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Access to Justice and the Evolution of Class Action Litigation in Australia

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ACCESS TO JUSTICE AND THE EVOLUTION OF CLASS ACTION LITIGATION IN AUSTRALIA

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[The federal and Victorian class action regimes are intended to facilitate aggregation of multiple claims. Aggregation can improve efficiency by combining similar claims and can enhance access to justice by providing a mechanism to litigate small claims. This article considers whether these efficiency and access aims are being achieved. The authors argue that whilst some developments in class action jurisprudence have been consistent with these legislative aims, other have not. Several features of Australian class action jurisprudence and practice have hampered the healthy development of the legislative regimes, including adverse costs orders, unclear threshold requirements, evasive posturing and unresolved class communication issues. Finally, having identified these difficulties, the authors propose reform possibilities and priorities.]

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I INTRODUCTION

Class action litigation has developed gradually in Australia since the introduction of Federal Court grouped proceedings legislation some 15 years ago.¹ Initial low levels of interest — no doubt the product of unfamiliarity with the nature, purpose and potential of the new type of action — have gradually given way to increased use. Notwithstanding this evolution, class action litigation in Australia is still young and the case law is still developing.

This article considers the evolution of class action litigation from the perspective of those wishing to bring or to join such an action. We argue that although some developments have been positive, significant obstacles remain for class action applicants. The purposes of this article are to identify those obstacles, to explain why they are inconsistent with the aims of class action legislation, to describe their impact on the development of the class action regime in Australia, and to make recommendations for reform.

One source of difficulty for applicants is departure in some judicial decisions from the aims of class action legislation. There is little doubt about what those aims are; an examination of parliamentary debates, the Law Reform Commission report that recommended enactment,² judicial decisions since enactment, academic literature, and the legislation itself reveals general agreement. The legislation was intended to provide a mechanism that promotes efficiency through aggregation of claims, enabling the pursuit of legitimate claims by people who might not otherwise be able to do so. Notwithstanding this general agreement, some decisions are in effect inconsistent with the intent of the legislation. These decisions have had negative consequences for class action applicants and have hampered the development of a healthy class action regime.

Another factor that has contributed to the difficulties faced by class action applicants in Australia is a tendency to assume that traditional civil procedure rules, attitudes and practices can be relied upon to determine the way in which class actions are conducted. This tendency is primarily the result of a conception of civil liability that focuses on compensation and legal representation of individual plaintiffs rather than on large classes of plaintiffs. Several concerns underlie such an individualised conception of civil justice. Broadly, they stem from a perceived need to discourage 'entrepreneurial litigation' and a 'United States-style litigation explosion', as well as views that equate class action lawyers with 'ambulance chasers' and suspicion of any litigation funding arrangement that departs from traditional practices.

Part II of this article briefly explains the intent of the class action legislation. In Part III, we consider several prevailing attitudes about class actions and explain why they impede the development of the class action jurisdiction. We then identify and analyse, in Part IV, specific features of class action litigation in Australia that create unwarranted obstacles for class action applicants. To this end, we consider why such obstacles exist and offer suggestions as to how their

¹ See *Federal Court of Australia Act 1976* (Cth) pt IVA ('*Federal Court Act*').

² Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988).

adverse impact upon access to justice can most effectively be addressed. In Part V we consider the growing role of institutional litigation funders in Australian class action litigation. The debate that has accompanied this development reflects many of the themes we explore in this article, including suspicion of alternative funding models and fear of entrepreneurial litigation. However, we note with encouragement judicial comments that endorse the need to embrace new rules and models for the funding and conduct of class actions in Australia.

Class actions are political in the sense that they are a public example of large numbers of ordinary citizens — whether they be consumers, shareholders, cartel victims or others — in conflict with large corporations or government. They bring to the fore fundamentally differing views about the nature and proper boundaries of civil litigation and the roles of key players in that system, especially judges, lawyers, parties, large corporations and the state.

We endorse a liberal approach to interpreting the legislation on which the federal and Victorian class action regimes are based and because of this have chosen to write this article from the perspective of class action applicants. We argue that some of the developments in class action litigation and jurisprudence are inconsistent with the access to justice and efficiency aims of that legislation. It is our intention that this article might encourage debate about the health of Australian class action regimes and about reform priorities.

II THE ORIGINS AND PURPOSES OF CLASS ACTION PROCEEDINGS IN AUSTRALIA

A *History*

The first Australian class action regime was enacted in 1992, though representative procedures themselves were not new. Such procedures have existed in English rules of court since 1883,³ and were given broader application in 1901.⁴ In Australia, these procedures found expression in the rules of court of the Australian states and territories.⁵ However, with few exceptions, they were not given a liberal interpretation and fell into disuse.⁶ The inadequacy of these procedures led to inquiries by government-funded law reform bodies, and ultimately to the current Australian class action regime.⁷

In 1988, a report by the Law Reform Commission (now the Australian Law Reform Commission ('ALRC')) entitled *Grouped Proceedings in the Federal*

³ See *Rules of the Supreme Court 1883* (UK) O 16 r 9, which provided that 'where there are numerous persons having the same interest in one course or matter, one or more of such persons may sue or be sued ... on behalf or for the benefit of all persons so interested', as cited in M D Chalmers and M Muir MacKenzie, *Wilson's Supreme Court of Judicature Act* (4th ed, 1883) 222.

⁴ See *Duke of Bedford v Ellis* [1901] AC 1.

⁵ See, eg, *Supreme Court Rules 1957* (Vic) O 16 r 9.

⁶ See, eg, *Temperton v Russell* [1893] 1 QB 435; *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021; *John v Rees* [1970] Ch 345; *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229; *R J Flowers Ltd v Burns* [1987] 1 NZLR 260; *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398.

⁷ See, eg, Law Reform Committee of South Australia, *Report Relating to Class Actions*, Report No 36 (1977); Law Reform Commission, above n 2.

Court was tabled in federal Parliament.⁸ Following debate, the class action regime now found in Part IVA of the *Federal Court Act* was enacted and took effect on 5 March 1992. A similar regime relating to class action proceedings commenced in Victoria was passed by the Victorian Parliament; this is found in the *Supreme Court Act 1986* (Vic) Part 4A, and took effect from 1 January 2000. Because most Australian class action litigation has been conducted in the Federal Court, the emphasis of this article is on the Commonwealth legislation and on cases decided pursuant to that legislation. However, the federal and Victorian class action regimes are for all present purposes identical, and accordingly our analysis applies equally to both Acts.

B Purposes

The policy and purposes underlying Part IVA of the *Federal Court Act* were identified in the second reading speech for the Bill that introduced it:

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

The second purpose of the Bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.⁹

1 Access to Justice

The second reading speech confirms that promoting access to justice is a central aim of the class action regime. The regime was established with the intention of providing a mechanism for individual citizens to seek redress through the courts for civil wrongs committed by governments, corporations and other defendants that are usually more powerful than any individual claimant.

The availability of such a mechanism is of increasing importance in a global economy in which civil wrongs are often committed on a mass scale by large and powerful entities. These entities enjoy the advantages that accrue in litigation and dispute resolution to those with 'deep pockets' and the status of 'repeat

⁸ Law Reform Commission, above n 2.

⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General). Similar comments have been made in the Victorian legislature in relation to that state's class action regime: see Victoria, *Parliamentary Debates*, Legislative Council, 4 October 2000, 429, 430–2 (M R Thomson, Minister for Small Business). For recent judicial consideration of the purposes of *Federal Court Act* pt IVA, see *Dorajay Pty Ltd v Aristocrat* (2005) 147 FCR 394, 422–3 (Stone J) ('*Aristocrat*'). This case is discussed below in Part IV(C).

players'.¹⁰ In his classic statement about the power and resource advantages enjoyed by repeat players¹¹ over 'one-shotters'¹² in litigation, Marc Galanter describes the negative impact of this power imbalance upon the capacity of citizens to obtain effective redress in courts.¹³ Galanter identifies the class action as a mechanism capable of addressing this problem. In his view, because the class action enables individuals to aggregate their claims, it can reduce power imbalances between repeat players and one-shotters.¹⁴

This rebalancing is clearly one aim of the legislation. It is intended to create power in numbers that would be non-existent if claims were pursued individually, and to provide a mechanism that ensures that a greater number of those claims will be litigated. Judicial comments about the role of commercial litigation funders in class action litigation have underscored this power balance issue.¹⁵ There has also been judicial acknowledgement that the class action mechanism makes it possible to pursue legitimate claims arising from mass wrongs that would not be addressed if individuals were left to seek a remedy on their own.¹⁶

¹⁰ Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95, 97, where the author describes 'one-shotters' as 'those claimants who have only occasional recourse to the courts', and 'repeat players' as those 'who are engaged in many similar litigations over time'.

¹¹ Ibid 98. Galanter refines the definition of repeat player to an "'ideal type" ... a unit which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests'. However, Galanter observes that repeat players will not necessarily exhibit all the features of this ideal type: at 98. For example, in the context of mass tort class actions, there will be some situations in which a typical repeat player — such as an asbestos manufacturer or a tobacco company — might have high stakes in a particular case because of the disastrous financial consequences of a loss.

¹² Ibid. Galanter's one-shooter will usually be a smaller unit than a repeat player and 'his claims may be so small and unmanageable ... that the cost of enforcing them outruns any promise of benefit': at 98. Applicants in a mass tort class action will not exhibit all the features of typical one-shotters, because of the capacity of the class action mechanism to narrow the power gap between applicants and respondents. It does this, for example, by giving applicants the power that comes from strength in numbers and access to experienced class action lawyers who, because of their experience, might themselves exhibit some of the features of repeat players.

¹³ Ibid 97–8, where the author argues that it is best to think of the one-shooter and repeat player categories as a 'continuum rather than as a dichotomous pair'.

¹⁴ See ibid 150–1 (citations omitted): 'The intensity of the opposition to class action legislation ... indicates the "haves" own estimation of the relative strategic impact of [class action proceedings]'. Galanter cites an official who supported Governor Ronald Reagan's veto of the California Legal Assistance programme: 'What we've created ... is an economic leverage equal to that of a large corporation. Clearly that should not be': at 151 fn 144.

¹⁵ See, eg, *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 226 (Mason P) ('*Fostif Appeal*'). His Honour also commented on 'deep-pocketed and determined defendants' and the ability of litigation funders 'to make the forensic decisions necessary to deal with determined and well-informed opponents': at 235.

¹⁶ See also below Part IV(A) for a discussion on the tactics of delay and attrition.

2 The Regulatory Role of Class Actions

The role of private litigation and tort law as regulatory tools has long been recognised.¹⁷ This is also true of class actions, as the Law Reform Commission has acknowledged:

Enabling people to have increased access to legal remedies in court proceedings could render the substantive law more enforceable and thus encourage a greater degree of compliance with laws the purpose of which is to prevent or discourage activities which cause loss or injury to others. This is an important consequence of any change in procedural remedies. Respect for the law should be enhanced if access to remedies is facilitated.¹⁸

One example of the regulatory role of class action legislation is the rise of shareholder securities class actions in Australia. These actions are widely viewed as a form of 'private enforcement' — a method of regulating business entities that exists alongside the provisions of corporate and consumer legislation.¹⁹ Securities class actions are now well established in the United States and Canada and are steadily developing in Australia. They provide shareholders with a practical mechanism to recover compensation from corporations and their officers for breaches of the law that cause shareholders to lose money. By contrast, the regulatory regimes operate to penalise corporations and their officers who breach the law, but do not usually operate to compensate shareholders for their losses.

In this way, shareholder class actions contribute to a culture of good corporate governance. For example, Jeremy Cooper, the Deputy Chairman of the Australian Securities and Investments Commission ('ASIC') has stated that shareholder class actions have a useful role to play in 'maintaining the integrity of the equity capital market.'²⁰ The Australian Shareholders' Association Ltd ('ASA') has

¹⁷ This understanding has led to the label of 'private Attorneys-General' being applied by some observers to those who bring class actions. See, eg, Peta Spender, 'Securities Class Actions: A View from the Land of the Great White Shareholder' (2002) 31 *Common Law World Review* 123, 124; Deborah R Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000) 71–3; Barry Lipp, 'Mass Tort Class Actions under the *Federal Court of Australia Act*: Justice for All or Justice Denied?' (2002) 28 *Monash University Law Review* 361, 364. For examples of concerns about the role of 'litigation as a governance tool', see Deborah R Hensler, 'Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation' (2001) 11 *Duke Journal of Comparative and International Law* 179, 211–2.

¹⁸ Law Reform Commission, above n 2, 33.

¹⁹ Spender, above n 17. See also John C Coffee Jr, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action' (1987) 54 *University of Chicago Law Review* 877.

²⁰ Jeremy Cooper, Deputy Chairman, ASIC, 'Corporate Wrongdoing: ASIC's Enforcement Role' (Paper presented at the International Class Actions Conference, Melbourne, 2 December 2005) 15 <[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ICAC2005_speech_021205.pdf/\\$file/ICAC2005_speech_021205.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ICAC2005_speech_021205.pdf/$file/ICAC2005_speech_021205.pdf)>, where Cooper commented that:

ASIC cautiously welcomes the emergence of the shareholder class action in Australia as a 'self help' mechanism whereby shareholders are able to seek damages for loss incurred at the hands of directors and advisers who negligently or dishonestly cause loss to those shareholders. ...

Vigilant shareholders and a vigorous, but appropriately balanced, shareholder class action landscape, will play an important part in maintaining the integrity of the equity capital market in years to come.

provided further support for such a role in a recent letter to the Federal Court that requested an expedited hearing application in a shareholder class action.²¹

The regulatory role of class action litigation in Australia has also recently been discussed in the context of institutional litigation funders. This issue is considered in Part V below.

C *The Present Situation*

The federal and Victorian class action regimes share many features that promote the policy and objectives of class action litigation. Nevertheless, the ability of claimants to obtain redress is still limited in ways not contemplated by the legislation. For example, there are only two firms in Australia that frequently act for applicants in this area — even though the procedure has been available for over 14 years. Given the ability of lawyers to locate and practise in profitable areas, this is a good indicator of how difficult it is to run class action litigation. One reason for these problems is the perpetuation of several fears about class action — fears which, in our view, are unsubstantiated.

III SOME RECURRING FEARS ABOUT CLASS ACTION LITIGATION

A *Fear of ‘Entrepreneurial Litigation’*

A recurrent concern directed at class actions is that they are opening the door to entrepreneurial litigation. Class actions, it is said, provide a gateway to a proliferation of predatory litigation run by opportunistic class action lawyers. These comments are often accompanied by concerns about the dangers of United States-style litigation, in whose jurisdiction such litigation is said to be endemic.²² These concerns indicate a failure to appreciate how class actions work;

The regulatory role of securities class actions has recently been a recurring theme in the Australian print media: see, eg, Marcus Priest, ‘Class Actions Put Heat on Executives’, *The Australian Financial Review* (Sydney), 8 July 2005, 56. This has been especially so in the wake of class actions against GIO Australia Holding Ltd (‘GIO’): *King v GIO Australia Holdings Ltd* [2000] FCA 1543 (Unreported, Wilcox, Lehane and Merkel JJ, 1 November 2000); and *Aristocrat Leisure Ltd: Aristocrat* (2005) 147 FCR 394.

²¹ Letter from Stuart Wilson (Chief Executive Officer, ASA) to the Associate to the Presiding Judge (Federal Court of Australia), 12 October 2005. The ASA stated in its letter that:

We consider that the protections afforded to potential investors in shares against:

- the omission of information from a prospectus; and
- misleading or deceptive statements in a prospectus;

by sections 710, 728 and 729 of the *Corporations Act 2001* are critical to the interests of shareholders and potential shareholders, and to the proper operation of the Australian capital market. ...

Given the vast sums of money that are regularly raised on the ASX by use of prospectus type documents, and the interest of the many tens of thousands of potential investors who rely upon them in making decisions as to whether to purchase shares, we consider that the appeal in this matter is of real public importance and respectfully request that its hearing be expedited.

See *Cadence Asset Management Pty Ltd v Concept Sports Ltd* (2005) 147 FCR 434 for the outcome of the appeal.

²² See, eg, Craig Phillips, ‘Class Actions — *Quo Vadis?* The Case for Restriction of Expansion’ (Paper presented at the Corporate Law Conference, Melbourne, 24 September 1998) [7.1]–[7.4], as cited in ALRC, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 477–8 fn 249. See also Public Interest Advocacy Centre for Coalition for Class

indeed, they are contrary to the very notion of the modern class action. The potential consequences of this antipathy were recognised by Justice Stephen Charles in 1996, when his Honour stated:

Class actions are unlikely to flourish in Australia without a change in attitudes, both in the profession and the judiciary. ... Many Australian judges may still view class actions as predatory litigation instituted for the advantage of entrepreneurial lawyers.²³

Fear of entrepreneurial litigation is also evident in the following comments of Callinan J, which his Honour made when considering the constitutional validity of the Victorian class action legislation:

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

...

[T]he problems to which I have just referred are likely to be aggravated by the increasingly competitive entrepreneurial activities of lawyers undertaking the conduct of class or group actions, in which, in a practical sense, the lawyers are often as much the litigants as the plaintiffs themselves, and with the same or even a greater stake in the outcome than any member of a group. This reality is likely to be productive of a multiplicity of group actions throughout the country.²⁴

A similar sentiment was expressed by Spender J during an application to strike out pleadings in *Philip Morris (Australia) Pty Ltd v Nixon*.²⁵ His Honour offered as possible characterisations of the case, 'the Ben Hur of ambulance chasing' and 'the big Ben Hur extravaganza'.²⁶

Concerns about entrepreneurial litigation do not appear to have any empirical foundation. Lawyers have been making money from litigation for a long time —

Actions (NSW), *Representative Proceedings in NSW: A Review of the Law and a Proposal for Reform* (1995) 25, as cited in ALRC at 477–8 fn 249; A Burrell and N Reece, 'Law Firms Duel for the Supremacy of a Class Act', *The Australian Financial Review* (Sydney), 16 July 1999, 26; Lucinda Schmidt, 'The Writ Stuff', *Business Review Weekly* (Melbourne), 23 July 1999, 64.

²³ Justice Stephen Charles, 'Class Actions in Australia' (Paper presented at the Australian Bar Association Conference, San Francisco, 18 August 1996).

²⁴ *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 73, 77 (citations omitted).

²⁵ (2000) 170 ALR 487 ('*Philip Morris*').

²⁶ Transcript of Proceedings, *Nixon v Philip Morris (Australia) Ltd* (Federal Court of Australia, Spender J, 10 November 1999) 258. These concerns are not restricted to the judiciary, but are shared by some members of the legal profession. This is evident in the following comments reported in Kate Marshall, 'Lawyers Win in GIO Class-Action', *The Australian Financial Review* (Sydney), 15 August 2003, 51, made at the time of the GIO class action:

defence lawyers warned that corporate Australia could expect an explosion of class actions as 'entrepreneurial' plaintiff lawyers seize the opportunity to make money out of disgruntled shareholders by getting around fee restrictions.

A litigation partner at Clayton Utz, Stuart Clark, said he had been warning anyone who would listen about the danger of 'Wild West bounty hunters' turned class-action litigators.

long before modern class action regimes existed. However, certain features of the modern class action regime are sufficiently different from traditional litigation practices to make some lawyers and judges uncomfortable.²⁷

One of these features is the nature of the relationship between the class lawyer and the members of the class. In a typical class action, the class is so large that it is impossible (or, at least, impracticable) for class lawyers and members of the class to interact in a manner that conforms to the traditional solicitor–client relationship. In particular, communication patterns will be different, for two main reasons. First, the size of the class may make it difficult or impossible for the lawyer to communicate with each individual member — as he or she would do with an applicant in a two-party dispute. Second, there may be many members of the class who have little if any interest in ongoing communication with the class lawyers, no expectation of that type of communication, or no inclination to monitor the activities of the class lawyers. This state of affairs is a foreseeable product of the class action format. One of its purposes is to create a vehicle for determining claims so small that they could not otherwise be pursued.²⁸ It is in the aggregation of the small claims that the determination is made possible, but it is because of the small size of most claims that many class members will take a *laissez faire* approach.

It is theoretically true that aggregation is not a prerequisite to commencing a class action. It is possible to identify one plaintiff, proceed with that person as the lead plaintiff, attempt to resolve the common issues, and only then identify class members after those common issues have been resolved. In practice, however, this is not the way class action litigation has evolved. In most cases, the class lawyer, lead plaintiff or litigation funder will require aggregation. Lead plaintiffs are hesitant to take the lead without some assurance that there is substantial interest in the case.²⁹ Identifying a group of other aggrieved parties at the outset indicates to a lead plaintiff that the case is of sufficient interest to justify the risks associated with being the representative party. Early aggregation may also satisfy such a party that he or she will not have to bear the costs burden alone. For similar reasons, litigation funders commonly insist on some assurance at the outset that the level of interest and number of claims will be sufficient to justify the financial risk of funding the case.³⁰ Class lawyers have similar concerns.³¹

²⁷ On the one hand, the High Court has stated that ‘no win, no charge’ or conditional fee arrangements for impecunious litigants are consistent with the highest standards of the profession: see especially *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 203 (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ). On the other, entrepreneurial lawyers who bring class actions for large groups of plaintiffs, many of whom would not otherwise have the resources to pursue their claims, have been the subject of criticism: see, eg, above nn 24–6 and accompanying text.

²⁸ See above Part II(B).

²⁹ See below Part IV(C), (I), where we discuss the nature of the risks assumed by lead plaintiffs and the challenge of identifying a class member who is willing to assume those risks.

³⁰ See below Part V, where we consider the role of litigation funders in class actions, and the type of risk analysis they conduct before deciding to fund a class action.

³¹ *Federal Court Act* s 33ZJ has not had the effect of reducing the need for aggregation. That provision makes it possible for lead plaintiffs to deduct from a damages award the difference between the ‘party and party’ costs that the defendant must pay and the solicitor–client costs that

Early aggregation is also consistent with the aims of the class action legislation because it has the capacity to promote efficiency and access to justice.³² It also ensures that the people affected by a claim receive early notice of that claim. This is reinforced by the fact that there are notice provisions in the legislation, the purpose of which is to inform class members of the claim and of their rights and responsibilities as class members.³³

A related source of discomfort is the role of class lawyers in advertising or soliciting for people to join the class. The practice of soliciting for business by lawyers has been a controversial issue for those charged with regulating the legal profession.³⁴ However, solicitation is now expressly authorised by rules of professional conduct in Australia,³⁵ and in any event it is inherent in the nature of a class action and the goals of the legislation that some solicitation will be required. Under Part IVA of the *Federal Court Act*, for example, group members must receive notice of the commencement of a class action.³⁶ This can amount to solicitation, as John C Coffee Jr suggests:

Solicitation is common in entrepreneurial litigation, where the socially desirable role of the lawyer is to aggregate claims that are by themselves unmarketable. Often, clients are simply unaware that they possess actionable claims. Thus, attorneys must pursue clients, since the clients will not ordinarily come to the attorneys. The traditional prohibition on client solicitation embodied the twin fears that clients retained through unsolicited legal advice would be overcharged and underrepresented. These dangers are not imaginary, but the relevant question about them is: dangerous compared to what? Clients who never learn of their legal rights receive even less representation and are economically worse off.³⁷

It may be the degree of solicitation, rather than solicitation per se, that is the subject of concern. Some solicitation — indeed, a considerable amount compared to traditional litigation — will be required to aggregate claims. Achieving

the lead plaintiff must pay to his or her lawyer. The provision is triggered, however, only where there has been an ‘award of damages’ — not where a case has settled. Comments made by Sackville J in *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 188 (*‘Courtney’*) suggest that it is theoretically possible to construct a class action settlement in such a way that it is or includes an ‘award of damages’, but we are unaware of any case in which this has occurred. Lead plaintiffs, class lawyers and litigation funders would not be willing to forego aggregation and the security it provides on the basis that they might eventually succeed in having s 33ZJ construed in their favour in the event of a settlement. However, *Federal Court Act* s 33ZF does confer broad powers upon judges to make any order that they think is ‘appropriate or necessary to ensure that justice is done in the proceeding’. This might conceivably be used to achieve in a settled case what is contemplated by *Federal Court Act* s 33ZJ for a case involving an ‘award of damages’.

³² These two aims featured prominently in the *Grouped Proceedings in the Federal Court* report: see Law Reform Commission, above n 2. See also above Part II(B).

³³ It may be that the need for early aggregation has become more pronounced as class actions have become more complex and expensive, and as institutional litigation funders have increasingly been relied upon to fund class action litigation. We are unaware of any empirical research that has considered this question.

³⁴ See, eg, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403. See also John B Attanasio, ‘Lawyer Advertising in England and the United States’ (1984) 32 *American Journal of Comparative Law* 493.

³⁵ See Christine Parker, ‘Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness’ (2002) 25 *University of New South Wales Law Journal* 676, 694–5.

³⁶ *Federal Court Act* s 33X(1)(a).

³⁷ Coffee, above n 19, 900 (citations omitted).

this aggregation is central to the class action legislative scheme.³⁸ Professional regulation, legal ethics, and judicial oversight of the conduct of class actions are among the ways in which solicitation and other aspects of the conduct of litigation can be controlled. However, to equate class action solicitation with ambulance chasing demonstrates a failure to understand the purpose and mechanics of the class action regime, and the necessary attributes of class action lawyers operating effectively within that regime.

B Fear of 'United States-Style' Flood of Litigation

Another recurrent concern is that class actions may encourage in Australia civil litigation practices similar to those thought to exist in the United States. This is a frequent theme in discussions about common law litigation and civil justice reform and is not restricted to a consideration of class actions.³⁹ It is usually expressed as a belief that there is 'litigation mania' or an explosion in the United States, where cases with no merit are allegedly brought and pursued solely to hinder respondents and to bring about a nuisance value settlement.⁴⁰ For example, consider the following exchange about commercial class action funding arrangements, which occurred in oral argument on the application for special leave to appeal to the High Court in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*, where McHugh J enquired:

In any of the cases has it ever been put forward for the continued justification of this public policy that this sort of litigation increases pressure on the courts and adds to the cost of the administration of justice?⁴¹

To this counsel responded:

Well, your Honour, *I do not know of any, as it were, research* which has identified the extent to which there is such a burden. *If Fostif becomes the law, I think your Honours can take it as almost a moral certainty that a whole new industry is going to take place. One has heard anecdotal stories of the United States of people wandering around businesses sort of setting up class actions like they are going out of style.*⁴²

Arguments that there has been an explosion of litigation in the United States have been criticised on various bases. Some commentators have observed that

³⁸ Use of the 'ambulance chaser' and 'bounty hunter' labels also fails to account for cases that come to class action lawyers through referrals from other lawyers or approaches by prospective members of a class. See Hensler, 'Revisiting the Monster', above n 17, 196–7.

³⁹ See *ibid* 180 (emphasis in original), where Hensler comments: 'Many ordinary Americans seem to think that class actions are a new-fangled litigation device invented by greedy plaintiff attorneys. (Outside the United States, the characterization is "greedy American plaintiff attorneys.")'.

⁴⁰ In debates preceding enactment of the Federal Court of Australia Amendment Bill 1991 (Cth), which instituted the Federal Court's class action regime, Senator Michael Tate stated:

we have set our face firmly against some features of the American legal system such as contingency fees, *which appear from my observations over there recently* to drive the American legal system, rather than the merits of the issues themselves.

Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3025 (Senator Michael Tate, Minister for Justice and Consumer Affairs) (emphasis added).

⁴¹ [2005] HCATrans 777, 15 (McHugh J, 30 September 2005).

⁴² [2005] HCATrans 777, 15 (N C Hutley, 30 September 2005) (emphasis added).

these arguments are unsupported by empirical evidence and are instead the product of untested elite perceptions.⁴³ Others have treated them as isolated anecdotes and war stories, influenced by unarticulated values and preconceptions.⁴⁴ The question of whether there is any empirical proof for claims about a United States-style litigation explosion has been hotly debated, and is one beyond the scope of this article. However, regardless of the view one takes of this debate, there are features of class action practices in Australia that make it unlikely that any such litigation mania would occur here.

First, class actions are very expensive to run. No applicant, applicant lawyer or litigation funder would spend the millions of dollars necessary to conduct a large class action unless there is reasonable certainty of recovery.⁴⁵ There is little if any incentive to pursue an unmeritorious claim. Second, the rule that 'costs follow the event' is a substantial disincentive; it operates so that unsuccessful litigants pay the majority of the successful parties' legal costs. This rule does not apply in the United States, where an unsuccessful class action applicant is not usually obliged to pay the respondents' costs. One of the reasons given in the *Grouped Proceedings in the Federal Court* report to refute concerns about 'blackmail litigation' was the deterrent effect of the risk of an adverse costs order.⁴⁶ The class action legislation preserves that disincentive by requiring the named applicant to pay the respondent's costs in the event of loss.⁴⁷

A realistic appraisal of the evolution of class actions since 1990 strongly suggests that there has been no flood of litigation in Australia and that business interests have not been impeded by such litigation.⁴⁸ The ALRC estimates that

⁴³ See Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society' (1983) 31 *UCLA Law Review* 4, 61–2. See also Stephen Burbank, 'The Roles of Litigation' (2002) 80 *Washington University Law Quarterly* 705, 705–6.

⁴⁴ Galanter, 'Reading the Landscape of Disputes', above n 43, 71, where he asks: 'Could one imagine public health specialists or poultry breeders conjuring up epidemics and cures with such cavalier disregard of the incompleteness of the data and the untested nature of the theory?'

⁴⁵ See below Part V, in which we expand on the risk analysis inherent in litigation funding. See also Burbank, above n 43, 709 (citations omitted), where the author makes a similar argument in the context of litigation in the United States, referring to the empirical research conducted by Professor Herbert Kritzer into contingency fees as having debunked a resilient myth that

the contingency fee is to blame for much of the supposedly frivolous litigation with which our courts are supposedly burdened. Of course, this myth is all the more surprising in the age of Law and Economics, since one would assume that, as rational actors, contingency fee lawyers pick and choose their cases, mindful that the dollars spent on losers are their own. Professor Kritzer's work has provided evidence that this assumption is correct and thus that those who regard frivolous litigation as a serious problem should look elsewhere for a whipping boy.

⁴⁶ Law Reform Commission, above n 2, 34, 144–5.

⁴⁷ The *Grouped Proceedings in the Federal Court* report states that 'the costs rules in grouped proceedings would act as a stronger disincentive to the commencement of blackmail suits than is the case for individual actions': *ibid* 145. These costs rules have been described in academic literature as a considerable barrier to bringing a class action: see Rachel Mulheron, *The Class Action in Common Law Legal Systems* (2004) 438; Vince Morabito, 'Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs' (1995) 21 *Monash University Law Review* 231, 232.

⁴⁸ In addition to judicial concerns about legal entrepreneurialism, discussed above in Part III(A), concerns have also been voiced by some members of the legal profession about the negative impact that class actions are likely to have on doing business. For example, in 2004 *The Australian Financial Review* published an article by two senior Australian company lawyers which concluded that '[i]f the business community fails to lobby for legislative change at the federal,

by the year 2000 there were 20 class actions before the Federal Court.⁴⁹ In December 2005, the Chief Justice of the Federal Court estimated that there had been 166 class actions in that Court concluded by that date, with 158 finalised and eight still on foot.⁵⁰ In addition, the ALRC has confirmed that concerns about a flood of litigation have not materialised:

Representative proceedings legislation was received with trepidation by some potential respondents, concerned at 'legal entrepreneurialism', 'US style litigation' and 'sensational' claims. Some lawyers and companies continue to express these concerns, although in consultations with the Commission, some lawyers agreed that there is no present evidence of unmeritorious claims or any litigation explosion as a result of the representative proceedings.

Contrary to the concerns surrounding the introduction of the procedure in the Federal Court, none of the dire consequences predicted have actually materialised in the past five years. There has been no flood of class action litigation. Instead there has been a gradual adoption of the procedure in many appropriate cases with more than adequate restraint and control being exercised by the Court as Judges and the profession seek to come to grips with a procedure which undoubtedly has the potential to contribute significantly to the administration of justice.⁵¹

Those class actions that have been commenced do not appear to have been unduly burdensome for the courts, with the ALRC reporting that, 'procedures for representative proceedings generally appear to be working well and in accordance with legislative intentions. The Federal Court does not view such cases as more problematic than other complex cases.'⁵²

For all these reasons, it is unlikely that there will be any sudden increase in the number of class actions. The 'costs follow the event' rule and the expense of running a class action will continue to operate as disincentives.⁵³ Indeed, there

state and territory levels, class actions will become much more of an impediment to doing business in Australia': Stuart Clark and Greg Williams, 'Class Actions a Growing Threat', *The Australian Financial Review* (Sydney), 11 March 2004, 79. It is not clear from the article what type of legislative change should be the objective of the business community's lobbying; whether it is that the rights of persons to bring an action against members of the business community when they are aggrieved be removed, or that their ability to instigate or participate in a class action against members of the business community be taken away. The former is an extraordinary proposition but in reality the outcomes would be the same. Whether it is the underlying legal right or the availability of a class action procedure by which to enforce that right that is removed, the result would be to make ordinary people who have claims against members of the business community less willing and less able to pursue those claims.

⁴⁹ ALRC, above n 22, 479.

⁵⁰ Chief Justice Michael Black, Federal Court of Australia, 'Untitled' (Speech delivered at the International Class Actions Conference, Melbourne, 2 December 2005). See also Matt Drummond, 'ASIC Talks Up Class Actions', *The Australian Financial Review* (Sydney), 5 December 2005, 5.

⁵¹ ALRC, above n 22, 477–8 (citations omitted). In this passage, the ALRC refers to Neil Francey, 'Class Action' (Paper presented at the New South Wales Bar Association Continuing Legal Education Programme, Sydney, 9 February 1998) [20].

⁵² ALRC, above n 22, 479 (citations omitted).

⁵³ A related question is whether the 'costs follow the event' rule ought to be a part of a class action regime. In a report prepared for the Attorney-General's Law Reform Advisory Council, a recommendation was made against including the rule in the Victorian class action legislation: see Vince Morabito and Judd Epstein, Attorney-General's Law Reform Advisory Council, *Class Actions in Victoria — Time for a New Approach*, Project No 16 (1995) [7.22]–[7.28].

may be a risk that, if the following issues are not addressed, use of the class action regime will decline below an optimal level. We are not suggesting that the class action door should open to anyone who wishes to gain entry. In ordinary civil litigation there are various ways to keep unmeritorious claims out of the system — or to dispose of them summarily — and there is no reason why class action litigation should be any different. We argue however that since the enactment of the *Federal Court Act* some developments have limited the availability of the class action regime in a manner that is contrary to the legislation's fundamental aims. In the following Part we explain why they impede the healthy development of class action litigation and recommend ways in which some of these developments might be reversed — or at least their worst effects mitigated.

IV SPECIFIC DIFFICULTIES FOR CLAIMANTS IN CLASS ACTIONS

A Tactics of Delay and Attrition

It has long been accepted by judges and regulators that the class action mechanism aims to increase the efficiency of litigation, reduce expense and minimise complexity.⁵⁴ The challenges of funding and conducting class actions are compounded when these aims are ignored. However, an examination of the Australian case law reveals that respondents often try to resist claims by invoking technical arguments about the requirements and appropriateness of the class action mechanism.⁵⁵ These arguments take many forms, including attacks on pleadings,⁵⁶ arguments that the number of common issues is not sufficient to justify the matter proceeding as a class action,⁵⁷ and arguments that not all members of the class have a cause of action against all respondents.⁵⁸

Such attempts are antithetical to the aims of class action legislation, reducing efficiency, increasing expense and adding considerable complexity to proceedings. This state of affairs was criticised by Finkelstein J on appeal in *Bright v Femcare*:

There is a disturbing trend that is emerging in representative proceedings which is best brought to an end. I refer to the numerous interlocutory applications, including interlocutory appeals, that occur in such proceedings. This case is a particularly good example. The respondents have not yet delivered their defences yet there have been approximately seven or eight contested interlocutory

⁵⁴ See, eg, *Sreika v Cardinal Financial Services Ltd* [2000] FCA 1647 (Unreported, Tamberlin J, 23 November 2000) [9]; *Batten v Container Terminal Management Services Ltd* [2000] FCA 1493 (Unreported, Kiefel J, 22 October 2001) [12]; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

⁵⁵ See, eg, *Bright v Femcare Ltd* (2001) 188 ALR 633; *Bright v Femcare Ltd* (2002) 195 ALR 574 ('*Bright v Femcare*'); *King v GIO Australia Holdings Ltd* [2000] FCA 1543 (Unreported, Wilcox, Lehane and Merkel JJ, 1 November 2000); *Aristocrat* (2005) 147 FCR 394.

⁵⁶ See, eg, *Petrusevski v Bulldogs Rugby League Club Ltd* [2003] FCA 61 (Unreported, Sackville J, 14 February 2003); *Philip Morris* (2000) 170 ALR 487; *Bright v Femcare* (2002) 195 ALR 574.

⁵⁷ See, eg, *Bright v Femcare* (2002) 195 ALR 574, 577–83 (Lindgren J); *Guglielmin v Trescowthick [No 2]* (2005) 220 ALR 515, 527–31 (Mansfield J).

⁵⁸ See, eg, *Philip Morris* (2000) 170 ALR 487, 517–20 (Sackville J); *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, 344–6 (Carr J) ('*Bray v Hoffman Appeal*').

hearings before a single judge, one application to a Full Court and one appeal to the High Court. I would not be surprised if the applicants' legal costs are by now well in excess of \$500 000. I say nothing about the respondents' costs. This is an intolerable situation, and one which the court is under a duty to prevent, if at all possible. ... [I]t is not unknown for respondents in class actions to do whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful.⁵⁹

In *Bright v Femcare* the applicant's wasted costs and disbursements exceeded \$1 million. The action was eventually discontinued because the class action mechanism was not providing effective relief. This may be pointed to as evidence that the action should not have been instituted in the first place, and to justify the manner in which the respondent conducted the litigation. However, it might well be asked: did the claim fail to provide effective relief because it was an inappropriate matter to have ever been brought as a class action, or because of the intensity with which the defendants resisted it? Consider that there were two appeals to the Full Court of the Federal Court and two appeals to the High Court — even before the applicant had received a defence. The applicant won both Federal Court appeals.⁶⁰ The High Court had not heard the appeals to it at the time the case was discontinued as a class action. It is at least possible that the resulting expense contributed to the applicant's decision to terminate the class action.

The applicant's success in the Federal Court appeals suggests that the decision to bring the claim as a class action was appropriate. A consideration of the facts of *Bright v Femcare* offers further support for this view.⁶¹ One of the functions of the class action regime is to provide a mechanism for resolving common questions. Among the common questions that could have been resolved in *Bright v Femcare* were whether the device was defective, whether the brochures distributed by the respondents provided sufficient information, and whether the device came out of calibration with repeated use. One outcome of the decision to terminate the claim as a class action was that many of the claims proceeded — and were ultimately settled — as individual medical negligence claims against doctors and hospitals in New South Wales, Queensland and Victoria. Any suggestion that this would have been less expensive than the class action mechanism to resolve the common questions is, as Finkelstein J remarked, 'inherently unlikely to be true.'⁶²

Analysed on its merits, then, there is at least some evidence that this was an appropriate case to proceed as a class action. Perhaps this is what prompted Finkelstein J to describe as 'disturbing' the trend towards excessive numbers of

⁵⁹ (2002) 195 ALR 574, 581–2.

⁶⁰ See *ibid*; *Femcare Ltd v Bright* (2000) 100 FCR 331.

⁶¹ The claim was brought by women who had undergone the Filshie clip sterilisation procedure against the inventor of the device and its Australian distributor. There were two groups of claimants: the women in one group had become pregnant after undergoing the sterilisation procedure, while the women in the second group had to undergo a second medical procedure as a result of the defective device.

⁶² *Bright v Femcare* (2002) 195 ALR 574, 606. This issue is also considered below in the context of applications under *Federal Court Act* s 33N: see below n 78 and accompanying text.

interlocutory proceedings in class actions, and to attribute this trend, in part, to respondents' tactics of doing 'whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs.'⁶³

In most of the cases in which defendants have challenged use of the class action mechanism, they have been unable to argue successfully that the case would be run more efficiently as individual claims.⁶⁴ In our opinion, the aim is usually to ensure that the class action proceeding stops, making it likely that the individual claims will not run at all. If this is not the specific aim, then it is the result — for, as many judges and commentators have observed, the only way that most of these claims can be pursued at all is through the vehicle of the class action. Mansfield J recognised this reality in *Guglielmin v Trescowthick* [No 2]:

I am also mindful that an order under s 33N at this stage would effectively put out of court the group members. They are large in number. Their claims are relatively small ... It would simply be uneconomic for their individual claims to be pursued. It would also not be in the public interest including for the efficient and effective use of the court's resources to hear and determine one claim of one holder of the Holdings securities at 3 April 2001, without the other holders of Holdings securities at that time (and the respondents) also being bound by the determination of issues common to those other potential claims.⁶⁵

These issues may be better understood by considering them within the factual context of *King v GIO Australia Holdings Ltd*.⁶⁶ Mr King, the representative applicant, had a claim for about \$3000 damages. He could not have sued GIO, its directors and advisers for that sum because of the cost to bring and to defend such a claim. It was only through the mechanism of the class action that he was able to assert his own small claim. The legal costs of opposing the class action claim totalled approximately \$30 million. Because of the availability of the class action regime, 22 000 shareholders received compensation of \$97 million for corporate behaviour that had been roundly condemned.⁶⁷ After the class action had commenced, GIO's conduct also became the subject of an ASIC prosecution that was ultimately successful.⁶⁸ It is highly unlikely that any shareholder would have received compensation without the class action.

Class actions are commonly claims for significant monetary damages because they are commenced to address mass wrongs. It is understandable and appropriate that such large claims are strenuously defended by the respondents to the actions. However, the cost dynamics of class actions mean that even if the chances of success in a strikeout application are low, it is usually financially worthwhile for a respondent to make one. By this and related methods, some respondents have adopted a strategy whereby repeated applications are made to

⁶³ *Bright v Femcare* (2002) 195 ALR 574, 607–8.

⁶⁴ Cf *ibid* 606, where Finkelstein J noted that these arguments are unpersuasive.

⁶⁵ (2005) 220 ALR 515, 533.

⁶⁶ [2000] FCA 1543 (Unreported, Wilcox, Lehane and Merkel JJ, 1 November 2000).

⁶⁷ See Anthony Hughes, 'Shareholder Lawsuits Are Here To Stay, Companies Warned', *The Sydney Morning Herald* (Sydney), 9 August 2003, 45.

⁶⁸ See *Australian Securities and Investments Commission v Vines* (2005) 55 ACSR 617.

strike out proceedings — combined with other applications on various technical points — and multiple appeals are pursued, almost regardless of merit or cost.

It would be naïve to think that court processes are not misused by both plaintiffs and defendants. This problem is a recurring theme in discussions about civil justice reform. For example, Lord Woolf made the following observations in *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*:

In the absence of any effective control by the court itself, however, the timetable is frequently ignored, and the lack of firm supervision enables the parties to exploit the rules to their own advantage. Such exploitation is endemic in the system: the complexity of civil procedure itself enables the financially stronger or more experienced party to spin out proceedings and escalate costs, by litigating on technical procedural points or peripheral issues instead of focusing on the real substance of the case. All too often, such tactics are used to intimidate the weaker party and produce a resolution of the case which is either unfair or is achieved at a grossly disproportionate cost or after unreasonable delay.⁶⁹

Similar comments have been made about civil litigation in Australia.⁷⁰ Numerous interlocutory applications, and their consequent appeals, have become a feature of class actions in Australia. They have adversely affected the efficacy of such litigation as a remedy. They increase the costs of bringing an action, which inevitably reduce the willingness of applicants to bring them. The assertive case management philosophies expressed by Finkelstein J in *Bright v Femcare* and by Mansfield J in *Guglielmin v Trescowthick [No 2]* are the most effective way of counteracting this negative trend.

⁶⁹ Lord Woolf, Department for Constitutional Affairs, United Kingdom, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) [5.5], which is available at <<http://www.dca.gov.uk/civil/interim/woolf.htm>>. Lord Woolf also stated, at [5.6], that there was considerable evidence that individual plaintiffs in personal injury cases ‘are often forced to settle for inadequate compensation because of the delaying tactics employed by defendants’ insurance companies’ and that discovery is sometimes used in larger, commercial cases ‘as a tactical weapon to intimidate a financially weaker opponent or to test the opponent’s seriousness in pursuing the action.’

⁷⁰ Justice G L Davies has expressed concern that inequality of resources in litigation ‘may compel a poorer opponent to expend more money than he or she can afford by engaging in time and cost wasting procedures thereby compelling the poorer litigant either to compromise unfairly or to give up’: Justice G L Davies, ‘The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System’ (2003) 12 *Journal of Judicial Administration* 155, 158. Davies J also opines that ‘a consequence of the [reforms] aimed at reducing party control over the litigation process has also been to reduce the extent to which one party can manipulate the system to his or her advantage and to the disadvantage of the other’: at 161.

B Section 33N and 'Declassing' a Proceeding

Federal Court Act s 33N(1) provides that the Federal Court may, on its own motion or upon application by the respondent, order that a proceeding no longer continue as a class action if:

- (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
- (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
- (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
- (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

This section has proved to be fertile ground for challenges to class action proceedings. Many statements of the law of class actions in Australia have occurred while considering s 33N. For example, the comments of Finkelstein J in *Bright v Femcare* were made in the context of a s 33N application by the respondents. His Honour criticised the strategy adopted by respondents of repeated applications, and then appeals, on issues related to pleadings, particulars and other procedural matters.⁷¹

As early as 1995, the adoption of s 33N in the Victorian legislation was strongly criticised. Chief among the criticisms presented in a report prepared for the Attorney-General's Law Reform Advisory Council was the extent to which s 33N had 'generated unnecessary litigation as most defendants, opposing class suits, have invariably relied on one or more [of the s 33N provisions] to argue that the court should stop the claims being pursued by means of a representative proceeding.'⁷² We endorse the view set forward in the report that the Federal Court's power to terminate a proceeding, once it has satisfied the threshold requirements to proceed as a class action, ought to be very limited.⁷³

In most class actions there are both common and individual questions in contention between the parties. Respondents often argue that some balance should be made between the individual and common issues and that, if the individual issues predominate, the case should be struck out as a class action. It is not difficult for such a respondent to generate numerous examples of individual questions which might be said to outweigh the common questions.⁷⁴ Notwith-

⁷¹ *Bright v Femcare* (2002) 195 ALR 574, 605–8. The comments of Mansfield J in *Guglielmin v Trescowthick [No 2]* (2005) 220 ALR 515, 533 were also made in the context of a s 33N application.

⁷² Morabito and Epstein, above n 53, [6.16].

⁷³ See *ibid* [6.19].

⁷⁴ See *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] Aust Torts Reports ¶81-692, where the argument was made even though all claims arose out of one explosion and fire.

standing the High Court's rejection of this approach in *Wong v Silkfield*,⁷⁵ similar arguments are still occasionally advanced.⁷⁶

These arguments are misconceived. If there are any substantial common issues of law or fact, it is inherently more efficient to resolve them in one action for all group members than to have many trials on the same point. Any common question of fact or law which has some weight or significance need only be determined once in a class action, and thereby bind all class members and the respondent. Even if the proceedings are then 'declassified', the class action would still have saved significant amounts of time, costs and resources for the parties and the court.⁷⁷ If there is a strong case on the common questions and a judgment favourable to the applicant is obtained, the result is often settlement on a global basis. This avoids further litigation on individual issues and results in further savings for the parties and courts.

As we argued in the preceding section, s 33N applications are often made not out of a concern that the proceedings will be more efficiently and effectively conducted for the group members as individual proceedings, but rather in the expectation that the individual cases will not be conducted at all if the proceeding is 'declassified'. In response to the respondent's arguments in *Bright v Femcare* that the case could be more efficiently run as individual proceedings — an argument accepted at first instance but rejected on appeal — Finkelstein J stated:

The only foundation for the finding that the costs of many individual actions are likely to be less than the cost of one representative proceeding is an unsubstantiated assertion by the solicitor acting for the first respondent. I say that the allegation is unsubstantiated because the solicitor provided no explanation how it might be that one action is likely to be less costly than many separate actions. For my own part, in the absence of a compelling explanation I would place no weight on such a statement because it is inherently unlikely to be true. Moreover, ... the total number of group members is not yet known. That circumstance alone is sufficient to render irrelevant the solicitor's evidence: How could he say that one representative action would be more costly than many actions when he is unable to specify the number of actions with which the comparison is being made? In any event I simply do not accept that one action can cost more than what may amount to hundreds of actions.⁷⁸

The majority in *Bright v Femcare* confirmed that a key consideration under s 33N is whether it would be cheaper to run the matter as a class action or as individual actions. Their Honours also confirmed that whether it is 'in the interests of justice' that a matter no longer continue as a class action must be balanced against the legislative aims of efficiency and access to justice.⁷⁹

⁷⁵ (1999) 199 CLR 255.

⁷⁶ See, eg, *Bright v Femcare* (2002) 195 ALR 574, 577–83 (Lindgren J); and, more recently, *Aristocrat* (2005) 147 FCR 394; *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449 (Unreported, Hansen J, 18 November 2005) ('*Media World*').

⁷⁷ See, eg, *Zhang v Minister of Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 403–5 (French J).

⁷⁸ (2002) 195 ALR 574, 606.

⁷⁹ *Ibid* 605–6 (Finkelstein J).

It may be that the combined effect of *Wong v Silkfield*⁸⁰ and the restrictive manner in which the courts have interpreted *Federal Court Act* s 33N are sufficient to counteract the significant impact that the provision can have on the legislation's underlying aims. It is likely that the number of respondent applicants under s 33N have declined over time, as case law and judicial attitudes have defined its boundaries — though no apparent empirical evidence supports this view. However, as stated above, respondents still advance such arguments. The provision is too wide, especially s 33N(1)(c) and (d), and we suggest that discussion about legislative reform should strongly consider their removal.

C Constitution of the Class

Federal Court Act s 33C states that an applicant may begin a representative proceeding for *some or all* of the persons satisfying the s 33C criteria: that is, the persons having claims that arise out of the same, similar or related circumstances giving rise to a substantial common question of law or fact. This provision has frequently been used to enable persons to group together in a class action and to agree upon a way of bringing their claims forward, whether that be agreement as to the solicitor they will all retain, agreement as to contributions to a 'fighting fund', or agreement to obtain litigation funding.

Many class actions have been commenced and completed in which the claim is brought by an applicant on behalf of identified group members. In such cases, class members are usually set out in a schedule or list, even though it encompasses only some of the persons affected by the alleged wrong that is the subject of the action. Such lists have been the result of agreements between group members about the best way forward in particular cases, and have meant that not all victims of an alleged wrong fell within the class definition.⁸¹

In two recent decisions however, the ability of claimants to take this course has been significantly restricted.⁸² In *Aristocrat*,⁸³ the group definition in the statement of claim was limited to the applicant and other persons 'for whom the solicitors for the Applicant have instructions to act at any particular time' who had acquired certain shares during a nominated period ('the solicitor criterion'). Stone J noted that the solicitors only accepted instructions from persons who entered into a retainer agreement with them, and that it was a term of each retainer agreement that the person also enter into a funding agreement with a nominated commercial litigation funder. Her Honour held that the solicitor

⁸⁰ (1999) 199 CLR 255.

⁸¹ See, eg, *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100; *Nguyen v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 66 FCR 239; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2001) 111 IR 241; *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139; *Cameron v Qantas Airways Ltd* (1995) 55 FCR 147; *Magnus v South Pacific Air Motive Pty Ltd* (1997) 78 FCR 456; *Magnus v South Pacific Air Motive Pty Ltd* [2001] FCA 465 (Unreported, Wilcox J, 27 April 2001); *McIntyre v Eastern Prosperity Investments Pty Ltd [No 3]* [2002] FCA 406 (Unreported, French J, 8 April 2002); *Spangaro v Corporate Investment Australian Funds Management Ltd* (2003) 54 ATR 241; *Marks v GIO Australia Holdings Ltd [No 2]* (1996) 66 FCR 128.

⁸² See *Aristocrat* (2005) 147 FCR 394; *Media World* [2005] VSC 449 (Unreported, Hansen J, 18 November 2005).

⁸³ (2005) 147 FCR 394.

criterion imposed an impermissible ‘opt in’ requirement contrary to the ‘opt out’ regime in Part IVA.⁸⁴

In *Media World*,⁸⁵ Hansen J of the Supreme Court of Victoria followed and extended the operation of *Aristocrat*. *Media World* concerned an application by a group of experienced investors, who alleged that loss had been caused by the respondent’s misleading conduct. These investors had considered their options for recovery, taken advice from several solicitors, selected one firm and finally elected to commence a class action on behalf of only those in their group. The class definition in the initial statement of claim was similar to that in *Aristocrat*, but was later amended so that the group members were identified by a schedule of the names of those who initially instructed the solicitors. The applicant contended that a group of claimants was entitled to bring an action for its own benefit and to specify itself in a list, without having to sue for all potential group members, and that this practice was not restricted by Part 4A of the Victorian Act. The applicant argued that there was no continuing obligation to retain particular solicitors because, once on the schedule, a person who ceased to retain the solicitors could still remain a group member. This was said to distinguish the situation from that in *Aristocrat*.

Hansen J rejected this distinction because the list had been compiled using the solicitor criterion, which his Honour held amounted to an impermissible opt in process for the same reasons given by Stone J in *Aristocrat*.⁸⁶ At the time of writing, the appropriate consequential orders to be made in *Aristocrat* and *Media World* are yet to be determined. For that reason, we will not analyse the decisions in detail and will only comment generally on their potential effect.

In our experience, victims of a mass wrong who are interested in pursuing a case often take the view that the litigation should be for the benefit of those who agree upon common arrangements for its efficient conduct. These arrangements might include, for example, contributing to a fighting fund, agreeing to particular funding arrangements, or agreeing to use and follow reasonable advice of shared solicitors. However, unless people can band together, class actions can only commence if a representative party comes forward. Such a party agrees to meet the cost of bringing the case for the benefit of all, and bears all the risk of an adverse costs order — yet obtains no benefit that could not be obtained in an individual action. This is a significant disincentive to use of the regime.

The decisions in *Aristocrat* and *Media World* may therefore reduce the efficacy of the class action mechanism. As a result, other mechanisms for aggregating claims, either in old-style representative proceedings or multiple applicant actions, will attract renewed attention. This would be an unfortunate outcome, because it was the difficulty associated with those other mechanisms for aggregating claims that led to the introduction of class actions in the first place. At the time of writing, there are at least two large claims in excess of \$97 million that

⁸⁴ Ibid 426–31 (Stone J).

⁸⁵ [2005] VSC 449 (Unreported, Hansen J, 18 November 2005).

⁸⁶ Ibid [39]–[41]. See also *Aristocrat* (2005) 147 FCR 394, 431 (Stone J).

will not run as class actions as a direct result of the *Aristocrat* and *Media World* decisions.⁸⁷

D *Security for Costs*

Until recently, security for costs was not a major concern in class actions. Courts were disinclined to make orders that might have the effect of forcing group members to contribute to a pool of funds to conduct the action. Such orders were considered to be contrary to the spirit of *Federal Court Act* s 43(1A), which limits the availability of costs orders to the named parties.⁸⁸ There was also concern that such orders might force applicants to bring their claims separately or abandon them altogether.⁸⁹

In *Bray v F Hoffman-La Roche Ltd*,⁹⁰ Merkel J referred to his earlier decision in *Woodhouse v McPhee*.⁹¹ In that decision, his Honour expressed concern that costs orders made by reference to the resources of a class would undermine the intent of the legislation:

it would be incongruous and anomalous for Parliament specially to confer a direct costs immunity under s 43(1A), *inter alia* to afford represented persons greater access to justice, and then for the courts indirectly to remove the effect of that immunity by making orders for security for costs on the basis that the applicant is bringing the proceedings for the benefit of others who ought to bear their share of the potential costs liability to other parties. In my view, in order to deal with that incongruity and anomaly the fact that an impecunious applicant is bringing a pt IVA proceeding for the benefit of represented persons, whilst a relevant consideration in favour of granting security, ought not of itself be as significant a consideration as it might otherwise be in favour of the granting of security.⁹²

However, upon appeal to the Full Court,⁹³ Finkelstein and Carr JJ took a contrary view. Finkelstein J found that the characteristics of group members should be taken into account as a relevant factor in determining whether to make

⁸⁷ Maurice Blackburn Cashman Lawyers is instructed in three shareholder claims (Challenger Financial Services Group Ltd, Multiplex Ltd and Australian Wheat Board Ltd) in which proceedings will be issued under state (New South Wales) representative proceedings legislation rather than under *Federal Court Act* pt IVA as a direct result of the *Aristocrat* and *Media World* cases.

⁸⁸ *Federal Court Act* s 43(1A) provides:

In a representative proceeding commenced under Part IVA or a proceeding of a representative character commenced under any other Act that authorises the commencement of a proceeding of that character, the Court or Judge may not award costs against a person on whose behalf the proceeding has been commenced (other than a party to the proceeding who is representing such a person) except as authorised by ... in the case of a representative proceeding commenced under Part IVA — section 33Q or 33R.

⁸⁹ See, eg, *Ryan v Great Lakes Council* (1998) 154 ALR 584; *Ryan v Great Lakes Council* (1998) 155 ALR 447 ('*Great Lakes Appeal*'); *Woodhouse v McPhee* (1997) 80 FCR 529; *Bray v Hoffman Appeal* (2003) 130 FCR 317.

⁹⁰ (2002) 118 FCR 1 ('*Bray v Hoffman First Instance*').

⁹¹ (1997) 80 FCR 529.

⁹² Ibid 533, referred to in *Bray v Hoffman First Instance* (2002) 118 FCR 1; and cited in *Bray v Hoffman Appeal* (2003) 130 FCR 317, 347 (Carr J).

⁹³ *Bray v Hoffman Appeal* (2003) 130 FCR 317.

an order for security for costs.⁹⁴ Carr J found that whether an order should be made may depend on the financial circumstances of the group members and whether an order for costs might stifle litigation.⁹⁵

If applications for security for costs may be determined by reference to the financial circumstances of group members, there is a real risk that many class actions will be unable to proceed. Applicants with small claims — and it is beyond dispute that this is one class of litigant for whom the legislation was enacted — may be unable or unwilling to pay the large security for costs orders made on the basis of the financial characteristics of group members over whom the applicant has no influence or control. This is particularly so where the order would be for a much larger sum than if the applicant had brought an individual claim. The class action regime is designed so that people and entities that fit within a specified class are members of that class unless they take an active step to opt out. In circumstances where group members may be large and financially strong, but have no interest in contributing to the costs of the litigation, there is a risk that the claim of the representative party may be stopped as a result of a security for costs order. This would undermine s 43(1A) and would also have the tendency to stifle genuine claims.

It may be suggested that it is unfair for respondents to incur costs with no prospect of security for those costs, in circumstances where there are some class members who are not the lead plaintiff but who have the resources to post security. This argument is unsound in principle and unworkable in practice. Defendants in class actions receive the same protection as that which they receive in other actions — that is, the court has discretion to make an order for security against the plaintiff. Nevertheless, the fact that no order can be made against a class member is often argued to be unfair. Such an argument presumes that respondents are entitled to greater protection in class actions — in the form of security for costs orders — than in other actions. It may be that this argument would be sounder in principle if an impecunious plaintiff was intentionally put forward as the lead plaintiff to ensure that no order for security could be made. However, there is no empirical proof that this occurs in practice. To the contrary, we suggest below that lead plaintiffs in major Australian class actions have usually been people of means.⁹⁶

Significant practical problems are also raised by the suggestion that class members ought to be subject to security for costs orders. For example, consider the issue of unidentified class members. A decision to grant security for costs could not be based upon their resources, because there would be no evidence from which such an assessment could be made. One need only contemplate how such an order might be framed and enforced to realise that it would be impracticable. For the same reason, it cannot be suggested that class members of means should identify themselves, come forward and agree to assume the burden of a security for costs order, barring which the named plaintiffs and other class

⁹⁴ Ibid 374.

⁹⁵ Ibid 348–9.

⁹⁶ See below nn 160–7 and accompanying text.

members will be unable to proceed with their action. This places a lead plaintiff at the mercy of class members over whom that lead plaintiff has no control.

It follows that it must be the identified class members, not the unidentified ones, whose means would be considered by the court when deciding whether to make a security for costs order. However, the same issues of control exist. Just because they are identified does not mean they will agree to assume the burden of a security for costs order. A further problem is that if only the identified class members risk being subject to such an order, this would create a greater incentive for class members to remain unidentified until such time as the case has drawn to a close.

Two examples of class composition serve to illustrate these difficulties. The first class is that in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*,⁹⁷ the second from *King v GIO Australia Holdings Ltd*.⁹⁸ Both classes included some large corporations, each of which retained independent solicitors. These corporations identified themselves to the class lawyers but did not become lead plaintiffs. They presumably would have been advised that they could remain in the class without assuming the lead plaintiff burden and without taking any active part or interest in the litigation. They probably adopted that course because they thought that it was in their commercial best interests to do so. In such cases, is it practicable to suggest that their membership in the class and their means ought to be taken into account by a judge when making a security for costs order against an impecunious lead plaintiff? Taking this argument to its logical conclusion, if identified class members refuse to step forward and agree either to be the lead plaintiff or to take responsibility for a security for costs order, then everyone suffers — including the lead plaintiff, whose assets may be insufficient to meet such an order.⁹⁹

The *Bray v Hoffman Appeal* decision may limit the willingness of individuals to become lead plaintiffs and lawyers to take on a class action. This would impose a significant restriction on use of the regime. Legislative change is required to make clear that only the applicant's resources are relevant to the determination of a security for costs application.

⁹⁷ (2000) 104 FCR 564.

⁹⁸ [2000] FCA 1543 (Unreported, Wilcox, Lehane and Merkel JJ, 1 November 2000).

⁹⁹ The effect of the judgments of Finkelstein and Carr JJ in *Bray v Hoffman Appeal* is that an order for security can be made in an appropriate case against class members. This decision is contrary to the intent of the legislation embodied in *Federal Court Act* s 43(1A) and explained in earlier cases and the *Grouped Proceedings in the Federal Court* report: Law Reform Commission, above n 2. It might be more acceptable if limited to cases in which one or more class members of substantial means intentionally put forward an impecunious lead plaintiff to avoid a security for costs order. There is a risk, however, that arguments about whether this had occurred would become one more basis on which to make interlocutory applications and appeals, thus exacerbating the problems that such procedures already cause in class action litigation: see above Part IV(A). Further, the potential evidence and proof issues raised by such a qualification may render it unworkable in practice.

E *Costs in Class Actions*

The cost of conducting class actions means that a significant proportion of the damages payable to group members will often be consumed by solicitor–client costs. This cost is exacerbated by the satellite litigation — technical challenges, attacks on pleadings and other interlocutory applications — that has become commonplace in such actions. As the size of the damages ‘pool’ is reduced by the increasing solicitor–client costs, the action becomes less valuable for the group. One way of addressing this difficulty is for courts to respond favourably to requests for indemnity costs against respondents. However, Australian courts have hitherto proved reluctant to make such orders.¹⁰⁰

Other jurisdictions have adopted various strategies to address these problems. In the United Kingdom, for example, conditional fee agreements may provide for an ‘uplift’ or ‘success fee’ of up to 100 per cent.¹⁰¹ This is four times greater than the maximum amount permitted in those Australian jurisdictions that permit any uplift or success fee at all. The Canadian courts have also recognised the need to allow class lawyers’ fees to reflect both the work done and the risk of non-payment. In *Parsons v Canadian Red Cross Society*, Winkler J restated the principle in the following terms:

If the [*Class Proceedings Act*] is to achieve the legislative objective of providing enhanced access to justice then in large part it will be dependant upon the willingness of counsel to undertake litigation on the understanding that there is a risk that the expenses incurred in time and disbursements may never be recovered. It is in this context that a court, in approving a fee arrangement or in the exercise of fixing fees, must determine the fairness and reasonableness of the counsel fee. Accordingly, the case law that has developed in Ontario holds that the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the solicitor in conducting the litigation and the degree of success or result achieved.¹⁰²

These United Kingdom and Canadian approaches address specific problems facing claimants by limiting the extent to which solicitor–client costs reduce damages awards and by increasing the willingness of lawyers to undertake such litigation. Reform of the rules regarding success fees would be consistent with the other common law jurisdictions. Such reform is an essential component of an integrated response to the problems created by the resource demands, cost and risk inherent in class action litigation. Recent comments of state law societies, in the context of discussions about the rise of commercial litigation funding in Australia, advocate this type of integrated approach.¹⁰³

¹⁰⁰ See *Graham Barclay Oysters Pty Ltd v Ryan* [No 2] (2000) 102 FCR 307, 463 (Kiefel J).

¹⁰¹ *Conditional Fee Arrangements Order 1995* (UK) s 3, made pursuant to the *Courts and Legal Services Act 1990* (UK) c 41, s 58(2).

¹⁰² (1999) 49 OR (3d) 281, 287–8 (citations omitted).

¹⁰³ See below nn 187–8 and accompanying text.

F *Personal Costs Orders*

A further difficulty facing applicants in class actions is the prospect of their lawyers being held responsible for adverse costs. No complaint can legitimately be made when a lawyer is ordered to pay the respondent's costs personally because of irresponsible recklessness,¹⁰⁴ abuse of process or similar conduct. However, the prospect of a costs order being made against the representative applicant's lawyers because the lawyers 'promoted' the litigation is an entirely different matter. Even the threat of seeking such an order can create difficulties for applicants in class actions.¹⁰⁵

One of the arguments used to justify the availability of personal costs orders against lawyers who act on a conditional fee basis is that those lawyers 'promote' the litigation and should therefore be liable to pay adverse costs directly.¹⁰⁶ However, the threat of such an order can act as a significant deterrent, and may discourage lawyers from entering the market for class action legal services. In *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd*,¹⁰⁷ for example, the respondent tobacco companies threatened to apply for costs orders against the representative applicant's solicitors. They did so on the basis that the applicant company had been established solely for the purpose of bringing the action. As a consequence, the solicitors for the applicant withdrew.¹⁰⁸ As Lindgren J observed in *Cook v Pasminco Ltd [No 2]*, it is important that solicitors remain free 'to undertake cases that appear to have little prospect of success', including class actions.¹⁰⁹ It would be a perverse result if conditional fee arrangements 'consistent with the highest standards of the profession'¹¹⁰ operated to expose the solicitors providing the arrangement to liability for adverse costs orders.

G *Actions against Multiple Respondents*

Federal Court Act s 33C, and its analogue in the *Supreme Court Act 1986* (Vic), requires that at least seven persons have claims against the same person or persons, and that the claims must arise out of the same, similar or related circumstances.

¹⁰⁴ *Cook v Pasminco Ltd [No 2]* (2000) 107 FCR 44, 57 (Lindgren J).

¹⁰⁵ Information provided by Bernard Murphy, based on enquiries made of Maurice Blackburn Cashman Lawyers, indicates that partners and employees of that firm have been told by opposing solicitors on at least eight occasions that they would be subject to personal liability for the costs of proceedings.

¹⁰⁶ See, eg, Phillips, above n 22, [7.5]. Similar arguments have been advanced in the context of respondents' opposition to the financing of class actions by litigation funders: see below Part V.

¹⁰⁷ *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 131 (Unreported, Wilcox J, 9 February 2000) ('*Tobacco Control Coalition*').

¹⁰⁸ *Ibid* [9].

¹⁰⁹ (2000) 107 FCR 44, 46. In Canada, personal costs orders are available only 'in the most unusual and extreme of cases': Gordon McKee, 'Class Actions in Canada: A Potentially Momentous Change to Canadian Litigation' (1997) 8 *Australian Product Liability Reporter* 84, 89.

¹¹⁰ *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 205 (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ).

The first of these requirements has generated significant litigation. Some of the resulting decisions have had a deleterious effect on the availability of class actions as a remedy; in our view, they are incorrect and contrary to the intention of the legislation. These decisions have interpreted s 33C as requiring all class members to have claims against all respondents. Accordingly, if there is one applicant suing multiple respondents on behalf of a class then the applicant and every group member must have a personal claim against each respondent.¹¹¹ This position was confirmed by the Full Court of the Federal Court in *Philip Morris*, but is contrary to some earlier cases¹¹² and has subsequently been rejected by other courts.¹¹³

There are good reasons to question the correctness of *Philip Morris*. First, the aims of the class action legislation call for a broad interpretation ‘that gives full effect to the benefits foreseen by the drafters.’¹¹⁴ There is nothing in the language of Part IVA to justify an interpretation that compels a multiplicity of proceedings; indeed, this would be inconsistent with its aims.¹¹⁵ Second, in several earlier decisions, the cases were permitted to proceed as class actions notwithstanding that not all of the class members were claiming against every respondent.¹¹⁶ Third, other jurisdictions with similar provisions have not adopted the narrow *Philip Morris* approach, preferring instead a broad interpretation more consistent with the legislative aims.¹¹⁷

¹¹¹ *Philip Morris* (2000) 170 ALR 487, 514 (Sackville J). However it should be noted that the point was not argued directly; rather, there was a concession made by counsel for the applicant, which the Federal Court affirmed. See also *Tropical Shine Holdings v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 462 (Wilcox J); *Symington v Hoechst Schering Agrovet Pty Ltd* (1997) 78 FCR 164, 166–7 (Wilcox J); *Ryan v Great Lakes Council* (1997) 78 FCR 309, 312 (Wilcox J) (‘*Great Lakes First Instance*’); *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179, 186–7 (Wilcox, Ryan and Madgwick JJ); *King v GIO Australia Holdings Ltd* [2000] FCA 617 (Unreported, Moore J, 12 May 2000) [14]. It is not, however, necessary for each group member to succeed against each respondent. In *King v GIO Australia Holdings Ltd* [2000] FCA 1543 (Unreported, Wilcox, Lehane and Merkel JJ, 1 November 2000) [7] (Wilcox, Lehane and Merkel JJ), the court found that a claim does not necessarily equate to a successful judgment and that the *Federal Court Act* s 33C requirement for a claim was therefore met even if the claim was ultimately unsuccessful. This case was followed in *Guglielmin v Trescowthick [No 2]* (2005) 220 ALR 515, 522 (Mansfield J).

¹¹² See, eg, *McMullin v ICI Australia Operations Pty Ltd* (1997) 72 FCR 1.

¹¹³ See, eg, *Bray v F Hoffman La-Roche Ltd* (2003) 25 ATPR ¶41-906.

¹¹⁴ See *Hollick v Toronto* [2001] 3 SCR 158, cited in Vince Morabito, ‘Class Actions against Multiple Respondents’ (2002) 30 *Federal Law Review* 295, 304, where the Supreme Court of Canada commented on the Ontario provision equivalent to *Federal Court Act* s 33C.

¹¹⁵ See *Bray v Hoffman Appeal* (2003) 130 FCR 317, 372–4 (Finkelstein J).

¹¹⁶ See Morabito, ‘Class Actions against Multiple Respondents’, above n 114, 308–13.

¹¹⁷ See *ibid* 315:

As was the case with the practice of the Federal Court in the pre-*Philip Morris* era, permitting the use of the class action device in multiple respondent suits, without requiring compliance with a principle such as the *Philip Morris* principle, has not generated problems for Canadian courts — in managing class proceedings — nor has it resulted in unfairness for either class members or defendants in Ontario and British Columbia. At the same time, this approach has expanded the availability of the class action device in multiple respondent suits thereby facilitating the attainment of the important social goals of class actions.

More recent decisions indicate that some judges do not accept the narrow interpretation. In *Bray v F Hoffman-La Roche Ltd*, Merkel J stated:

While it is clear that s 33C(1)(a) requires that the applicant and each group member have a claim against the respondent it is not altogether clear that the same requirement was intended to apply where there were multiple respondents. As I later explain, *the present case affords a good example of how the strict application of s 33C(1)(a), in a case involving more than one respondent, might give rise to requirements and limitations that have little to do with the purpose or efficacy of pt IVA*. However, as a single judge I am bound to apply the principles enunciated by the Full Court in *Philip Morris*.¹¹⁸

When this matter reached the Full Court, the majority (comprising Finkelstein and Carr JJ) expressly rejected *Philip Morris*, deciding that each group member did not need to have a claim against each respondent. Finkelstein J stated:

It seems to me that if *Philip Morris* be correctly decided, we are heading back in the direction of 1852. This result, so it seems to me, is so undesirable that it should be avoided at all costs unless, of course, parliament has mandated it in clear and unambiguous language. I am of the very firm view that there is nothing in the language of s 33C(1), when considered in isolation or in its setting, which requires that result. ... I will not place a construction on s 33C which requires separate proceedings to be instituted. If it were impermissible to bring such an action, all the objectives of pt IVA, the reduction of legal costs, the enhancement of access by individuals to legal remedies, the promotion of the efficient use of court resources, ensuring consistency in the determination of common issues, and making the law more enforceable and effective, would be undermined.¹¹⁹

In contrast to the majority, Branson J considered herself bound by *Philip Morris*, but gave it only qualified support.¹²⁰

Since these comments were made, there have been conflicting decisions.¹²¹ So long as the issue remains unresolved, it will continue to cause practical difficulties for applicants in class actions involving multiple respondents. The resulting uncertainty is especially troublesome in complex commercial cases, in which wrongful conduct is frequently caused by various parties who may be responsible to varying degrees. The practical consequence of the narrow *Philip Morris* approach is that class actions can be used only against respondents whose wrongdoing is common to all class members. This is the result notwithstanding the fact that the case of some group members against individual wrongdoers may be stronger than the case that is common to all class members.

¹¹⁸ (2003) 25 ATPR ¶41-906, 46 505 (emphasis added).

¹¹⁹ *Bray v Hoffman Appeal* (2003) 130 FCR 317, 373-4.

¹²⁰ *Ibid* 358-9.

¹²¹ In *Milfull v Terranora Lakes Country Club Ltd (in liq)* (2004) 214 ALR 228, 229 (Kiefel J), his Honour, relying on *Bray v Hoffman Appeal* (2003) 130 FCR 317, observed that the requirement that each group member have a claim against each respondent 'no longer prevails'. However, in *Guglielmin v Trescowthick [No 2]* (2005) 220 ALR 515, 522 (citations omitted), Mansfield J stated:

Most recently Tamberlin J in *Johnstone* indicated that the observations of Finkelstein J are obiter dicta, and considered himself bound by *Philip Morris*. I propose to adopt the same course. The applicant, through senior counsel, did not ask me to act otherwise.

The *Philip Morris* approach also leads to artificial arguments about pleadings. Applicants are routinely exposed to interlocutory litigation on this issue which is expensive and can involve significant delay.¹²² Some cases have been discontinued as a result.¹²³ In our opinion, tobacco litigation has taken a different course in Australia as a result of this interpretation of *Federal Court Act* s 33C. In practical terms, such a narrow approach has meant that claims for injury caused by smoking cannot be joined.¹²⁴

The disturbing effect is that greater limitations may operate upon claims made in class actions than upon those made in individual actions.¹²⁵ Legislative amendments are necessary to incorporate the view of the *Bray v Hoffman Appeal* majority. Because of the approach taken in *Philip Morris*, a prudent applicant's lawyer may be required to balance the procedural advantages of a class action for his or her clients against the desirability of pleading a case against each respondent that is potentially liable. Given the uncertainty of the law on this point, prudence requires class lawyers to proceed on the basis that a court will, if asked, adopt the narrow interpretation of s 33C in a case involving multiple respondents.

H Settlement of Class Actions

Settlement difficulties are not unique to class action litigation in Australia. Settlement has been one of the areas of greatest attention in class action jurisprudence in North America, where the law is more developed.¹²⁶ One of the challenges is to ensure that the interests of class members are adequately protected.¹²⁷ A related issue is that the interests of the applicant and respondent and their lawyers may have converged by the time they agree on a settlement proposal, which means that any potential conflict of interest between the class representative and the other class members would not be mitigated by adversarial arguments. In *Lopez v Star World Enterprises Pty Ltd*, Finkelstein J noted that a judge's job in ensuring the fairness of a settlement 'is indeed an onerous one,

¹²² See, eg, *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164; *Great Lakes First Instance* (1997) 78 FCR 309; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179; *Philip Morris* (2000) 170 ALR 487; *King v GIO Australia Holdings Ltd* (2000) 174 ALR 715.

¹²³ See, eg, *Philip Morris* (2000) 170 ALR 487.

¹²⁴ See *ibid.* For a consideration of a similar trend in tobacco litigation in the United States, see Robert L Rabin, 'The Third Wave of Tobacco Litigation' in Robert L Rabin and Stephen D Sugarman (eds), *Regulating Tobacco* (2001) 176, 186, where the author states that one of the reasons for a new surge in individual tobacco litigation cases in the United States was doubt about the willingness of courts to approve consolidation of tobacco claims.

¹²⁵ Damian Grave and Ken Adams observe that *Philip Morris* (2000) 170 ALR 487 imposes a more restrictive requirement than is found in the traditional representative proceedings, which were thought to be too restrictive and were replaced by the more expansive *Federal Court Act* pt IVA: Damian Grave and Ken Adams, *Class Actions in Australia* (2005) 112.

¹²⁶ On the settlement of class actions, see generally Mulheron, above n 47, ch 11. See also Grave and Adams, above n 125, ch 13.

¹²⁷ For consideration of this issue from various perspectives, see Hensler, 'Revisiting the Monster', above n 17, 189; Lipp, above n 17, 387–96; Coffee, above n 19, 825–7; Mulheron, above n 47; Grave and Adams, above n 125, chs 13–14.

especially where the application is not opposed.’¹²⁸ This is why it has been suggested that a hearing to approve a settlement is ‘more akin to ex parte proceedings than adversarial ones.’¹²⁹

Accordingly, to ensure that the interests of class members are protected, it is essential for the court to have a significant role in the approval or rejection of proposed settlements.¹³⁰ This is the approach that courts in Australia have adopted.¹³¹ A class action cannot be settled or discontinued without the approval of the court.¹³² The test is whether the proposed settlement is fair, reasonable or adequate in the interests of group members. In considering whether a proposed settlement satisfies this test, the courts will have regard to such factors as: the complexity and duration of the litigation; the reaction of the class to the settlement; the stage of the proceedings; the risks of establishing liability and damages; and the reasonableness of the settlement, in light of the best recovery and the risks of litigation.¹³³

Notwithstanding these measures, other problems arise in the context of settlement. Some respondents seek to settle directly with group members rather than communicating offers through the solicitors for the class. The North American jurisprudence on this issue is clear: once a class is certified, such communications are prohibited.¹³⁴ Australian courts have preferred to regulate rather than prohibit such conduct.¹³⁵

¹²⁸ (1999) 21 ATPR ¶41-678, 42 670. There have been numerous criticisms of virtually every aspect of the class action settlement process. See the exhaustive review of the authorities in Mulheron, above n 47, 392-3, where the author concludes that while concerns about potential abuse of the class action settlement process are legitimate, they ‘may tend to be overstated, and in any event, are hardly restricted to class actions jurisprudence’: at 393. For criticisms of some aspects of the class action settlement process in an Australian context, see Lipp, above n 17, 387-96.

¹²⁹ Susan P Koniak and George M Cohen, ‘Under Cloak of Settlement’ (1996) 82 *Virginia Law Review* 1051, 1105.

¹³⁰ For a summary of the unusual view of the Scottish Law Commission that judges should play a very limited role in the monitoring of class action settlements, see Mulheron, above n 47, 393. The Commission’s opinion seems to be based on an outmoded conception of the role of judges and a desire to apply to class actions the same rules of procedure that are used in non-class action litigation. This tendency arguably hinders the healthy development of class action regimes.

¹³¹ See, eg, *Reiffel v ACN 075 839 226 Pty Ltd [No 2]* [2004] FCA 1128 (Unreported, Gyles J, 1 September 2004). Although the courts have taken an active role in the process of approving settlements, there is still some uncertainty as to which settlements courts are required to involve themselves in approving: see *Courtney* (2002) 122 FCR 168 181-2 (Sackville J); *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505 (Unreported, Merkel J, 19 December 2003) [16]-[24].

¹³² *Federal Court Act* s 33V.

¹³³ *Williams v FAI Home Security Pty Ltd [No 4]* (2000) 180 ALR 459, 465 (Goldberg J). For general comments on the role of the judge in the class action settlement process, see Michael J Legg, ‘Judge’s Role in Settlement of Representative Proceedings: Lessons from United States Class Actions’ (2004) 78 *Australian Law Journal* 58, 65-72. Mulheron observes that ‘one of the most notable features of the class action regimes in [Australia, Canada and the United States] is the complete lack of statutory guidance by which the court should exercise its discretion in approving settlement agreements’: Mulheron, above n 47, 397. The author argues that it is necessary to develop and apply statutory criteria to the facts of a proposed settlement: at 397-8.

¹³⁴ It may be suggested that because there is a certification process in the United States but none in Australia, the United States prohibition on defendant communication with class members for the purpose of settling has little relevance in the Australian context. However, this may be a distinction of little consequence because, as some commentators have observed, the judicial scrutiny provided by the United States certification process is available through a variety of other mechanisms in *Federal Court Act* pt IVA. See, eg, Mulheron, above n 47, 26-7 fn 28, and the sources

One risk of direct communication between respondents and class members is that class members may be misled about aspects of the claim or terms of the proposed settlement. Whilst it is impossible to know in advance whether a respondent will mislead a class member about the case or a settlement offer in a direct communication, it is clear that the interests of the two parties differ. There is therefore a real risk that communication between the respondent and the class members may not be entirely accurate and balanced.

A related problem is that it is often impossible for class members to be provided with independent legal advice about direct communications received from a respondent. For example, in the GIO class action, GIO contended that it was entitled to make individual settlement offers. In that case there were potentially 50 000 class members after the opt out period was closed. If the respondent had made 50 000 individual offers, then the best that the solicitors for the class could have done was to write 50 000 letters containing generic advice for those class members. The solicitors for the class could not have provided individual advice to those class members which took account of their individual situations.

In every class action, there are individual issues relevant to each individual class member's case. In a misleading and deceptive conduct case like the GIO class action, for example, there were individual questions as to the reliance by each class member on the misleading conduct and the quantification of damage. Similarly, in a mass tort class action like the Esso class action, where there were potentially more than one million class members, there were questions as to the existence of a duty of care in relation to the type of damage suffered by each class member and issues regarding quantification of the individual damage of each class member.¹³⁶ If settlement offers to class members are made in person,¹³⁷ it is impossible for the solicitors for the class to be present at each of those negotiations.

The potential negative consequences of this approach are evident when one considers how events unfolded in the Tasfast class action. That case involved a constitutional challenge to the Victorian class action legislation that went to the High Court, where the constitutional validity of the legislation was upheld.¹³⁸ While the case was on foot, loss adjusters for the respondents approached various class members directly and told them that the case would be appealed, that this would take several years, and that they could get 60 per cent immediately or risk getting nothing in several years. By the time the plaintiffs succeeded

to which the author there refers. In effect, there is a certification process in Australia, albeit with a different name (or names) — for example, applications under *Federal Court Act* ss 33C and 33N.

¹³⁵ See *Courtney* (2002) 122 FCR 168, 189 (Sackville J); *King v GIO Australia Holdings* (2000) 100 FCR 209. In *Courtney*, a regulation order was made setting out the manner in which the defendants could communicate with class members. An interesting avenue of research may be to enquire into the cases in which such regulation orders have been made, and then to enquire of defendants whether they pursued their right to communicate with the class members as described in the order.

¹³⁶ See generally *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564.

¹³⁷ See, eg, *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457 (Unreported, Bongiorno J, 22 October 2002).

¹³⁸ See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1.

in the High Court, many of the claims had been settled for less than full value.¹³⁹ If the loss adjusters had been required to communicate the offer to settle for 60 per cent of the value of claims to the class lawyers, those class lawyers could have communicated the offers to the class members in a way that would have been more balanced and that would have drawn attention to the strengths as well as the weaknesses of the claims. This might have encouraged more class members to remain in the class action. The best response to this risk is for courts and class lawyers to ensure that communications from respondents are accurate and balanced.¹⁴⁰

Finally, allowing individual offers of settlement is contrary to one of the central aims of the class action legislation, because it has the potential to reduce the size of the class to a point where it becomes uneconomical to continue. The cost-benefit analysis conducted by class members, the class representative and the class lawyers at the beginning of the action can be altered significantly if respondents are allowed to 'pick off' class members after the opt out date has passed.¹⁴¹ No individual shareholder or other claimant is likely to be able to spend the large sums necessary to pursue an individual claim; his or her claim can only be pursued in the context of a class action.¹⁴² The costs incurred in pursuing a class action can only be met if there is a large class with significant damages entitlements from which any solicitor-client costs incurred by the applicant's lawyers can be paid. Without such a class the applicant cannot be reimbursed for the fees that he or she has incurred for the benefit of the class. If the applicant's lawyer has conducted the case on a conditional fee basis, this diminishes the economic viability of pursuing the class action. If the respondent is able to reduce the class by settling with class members individually after the expiry of the opt out period, the economic viability of the class action may be lost and persons who would otherwise be able to make a claim will be unable to do so. This defeats the purpose of the legislation, which is one reason why it has been prohibited by some courts in the United States.¹⁴³

¹³⁹ For those who stayed within the class action, the predictions regarding delay were accurate. The respondent unsuccessfully argued its jurisdictional case in the Supreme Court of Victoria, the Court of Appeal and then the High Court, which took several years.

¹⁴⁰ The claim of some respondents that they are free to communicate directly with group members is overstated, and even those respondents who have described the right broadly have also acknowledged that they must approach such communications with a great deal of care: see Brooke Davie, 'Guidelines for Communications with Unrepresented Group Members' (2002) 13 *Australian Product Liability Reporter* 89; Stuart Clark, 'Class Action Defendants Are Free To Communicate with Class Members' (2002) 13 *Australian Product Liability Reporter* 33.

¹⁴¹ Grave and Adams express the view that 'respondents have sought to, on occasion, compromise those group members' claims that are most likely to succeed or that are the larger claims in terms of quantum. The intended effect is to remove or diminish the applicant's prospects of recovering costs': Grave and Adams, above n 125, 458. Such tactics may have a chilling effect on the growth of the class action jurisdiction by adding to the list of factors that discourage lawyers from taking up these cases, especially on a 'no win, no fee' basis.

¹⁴² See, eg, *Guglielmin v Trescowthick [No 2]* (2005) 220 ALR 515, 533 (Mansfield J).

¹⁴³ See, eg, *Resnick v American Dental Association*, 95 FRD 372 (ND Ill, 1982); *Kleiner v First National Bank of Atlanta*, 751 F 2d 1193, 1207 fn 28 (Vance CJ) (11th Cir, 1985). However, there appears to be no consensus among American judges on this issue: see Vince Morabito, 'Judicial Supervision of Individual Settlement with Class Members in Australia, Canada and the United States' (2003) 38 *Texas International Law Journal* 663, 717-20.

Another significant effect of allowing respondents to pick off some class members by settling their claims after the opt out date is the increased burden of class legal costs which may ultimately fall on the remaining class members. The class members who individually settle may take the benefit of the litigation that has generated the settlement offer without being required to meet the same share of the legal costs incurred by the remaining class members.¹⁴⁴ Taken to its logical conclusion, the class action brought by the representative party may generate settlement offers being made by the respondent to all the class members, yet the representative party may be forced to meet all the costs of the proceedings without obtaining a fair share of these costs from other class members.¹⁴⁵

One of the factors upon which respondents tend to rely to justify their right to communicate with unrepresented class members is that it is permitted by the traditional rules of professional conduct.¹⁴⁶ In our view this is another example of the unsuitability of using traditional rules to determine the manner in which class actions can best proceed. Although traditional rules of professional conduct may have permitted a lawyer to contact an unrepresented party, or respondents or their agents to contact group members directly, those rules were devised long before class action regimes were introduced. For the reasons previously explained, there are sound reasons for circumscribing contact between respondents and group members to a greater extent in class action proceedings than in other civil actions.

Two issues should be included in any contemplated reform of settlement procedures. First, endorsing Rachael Mulheron's suggestion, is a need for greater clarity regarding the criteria that courts use to determine whether settlement agreements will be approved.¹⁴⁷ Second, settlement communications between respondents and class members should take place only through the class lawyer. Even if this reform is not implemented, clearer guidelines are required on the extent to which respondents may communicate directly with class members.

I *The Opt Out Notice*

The consent of a person to be a class member is not required.¹⁴⁸ Instead, eligible parties are deemed to remain class members unless they opt out¹⁴⁹ before a

¹⁴⁴ See Grave and Adams, above n 125, 371–2 for discussion of Sackville J's comments about 'freeloaders' in *Courtney* (2002) 122 FCR 168.

¹⁴⁵ A similar though not identical problem has arisen in the United States in the context of individual plaintiffs withdrawing from the class after considerable work has been done by the class lawyers. One solution that has been devised in such cases is for the withdrawing parties to contribute to the costs incurred to the point at which they have withdrawn. The rationale is that if they pursue individual actions, they will have the benefit of the work (for example, discovery) that has been conducted in the class action: see generally Coffee, above n 19, 915–17, 925.

¹⁴⁶ This argument was successfully advanced by the respondents in *Courtney* (2002) 122 FCR 168. Sackville J accepted that there is nothing to prevent communication with group members, providing that such communication 'does not infringe any other law or ethical constraint (such as a professional conduct rule which requires solicitors to communicate with a represented group member through the latter's own legal representatives)': at 183.

¹⁴⁷ See Mulheron, above n 47.

¹⁴⁸ *Federal Court Act* ss 33E, 33J.

date fixed by the court.¹⁵⁰ Class members are notified, usually by publication in newspapers, of the commencement of the proceedings and their right to opt out. The form and content of opt out notices must be approved by the court and are specific to each case.¹⁵¹ However, opt out notices are now very similar.

The main challenges faced by applicants are disputes about the wording of such notices and the costs associated with their publication. One common respondent tactic is to seek to have the notice worded so that it is biased against participation in the class action. In the GIO class action, for example, some respondents sought to set out all of the negative consequences for class members if they stayed in the proceedings and none of the positive consequences of remaining in the class.¹⁵² Another recent decision illustrates that this tactic is still employed on occasion.¹⁵³

In large class actions, the cost of notices can be prohibitive.¹⁵⁴ In the Esso class action, Esso Australia Pty Ltd proposed a notice regime that required multiple large advertisements to be taken out in newspapers throughout Australia. To do so would have cost the applicant more than \$400 000.¹⁵⁵ As with other aspects of class action litigation explored in this article, robust judicial supervision has proved to be the most effective way to control the opt out notice process and the time and costs issues that can arise.

J The Representative Party

A significant practical difficulty in class actions is finding a group member who is willing to be the representative party rather than just an ordinary group member. Both the federal and Victorian class action regimes provide that, except in limited circumstances, costs orders can only be made against the representative party or the respondent and not against the group members.¹⁵⁶ The exposure of a group member to costs liability is therefore so advantageous compared to that of a representative party that almost all claimants would elect to be group members. Any prospective class member must be advised of these costs issues, and any prospective representative party must be advised of the costs advantage enjoyed by a class member over a class representative. When such advice is given, people who were otherwise keen to bring a class action will often decline to be the representative party because of concerns about an adverse costs

¹⁴⁹ *Federal Court Act* s 33E, with the exception of persons described in *Federal Court Act* s 33E(2).

¹⁵⁰ *Federal Court Act* s 33J.

¹⁵¹ *Federal Court Act* s 33X.

¹⁵² *King v GIO Australia Holdings Ltd* [2000] FCA 1869 (Unreported, Moore J, 20 December 2000); *King v GIO Australia Holdings Ltd* [2001] FCA 270 (Unreported, Sackville, Hely and Stone JJ, 20 March 2001).

¹⁵³ *Petrusevski v Bulldogs Rugby League Club Ltd* [2003] FCA 1056 (Unreported, Sackville J, 8 October 2003).

¹⁵⁴ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2001] VSC 284 (Unreported, Gillard J, 17 August 2001).

¹⁵⁵ Affidavit of N J Styant-Browne, filed on behalf of the applicants, *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (Sworn on 22 September 1999) [20]. See also *King v GIO Australia Holdings Ltd* [2000] FCA 1869 (Unreported, Moore J, 20 December 2000) [3], [13], [20]–[22].

¹⁵⁶ See *Federal Court Act* ss 43(1A), 33Q(3), 33R(2) and the equivalent Victorian provisions: *Supreme Court Act 1986* (Vic) ss 33ZD, 33Q(3), 33R(2).

order.¹⁵⁷ Concern about the potential negative impact of the costs shifting rules figured prominently in the deliberations of the ALRC.¹⁵⁸ One expert commentator has observed that it is difficult to see ‘who, properly advised, would agree to become a representative plaintiff’ because of the adverse costs rule.¹⁵⁹

A further concern sometimes expressed in discussions about class actions is that applicants’ solicitors ‘invariably select a man or woman of straw as the representative applicant [so as to] ensure that there is often no prospect of a respondent recovering their costs.’¹⁶⁰ The reality of class action litigation reveals that these concerns are ill-founded. A consideration of a number of Australian class action cases reveals that applicant’s lawyers do not select representative parties because of their lack of resources and resulting inability to pay any adverse costs order.

In the GIO class action, for example, the applicant was an ordinary working Australian with approximately \$150 000 equity in his family home in suburban Sydney.¹⁶¹ In *Spangaro v Corporate Investment Australia Funds Management Ltd*,¹⁶² the applicant was a businessman with significant assets. In *Bray v Hoffman First Instance*,¹⁶³ the initial applicant was an employed teacher with significant assets, and the second applicant was a pensioner who purchased a house in her name whilst the case was on foot and had equity of approximately \$70 000 in that home.¹⁶⁴ Indeed, the final substituted applicants in that case were three Australian companies of significant worth. In the Esso class action the first applicant was a large tile company with a multi-million dollar turnover.¹⁶⁵ In all of these cases it would probably have been possible to find a woman or man of straw to be the representative party, but in none was that strategy adopted.

Even if such a strategy had been employed, there is nothing in either the legislation or ethical and professional conduct rules that places an obligation on an applicant’s legal advisers to choose a representative party of means. In *Cook v Pasmenco Ltd [No 2]*,¹⁶⁶ for example, the respondents sought an order for costs against the applicant’s solicitors personally for various reasons, including that they had strategically chosen a representative applicant who was an undischarged bankrupt. In the absence of evidence as to how the applicant was selected, Lindgren J did not draw an inference that the solicitors invited her to be

¹⁵⁷ In the GIO class action, approximately 70–80 of the people who telephoned the eventual class lawyers regarding their losses were asked whether they would agree to be the lead plaintiff in the contemplated litigation before one agreed to assume that role.

¹⁵⁸ See Grave and Adams, above n 125, 446–7.

¹⁵⁹ Garry D Watson, ‘Class Actions: The Canadian Experience’ (2001) 11 *Duke Journal of Comparative and International Law* 269, 275.

¹⁶⁰ ALRC, above n 22, 486.

¹⁶¹ *King v GIO Australia Holdings Ltd* [2000] FCA 617 (Unreported, Moore J, 12 May 2000) [4]–[8].

¹⁶² (2003) 47 ACSR 285.

¹⁶³ (2002) 118 FCR 1.

¹⁶⁴ *Bray v Hoffman Appeal* (2003) 130 FCR 317, 323–5 (Carr J).

¹⁶⁵ See *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27 (Unreported, Gillard J, 20 February 2003).

¹⁶⁶ (2000) 107 FCR 44.

the named applicant because of her status as an undischarged bankrupt. His Honour went on to make the following observations:

faced with a number of potential representative parties, solicitors are not obliged to make a choice in the interests of the prospective respondent. No doubt a variety of factors may lead to one person rather than another becoming [the] representative party, such as: the proximity of the person to the solicitors' office; ease of communication between the solicitors and the person; degree of interest and involvement; likely performance as a witness; the facts of the individual cases.

Assume now that one prospective representative party is a person whose means appear to be sufficient to meet, wholly or partially, an adverse costs order, while another is almost insolvent. Solicitors are not subject to any legal or ethical obligation to choose the former. Certainly they could not be criticised for choosing the latter. It might even be suggested (I express no view) that they owe a duty to the former to choose the latter, unless other factors suggest a different choice!¹⁶⁷

The successful class actions to date in Australia have been possible because, notwithstanding these difficulties, some claimants have been prepared to take on the significant risks associated with being the representative party.

K Summary

Adverse costs orders, unclear threshold requirements, evasive posturing, and unresolved class communication issues continue to number among the main challenges faced by applicants in Australian class actions. We have analysed these challenges from the perspective of the access to justice and efficiency aims of the class action regime and have made some recommendations for change. Although we have identified a number of negative developments, we have also shown that many judges are willing to reject traditional approaches and attitudes in favour of the assertive case management role that is necessary if the aims of the legislation are to be achieved.

The following Part discusses the rise of litigation funding and its potential impact on the conduct of class actions in Australia.

V THE ROLE OF INSTITUTIONAL LITIGATION FUNDERS IN AUSTRALIA

In the *Grouped Proceedings in the Federal Court* report, the Law Reform Commission recommended that third party funding of class actions be permitted, provided that any consideration for such funding would not be a share of the proceeds or the subject of the action.¹⁶⁸ The report explicitly acknowledged the capacity of third party funding to 'enabl[e] less wealthy individuals or groups to

¹⁶⁷ Ibid 49–50. Stone J later granted leave to appeal from the order of Lindgren J that the applicant's solicitors pay the respondents' costs, albeit on another ground: *Cook v Pasminco Ltd* [2001] FCA 1277 (Unreported, Stone J, 7 September 2001).

¹⁶⁸ Law Reform Commission, above n 2, 129.

gain access to the courts' as one of the factors justifying such funding.¹⁶⁹ However, this was one of the recommendations in the report that was not enacted by the Parliament. Nevertheless, at least since 2003, commercial litigation funders have been prepared to fund Part IVA class actions.¹⁷⁰ They have increasingly been recognised by courts as making positive contributions towards the aims of the legislation and as accommodating the commercial realities of class action litigation.¹⁷¹

Early decisions invoked the doctrines of maintenance and champerty to invalidate litigation funding agreements with commercial funders.¹⁷² However, this resistance to litigation funding has since given way to judicial endorsement of the constructive role that it can play in the conduct of litigation. The leading case is *Fostif Appeal*.¹⁷³ At first instance, the funding agreement was found to be invalid as champertous. The Court of Appeal acknowledged a need for change in attitude toward litigation funders:

These changes in attitude to funders have been influenced by concerns about access to justice and heightened awareness of the cost of litigation. Governments have promoted the legislative changes in response to spiralling costs of legal aid. Courts have recognised these trends and the matters driving them. 'Ambulance chasing' still has negative connotations in many quarters, but it is now widely recognised that there are some types of claim that will simply never get off the ground unless traditional attitudes are modified. These include cases involving complex scientific and legal issues. The largely factual account in the book and film *A Civil Action* has demonstrated the social utility of funded proceedings, the financial risks assumed by funders, and the potential conflicts of interest as between group members in mass tort claims propounding difficult actions against deep-pocketed and determined defendants.¹⁷⁴

¹⁶⁹ Ibid. The Law Reform Commission gave as examples of third party funders, trade unions, consumer groups and environmental organisations. Recent judicial comments in Australia endorsing third party funding by commercial litigation funders have also relied on the access to justice rationale: see, eg, Transcript of Proceedings, *Welcome to The Honourable Chief Justice Martin* (Supreme Court of Western Australia, Martin CJ, 1 May 2006) 19 <<http://www.supremecourt.wa.gov.au/publications/pdf/WelcomeTranscript.pdf>>; *QPSX Ltd v Ericsson Australia Pty Ltd [No 3]* (2005) 219 ALR 1, 14 (French J); *Fostif Appeal* (2005) 63 NSWLR 203, 226, 227 (Mason P); *Campbells Cash & Carry v Fostif Pty Ltd* [2006] HCA 41 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 30 August 2006) [142] (Kirby J).

¹⁷⁰ For example, the publicly-listed litigation funder IMF (Australia) Ltd is presently funding shareholders to obtain redress for alleged misleading and deceptive conduct in actions against Aristocrat Leisure Ltd, Concept Sports Ltd, Sons of Gwalia Ltd and ION Ltd: IMF (Australia) Ltd, *Funded Cases* (2006) <<http://www.imf.com.au/page.asp?content=fundedcases>>.

¹⁷¹ See, eg, *Fostif Appeal* (2005) 63 NSWLR 203; *QPSX Ltd v Ericsson Australia Pty Ltd [No 3]* (2005) 219 ALR 1, 14 (French J).

¹⁷² For a description of the development of the law of maintenance and champerty, see the judgment of Gummow, Hayne and Crennan JJ in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 30 August 2006) [68]–[82].

¹⁷³ (2005) 63 NSWLR 203.

¹⁷⁴ Ibid 226 (Mason P).

Mason P observed that these changes and the principles on which they are based 'were reflective of goals consonant with the Overriding Purpose Rule ... and contemporary attitudes to civil litigation.'¹⁷⁵

The effect of *Fostif Appeal* is that defendants have been confined to a narrow scope within which they can challenge the participation of a commercial litigation funder.¹⁷⁶ According to Mason P, a court would not be concerned about the arrangements between an applicant and a litigation funder unless those arrangements amounted to an abuse of process. They would only constitute an abuse if 'they have corrupted or have a tendency to corrupt the processes of the Court in the particular litigation.'¹⁷⁷ Barring such circumstances, it is 'simply no business of a defendant to be taking up the cudgels on behalf of the funded litigants.'¹⁷⁸

In their submissions in support of their applications for special leave to appeal to the High Court, the applicants challenged this 'taking up the cudgels' comment, describing it as 'the notion that a respondent vexed with a champertous proceeding no longer has standing to complain of that circumstance.'¹⁷⁹ Among the issues that the High Court was asked to consider were: whether the Court of Appeal erred in holding that champerty no longer exists in modern law;¹⁸⁰ whether the public policy consideration underlying the torts of maintenance and champerty received inadequate attention from the Court of Appeal; and the constitutional question whether, given the participation of a litigation funder in the case, there was a 'controversy' of the kind required for the exercise of the judicial power of the Commonwealth.¹⁸¹

¹⁷⁵ Ibid. The reference to the overriding purpose rule is to the *Civil Procedure Act 2005* (NSW) s 56(1), which states: 'The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.'

¹⁷⁶ See also *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455 (Unreported, Sundberg J, 22 April 2005).

¹⁷⁷ See *Fostif Appeal* (2005) 63 NSWLR 203, 229. For an endorsement of this aspect of the case, see the comments of Stone J in *Aristocrat* (2005) 147 FCR 394, 415.

¹⁷⁸ See also *QPSX Ltd v Ericsson Australia Pty Ltd [No 3]* (2005) 219 ALR 1, 3, 12–16 (French J), where his Honour notes the ability of the applicants to protect their own interests.

¹⁷⁹ *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2005] HCATrans 777, 7 (A C Archibald, 30 September 2005).

¹⁸⁰ In response to this submission, McHugh J stated:

But, Mr Archibald, this is all about public policy. The judges made this particular aspect of public policy and the judges are entitled to change it. The reason for the change is that the courts have been influenced by concerns about access to justice and a heightened awareness of the cost of litigation. In those circumstances the view is taken by the Court of Appeal that what they referred to as the modern law in respect of champerty does not make this either champerty or an abuse of process.

Ibid (McHugh J).

¹⁸¹ The 'controversy' issue was raised in *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd*, which was heard with the *Fostif* special leave application: *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2005] HCATrans 777, 6, 22 (Gleeson CJ, 30 September 2005). *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* involved the participation of a litigation funder in a representative proceeding in New South Wales to recover petrol licence fees. Counsel for Trendlen Pty Ltd submitted that the effect of participation of a litigation funder in this case was 'the conversion of rights into instruments of commerce': at 7 (N C Hutley). A similar argument was made unsuccessfully in *Aristocrat* (2005) 147 FCR 394, 416 (Stone J), where *Aristocrat Leisure Ltd* failed to establish that the proceeding was an abuse of process.

The respondents argued that the appropriate test was whether there had been an abuse of process and that, far from abusing court processes, the participation of the litigation funder actually assisted them. They also submitted that as this was a representative action, the intense judicial supervision that occurs in such cases would be sufficient to monitor and address any issues of improper use of court process. Counsel for Fostif Pty Ltd cited examples of class actions in which issues that arose regarding the participation of a litigation funder were addressed and dealt with at first instance and by intermediate courts.¹⁸²

Leave to appeal was granted and a review of the High Court transcript reveals the Court's sensitivity to the role of class actions and commercial litigation funding in addressing access to justice issues.¹⁸³ It also exhibits caution about intervening in individual cases without more evidence about the nature of the funding arrangements, and awareness of the significant public policy issues raised by the appeals. In its recent decision, a majority of the High Court — comprising Gleeson CJ, Gummow, Hayne, Kirby and Crennan JJ — held that there was nothing about the litigation funding arrangement in that case that was either an abuse of process or contrary to public policy.¹⁸⁴

These decisions reveal strong judicial endorsement of the capacity of commercial litigation funding to enhance access to justice. The judgments also reflect a realisation that complex class litigation entails significant commercial risks, and an awareness that funders of litigation can make positive contributions to its responsible conduct and management. As French J stated in *QPSX Ltd v Ericsson Australia Pty Ltd* [No 3]:

Where [litigation funding agreements] involve the creation of budgets by funders knowledgeable in the costs of litigation it may inject a welcome element of commercial objectivity into the way in which such budgets are framed and the efficiency with which the litigation is conducted. The formulation of a budget limiting the amount of funding provided is, of course, different from the assumption by the funder of control of the conduct of the litigation. The court is in no position to pass definitive judgments on questions of the overall economic benefits to be derived from legitimate litigation funding arrangements. But the development of modern funding services in commercial litigation may be seen as indicative of a need in the market place to which those developments are legitimate responses. It is not for the court to judge them as contrary to the

¹⁸² See *Clairs Keeley (a firm) v Treacy* (2003) 28 WAR 139; *Clairs Keeley (a firm) v Treacy* (2004) 29 WAR 479; *Clairs Keeley (a firm) v Treacy* [2005] WASCA 86 (Unreported, Steytler P, Roberts-Smith and McLure JJA, 10 May 2005). For a recent consideration of these cases, see Carman Yung, 'Litigation Funding: Officious Intermeddling or Access to Justice?' (2005) 15 *Journal of Judicial Administration* 61, 74–80.

¹⁸³ See *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2005] HCATrans 777 (30 September 2005).

¹⁸⁴ See *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 30 August 2006) [88], where Gummow, Hayne and Crennan JJ stated:

The appellants' submissions can be seen to fasten upon Firmstones' [the litigation funder] seeking out those who may have claims, and offering terms which not only gave Firmstones control of the litigation but also would yield, so Firmstones hoped and expected, a significant profit to Firmstones. But none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.

public interest unless it be shown that a particular arrangement threatens to compromise the integrity of the court's processes in some way.¹⁸⁵

Support for the growing role of commercial litigation funders has also come from the legal profession. The Law Council of Australia published a submission in favour of litigation funding in which it stated that such funding provides an important means of improving access to justice and should be encouraged.¹⁸⁶ The Council endorsed national regulations to protect consumers and create certainty for litigation funders. These views have been reiterated by the President of the Council, who encouraged the state and territory Attorneys-General to 'strike an appropriate balance between ensuring consumers are protected and facilitating the role of litigation funders in the judicial process'.¹⁸⁷

The Law Institute of Victoria has echoed the recommendations put forward by the Law Council of Australia. In a recent comment on general issues regarding the costs of litigation, the Chief Executive Officer of the Law Institute of Victoria noted the decline in legal aid funding for civil cases during the past 15 years. He observed:

This creates a substantial access to justice issue for many individuals and businesses with meritorious cases who do not pursue them because they simply cannot afford to bring the action. While we can complain and protest about this situation and insist that additional funding be made available for legal aid to fund civil matters, the priority will be criminal matters.

In these circumstances it is timely for the legal profession, governments and other bodies to look for other solutions to this problem. The growth of litigation funders is to be encouraged and it is clear that many cases would not have been pursued but for the involvement of funders.¹⁸⁸

There have been some concerns expressed that support for commercial litigation funding may give rise to speculative claims.¹⁸⁹ While the development of commercial funding of class actions has the capacity to increase the number of

¹⁸⁵ (2005) 219 ALR 1, 14. See also Jamie Richardson and Michael O'Brien, 'Men in Tight Financial Situations: Litigation Funding in the 21st Century' (2005) 79(12) *Law Institute Journal* 26, 27, where the authors discuss the capacity of commercial litigation funding to enhance access to justice, and continue 'but beyond its obvious appeal to the impecunious, litigation funding may also offer a risk management tool for plaintiffs wishing to lay off downside litigation risks in return for a percentage of potential returns'.

In *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455 (Unreported, Sundberg J, 22 April 2005), a litigation funding agreement required the applicant to notify the funders of the terms of any proposed settlement, and authorised the funder to request that the applicant obtain the advice of senior counsel whether settlement should occur and as to its terms. Sundberg J found that this was not inappropriate or excessive control, but 'merely protective of the funders' investment': at [32]. Similarly, Sundberg J found that the funder's right to terminate 'is an almost unavoidable feature of a litigation funding agreement. ... [T]he funders would be very unlikely to fund a case without a right to terminate': at [33].

¹⁸⁶ See Submission to Standing Committee of Attorneys-General, in response to *Litigation Funding in Australia*, 14 September 2006 (Law Council of Australia).

¹⁸⁷ John North, 'Litigation Funding: Much To Be Achieved with the Right Approach' (2005) 43 *Law Society Journal* 66, 69.

¹⁸⁸ John Cain, 'Aiding Access to Justice' (2005) 79(12) *Law Institute Journal* 6, 6, where the author endorses a scheme of moderate regulation of litigation funders.

¹⁸⁹ See Priest, 'Class Actions Put Heat on Executives', above n 20; Marcus Priest, 'Class Actions Diluting Disputes', *The Australian Financial Review* (Sydney), 26 August 2005, 56.

class actions brought, there is little chance that the increase will include unmeritorious or speculative claims. The evidence indicates that litigation funders are very careful about the risks they assume; they gain nothing from funding and losing bad cases. It is reasonable to expect a publicly-listed litigation funder, with obligations to its own shareholders, or other private companies with obligations to their investors, to be careful not to embark upon speculative litigation. Evidence of their approach confirms that this expectation is reasonable.¹⁹⁰

In the absence of commercial litigation funding, the result is that fewer solicitors are available to claimants. This is due to the limited number of law firms with the size, experience and preparedness to take on class action litigation on a contingency basis. Few firms could bear the cost and fewer still have shown that they are willing to do so. We are not suggesting that commercial litigation funding will ameliorate all issues of access to justice faced by class action claimants. Commercial litigation funders handle very large cases, leaving many smaller companies and individuals who will continue to face barriers to the enforcement of their legal rights. Other approaches and innovations are possible, including: state-funded and not-for-profit litigation funding; litigation insurance; and a relaxation of the rules regarding contingency fees. These options were among the suggestions made by the Law Council of Australia in response to the recent debate about litigation funding and access to justice.¹⁹¹ Access to justice is undeniably a central aim of class action legislation, and commercial funding is no panacea for that objective. However, a robust commercial litigation funding market does represent a positive step towards its attainment.

VI CONCLUSION

In this article we have considered the development of class action litigation in Australia from the perspective of actual and potential applicants. We have identified the main factors that, in our view, are hampering the regime's continued development. Chief among these is the satellite litigation that has become an entrenched feature of class action proceedings and greatly increased their cost and duration. We have also described the outmoded and unsubstantiated attitudes, still prevailing in some quarters, that equate the pursuit of class actions with ambulance chasing, and that predict without examination or evidence a flood of litigation. Finally, we have identified examples of how rigid adherence to traditional litigation practices can impede rather than enhance access to justice and efficiency in class action litigation. Finally, we have made some constructive suggestions about issues that should be included on a reform agenda.

¹⁹⁰ Priest, 'Class Actions Put Heat on Executives', above n 20.

¹⁹¹ North, above n 187, 68–9. See also Chris Dale, 'An End of Year Challenge' (2004) 78(12) *Law Institute Journal* 4, 4:

Whatever may be said about the cost of litigation, one thing is for sure, there must be more inventive ways of funding it. ... [W]hat else is available to meet the cost of litigation and overcome the suggestion that, in the superior courts at least, litigation is only available for the rich, very poor, large corporates or governments?

Approximately 10 years ago, one judge expressed the following view of the role, and the potential, of class action proceedings:

Representative proceedings, especially those involving more than one respondent, need close judicial supervision. ... The procedure has the potential to handle cases more efficiently than otherwise and to resolve cases that might otherwise remain unresolved. Its use will often require innovative answers to practical problems. Imaginative case management, and sensible attitudes by both bar and bench, will ultimately demonstrate that the representative proceeding provides a valuable addition to traditional procedures.¹⁹²

These comments are as relevant now as they were when originally made. They capture the essential role of the judge in the conduct of class action proceedings, and emphasise the need for imagination and innovation. Perhaps most significantly, they remind us of the capacity of class actions to 'resolve cases that might otherwise remain unresolved.'¹⁹³

¹⁹² Justice Murray Wilcox, 'Representative Proceedings in the Federal Court of Australia: A Progress Report' (1996) 15 *Australian Bar Review* 91, 97–8.

¹⁹³ *Ibid.*