would ensure that representative proceedings are used only where it is efficient to do so and would promote better representation of group members’ interests.

The Current Position

The current legislation allows a representative proceeding to be commenced in respect of claims arising out of the same or similar circumstances which give rise “to a *substantial common issue of law or fact*”. As interpreted by the High Court, the criterion that a common issue be “*substantial*” requires only that the issue be “*real*” in the sense of being not trivial, nominal or ephemeral.³⁴ Perhaps counter-intuitively, it does not require that the issue be major or of any particular significance to the resolution of the claims of group members.³⁵

Without question, there will be cases in which the determination of one common issue has great power in substantially disposing of group members’ claims, such as resolution of the cause of the bushfire in the numerous class actions relating to the

Victorian fires of 2009. In other actions, however, where the common issue on which the legitimacy of the whole class action hangs—while “*real*”—will have little effect on the determination of each group member’s claim, there is a real question as to whether the use of the class action mechanism is the most appropriate method of adjudication of those claims.

This stands in contrast to the position under the U.S. Rules which, in addition to the threshold requirements discussed previously, provides that class actions seeking monetary relief may only be maintained if the Court finds that the common questions predominate over individual questions and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.³⁶ What this really means is that the claims should be susceptible to being proved using class-wide proof—that



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is, proof that is uniformly applicable to all group members. If the addition of a group member means that different proof would be needed to prove that person’s claim at trial, then the predominance requirement is not satisfied.³⁷

While the Federal Court currently has power under the Act to order that a proceeding not continue as a representative proceeding where it finds that the representative proceeding will not provide an efficient means of dealing with the claims of group members,³⁸ in practice that power has been employed only rarely. In addition, since the High Court’s clarification as to the extent of commonality required, respondents have had a diminishing degree of success in challenging the conduct of proceedings as a class action.³⁹

Difficulties Caused By the Current Test

The low “commonality” threshold that must be met to commence a representative proceeding has facilitated the expansion of representative proceedings in Australia.

INEFFICIENT USE OF REPRESENTATIVE PROCEEDINGS

The representative proceeding procedure was intended to promote the efficient use of Court resources by avoiding a multiplicity of proceedings and to provide access to justice for those with claims that may be uneconomic to run individually.

Representative proceedings in which common issues do not predominate over individual issues can frustrate rather than promote these ends. In such cases, even if the representative applicant succeeds in relation to some or all common issues, individual trials are nevertheless necessary to resolve major elements of group members’ claims, including establishing the element of causation, the need to establish individual reliance, and calculating loss and damage.

The problems posed by the low “commonality” threshold currently in force were well illustrated by the *Vioxx* class action. The proceedings commenced in 2006. In 2008, the respondent applied for an order under section 33N that the proceeding not continue as a representative proceeding on the grounds that it would not provide an efficient and effective means of dealing with claims of group members. That application was rejected,⁴⁰ and the matter proceeded to trial. After a lengthy and expensive trial and appeal, the applicant established, as a common issue, that the respondent was negligent in failing to warn of the risk that *Vioxx* could contribute to the onset of heart attacks. Importantly, however, the finding of negligence and the findings on other common issues relating to claims made under the *Trade Practices Act 1974* (Cth) did not provide group members with an entitlement to relief as the question of liability to each group member still turned on factors that are unique to that individual.

As the trial judge noted:

“In a number of important respects, my determination of the applicant’s claim in this proceeding will have consequences for the claims of the other group members. There are, however, many respects in which it will not.”⁴¹

In order to take any benefit from the common issue finding, a group member would need to establish that the consumption of *Vioxx* caused a heart attack in their individual case and that it would not have done so had a proper warning been given. Mr. Peterson, the representative applicant, failed to establish his personal claim entirely.

It has now been almost six years since the proceedings were commenced and almost two years since the common questions were finally resolved. There has been no indication that any group member will attempt to pursue an individual claim, and a settlement proposal has been rejected by the Court (see further below). The lawyers for the class, Slater & Gordon, have written off approximately \$10 million of costs incurred in representing the applicant, and it would be reasonable to assume that the respondent incurred costs of a similar amount in defending the proceedings. Vast amounts of the Court’s time and of the parties’ resources have been expended with little, if anything, to show for it.

In a rare decision upholding the respondent’s complaint, the Court ordered that the *Bell Potter* class action go forward other than as a representative proceeding some two years after the proceeding was commenced. In these proceedings, Bell Potter was sued based on allegations arising out of its dealings as a stockbroker and, in particular, in relation to broking activities concerning a listed company’s stock. Bell Potter was alleged to have made representations and recommendations about the value of the company’s shares, both orally (in various statements alleged to have been made separately to a number of group members over the period) and in writing (in at least ten separate “Company Update” reports issued by the stockbroker over the period). In ordering that the proceeding no longer continue under Part IVA, the Court stated that, given the factual matrix of the case, involving 282 separate alleged share transactions for all group members and the large number of separate representations, there was such a lack of commonality of issues that any

determination of the representative applicant's claim would "offer no real guide as to how the balance of the claims by the Claimants would be determined were they to proceed to be determined individually."⁴² In this case, the Court subsequently allowed the proceeding to continue with 43 group members as named applicants, as well as 25 other persons who were not formerly group members, and refused a later application by the applicants to reconstitute it as a class action.⁴³ While the end result may be the same as would have occurred if a "predominance" test applied, it was reliant on the respondent making a formal application and took more than three years from commencement for the proceeding to be constituted in a way that it can now proceed.

Both cases illustrates that plaintiffs' lawyers and litigation funders prefer the class action regime over more traditional procedures for determining or grouping related claims, such as multi-applicant proceedings. *Bell Potter* in particular illustrates the difficulties that arise in seeking to utilise the class action regime where there is not a neat case of a representation that is said to flow from a single document, such as a prospectus, in identical form to all group members.

The predominance requirement in the U.S. Rules was introduced to prevent such a

situation by ensuring that class actions are not maintained in circumstances where there are substantial questions (such as questions of individual reliance) that are only capable of individual resolution.⁴⁴ This more stringent test reflects the fact that a class action is an inappropriate vehicle to resolve multiple claims where individual questions have such scope or variety as to overload the action and to frustrate the economies class actions can otherwise deliver.⁴⁵ There is also a risk that unmeritorious individual claims are hidden within the class, and the respondent is put under enormous pressure to settle without those claims being subjected to the kind of scrutiny as would occur had individual proceedings been commenced.

PROPER REPRESENTATION OF GROUP MEMBERS

The class action system relies heavily on the shared interests of the representative applicant and of group members in the resolution of the common questions to ensure that the applicant adequately represents the interests of group members. However, where the common issues do not predominate over individual issues, there is a significant danger that the interests of the applicant and of group members will diverge or conflict.

“Where the common issues do not predominate over individual issues, there is a significant danger that the interests of the applicant and of group members will diverge or conflict.”

For example, if the determination of liability requires the determination of questions of causation at an individual level (as in the *Vioxx* case referred to above) then it is highly likely that the strength of group members' claims will vary significantly and will be largely determined by individual issues. Where this is the case, there is a real danger that group members will be prejudiced by tactical or strategic decisions made on their behalf by the applicant. For example, an applicant with a comparatively weaker case may seek to compromise the comparatively stronger claims of group members at an undervalued rate or settle on terms that do not adequately reflect the differing prospects of respective group members. Indeed, the settlement proposed by the applicant in the *Vioxx* proceedings was found to be neither fair nor reasonable because it failed to account for the varying strengths and weaknesses of group members claims.⁴⁶

Opportunities For Reform

Representative proceedings should be allowed only where, at an early stage of proceedings, it is clear that common issues of law or fact predominate over individual issues such that they would be substantially dispositive of group members' claims. Such a reform would ensure the efficient use of Court resources, promote group members' interests and protect respondents from unmeritorious claims.

This reform could be implemented either as a prerequisite for commencing proceedings or by amending the current threshold requirements for the initiation of a class action in section 33C, as a component of a certification procedure or as an additional ground for ordering that a proceeding not continue as a representative proceeding under section 33N. In our view, the preferable course would be for the question of predominance to be determined at a certification hearing with the onus being on the applicant to establish that common questions predominate over individual ones.

“ [T]he preferable course would be for the question of predominance to be determined at a certification hearing with the onus being on the applicant to establish that common questions predominate over individual ones. ”

Class Closure

The Federal class action regime was designed as an “opt out” system, in which the applicant could represent an open class of group members without any requirement that they take an active step to “opt in” to the proceeding. In many cases, the uncertainties inherent in an open class (how many group members are there? what are their claims worth?) have led the Court to make orders “closing” the class in order to encourage settlement or facilitate settlement distributions.

Class closure orders arguably run counter to the “opt out” model and are not expressly provided for in the current legislation. There is therefore some uncertainty as to the circumstances and form in which they can and should be made. Legislative reform which clearly provided for the making of class closure orders at an appropriate stage in proceedings would give commercial certainty to parties, promote settlements and provide finality in litigation.

The Development of Class Closure Orders

As noted above, the class action regime operates as an “opt out” rather than an “opt in” system. Every person who falls within the class definition contained in the originating process is represented in the proceeding, subject to a right to opt out of the proceeding at a date fixed by the Court prior to the initial trial or settlement approval.⁴⁷ There is no requirement that a group member take any active step to opt

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in to the proceeding. As a consequence, it is possible that group members may be represented in open-class proceedings of which they are ignorant. In many cases, the total number of group members (and the total value of their claims) will be unknown at commencement even by the representative applicant. This feature of open-class actions in the “opt out” system introduces a very significant degree of uncertainty into representative proceedings and, while the total value of group member claims is at large, it inhibits global settlements and it makes impractical anything other than an essentially open-ended and potentially drawn-out process of individualised assessment and compensation. Respondents understandably do not like (and often cannot obtain authority to settle for) the “open chequebook” style of settlement.

One way in which this uncertainty has been addressed has been the rise of claims involving “closed classes”. In such cases, the group is defined to include all of those who not only share a particular type of claim but who also have retained a specific law firm and/or entered into a funding agreement with a particular funder. After some initial uncertainty as to whether such actions impermissibly subverted the “opt out” model, closed classes have been held to be permissible.⁴⁸

The commencement of proceedings on behalf of a closed class is a different process from the making of a class closure order. Class closure involves the Court ordering that each group member identify himself or herself by a certain point in time (e.g., by registering as a group member), failing which any subsisting entitlement to damages of the group member may be extinguished or barred.⁴⁹ Class closure

orders have been made in a number of cases⁵⁰ in reliance on the Court’s general power under section 33ZF of the Act, which empowers the Court to make, of its own motion or on application by a party or a group member, any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding. Some judges, however, have noted that there is “at least a question as to the power to do so and the appropriateness of doing so”⁵¹ and other judges have indicated a reluctance to make such orders at an early stage of proceedings for fear that it subverts the opt-out model.⁵²

Clarifying the Power and Appropriateness of Making Class Closure Orders

In its January 2000 report into the Federal civil justice system, the ALRC noted the practice of making class closure orders and stated that:

“Legislation may be needed to require the Court to close the class at a specified time before judgment. Such a provision would retain the benefits of the opt-out procedure while providing, before judgment, an opt-in arrangement, naming those who receive the benefit in the event of an adverse judgment for the respondents. This will also assist the Court to make an award of damages for the entire class, where that is appropriate. This issue may require immediate legislative amendment to ensure the continuing viability of the Part IVA arrangements.”⁵³

Just such a provision has been adopted in the Victorian class action legislation. Section 33ZG of the *Supreme Court Act 1986* (Vic) provides:

Without limiting the operation of section 33ZF, an order made under that section may—

(a) set out a step that group members or a specified class of group members must take to be entitled to—

(i) any relief under section 33Z; or

(ii) any payment out of a fund constituted under section 33ZA; or

(iii) obtain any other benefit arising out of the proceeding—

irrespective of whether the Court has made a decision on liability or there has been an admission by the defendant on liability;

(b) specify a date after which, if the step referred to in paragraph (a) has not been taken by a group member to whom the order applies, the group member is not entitled to any relief or payment or to obtain any other benefit referred to in that paragraph.

Significantly, this provision specifically enables a court to impose such a requirement prior to a judgment or settlement on questions of liability. The introduction of a similar provision into the Federal legislation would provide a certain basis for the making of class closure orders at any stage of proceeding.

To date, class closure orders have been made at various stages of the proceeding, including:

- after opt out notices had been sent,⁵⁴
- after the determination of common issues concerning liability;⁵⁵ and
- as part of the approval of settlement,⁵⁶

some without consequence of failure to register and others with a termination of any entitlement to damages absent registration or the provision of appropriate information.⁵⁷

As noted above, however, there has been reluctance to close a class at an early stage of proceedings on the basis that the class action regime requires little or no active involvement by group members.⁵⁸ Most recently, in class action proceedings about the risks associated with drugs for the treatment of Parkinson’s disease, the Court declined to make class closure orders despite the fact that all parties supported the proposed orders. The Court held that the respondents had not demonstrated a compelling reason to require the group members to go beyond their essentially passive role to take a positive step in order to close the class. In one of the class actions, the pleadings had not closed, the common questions were not settled, opt-out notices were about to be advertised and the parties had not yet entered into settlement discussions (although the parties saw class closure as a necessary feature of such discussions) and, in those circumstances, the Court concluded that:

“...for the court to impose upon group members a positive requirement to opt-in, at this juncture, would turn on its head the very nature of the opt-out model chosen by the legislature.”⁵⁹

This result was received with some surprise in circumstances where all parties consented to closing the class. The Court did, however, make orders requiring the publication of notices to encourage group members to register with the applicants’ solicitors, but not with threat of sanction.

The Court also indicated that it might be prepared to revisit a class closure application once any settlement discussion was more advanced as at that point *“closing the class will be a justifiable step in facilitating the bringing of the proceeding to finality.”*⁶⁰

An equally principled approach to the exercise of power under section 33ZF of the Act suggests that the Court should be empowered to close a class at any point in the proceeding:

*“The criterion ‘justice is done’, involves consideration of the position of all parties. An order preventing unfairness to a particular party may be necessary to ensure justice is done in the proceeding.”*⁶¹

The ability to make this assessment should be open to the Court at an early stage in proceedings so that, in appropriate cases, early settlement can be sought and substantial costs to the parties and to the Court avoided. The position was well stated recently by the Victorian Supreme Court:

*“Ultimately, it is a question of balance and judicial intuition. It requires a determination as to when in the course of a proceeding it is appropriate and in the interests of the group as a whole to require a step to be taken which may promote a prospective settlement as against simply letting the case proceed, perhaps interminably, without requiring group members to lift a finger—even if that course leads to disaster.”*⁶²

Emphasis should be given to the overarching purpose of the civil procedure rules to facilitate the just resolution of the dispute as quickly, inexpensively and

efficiently as possible.⁶³ This purpose, combined with the Court’s power to make orders of its own motion to ensure that justice is done in the proceeding (pursuant to section 33ZF of the Act), mean that there should be no presumption against class closure orders at a particular stage of proceedings, and no requirement that there be a compelling reason related to the prospect of bringing finality to proceedings whether by settlement or by judgment.

For open-class actions, it is important to the parties to understand the size of the class so they can apply the appropriate resources to the proceeding and determine whether to pursue settlement. It is also relevant to the Court for context as to what is necessary to facilitate the just resolution of the claim at a cost that is proportionate to the importance and complexity of the matters in dispute.⁶⁴

The Court should be specifically empowered to make class closure orders—including prior to the initiation of settlement discussions or proximity of judgment—if the Court considers it to be in the interests of the class as a whole. In making this assessment, the Court should have regard to:

- the point at which the case has reached;
- the attitude of the parties to such a step; and
- the complexity and likely duration of the case.

A determination as to whether class closure orders should be made in a particular class action should be made shortly after certification, such as at a case management conference.

Competing Actions

Parallel and competing class actions are increasing in Australia. Empirical research has shown that close to half of all proceedings commenced under Part IVA in the first 17 years of operation were “related” class actions in that they concerned the same subject matter.⁶⁵

Where there are multiple class action proceedings in respect of the same subject matter, in addition to the possibility of disparate findings of law or fact being made (a risk also present in unitary proceedings), the underlying objective of the class action regime to promote efficiency in the use of court resources and consistency of outcome in relation to common issues is undermined. Respondents should not have to face multiple actions regarding the same subject matter. Such actions should be consolidated, even if this requires Courts to make difficult decisions regarding which of competing representative applicants and plaintiff law firms should be permitted to proceed.

Difficulties Caused By Competing Class Actions

The phenomenon of multiple class actions is not a new one. Indeed, the possibility of multiple class actions being commenced in relation to the same or similar issues was noted at the time the legislation implementing Part IVA was introduced to Parliament.⁶⁶

The scale of class actions, however, means that having multiple actions on foot can result in substantial duplication of legal costs and may substantially undermine the goals of efficiency and certainty underlying the class action regime. As Justice Finkelstein of the Federal Court of Australia explained:

“It goes without saying that it is undesirable that multiple actions raising the same or similar issues be tried separately, perhaps before different judges. For one thing, it is undesirable that common issues should be separately litigated since the decisions could be inconsistent. For another, there are obvious efficiencies (both as regards court time and parties’ costs) in having common questions resolved at one time.”⁶⁷

Similar statements have been made by the United States’ Advisory Committee on Civil Rules and Canada’s Committee on the National Class and Related Interjurisdictional Issues.⁶⁸

Moreover, the presence of multiple class actions may result in delays to the resolution of proceedings by settlement. A respondent faced with multiple class actions is unlikely to agree to settle a particular proceeding unless it is able to settle all of the class actions against it. Settlement of multiple class actions brought by competing funders and lawyers can involve additional complexities and costs, both to the respondent and to the claimants.

How Related Is Too Related?

While the term “multiple class actions” can be broadly understood to describe representative proceedings concerning the same legal dispute brought by different lawyers,⁶⁹ there are a number of possible incarnations, which give rise to different concerns.

The scenario that is most problematic is that of *directly competing class actions*, in which actions are commenced on behalf of the same class of claimants in respect of the same legal dispute. Where one or more of the class actions is commenced as an open-class proceeding, such a situation can result in the same persons falling within the group definition (and therefore being a group member) in both class actions. In unitary proceedings, such a situation would constitute an abuse of process and one or more actions would be struck out. In class action practice, it is essential that a similar result be achieved, having regard to the overarching purpose of the Act to facilitate the just resolution of disputes as quickly, cheaply and efficiently as possible.⁷⁰

Competing class actions of this type are particularly concerning because the “race” to file for the same claimants may lead to inadequately prepared and particularised

proceedings, or, at the more extreme end of the spectrum, proceedings commenced without the authority of the named claimant being filed.⁷¹ This is not a theoretical risk. Recent examples of competing class actions include:

- Two class actions commenced regarding continuous disclosure allegations against Nufarm, in which one proceeding was commenced in December 2010 and the second proceeding was filed in January 2011.
- Two class actions commenced against OZ Minerals in 2009 and 2010, again alleging breaches of the continuous disclosure regime.
- Recently, a Melbourne solicitor acting through an investment vehicle (Melbourne City Investments Pty Ltd) has commenced representative proceedings against a number of ASX listed respondents in circumstances where another law firm had already made public statements that it was preparing to launch class actions against the same companies. As a result, at present there are two class actions on foot against Leighton Holdings⁷² and the prospect of two class actions against Treasury Wine Estates.

In these circumstances, it is critical that the Court is able to conduct an assessment of which vehicle is best placed to take the claims of group members forward. As Justice Merkel stated in relation to the Longford gas explosion class action:

“[Where] there are several representative proceedings it will be incumbent on the Court to determine which of those proceedings should be permitted to proceed... Thus, at an early

directions hearing, questions of vexation and oppression can...be considered by the Court.

*In my view... an approach which would, prima facie, treat any subsequent proceedings as vexatious and oppressive would not be in accordance with principle, authority or the object of the statutory scheme to 'enhance access to justice, reduce the costs of proceeding and promote efficiency in the use of court resources.'*⁷³

The *second* multiple class action scenario that arises is often referred to as *remaindering*. This describes situations where:

- a first class action is commenced by one law firm using a closed class, defined by reference to persons who have executed funding agreements with a particular third party litigation funder or retainer agreements with the law firm; and
- another law firm (sometimes in combination with a different funder) commences an open-class action seeking to pick up everyone else, raising the same issues against the same defendants, but with a different representative applicant.⁷⁴

A recent example of remaindering is the three class actions filed against the Centro Group. Maurice Blackburn commenced two closed-class actions with Richard Kirby as the representative claimant: one against Centro Properties Limited/CPT Manager Limited, and another against Centro Retail Limited/Centro MCS Manager Limited. The class was defined by reference to each group member having entered into a litigation funding agreement (with IMF

(Australia) Ltd, now Bentham IMF Ltd). Some two years later, Slater & Gordon commenced an open-class action funded by Comprehensive Legal Funding LLC, with Nicholas Vlachos, Monatex Pty Ltd and Ramon Franco as the representative claimants, naming all four Centro entities as respondents. These proceedings mirrored the initial actions, but defined the class by excluding those group members in the *Kirby* class actions. After some initial judicial consternation, all of the actions were allowed to proceed.

The *third* scenario that can arise is where there are *interrelated class actions* - separate class actions against different defendants that raise similar issues.

Examples include:

- the ongoing bank fees litigation, in which the class action against the Australia and New Zealand Banking Group (ANZ) raises the same issues (fees charged by banks to their customers which are said to be penalties) as proceedings against a number of other banks, including the National Australia Bank, the Commonwealth Bank, and Westpac Banking Corporation; and
- numerous class actions commenced against banks in relation to the collapse of Storm Financial.

Existing Mechanisms

The Court has a general power under which it can order that proceedings be consolidated, heard together, heard immediately after one another or stayed until the determination of any one of the other proceedings.⁷⁵

While this power has been used sparingly, examples of each mechanism can be identified in class action practice, such as:

- in the *Nufarm* proceedings, in which the different plaintiff firms were ordered to cooperate and granted leave to represent the plaintiffs jointly, and the two proceedings were formally consolidated;
- in the *Esso Longford Gas* proceedings, in which the two law firms agreed to jointly conduct one proceeding;
- in the *Centro* proceedings, which were heard together;
- in the *OZ Minerals* proceedings, in which the two class actions were jointly managed in the docket of the one judge. Notably, the discovery given in the first commenced class action was ordered to be given in the second filed action almost immediately after it was filed;⁷⁶ and
- in the *bank fees* class action, where class actions against the other banks have been stayed pending the outcome of the proceedings against ANZ (judgment at first instance was handed down in February 2014, now under appeal).

Where two class actions are running simultaneously, there can be a significant effect on costs. While one plaintiff law firm has stated that legal fees in class actions average around 12 percent,⁷⁹ this can differ significantly. For example, in the *Centro* proceedings (described above), the lawyers in the last-commenced class action received as court-approved fees approximately 20 percent of the \$50 million settlement sum payable to group members in that proceeding, while the firm which commenced the original class action received 14 percent of the \$150 million settlement sum.⁷⁸ The legal costs in total exceeded \$30 million or 15% of the settlement of \$200 million. There is no doubt that legal costs would have been lower if one law firm had represented the entire class.

Absent consolidation, other inefficiencies may occur—for example, the degree of commonality between the proceedings diverges, the plaintiff lawyers engage in different tactics or interlocutory applications, or one action lags behind the other. The use of a stay of proceedings pending judgment in related proceedings may have the consequence that respondents continue to incur reputational damage by virtue of the proceedings remaining on foot, while the

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respondent whose proceeding is chosen to go forward is forced to bear the majority of legal costs (with subsequent proceedings being able to “piggy back” on particular rulings made in the first set of proceedings).

Options For Reform

Some commentators have promoted reform by clarifying the Court’s discretionary powers to manage class action proceedings. Section 33ZF of the Act empowers the Court to make any order it considers appropriate or necessary to ensure that justice is done in the proceedings. Justice Finkelstein has noted that this power is “*certainly wide enough to permit the court to regulate how multiple class actions should be conducted.*”⁷⁹

Clarity on if and how this provision is to be used in relation to multiple class actions, either by way of judicial or legislative guidance, would assist in preventing problems of inefficiency arising from competing class actions. Such an approach would require Courts take a proactive approach in exercising discretionary powers to manage proceedings.

For truly competing class actions, the preferable approach to reform would involve the consolidation of the proceedings and the appointment of a single law firm to represent the combined class going forward. The questions of consolidation and case management could be determined at a certification hearing.

While it is possible for there to be separate legal representation of representative applicants, this should be allowed only rarely given the inevitable adverse effect on the legal costs of the proceedings. While this may involve some hard choices by the

Court as to who is better placed to continue the class action, effectively overriding the freedom of group members to choose their legal counsel, the usual position in our courts is that only one law firm may represent a plaintiff. The Court could consider;

- the evidence establishing support for the proceedings being conducted by one plaintiff law firm or another (include the time and effort already expended on investigating and preparing the claim); and
- whether the resources of the firms are sufficient to efficiently conduct the proceeding and adequately represent the interests of the group members.

Alternatively, the Court should make it clear that only one set of costs will be allowed, and double handling disallowed.

In respect of the other kinds of multiple class actions, these should be ordered wherever possible to proceed together using existing docket management mechanisms, as outlined above.

As Justice Merkel stated in his decision relating to the multiple Longford gas explosion proceedings:

*“It is in the public interest that consideration be given to such matters in a case such as the present if the Court is required to select which of several different proceedings before the Court is to continue as a representative action under Pt IVA.”*⁸⁰

Scrutiny of Settlements

The vast majority of the representative proceedings commenced in the Federal Court have ended in settlement rather than judgment. The current legislation requires that settlements must be approved by the Court, but contains few other provisions addressing the mode or form of settlement and approval. The vast majority of settlements put forward have received Court approval.

Although it has been almost 22 years since the class action legislation commenced, there are still uncertainties in the approval of settlements. This section addresses three areas:

- (a) the permissible scope of settlements;
- (b) settlements which discriminate as between group members; and
- (c) the approval of legal costs.

Legislative and procedural reforms addressing these issues would provide commercial certainty for parties, promote early settlement and ensure that the interests of group members are adequately protected in settlements.⁸¹

Permissible Scope of Settlements

While the Act provides that a representative proceeding may not be settled without approval of the Court, the Act does not otherwise address the scope of the representative applicant's authority to enter into settlements binding upon group members. This is of particular concern in cases where:

- the proposed settlement contains releases going beyond the claims advanced in the proceedings (e.g., releases in favour of non-parties or of claims arising from non-pleaded facts);
- the settlement deals with issues beyond the scope of the common questions; or
- the settlement treats various group members differently from one another, with certain group members' claims released for no compensation.

The representative applicant represents group members in respect of the common issues. While the Court has power to make awards of damages for group members, including both in the aggregate and for individual group members, it is not clear that this power extends to individual issues for group members who are absent. In fact, the Act expressly contemplates that an individual group member would need to appear in the action for their individual issues to be determined. This legislative gap introduces a degree of commercial uncertainty concerning the efficacy of such settlements.

In some cases, respondents have sought to address this uncertainty by requiring that group members participating in the settlement provide individual releases or by seeking indemnities from the representative applicant (or their funder). These are solutions that add cost and complexity to settlements. Other litigants place their faith in the general power in s33ZF of the Act to “make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.” Australia has not yet seen significant collateral litigation concerning the efficacy of approved class action settlements as has occurred in other jurisdictions, despite the existence of a right on the part of group members to independently appeal judgments in the proceeding.⁸² As competing class actions continue to be filed, however, it is increasingly likely that this will be tested at some point.

Legislative clarification of the power of the Court to approve settlements that go beyond common issues, and to extinguish fully the claims of group members, would

provide commercial certainty to all parties and facilitate settlement.

Discriminatory Settlements

Judges of the Federal Court have consistently noted that their task when considering a proposed settlement is an onerous one as group members affected by that settlement are often (in an open class) unrepresented or not separately represented, and in any case may have limited understanding of the proceeding.⁸³ The consideration of whether to approve the settlement of a representative proceeding has been described as an exercise of supervisory or protective jurisdiction. Judicial control of these proceedings ensures not only that litigation is conducted efficiently but also that the *“interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf.”*⁸⁴

As approval applications are often unopposed, the Court is generally deprived of the benefit of hearing conflicting arguments. This is of particular significance where a settlement is put forward which treats individual or subsets of group members on a differential basis. For example, several recent settlement applications have given rise to consideration as to extent to which subsets of group members who have entered into funding agreements may be treated differently to those who have not:

- In the representative proceeding against Macquarie Bank arising out of the collapse of Storm Financial, the intervention of ASIC, and its pursuit of an appeal, caused an unfairly discriminatory proposed settlement not to be approved (as noted above, it was

openly recognised by the applicant that settlement would have delivered a 42 percent recovery to one set of group members (who were funding the class action), but only an 18 percent recovery to others);⁸⁵

- In the *GPT* class action, the Court rejected a settlement proposal which would have seen commission paid to the TPLF provider in respect of settlement amounts allocated to non-funded group members, on the basis that it would have delivered the funder an amount greater than that to which it was contractually entitled.⁸⁶ The Court noted, however, that it would (and later did) approve a mechanism by which the funder received the contracted for amount but the liability to pay that commission was borne equally by funded and unfunded group members (commonly referred to as an equalisation factor).⁸⁷

Group members who may be prejudiced by a discriminatory settlement will often lack the incentive or resources necessary to

object to the settlement in Court. In the absence of such objection, or the timely intervention of an interested regulator to act as contradictor, it is unrealistic and unfair to expect that even the most diligent of Courts will be able to consistently identify unfairly discriminatory treatment. As intervention of that kind is exceptionally rare, unrepresented group members are therefore vulnerable to discriminatory treatment in class action settlements.

This vulnerability is enhanced where a TPLF provider is involved. Most funding arrangements give a degree of control over the litigation to the TPLF providers, which can extend to consideration of settlement proposals. In such a situation, and particularly where the TPLF and plaintiff law firm have a continuing relationship, there may be a conflict between the interests of funded group members, unfunded group members and the TPLF provider that could test the plaintiff lawyer's "undivided" loyalty to their client.⁸⁸

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This problem should be addressed by:

- (a) requiring that adequate notice and disclosure of differential treatment of group members be given;
- (b) expressly specifying that an obligation of candour is imposed upon an applicant proposing a settlement akin to that applying to *ex parte* hearings, under which the solicitors for the representative applicants must show the utmost fairness and good faith, and see that all relevant matters, whether for or against the application, are brought to the attention of the Court;⁸⁹
- (c) expanding the circumstances in which the Court can appoint a sub-group representative under section 33Q of the Act to extend to settlement issues; and
- (d) consideration by the Court to appointing an *amicus curiae* or litigation guardian to represent the interests of group members and to order that their costs be paid out of the settlement amount.

Scrutiny of Costs

Proposed class action settlements invariably provide that the applicant's legal costs be paid out of the settlement amount in priority to any distribution to group members. This requires the Court to consider whether the amount to be paid in respect of costs is fair and reasonable. As

settlement hearings are generally unopposed, the Court is entirely reliant upon the information put forward by the applicant's lawyers in support of the reasonableness of their own costs. Moreover, those lawyers will have an interest in that question directly conflicting with the interests of group members as any reduction in the amount payable in respect of costs will typically inure to the benefit of group members.

In the vast majority of class action settlements, the Court has approved the proposed costs sum without any reduction. However, in the *GPT* class action, the Court was not satisfied by the evidence put forward by the applicant's solicitors and referred the matter to a registrar for assessment of the applicant's costs. This ultimately resulted in the approved costs being some \$770,000 less than the amount originally claimed.⁹⁰

Greater scrutiny of the costs claimed by the applicant's lawyers would deliver greater returns to group members and would ensure that proceedings are conducted with the greatest efficiency. The Court should be empowered to appoint an independent expert to assess any claimed costs, with the costs of that expert to be borne out of the settlement amount.

The Burden of Discovery

In common law systems such as Australia, parties to a dispute are dependent on their own investigative processes to gather evidence relevant to their dispute. Discovery is a court-based process which allows the parties to the litigation to obtain and/or inspect documents and other information held by the opposing party that are relevant to the issues in dispute.

Providing discovery to class action plaintiffs is, however, expensive and time-consuming for respondents, and is often the single largest cost in corporate litigation.⁹¹ Too frequently, broadly-pleaded claims are used to justify expansive requests for discovery, the results of which then form the basis of amendments to pleadings to reflect the information gathered.

For example, recently the Victorian Supreme Court faced an application from an applicant for discovery of the respondent's share register in respect of a class action alleging a failure by the respondent to comply with its continuous disclosure obligations at a particular point in time, and misleading or deceptive conduct. Counsel for the applicant admitted that the discovery was sought to determine whether there was an earlier breach of a disclosure obligation. In that instance, the Court accepted the respondent's contention that the proposed order, if made, had the potential to require a very expensive, protracted and disruptive search by the respondent in advance of general discovery:

“A person who has no evidence that fish of a particular kind are in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any or not.”⁹²

– Justice Owen, Judge of the Supreme Court of New South Wales

“Discovery for that purpose, at this stage of the proceeding, is fishing for a cause of action and impermissible.”⁹³

As has been done in relation to commercial disputes in the Equity Division of the Supreme Court of New South Wales, the obligation to provide discovery in relation to

the substantive issues should not as a matter of course be imposed upon respondents to class actions until after plaintiffs have filed both a statement of claim and supporting evidence. This would enable disputes to be narrowed, or even settled, before the burdensome and expensive task of discovery is undertaken.

Beyond Judicial Management

One option is to increase judicial management of discovery. As Justice Vickery stated extra-judicially:

*"[Discovery] is not only amenable to case management, but arguably cannot function effectively without it."*⁹⁴

This concern is shared with other judicial officers well practiced in the management of large-scale class actions. As Justice Finkelstein noted in a paper prepared for the Federal Court, and cited by the ALRC in its 2011 report *Managing Discovery: Discovery of Documents in Federal Courts*:

*"The key to discovery reform lies in active and aggressive judicial case management of the process. The most effective cure for spiralling costs and voluminous productions of documents is increased judicial willingness to just say no."*⁹⁵

The ALRC made a significant number of recommendations in its paper with a view to ensuring that the cost and time required for discovery is proportionate to the matters in dispute, limiting the overuse of discovery, reducing the expense of discovery and ensuring that key documents relevant to the issues in dispute are identified as early as possible. The key recommendations related to the ability to order the preparation of a discovery plan, as

well as the use of existing procedures to enable the production and inspection of documents prior to formal discovery on a broader scale. Importantly, the ALRC specifically stated that its recommendations were *"designed to encourage the judiciary to take a more robust approach to the existing powers to control discovery."*⁹⁶

In 2012, amendments to the Act took effect which permit the Court to order that the party requesting discovery pay in advance for some or all of the estimated costs of discovery or give security for the payment of the cost of discovery, as well as making an order specifying the maximum cost that may be recovered for making discovery or giving inspection.⁹⁷ Further, in conjunction with the release of the revised Federal Court Rules, the Federal Court issued a new Practice Note with the aim of *"eliminating or reducing the burden of discovery."*⁹⁸

That Practice Note:

- provides that the Court will not order discovery as a matter of course and only if necessary for the determination of issues in the particular case; and
- requires parties to address the Court as to why discovery is necessary and whether its stated purpose can be achieved by less expensive means, or by limited or tailored document production.

While these are positive developments, the practice varies across individual judges. While courts have discretion to limit discovery through proactive case management, there is still a deeply ingrained tendency to regard discovery as a necessary evil in most cases. We think that the Court could go further and move to a

starting position that discovery be deferred until after evidence has been filed, and then give active consideration to whether it is still required. The presumption should be that discovery not be granted until the issues in dispute are clearly delineated.

As such, discovery in class action proceedings should be modelled on “disclosure” in the Equity Division of the New South Wales Supreme Court (the Equity Division). Since release of the Practice Note *Disclosure in the Equity Division*⁹⁹ on 22 March 2012, parties to litigation in the Equity Division must generally file their statements of claim and serve evidence before an order for discovery is granted. Only where there are “exceptional circumstances necessitating” will the Court make an order for disclosure of documents before the parties have served their evidence.

Even after evidence is served, an order for discovery remains discretionary. The Court will only make a discovery order where it is “necessary for the resolution of the real issues in dispute”. The parties must support their applications for orders for discovery with an affidavit setting out:¹⁰⁰

- The reason *why* discovery is necessary for the resolution of the real issues in dispute in the proceedings;
- The *classes* of documents in respect of which discovery is sought; and
- The *likely* cost of such discovery (based on correspondence between the parties).

The Practice Note envisages that the vast majority of proceedings will be conducted commencing with the plaintiff’s service of the evidence including documents on

which it relies, followed by the respondent’s service of the evidence including the documents on which it relies, so that the real issues in proceedings are confined not only by the pleadings but also by the evidence.¹⁰¹

Benefits For Parties and the Courts

Orders for discovery made after the parties have served their evidence ensure that discovery is focussed on the key issues remaining in dispute. As Justice Judd of the Victorian Supreme Court noted in the shareholder class action case referred to above:

*“Responsible limits must be placed upon the discovery obligation. That will not be possible in the absence of a much more precise definition of issues.”*¹⁰²

Precise issue definition is only feasible where the statement of claim pleads a cause of action against the respondent *“with sufficient clarity to enable the defendant and the court to assess the viability of each cause of action, and the defendant to plead a responsive case that will expose the real issues for trial”*.¹⁰³

There are important similarities in the discovery regimes in both the Federal Court and the Equity Division:

- both require consideration of whether the discovery in question is necessary; and
- both seek to proactively reduce the burden of discovery.

Although the existing Federal Court practice note on discovery asks whether discovery is necessary “to facilitate the just resolution

of the proceeding as quickly, inexpensively and efficiently as possible,”¹⁰⁴ the Equity Division more specifically focuses on “the just, quick and cheap resolution of the real issues in dispute in the proceedings.”¹⁰⁵

By requiring parties to prepare and file their evidence prior to discovery, thereby honing the issues in dispute in proceedings, the Court will be able to make discovery orders that are more confined and specifically tailored to only those issues. As a result, it will significantly reduce the cost and burden on respondents. This is not to say that there should be no mechanism available to prospective claimants to address any information asymmetry. For example:

- if representative applicants are lacking material necessary to determine if they have a viable cause of action, they should be able to avail themselves of the existing mechanisms for preliminary discovery, a process that would continue even if the approach of the Equity Division were adopted for class actions.¹⁰⁶
- if a genuine need can be established for discovery prior to evidence, such as to support expert evidence, such an order can still be sought by means of application to the Court.¹⁰⁷

Three clear benefits flow from this more restrictive approach to orders for discovery:

First, the requirement that evidence be filed with (or shortly after) the statement of claim would serve to slow the race to be “first to file” proceedings or “seize jurisdiction” in relation to a particular subject matter, as adequate preparatory work would need to be undertaken prior to filing.¹⁰⁸ This approach will also enhance the ability of a respondent to respond to the claim in a more meaningful way (rather than bare allegations being met with bare denials), as the parameters of the dispute should be more clearly delineated.

Second, narrowing the matters that are really in issue at an early stage facilitates and encourages frank discussions about settlement and prospects for success. Parties who are forced by the courts to evaluate their causes of action and evidence before discovery are more likely to be realistic about the way forward.

Third, the documents ultimately discovered are fewer in number and of greater relevance. Clear and limited classes reduce the burden on the party that provides discovery by reducing the number of relevant documents, and are similarly cheaper and faster to review for the party that seeks discovery,¹⁰⁹ which should reduce costs and delay.

“By requiring parties to prepare and file their evidence prior to discovery, thereby honing the issues in dispute in proceedings, the Court will be able to make discovery orders that are more confined and specifically tailored to only those issues. As a result, it will significantly reduce the cost and burden on respondents.”

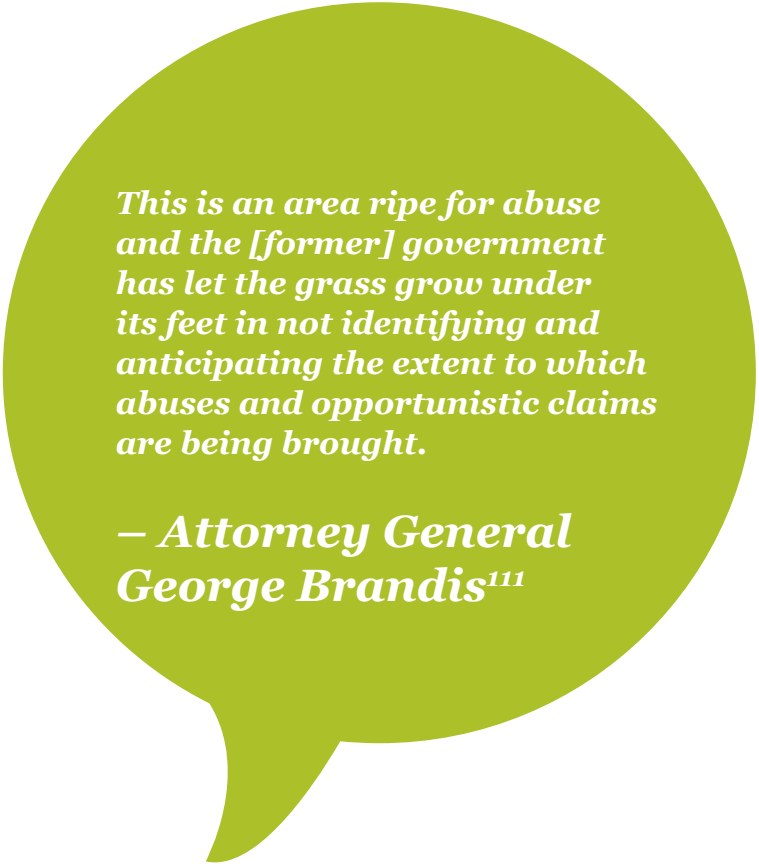
Litigation Funding: New Concerns Arise

TPLF plays an important and controversial role in class actions in Australia, as outlined in previous publications¹¹⁰ One such controversy merits particular attention in the context of class action reforms. During the past year, law firms have themselves sought to provide litigation funding. Recently revealed details about how plaintiff law firm Maurice Blackburn’s funding arm, Claims Funding Australia, is structured enables the development to be critically examined and questioned.

Circumventing Protections

In April 2013, Claims Funding Australia Pty Ltd (CFA) sought approval from the Federal Court to co-fund a class action being run by Maurice Blackburn. CFA was effectively created by Maurice Blackburn and the entities had the following links (see Figure 1):

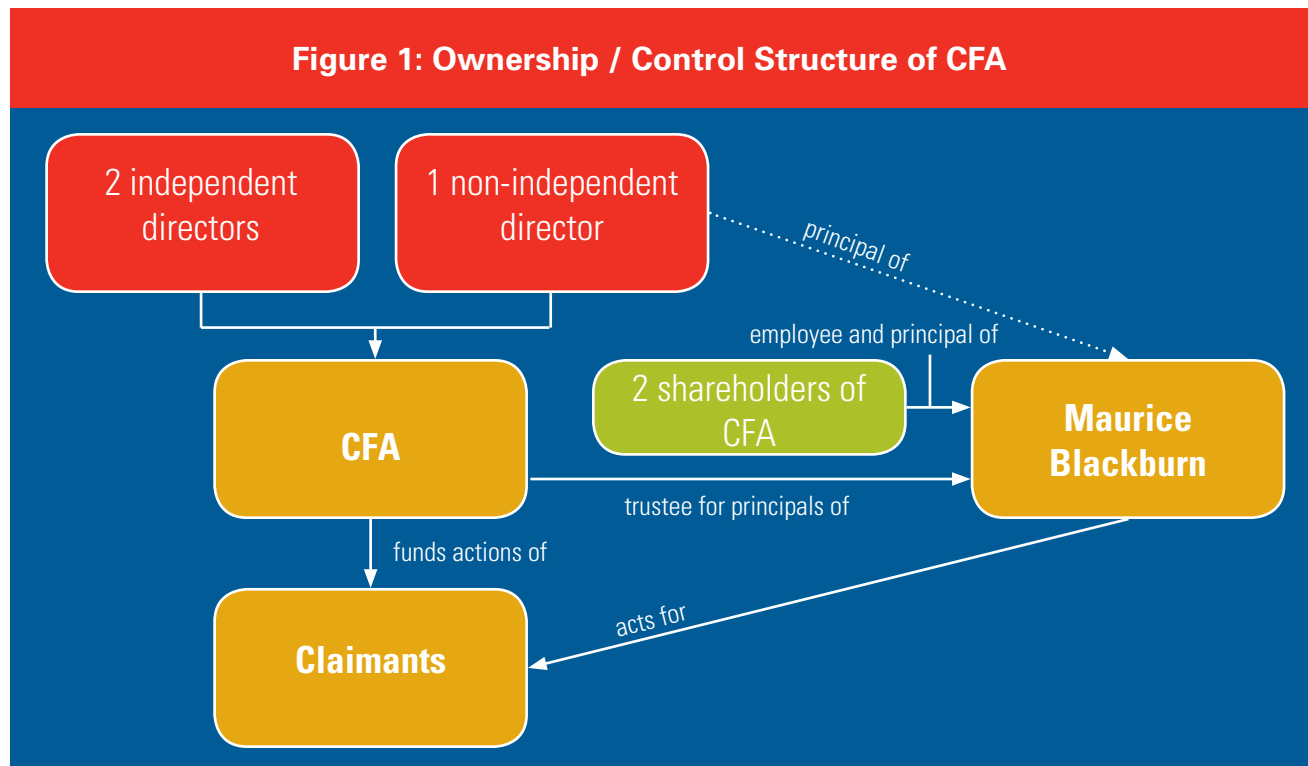
- CFA is the corporate trustee of the Claims Funding Australia Trust (CFA Trust), and the beneficiaries of that trust are the principals and partners of Maurice Blackburn.
- An employee of Maurice Blackburn and a principal of Maurice Blackburn hold the sole shares in CFA on trust for Maurice Blackburn.



This is an area ripe for abuse and the [former] government has let the grass grow under its feet in not identifying and anticipating the extent to which abuses and opportunistic claims are being brought.

– Attorney General George Brandis¹¹¹

- One of CFA’s three directors is a principal of Maurice Blackburn.
- Maurice Blackburn lent money to CFA for the purpose of funding litigation.
- Principals of Maurice Blackburn interviewed and appointed the manager of the CFA Trust.



Links between plaintiff law firms and TPLF providers are not new;¹¹² however, the CFA development went one step further. Until January this year, CFA was set to fund two class actions in which Maurice Blackburn was also acting, and was considering funding two additional class actions as well as individual actions.¹¹³

There were legitimate concerns that permitting Maurice Blackburn to act in class actions funded by CFA:

- allowed Maurice Blackburn to effectively obtain contingency fees in such class actions, which are otherwise prohibited; and

- involved the risk that conflicts of interest would arise between Maurice Blackburn’s financial interest in the funder, the outcome of the class action on the one hand, and its duty to its clients on the other.

CONTINGENCY FEES

One issue to be considered by the Federal Court was whether the relationship between Maurice Blackburn and CFA contravened legal professional obligations regarding the charging of contingency fees in NSW, where the class action proceedings had been filed. The *Legal Profession Act 2004* (NSW) (LPA), and similar legislation in the other states and territories, currently prohibit solicitors from charging contingency fees.¹¹⁴

By providing CFA with a percentage of any award or settlement, the funding arrangement effectively gave the principals of Maurice Blackburn a financial interest in the litigation. Maurice Blackburn maintained that the proposal to fund class actions in which it was acting through CFA does not breach the LPA. The Legal Services Commissioners of NSW, Queensland and Victoria, however, made a joint submission to the Federal Court raising concerns.¹¹⁵

As part of the current Productivity Commission inquiry into Access to Justice, a number of law firms have made submissions proposing the removal of the current prohibition on the charging of contingency fees on the basis that it will enhance access to justice. The Commission is expected to release its draft report in April 2014 with the final report to government to be issued in September 2014.¹¹⁶ Whether or not arrangements such as that between CFA and Maurice Blackburn are deemed to wrongly circumvent bans on contingency fees, the arrangement illustrates the potential for conflicts of interest to arise.

CONFLICTS OF INTEREST

New regulations came into effect from 12 July 2013 in relation to the management of conflicts of interest by litigation funders, making failure to adopt adequate procedures for managing conflicts an offence under the Corporations Act 2001 (Cth).¹¹⁷ These requirements are additional to those contained in the various state and territory solicitors' rules which, for those applying the new Australian Solicitors' Conduct Rules, provide that a solicitor must not act for a client where there is a conflict between the duty to serve the best

interests of a client and the interests of the solicitor or an associate of the solicitor.¹¹⁸

Notwithstanding these requirements, real concerns remain as to whether it is possible as a practical matter to manage conflicts of interest where the law firm associated with the funder is also acting in the class action being funded. It is only by ensuring that the law firm cannot act for clients in class actions funded by a related funding entity that the issue will be wholly resolved, as it will remove any interest of the law firm in the funder's "contingency fee", and removing the alignment of economic interests between the firm and the funder.

“Real concerns remain as to whether it is possible as a practical matter to manage conflicts of interest where the law firm associated with the funder is also acting in the class action being funded.”



A RESULT

On 29 January 2014, CFA discontinued its approval application in the Federal Court. Maurice Blackburn explained the rationale for the discontinuance as follows:

“The new Commonwealth Attorney-General has plainly stated that he is proposing to introduce further regulation of litigation funding and that he is strongly opposed to litigation funding companies, that are owned by the principals of law firms, funding lawsuits in which that law firm represents the claimants.

In these circumstances it seems likely that even if Court approval were obtained the co-funding arrangement will be prohibited by regulation. This situation has led Claims Funding Australia to withdraw its application to the Court for approval of the co-funding model.”¹¹⁹

For the reasons set out above, the discontinuance of CFA’s co-funding arrangements should be welcomed. However, arrangements of this nature highlight the need for further government oversight of litigation funding including its connection to legal representation. Without such oversight, funders and plaintiff law firms will continue to find novel approaches to funding and managing class actions for financial benefit, which may rightly attract similar concerns. Two such concerning approaches are outlined below.

Innovation One: Court “Appointed” Funders

In Australia, funders generally pay the legal costs and expenses of running a class action as well as agreeing to meet any adverse costs order against the representative applicant. They do this in return for a portion of any settlement sum or judgment (usually 25 percent to 45 percent) received by group members who have signed up to a funding agreement with the funder.¹²⁰ Thus, ordinarily, funders’ entitlements are contractual in nature, and based in the relevant group members consent to the funding agreement. Funders often used closed classes to prevent unfunded group members from “getting a free ride”. They do this by confining the class to individuals who have signed a funding agreement.

International Litigation Funding Partners Lte (ILFP) is attempting to change the basis of a funder’s right to part of any settlement sum or judgment. In *Inabu Pty Ltd v Leighton Holdings Limited* (Leighton class action) the applicant, represented by Maurice Blackburn, has applied to the Federal Court to formally “appoint” a funder of the proceedings. The *Leighton* class action commenced by Maurice Blackburn is an open class. This means that all persons falling within the class definition are group members, unless they “opt out”. An application has been brought seeking court orders:¹²¹

- appointing ILFP as the funder of the proceedings; and
- entitling ILFP to be paid its costs, expenses and remuneration.

While funding agreements are subject to general prohibitions on misleading and deceptive conduct and on unconscionable or unfair contracts, this is the first time an application of this nature has been made.¹²² The application is in stark contrast to the usual position adopted by TPLF providers stating that they have merely a private contractual arrangement with group members, which places them outside the bounds of court or government oversight.

Ordinarily a court does not have a role in what is effectively appointing a funder and there are serious questions as to:

1. Whether the Federal Court has the power to make such an order;
2. If it has such power, whether such coercive powers should be used to impose financial relationships between the non-party funder and absent group members; and
3. What recourse would be available to group members who oppose the appointment of a TPLF provider (either when the appointment is made, or after notice is given); and what their recourse would be if they wish to pursue “breach of contract” claims against the funder at later date for funder misconduct, when they are not in a contractual relationship with the funder.

In all of these circumstances it is all the more surprising that no order has been made in the *Leighton* class action (under s 33X of the Act) that group members be given notice of the application and an opportunity to be heard as to the justice of the proposal or whether the funding arrangement is fair and reasonable,

given the potentially profound effect on their legal rights. The application is listed for hearing on 23 April 2014.

If these orders are made it will radically change the nature of funders’ rights to draw their revenue from any settlement or judgment. Funders have typically preferred “closed classes”, in which the group members have all signed up to the funding agreement, as this provides them with certainty, and prevents “free riders” from obtaining a benefit from the class action without promising to contribute the funder’s premium. If the present application is successful, ILFP’s costs, expenses and remuneration will presumably be drawn from any settlement or judgment sum to which group members are entitled, irrespective of whether those group members have entered into a funding agreement with ILFP. Such rights will no longer arise by agreement, and thereby the consent, of individual group members, but will be mandated by the court, regardless of whether the group members agree or consent. This will also remove the disadvantages of the open class model to funders, and may increase the number of potential class actions that will be attractive to funders, as they will no longer need to rely entirely upon those who voluntarily sign up for their returns.

Innovation Two: Lawyers As Group Members

The second concern arises in relation to class actions whereby the lawyer representing the class is also a class member in their own right and acts as lead plaintiff. This concern has exacerbated recently as, over recent months, Melbourne

solicitor Mark Elliott—the sole director and shareholder of Melbourne City Investments (MCI)—has commenced class action proceedings in the name of his company against each of Leighton Holdings, Treasury Wine Estates and WorleyParsons and is acting as solicitor on the record in each proceeding.

While lawyers cannot be prevented from acting for themselves (despite the adage that one who is his own lawyer has a fool for a client), there are real concerns about potential conflicts of interest given that:

- Mr. Elliott through MCI purports to represent other group members through MCI's role as lead plaintiff, and controls the conduct of the proceeding with the ability to bind group members in the result;
- Mr. Elliott owes no fiduciary obligations to any other group members as there is no lawyer-client relationship between them. Rather, he has a duty to act in the best interests of MCI as his client (that is, in his own best interests);
- MCI (and through it Mr. Elliott) has the opportunity, as the driving force of the litigation, to seek reimbursement for time and cost expended in acting as representative party beyond its pro rata share of any judgment of settlement, and¹²³
- The proceedings have been commenced as open-class actions, representing persons who are unaware of the existence of the proceeding or the interrelationship of the key players.¹²⁴

Allowing a lawyer to represent group members, whilst being such a member, heightens the risk of conflict of interests between the lawyer's particular interests in the class action, and the interests of other group members. For example, if the lawyer's claim is relatively weak, it is in his or her interest to agree to apportion settlement funds in a way that does not account for that weakness. Obviously that interest conflicts with the interests of those group members with relatively stronger claims.

Lawyers have a duty of utmost loyalty to their clients, and they must avoid any conflict of interest. As such, consideration should be given to whether in such circumstances an alternate representative applicant would better represent the interests of group members as a whole, such that a presumption to that effect ought to be introduced.

Oversight Required

With the expansion of the business of litigation funding in Australia, novel approaches are being taken in relation to managing and funding class actions. Appropriate legislation is required to address the real concerns that arise in relation to the propriety of such approaches, as outlined above.

Until such oversight is implemented, the door is open to funders and plaintiff law firms to exercise creativity in devising new structures for the conduct of class actions so as to circumvent the prohibition on contingency fees and to share in the substantial returns enjoyed by third party funders, regardless of concerns surrounding them.¹²⁵

“Until such oversight is implemented, the door is open to funders and plaintiff law firms to exercise creativity in devising new structures for the conduct of class actions so as to circumvent the prohibition on contingency fees and to share in the substantial returns enjoyed by third party funders, regardless of concerns surrounding them.”



Conclusion

After 21 years of procedural development, it is now apparent that reform of the Australian class action model is required to ensure that it continues to meet its objectives of providing for the efficient resolution of multiple claims sharing common issues, increasing access to justice for small claimants and safeguarding the interests of group members and respondents alike.

The types of claims being brought, and the means by which they are being run and being funded, mean that the use of ad hoc approaches to practical issues in the management of class actions risks inconsistent results unless the regime is improved to meet these new challenges.

Most significantly, the introduction of a class certification process would not only reduce cost, but also:

- protect group members and respondents alike from the dangers of inappropriate actions being commenced and run;
- allow the timely assessment of whether the commonality of issues amongst the class is sufficient, and ensure that there is a proper basis for the allegations made; and

- permit the Court to determine at an early stage how competing class actions should be dealt with.

Further reforms to provide a consistent approach as to the basis for, appropriate nature of and timing of class closure orders is also warranted so as to facilitate the early resolution of proceedings.

Discovery reforms are also needed to narrow and facilitate efficient resolution of class actions disputes. The burdensome and expensive obligation to provide discovery should not be imposed upon respondents to class actions until after the plaintiffs have filed both a statement of claim and supporting evidence.

Each of these reforms will be supported by greater clarity governing the judicial approval of settlements and, in particular, the Court's powers to approve settlements which go beyond common issues and extinguish the rights of class members.

Finally, a comprehensive approach needs to be taken to the funding of litigation by lawyers to protect the interests of group members and to ensure that the present prohibition on contingency fees is not circumvented.

These reforms could be carried out either by targeted amendments or as part of a broader and more comprehensive review and reform of class action procedure in Australia. In either case, the implementation of such reforms would ensure that class action regimes live up to the original objectives of providing an efficient class action procedure, which increases claimants' access to justice while protecting all parties from the dangers of inappropriate or abusive actions.

Endnotes

- 1 Australian Law Reform Commission Report No 46 “Grouped Proceedings in the Federal Court”.
- 2 Second Reading Speech, Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, pp 3174-5 (Michael Duffy).
- 3 Class action regimes were introduced in Victoria in 2000 (Part 4A of the *Supreme Court of Victoria Act 1986*) and New South Wales (NSW) in 2011 (Part 10 of the *Civil Procedure Act 2005*) which largely reflect the regime under Part IVA, and much of the commentary in this report is equally applicable to them.
- 4 While respondent (as used in the Federal Court Act) is interchangeable with “defendant” (used in the *Supreme Court Act of Victoria*), for ease of reference this report uses “respondent” to refer to Australian practice and “defendant” to refer to U.S. practice.
- 5 Belinda Merhab “Judge queries fairness of Vioxx settlement”, *Sydney Morning Herald*, 17 April 2013 (see <http://news.smh.com.au/breaking-news-national/judge-queries-fairness-of-vioxx-settlement-20130417-2i08z.html>).
- 6 Vince Morabito and Jane Caruana “Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia”, (2013) 61 *American Journal of Comparative Law* 579 at 581. An exception is Sweden, which has no certification procedure but uses an opt-in regime.
- 7 Rachael Mulheron, “Justice Enhanced: Framing an Opt-Out Class Action for England” (2007) 70(4) *MLR* 550 at 568.
- 8 Section 33C of the *Federal Court of Australia Act 1976* (Cth) (the Act).
- 9 Section 33H of the Act.
- 10 Under the U.S. Rules, one or more members of a class may sue or be sued as representative parties on behalf of all members. It is not proposed by this paper that Australian class action procedure be reformed to permit actions to be brought against a respondent as a representative of a class of respondents. Under section 33C(1) of the Act, one of the requirements for commencing a class action is that the group members ‘have claims against the same person’. This has been interpreted by the Full Court of the Federal Court of Australia to require that *all* group members must have the same claim against *all* respondents: *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 48.
- 11 United States Federal Rules of Civil Procedure 23(a), hereafter U.S. Rules.
- 12 U.S. Rule 23(b).
- 13 U.S. Rule 23(c).
- 14 The considerations in appointing class counsel are set out in U.S. Rule 23(g) and include the work counsel has done in identifying or investigating potential claims in the action, their class action experience and knowledge of the applicable law, the resources available, and any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class. Orders appointing class counsel may also include provisions about the award of attorney’s fees or nontaxable costs. Under U.S. Rule 23(h), the court may later award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.
- 15 A summary of this empirical work is to be found in Vince Morabito and Jane Caruana “Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia”, (2013) 61 *American Journal of Comparative Law* 579 at 598-599.
- 16 ALRC Report No 46 at [145].
- 17 A process described by some commentators as “decertification”: see Vince Morabito and Jane Caruana “Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia”, (2013) 61 *American Journal of Comparative Law* 579.
- 18 Section 33J of the Act.
- 19 Section 33T of the Act.
- 20 ALRC Report No 46 at [146]-[147].
- 21 ALRC Report No 46 at [147].

- 22 Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) quoted in Stuart Clark and Christina Harris, "The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?" (2008) 32 MULR 775.
- 23 Rachael Mulheron, "Justice Enhanced," op at 801 fn 159.
- 24 *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111 at 116 [19].
- 25 This is a point which has been made by Justice Lindgren: see "Class Actions and Access to Justice" (Keynote address delivered at the International Class Actions Conference, Maurice Blackburn, Sydney, 25–26 October 2007).
- 26 *Matthews v SPI Electricity Pty Ltd (Ruling No 1)* [2011] VSC 167.
- 27 *Melbourne City Investments Pty Ltd v Leighton Holdings Limited* [2014] VSC 7 at [47].
- 28 *Melbourne City Investments Pty Ltd v Leighton Holdings Limited* [2014] VSC 7 at [23] per Judd J.
- 29 Orders under section 33T of the Act have however been made on application of a representative applicant seeking to be substituted out of that role (being unwilling or unable to act) and by challenging respondents.
- 30 Stephen Yeazell, "From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation" *UCLA Law Review*, vol 27 (1980) 514 at 522, quoted with approval by McHugh J in *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 429.
- 31 *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447.
- 32 *ASIC v Richards* [2013] FCAFC 89.
- 33 Under section 33Q of the Act, the Court is presently able to give directions establishing a sub-group consisting of those group members who share issues that are common to the claims of only some of the class, and to appoint a person to be the sub-group representative. This power could be expanded to enable the court to certify discrete sub-groups. It is noteworthy that, in the United States where certification is necessary, sub-classes have frequently been established to address potential conflicts of interest, whereas the Federal Court's power to establish sub-groups and appoint sub-group representatives has not ever been employed to the best of our knowledge.
- 34 *Wong v Silkfield* (1999) 199 CLR 255.
- 35 *Brisbane Broncos Leagues Club v Alleasing Finance Australia Pty Limited* [2011] FCA 138.
- 36 U.S. Rule 23(b)(3).
- 37 *See Comcast Corp. v. Behrend*, 569 U.S. ___, 133 S. Ct. 1426 (2013).
- 38 Section 33N of the Act.
- 39 In his study of class actions filed in the Federal Court between 1992 and 2009, Professor Vince Morabito found that in only 28.4% of all the class actions filed was it discovered that there was a formal application filed by one or more respondents seeking an order that the proceeding not be allowed to proceed as a class action, whether pursuant to section 33C (failure to comply with the criteria for commencing a class action) or section 33N (decertification). While applications lodged between 1992-2000 had a success rate of between 25% and 40%, after 2000 they succeeded in only 9% of cases (2000-2004) and then in no cases (2004-2009): Vince Morabito and Jane Caruana "Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia", (2013) 61 *American Journal of Comparative Law* 579 at 594-598.
- 40 *Peterson v Merck Sharpe & Dohme (Australia) Pty Ltd (No 3)* [2009] FCA 5.
- 41 *Peterson v Merck Sharpe & Dohme (Australia) Pty Ltd* [2010] FCA 180 at [13].
- 42 *Meaden v Bell Potter Securities Limited (No 2)* [2012] FCA 418 at [65].
- 43 *Meaden v Bell Potter Securities Ltd (No 6)* [2013] FCA 1176.
- 44 Notes of Advisory Committee on Rules – 1966 Amendment.
- 45 Benjamin Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)" 81(2) *Harvard Law Review* 356 at 390.
- 46 *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447.
- 47 Section 33J of the Act.
- 48 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.
- 49 *Matthews v SPI Electricity Pty Ltd (Ruling No 13)* [2013] VSC 17 at [23].

- 50 See the discussion in *Matthews v SPI Electricity Pty Ltd (Ruling No 13)* [2013] VSC 17 at [26]-[39]; see also Vince Morabito, “Judicial Responses to Class Action Settlements That Provide No Benefits to Some Class Members” *Monash University Law Review* (Vol 32, No 1) 75.
- 51 *Reiffel v ACN 075 839 226 Pty Limited (No 2)* [2004] FCA 1128 at [13], per Gyles J
- 52 See *Winterford v Pfizer Australia Pty Ltd* [2012] FCA 1199 at [9].
- 53 Australian Law Reform Commission Report No 89 *Managing Justice: A Review of the Federal Civil Justice System (2000)* at [7.116].
- 54 *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2002] FCA 1560.
- 55 See for example *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1.
- 56 *Perry v Powercor Australia Pty Ltd* [2012] VSC 113; *Thomas v Powercor Australia Pty Ltd* [2011] VSC 614.
- 57 See for example *Scott and Taws v Oz Minerals* (NSD 1433 of 2010), per orders dated 20 October 2011, in which the order was made at the time opt out notices were published.
- 58 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No.2)* [2010] FCA 176, [16]-[17] per Finkelstein J.
- 59 See *Winterford v Pfizer Australia Pty Ltd* [2012] FCA 1199 at [9].
- 60 See *Winterford v Pfizer Australia Pty Ltd* [2012] FCA 1199 at [9].
- 61 *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 4.
- 62 *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v United Services Corporation Limited (Ruling No 13)* [2013] VSC 17 at [76].
- 63 Section 37M of the Act. A similar provision appears in section 7 of the *Civil Procedure Act 2010* (Vic), and by section 9(1)(b) of that Act one of the factors to which the Court shall have regard in furthering that overarching purpose is the public interest in the early settlement of disputes by agreement between parties. This provision is not replicated in the Federal Court Act
- 64 Section 37M(2)(e) of the Act.
- 65 Vince Morabito, “An Empirical Study of Australia’s Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives” (September 2010) 3.
- 66 Commonwealth Parliamentary Debates, House of Representatives, 26 November 1991, 3288-89 (Peter Costello); Vince Morabito, “Clashing Classes Down Under – Evaluating Australia’s Competing Class Actions through Empirical and Comparative Perspectives” (2012) 27 *Connecticut Journal of International Law* 205, 207.
- 67 *Kirby v Centro Properties Limited* [2008] FCA 1505, [9] (Finkelstein J). See also Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000) at 532.
- 68 Vince Morabito, “Clashing Classes Down Under – Evaluating Australia’s Competing Class Actions through Empirical and Comparative Perspectives” (2012) 27 *Connecticut Journal of International Law* 205, 209.
- 69 Vince Morabito, “Clashing Classes Down Under – Evaluating Australia’s Competing Class Actions through Empirical and Comparative Perspectives” (2012) 27 *Connecticut Journal of International Law* 205, 213.
- 70 Section 37M of the Act.
- 71 See the section on Class Certification above in relation to the bushfires class action.
- 72 As noted in the section on Class Certification above, the initial statement of claim filed by Melbourne City Investments has been struck out, although leave to replead has been granted.
- 73 *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) ATPR 41-679 at 42,677.
- 74 The use of closed classes was definitively held to be legitimate in the decision of the Full Federal Court in *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* (2007) 164 FCR 275.
- 75 *Federal Court Rules 2011*, Rule 30.11.
- 76 The formal order was that “Proceeding NSD 1433 of 2010 be placed in the docket of Emmett J alongside NSD 1127 of 2009”: orders dated 22 October 2010.
- 77 Submission by Maurice Blackburn to the Productivity Commission inquiry into Access to Justice, 8 November 2013, 14 at [13.10].
- 78 See *Kirby v Centro Properties Limited (No 6)* [2012] FCA 650.
- 79 *Kirby v Centro Properties Limited* [2008] FCA 1505, [26] (Finkelstein J). The State Supreme Court

- Acts do not contain corresponding provisions, but it is said that they are unnecessary because the State Supreme Courts (by way of example, the Supreme Court of Victoria) have express or inherent jurisdiction and/or powers: Vince Morabito, "Clashing Classes Down Under – Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives" (2012) 27 *Connecticut Journal of International Law* 205, 217.
- 80 *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) ATPR 41-679 at 42,687.
- 81 In Australia, we have not experienced the dilemma that can arise where competing class actions are mounted in different jurisdictions and are then subject to differing treatment by the Court in considering and approving settlements (as has been the case in the United States). Most class actions are commenced in the Federal Court and are typically commenced in the same registry. Where they are not they are typically transferred to be case managed together. Examples include the *Nufarm* class actions (separate proceedings were commenced in two different State registries of the Federal Court with the Victorian proceeding subsequently transferred to be case managed together with the other proceeding in the NSW registry - orders dated 9 August 2011); *Hip Implant* class actions (proceedings commenced in the Queensland and NSW registries consolidated in the NSW registry – orders dated 20 April 2011) and *Storm Financial* class actions (a class action commenced in the NSW registry in relation to the collapse of Storm Financial was later transferred to the Queensland Registry to be listed in the same docket as proceedings subsequently commenced by ASIC and a further class action commenced later in time - orders dated 4 March 2011). Under cross-vesting legislation in place in each State and Territory as well as federal legislation, proceedings may also be transferred from a State court to the Federal Court (and vice versa): see for example the *Jurisdiction of the Courts (Cross-Vesting) Act 1987* (Cth).
- 82 Under the Act, a non-representative group member can appeal a judgment: section 33ZC. Vince Morabito identified only three appeals by group members between 1992 and 2009: "An Empirical Analysis of Appeals by Class Members in Australia's Federal Class Actions" (2013) 42 *Common Law World Review* 240 at 249, all of which were filed in the first five years of Part IVA taking effect and none of which related to settlements (indeed there has been no opportunity for an authoritative statement that a group member dissatisfied with a settlement can appeal the judgment approving settlement pursuant to this provision). This is a separate process to the objections that may be raised by a group member to a proposed settlement as part of judicial consideration of the approval pursuant to section 33V of the Act. This contrasts with the position in the United States, in which settlement objectors have been described as "the least popular parties in the history of civil procedure", although statistics show that less than 10 percent of class action settlements approved by federal courts in 2006 were appealed by class members: see Edward Brunet, "Class Action Objectors: Extortionist Free Riders or Fairness Guarantors" 2003 *The University of Chicago Legal Forum* 403, at 472 as cited in Brian T. Fitzpatrick, "The End of Objector Blackmail?" (2009) 62 *Vanderbilt Law Review* 1623 at 1625, and Brian T. Fitzpatrick "An Empirical Study of Class Action Settlements and Their Fee Awards" (2010) 7(4) *Journal of Empirical Legal Studies* 811 at 840.
- 83 *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 at [15]-[16].
- 84 *Carnie v Esanda Finance Corporation* (1995) 182 CLR 398 at 408 per Brennan J, cited by Gleeson CJ in *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [21].
- 85 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89.
- 86 *Modtech Engineering Pty Ltd v GPT Management Holdings Limited* [2013] FCA 626.
- 87 See also *Third Party Litigation Financing in Australia: Class Actions, Conflicts and Controversy*, U.S. Chamber Institute for Legal Reform, October 2013, at 19-29.
- 88 See further U.S. Chamber Institute for Legal Reform, *Third Party Litigation Financing in Australia: Class Actions, Conflicts and Controversy* (October 2013), accessed at <http://www.instituteforlegalreform.com/resource/third-party-litigation-financing-in-australia-class-actions-conflicts-and-controversy>.
- 89 *Re Cooke* (1889) 5 TLR 407 at 409 per Lord Esher MR. Such an obligation is important as whether a fiduciary duty is owed to unrepresented group members is an issue that has not yet been authoritatively determined: see *McMullin & Anor v ICI Australia Operations Pty Ltd & Ors* [1997] FCA 1426 and *Courtney v Medtel Pty Limited* [2002] FCA 957; *Muswellbrook Shire Council v Royal Bank of Scotland NV* [2013] FCA 616.
- 90 *Modtech Engineering Pty Limited v GPT Management Holdings Limited (No 2)* [2013] FCA 1163.

- 91 ALRC *Managing Discovery: Discovery of Documents in Federal Courts*, 25 May 2011, 14.
- 92 *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1955) 72 WN (NSW) 250 at 254 per Owen J.
- 93 *Melbourne City Investments Pty Ltd v Leighton Holdings Limited* [2014] VSC 7 at [47], per Judd J.
- 94 P Vickery "Managing the paper: Taming the Leviathan (2012) 22 *JJA* 51 at 68.
- 95 Finkelstein R, "Discovery Reform: Options and Implementation" (2008), prepared for the Federal Court of Australia, p 12, quoted in ALRC *Managing Discovery: Discovery of Documents in Federal Courts*, 25 May 2011, 14.
- 96 ALRC *Managing Discovery: Discovery of Documents in Federal Courts*, 25 May 2011, 21.
- 97 Section 43(3)(h) of the Act.
- 98 Federal Court of Australia Practice Note CM 5 on Discovery (1 August 2011).
- 99 Practice Note SC Eq 11, *Disclosure in the Equity Division*, 22 March 2012. The Equity Division uses "disclosure" in lieu of "discovery". For ease of reference, "discovery" will be used.
- 100 Practice Note SC Eq 11, *Disclosure in the Equity Division*, 22 March 2012. The Equity Division uses "disclosure" in lieu of "discovery". For ease of reference, "discovery" will be used.
- 101 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analyst Group Pty Ltd* [2010] NSWSC 393 at [65]-[66], per Bergin CJ in Eq.
- 102 Judd J in *Melbourne City Investments Pty Ltd v Leighton Holdings Limited* [2014] VSC 7 at [24].
- 103 Judd J in *Melbourne City Investments Pty Ltd v Leighton Holdings Limited* [2014] VSC 7 at [24].
- 104 Federal Court of Australia, Practice Note CM 5 "Discovery", 1 August 2011.
- 105 Practice Note SC Eq 11, *Disclosure in the Equity Division*, 22 March 2012, [3].
- 106 *Federal Court Rules 2011*, Division 7.3.
- 107 This would extend to any discovery necessary for a certification hearing.
- 108 Indeed, in some jurisdictions, practice notes specifically require the parties to be ready to comply with all procedural rules and practice notes, and that, except in special circumstances, preparation or trial be well advanced, prior to filing proceedings: NSW District Court Practice Note DC (Civil) Nos 1 and 2 (general Division and Commercial Division respectively).
- 109 In Her Honour's consideration of the proposed terms of settlement in *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626, Justice Gordon approved of the overall settlement but refused to approve the total sum allocated to the applicant's legal cost, reducing a proportion of the costs expended on discovery by the applicant's solicitors.
- 110 U.S. Chamber Institute for Legal Reform *Third Party Litigation Financing in Australia: Class Actions, Conflicts and Controversy* (October 2013).
- 111 Chris Merritt, "Brandis takes aim at litigation funders," *The Australian* 19 July 2013.
- 112 Other ownership links between plaintiff law firms and TPLF also exist. Claims Funding International, an Irish company currently funding a class action in the Netherlands in relation to an alleged air cargo cartel, among others, is owned by associates of Maurice Blackburn. Similarly, Canadian firm Siskinds LLP holds investments in Singapore-registered International Litigation Funding Partners Pte Ltd., which provides funding in Australia. See *Developments and Update on Litigation Funding in Australia*, U.S. Institute for Legal Reform, 16 May 2010. Peter Gordon, ex Slater & Gordon, is a director of Comprehensive Legal Funding LLC ("CLF"), together with U.S. plaintiff lawyer Reagan Silber. Gordon advises CLF via his law firm Gordon Legal. Slater & Gordon act in most of the class actions funded by CLF in Australia.
- 113 The additional class action is a shareholder class actions commenced against Allico (Proceeding NSD1609/2013, *Blairgowrie Trading Ltd v Allico Finance Group Ltd*), while individual actions to be funded by CFA in Australia include an action brought on behalf of a SME (*Shearpond Pty Ltd v Atune Financial Solution Pty Ltd*). CFA is also funding private actions overseas.
- 114 In addition, the Australian Solicitors' Conduct Rules 2011 (forming part of the local solicitor's rules in the States of NSW, Queensland and South Australia - see for example the *New South Wales Professional Conduct and Practice Rules 2013*) prohibit a solicitor from exercising any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client (Rule 12.2), which serves to add another layer of complexity to the issue before the Federal Court.

- 115 Letter from the Office of the Legal Commissioner for Victoria dated 14 May 2013, as accessed from the Federal Court's file in proceedings NSD368/2013.
- 116 For information on the Productivity Commission's inquiry into Access to Justice, including submissions, see <http://www.pc.gov.au/projects/inquiry/access-justice>.
- 117 *Corporations Amendment Regulation 2012 (No. 6)* (Cth), complemented by Regulatory Guide 248 as issued by the Australian Securities and Investments Commission (ASIC): *Litigation schemes and proof of debt schemes: Managing conflicts of interest*. For more on these regulations see King & Wood Mallesons' *Class Actions in Australia: year in review 2012* at http://www.mallesons.com/Documents/Class_Actions_in_Australia-The_Year_in_Review_2012.pdf, page 22.
- 118 Australian Solicitors' Conduct Rules 2011, Rule 12.1. See further U.S. Chamber Institute for Legal Reform *Third Party Litigation Financing in Australia: Class Actions, Conflicts and Controversy*, pages 15-18, accessed at <http://www.instituteforlegalreform.com/resource/third-party-litigation-financing-in-australia--class-actions-conflicts-and-controversy>.
- 119 See <http://www.mauriceblackburn.com.au/areas-of-practice/class-actions/current-class-actions/equine-influenza-class-action/update-on-funding-of-equine-influenza-class-action.aspx>.
- 120 Read more in King & Wood Mallesons' *Class Actions in Australia: year in review 2012* at http://www.mallesons.com/Documents/Class_Actions_in_Australia-The_Year_in_Review_2012.pdf.
- 121 Pursuant to ss 23 and 33ZF of the Act and r 1.32 of the *Federal Court Rules 2011*.
- 122 The ALRC contemplated common fund applications being made to appoint a solicitor on behalf of the open class, under which attorneys could recover reasonable fees from all group members even though they had no contractual relationship with them: ALRC Report at [289]. This funding option was not adopted in the resultant legislation. Some practitioners consider that the Court has jurisdiction and power to review the terms of funding agreements as an incident of their general control of the litigation before them: Submission by Maurice Blackburn to the Productivity Commission inquiry into Access to Justice, 8 November 2013, 18 at [13.35(c)].
- 123 Any such payment would have to be approved by the Court at the conclusion of the proceedings, either pursuant to section 33V of the Act (approval of a settlement) or its general jurisdiction to award costs (with limited authority supporting the reimbursement of management time spent on litigation). Neither of these mechanisms however put group members on notice of the potential for such payments.
- 124 Problems arising from having lead counsel either act as lead plaintiff or have a family member as lead plaintiff were an impetus for the introduction of a process for the determination of the most appropriate lead plaintiff by means of the *Private Securities Litigation Reform Act 1995*, Pub L No 104-67, 109 Stat 737 (1995). See the discussion of potential conflicts in Neil Rock "Class Action Counsel as Named Plaintiff: Double Trouble" (1987) 56 *Fordham LR* 111. See also U.S. Chamber Institute for Legal Reform *Frequent Filers: The Problems of Shareholder Lawsuits and the Path to Reform* (February 2014) at pages 19-21.
- 125 For further information on the U.S. Chamber Institute for Legal Reform's proposals on the regulation of litigation funding in Australia see its submission to the Productivity Commission inquiry into Access to Justice dated 1 November 2013 at http://www.pc.gov.au/__data/assets/pdf_file/0019/129115/sub025-access-justice.pdf.



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