

A BEGINNERS GUIDE TO CLASS ACTIONS IN AUSTRALIA

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INTRODUCTION

These actions may be described as cases where multiple claims, raising similar or common issues of fact or law, may be litigated by a representative plaintiff or plaintiffs on behalf of a broader group or class of persons, the members of which group are not, themselves, directly named as parties to the litigation.

In many ways, this development has been a result of American influences on Australian law. There are, however, significant differences between class action law and practice in Australia and the United States.

In a technical sense, class actions have developed in Australia as a result of the introduction of American style class action legislation in Australian jurisdictions (the Federal jurisdiction and the jurisdictions of the State of Victoria, New South Wales and most recently, Queensland), and as a result of a change in judicial attitudes towards the use of older style 'representative proceedings' in other jurisdictions which lack specific class action legislation¹.

Class actions are now firmly established as part of Australia's litigation landscape. They have been available in:

- the Federal Court, since March 1992;
- Victoria since, January 2000;
- New South Wales, since March 2011; and
- Queensland since, March 2017.

The Australian Government supports class actions (and litigation funders) as it sees that they provide access to justice for a large number of consumers who would otherwise have difficulty in having their claims heard and assessed.²

On the other hand, directors see class actions brought against corporations as highly complex pieces of litigation that have the potential to impose significant burdens on the companies and directors involved.³

Class actions arise in a number of different contexts from claims about defective products to claims about employee discrimination, to consumer claims as well as natural disasters and events.

In this paper, we focus on developments in class actions relating to financial lines, including class actions brought by shareholders or holders of other securities or by investors in various financial products.

The Australian law concerning class actions will be discussed by reference to the following topics:

- the class action procedure;
- costs and litigation funding issues;

- trends in securities and shareholder class actions; and
- other recent developments.

THE CLASS ACTION PROCEDURE

Australian jurisdictions have introduced detailed American-style class action legislation.⁴ As previously mentioned, these jurisdictions are those of the:

- Federal Court;
- Supreme Court of Victoria;
- Supreme Court of New South Wales; and
- Supreme Court of Queensland.

In the Federal sphere, the relevant class action legislation is set out in Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the **Act**). The legislation came into effect in 1992, and applies to causes of action which have accrued since March 1992.⁵

In Victoria, the class action legislation is set out in Part 4A of the *Supreme Court Act 1986*, and Order 18A of the Supreme Court Rules. The Victorian legislation applies to causes of action accruing after 1 January 2000.

In New South Wales, the class action legislation is set out in Part 10 of the *Civil Procedure Act 2005*, through the *Courts and Crimes Legislation Further Amendment Act 2010*. The New South Wales legislation applies to causes of action accruing after 4 March 2011.

In Queensland, the class action legislation is set out in the amended part 13A of the *Civil Proceeding Act 2011*, through the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Act 2016*. The Queensland legislation applies to causes of action accruing after 1 March 2017.

The state based class action legislation is very closely modelled on the federal legislation, although of course it has a different commencement date and very different jurisdictional ambit. For simplicity, we shall confine our review of the structure of the class action legislation operating in Australia to that set out in Part IVA of the Act.

The introduction of the federal class action legislation in 1992 followed from an influential report of the Australian Law Reform Commission, titled *Grouped Proceedings in the Federal Court*, ALRC Report 46. The objective of the legislation, and the public interest which it serves, has been described as follows by Finkelstein J of the Federal Court:

'Whether or not it is in the interests of justice to make such an order has to be weighed against the public interest in the administration of justice that favours class actions. That requires one to consider the principal objects of the class action procedure. They are: (1) To promote the efficient use of court time and the parties' resources by eliminating the need to separately try the same issue; (2) To provide a remedy

in favour of persons who may not have the funds to bring a separate action, or who may not bring an action because the cost of litigation is disproportionate to the value of the claim; and (3) to protect defendants from multiple suits and the risk of inconsistent findings.⁶

FEDERAL JURISDICTIONAL ISSUES

An initial point to note is that a class action in the Federal Court under Part IVA of the relevant Act must fall within the jurisdictional ambit of the Federal Court. Loosely speaking, this means that the class action must involve some matter or issue governed by federal law the jurisdiction of which has been properly conferred by legislation on the Court.

If a matter properly before the Federal Court also involves issues of State law, then the Federal Court has an ancillary jurisdiction to hear and determine in the same proceedings those matters of State law.⁷ However, if the Federal Court's jurisdiction has not been sufficiently invoked, the Court cannot determine matters purely involving disputes under State laws.

Important areas of federal jurisdiction conferred on the Federal Court, and therefore amenable to class action proceedings before the Court include jurisdiction to hear:

- proceedings by consumers and others against corporations alleged to have engaged in misleading or deceptive conduct in trade or commerce.⁸
- product liability proceedings against corporations.⁹
- shareholder and securities claims.¹⁰
- anti-trust or anti-competitive conduct claims.¹¹

Although many types of financial lines claims – importantly including shareholder and securities class action claims – would likely fall within federal jurisdiction, many other types of claims may not do so. Thus, many types of tort claim, such as claims for negligently inflicted bodily injury or property damage or economic loss not involving products, or claims for breach of contract, would not ordinarily fall within federal jurisdiction, and would need to be dealt with in State courts. As a consequence, some of the largest class action claims in Australia have been litigated in State courts, such as the class actions arising from the:

- 2009 Victorian bushfires; and
- 2011 Queensland floods.

THRESHOLD REQUIREMENTS

Section 33C of the Act sets out the threshold requirements for the bringing of a class action. Those requirements are as follows:

33C(1) Subject to this Part, where:

- (a) 7 or more persons have claims against the same person; and

- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) the claims of all those persons give rise to a substantial common interest of law or fact;

a proceeding may be commenced by one or more of those persons as representing some or all of them.

- (2) A representative proceeding may be commenced:
 - (a) whether or not the relief sought:
 - (i) is, or includes, equitable relief; or
 - (ii) consists of, or includes, damages; or
 - (iii) includes claims for damages that would require individual assessment; or
 - (iv) is the same for each person represented; and
 - (b) whether or not the proceeding:
 - (I) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or
 - (II) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.⁷

CLAIMS AGAINST THE SAME PERSON

One area of controversy involves whether the section 33C(1)(a) threshold requires each group member to have a claim against each respondent, or whether it is sufficient for some group members to have a claim against one respondent, and other group members to have a separate claim against another respondent. There has been conflicting Federal Court authority on this issue.

In the tobacco class action, Sackville J held that each group member must have a claim against each respondent.¹² In the case the applicants, Nixon et al, brought proceedings in their name and as representatives of a class of persons who had used tobacco products manufactured by a number of different tobacco manufacturers. Some had used the products of Manufacturer A; others had used the products of Manufacturer B; others had used the products of Manufacturer C; some had used a combination of products from different manufacturers.

On the application of the respondent tobacco manufacturers, Sackville J struck out the applicants' pleading. His Honour held:

‘...in my opinion, the statement of claim does not establish that the requirements of s 33C(1)(a) of the *Federal Court Act* have been met. As I have explained, the applicants do not plead a case based on the collective conduct of all three respondents. What is alleged, in essence, is that each of the respondents, over a period of twenty-five years or more, engaged separately in misleading or deceptive conduct. Each group member is said to have been influenced to smoke, continue smoking or fail to quit smoking by the conduct of one or other of the respondents. This does not constitute the pleading of a claim by all applicants and group members against all respondents, as s 33C(1)(a) requires. Rather, the statement of claim pleads that some applicants and group members have claims against

one respondent, while others have claims against the other individual respondents.’

The decision of Sackville J in the tobacco class action was not followed by the majority of the Full Federal Court in *Bray v Hoffman-La Roche Ltd*.¹³ In that case the applicant, Ms Bray, commenced a class action against Hoffman-la Roche and other pharmaceutical companies for alleged global price fixing in relation to the sale and distribution of vitamins.

The respondents had already been prosecuted for this conduct in the United States and Canada. The applicant sought to bring proceedings for damages on behalf of herself and members of a group who had purchased vitamins in Australia over a seven year period, during which time the group members had allegedly paid more for the product than they would have paid but for the price fixing.

In *Bray* the Full Court of the Federal Court permitted the class action to proceed, even though it was not pleaded that all class members had a claim against all vitamin manufacturers. Finkelstein J, with whom Carr J agreed, stated:

‘It seems to me that if *Philip Morris (Australia) Ltd v Nixon* 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. It is as well to recall the words of the section. ... It can immediately be acknowledged that a properly constituted representative proceeding must involve a group of seven or more persons each of whom has a claim or claims against one person. But that is all the section requires. It simply does not address the situation where some members of the group, say ten out of a group of fifteen, also have claims (that is, causes of action) against some other person, being causes of action which satisfy both s33C(1)(b) (each claim arises out of the same circumstances) and s33C(1)(c) (each claim gives rise to common issues of law or fact). Is it necessary for the claims of this smaller group to be prosecuted in a separate proceeding or can they be joined in the proceeding brought by the larger group? 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.’

The Full Federal Court in *Cash Converters International Limited v Gray*¹⁴ posed the question of whether section 33C(1) requires that each group member have a claim against each respondent to the proceedings? The Full Court’s answer was no.

The decision proceeded on the basis that to satisfy the standing requirements, a class representative must have a claim against each respondent. Further, seven group members must have a claim against one respondent for the proceedings to be commenced. However, the addition

of other group members and other respondents is not prohibited. Consequently, multi-respondent class actions are now easier to commence in the Federal Court of Australia.

CLAIMS IN RESPECT OF THE SAME, SIMILAR OR RELATED CIRCUMSTANCES

Section 33C(1)(b) prescribes, as a threshold issue, that the claims of the represented persons arise out of the same, similar or related circumstances.

In *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs*¹⁵, it was held by French J that the expression ‘related’ circumstances connoted a wider category of relationship than ‘the same’ or ‘similar’ circumstances. Therefore, if a claim arises out of ‘related’ circumstances, the threshold requirement in section 33C(1)(b) would be satisfied. In determining whether circumstances are sufficiently ‘related’ within the meaning of the section, the court will need to determine whether the similarities or relationships between the circumstances are sufficient to merit grouping for a representative proceeding. This will be a question of fact for determination in each case.

In *Zhang*, a group asserting refugee status alleged they had been denied natural justice because the relevant decision maker, the Minister for Immigration, had refused to permit the claimants an oral hearing. French J had to determine whether these ‘circumstances’ - that is, that each refugee had not been given an oral hearing of his or her claim by the Minister - were sufficient to make the circumstances ‘related’ within the meaning of the section. His Honour found that there was a sufficient connection to satisfy the requirement in section 33C(1)(c) in this case.

CLAIMS GIVING RISE TO A SUBSTANTIAL COMMON ISSUE OF LAW OR FACT

The third threshold requirement in section 33C is that the claims of the representatives and the class members must give rise to a substantial common issue of law or fact.

The meaning of this threshold requirement was considered by the High Court in *Wong v Silkefield Pty Ltd*.¹⁶ The facts of the case involve an allegation by the applicants that the respondent property development company had engaged in misleading or deceptive conduct in respect of the sale or proposed sale of lots in a residential building in Queensland.

The misleading and deceptive conduct was said to constitute false representations concerning the building made in a ‘section 49’ document handed to purchasers at or before the date of entry into separate contracts to purchase the relevant apartments. The applicants brought the proceedings on their own behalf and also on behalf of a class comprising other persons who had entered into such contracts with the respondent.

The respondent applied to have the class action struck out on the basis that the proceedings did not involve a ‘substantial common issue of law or fact’ as required by section 33C(1)c of the Act. The Full Court of the Federal Court by majority found that this requirement was not satisfied. This was because, according to the majority judges, for a proceeding to involve a ‘substantial common issue of law or fact’ as required by the legislation, the issue or issues common to the claims of all group members must be likely to have a major impact on the conduct and outcome of the litigation.

In this instance, the Federal Court did not consider this element was satisfied because the only identified common issue was that contained in the Section 49 document distributed by the property developer. Issues such as the extent to which each class member relied on the document, suffered loss and damage as a result, and the quantification of that damage were all unique to each individual claimant.¹⁷

The High Court, however, disagreed with the Full Court of the Federal Court, and permitted the proceedings to continue as a class action. The High Court unanimously found as follows:

‘The term ‘substantial’ may have various shades of meaning. Having regard to the context, it may mean ‘large or weighty’ or ‘real or of substance as distinct from ephemeral or nominal’. Some assistance for the present case may be derived from authorities construing provisions in the form of that rule considered in *Carnie v Esanda Finance Corporation* (1995) 182 CLR 398. This rule provided for the commencement of proceedings by numerous persons having ‘the same interest in any proceeding’. In *Carnie*, Mason CJ, Deane and Dawson JJ expressed the view that to equate the meaning of the phrase ‘same interest’ with a common ingredient in the cause of action by each member of the class might not adequately reflect the statutory expression. Their Honours said that the expression may extend ‘to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings’. Brennan J and McHugh J were of opinion that a plaintiff and the represented persons had ‘the same interest’ when they had a community of interest ‘in the determination of any substantial question of law or fact that arises in the proceedings’. Toohey and Gaudron JJ treated as sufficient ‘a significant question common to all members of the class’, to be determined by the grant of declaratory relief.

Clearly, the purpose of the enactment of Part IV A is not to narrow access to the new form of representative proceedings which might have applied under regimes considered in cases such as *Carnie*. This suggests that, when used to identify the threshold requirements of section 33C(1), ‘substantial’ does not indicate that which is ‘large’ or ‘of special significance’ or would ‘have a major impact on the...litigation’ but, rather, is directed to issues which are ‘real or of substance’.

Foster J noted that the only issue of fact which could be common to all members of the postulated group, identified and unidentified, would be that raised in the statement of claim reflecting the representation as to the accuracy of the section 49 statements. His Honour, like Spender J at first instance, regarded the identified common issue as ‘substantial’ in the necessary sense. This was because the allegations involved were serious and significant and detrimental misrepresentations were claimed. It is not to the point that, in the final resolution of the litigation, this might not prove to be the ‘major’ or ‘core’ issue.

It is not necessary to show that litigation of this common issue would be likely to resolve wholly, or to any significant degree, the claims of all group members’.

OPT-OUT PROCEDURE, CONSENT, AND NOTICE

In class action proceedings under Part IVA of the Act, consent to be a group member in a representative proceeding is generally not required: see section 33E(1). The class action rules also specifically adopt an opt out procedure, whereby group members will be bound by the outcome of the representative proceeding unless, before a date specified by the court, the group member has given written notice of a decision to opt out of the group: see section 33J. A judgment in a representative proceeding binds all group members other than those who have opted out: see section 33ZB.

Related to the consent and opt out procedures, Part IVA of the Act also contains detailed rules specifying the manner and form by which notice must be given to group members of the representative proceeding: see section 33X. The form and content of a notice must also be approved by the court: see section 33Y. As a general rule, the costs of giving notice in the court approved form to group members must be borne by the representative or representatives who instituted the proceedings: see *Johnson Tiles Pty Limited v Esso Australia Pty Limited*.¹⁴

Relevant sections of the legislation dealing with the abovementioned topics are set out below:

- 33E (1) The consent of a person to be a group member in a representative proceeding is not required unless subsection (2) applies to the person.
- (2) None of the following persons is a group member in a representative proceeding unless the person gives written consent to being so:
- (a) the Commonwealth, a State or a Territory;
 - (b) a Minister or a Minister of a State or Territory;
 - (c) a body corporate established for a public purpose by a law of the Commonwealth, of a State or of a Territory, other than an incorporated company or association; or
 - (d) an officer of the Commonwealth, of a State or of a Territory, in his or her capacity as such an officer.
- 33H (1) An application commencing a representative proceeding, or a document filed in support of such an application, must, in addition to any other matters required to be included:
- (a) describe or otherwise identify the group members to whom the proceeding relates; and
 - (b) specify the nature of the claims made on behalf of the group members and the relief claimed; and
 - (c) specify the questions of law or fact common to the claims of the group members.

- (2) In describing or otherwise identifying group members for the purpose of subsection (1), it is not necessary to name, or specify the number of, the group members.

- 33J (1) The Court must fix a date before which a group member may opt out of a representative proceeding.
- (2) A group member may opt out of representative proceeding by written notice given under the Rules of Court before the date so fixed.
 - (3) The Court, on the application of a group member, the representative party or the respondent in the proceeding, may fix another date so as to extend the period during which a group member may opt out of the representative proceeding.
 - (4) Except with the leave of proceeding must not commence earlier than the date before which a group member may opt out of the proceeding.

33M Where:

- (a) the relief claimed in a representative proceeding is or includes payment of money to group members (otherwise than in respect of costs); and
- (b) on application by the respondent, the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost of the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts;

the Court may, by order:

- (c) direct that the proceeding no longer continue under this Part; or
- (d) stay the proceeding so far as it relates to relief of the kind mentioned in paragraph (a).

33X (1) Notice must be given to group members of the following matters in relation to a representative proceeding:

- (a) the commencement of the proceeding and the right of the group members to opt out of the proceeding before a specified date, being the date fixed under subsection 33J(1);
- (b) an application by the respondent in the proceeding for the dismissal of the proceeding on the ground of want of prosecution;
- (c) an application by a representative party seeking leave to withdraw under section 33W as representative party.
- (2) The Court may dispense with compliance with any or all of the requirements of subsection (1) where the relief sought in a proceeding does not include any claim for damages.
- (3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceeding is founded.
- (4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under

section 33V must not be determined unless notice has been given to group members.

- (5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.
- (6) Notice under this section must be given as soon as possible after the happening of the event to which the notice relates.

33Y (1) This section is concerned with notices under section 33X.

- (2) The form and content of a notice must be as approved by the Court.
- (3) The Court must, by order, specify:
 - (a) who is to give the notice; and
 - (b) the way in which the notice is to be given;

and the order may include provision:

- (c) directing a party to provide information relevant to the giving of the notice; and
- (d) relating to the costs of notice.
- (4) An order under subsection (3) may require that notice be given by means of press advertisement, radio or television broadcast, or by any other means.
- (5) The Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.
- (6) A notice that concerns a matter for which the Court's leave or approval is required must specify the period within which a group member or other person may apply to the Court, or take some other step, in relation to the matter.
- (7) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.
- (8) The failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in a proceeding.⁷

JUDICIAL SUPERVISION OF REPRESENTATIVE PARTY

The provisions of Part IVA of the Act also makes express provision for judicial supervision of the representative party. The relevant legislation is set out in section 33T as follows:

- (1) If, on an application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and may make such orders as it thinks fit.
- (2) If, on an application by a sub-group member, it appears to the Court that a sub-group representative party is not able adequately to represent the interests of the sub-group members, the Court may substitute another person as sub-group representative party and may make such other orders as it thinks fit.²⁰

Following the Victorian black Saturday bushfires, Slidders Lawyers (**Slidders**) issued a class action against two power companies in relation to the Kilmore East and Beechworth fires. Mr Leo Keane was the named representative plaintiff, however Slidders did not have instructions or authority from Mr Keane to issue the proceedings.²¹

The power companies applied to dismiss the proceedings as an abuse on process. The Court refused to strike the matter out but instead made orders to regularise the proceedings and made certain orders as to costs and interest so that the parties were not disadvantaged by the change in representation.²²

DISCRETION TO REFUSE ORDER

The Federal Court class action legislation also makes express provision for the court to make an order that a proceeding no longer continue as a class action where the court is satisfied that it would be in the interests of justice for this to happen. The relevant section, section 33N, is in the following terms:

- 33N (1) The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:
- (a) the costs that would be incurred if the proceeding were to continue as a 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.
- (2) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the respondent except with the leave of the court.
- (3) Leave for the purposes of subsection (2) may be granted subject to such conditions as to costs as the Court considers just.

Some class action litigation in the Federal Court of Australia has also involved interlocutory applications by respondents asserting that it is not ‘in the interests of justice’ for the class action to continue, and asking that the court exercise its discretion under section 33N to make an order that the proceedings not continue as a group proceeding.

The prevalence of such applications, and the correct judicial approach to them, was the subject of judicial

comment in *Bright v Femcare Ltd.*²³ In that matter the applicants were two groups of women who had undergone sterilisation procedures using a product manufactured by Femcare Ltd. Group A, the first group of women, had become pregnant. Group B, the second group of women, had avoided pregnancy by undertaking further sterilisation procedures after learning of the defects in the initial treatment.

The first respondent sought an order under section 33N that the representative proceeding not be continued. The respondent’s argument was that it would be more efficient and in the interests of justice if the claims were to proceed individually. This was said to be because of significant non-common causation and damages issues.

In rejecting the respondent’s argument, Finkelstein J, sitting on the Full Court of the Federal Court²⁴, said:

‘An action which has properly been commenced as a representative proceeding (or class action as is commonly referred to) may be ordered no longer to continue as such a proceeding only ‘if it is in the interests of justice’: section 33N *Federal Court of Australia Act 1976* (Cth). Whether or not it is in the interests of justice to make such an order has to be weighed against the public interest in the administration of justice that favours class actions...

There will be cases where a representative proceeding will not resolve all issues in a dispute. Commonly, for example, a representative proceeding will be suitable to try issues of liability, while proof of damage and other remedies may be left to each individual member of the class to establish. Sometimes the benefit of a representative proceeding will be even less than that. There will be cases where a class action will do no more than resolve certain issues relating to liability, leaving others to be dealt with on an individual basis. Inducement in a fraud case, for example, could really be dealt with as a common issue.

There is no doubt that a representative proceeding is particularly useful in product liability cases. The reasons are obvious. These cases usually raise common issues relating to matters such as the manufacturing process, the knowledge of any health hazard presented by the use of the manufactured article, whether there has been a failure to test the article and whether the manufacturer has any duty to warn about the dangers associated with the use of the article. Because the damage that may be caused by the use of certain defective products is likely to be of similar character, a class action can also be of benefit to the determination of the damages suffered by the members of the class...

As regards the judge’s first reason for making the order (that the resolution of the common questions of law and fact will not materially advance the position of the group), I think that she was in error for the reasons given by both Lindgren and Kiefel JJ. I only wish to add one or two short points to what they have said.

I am of the firm view that this case is a good example of the benefits of a class action. Take group B members by way of example. First, on the question of liability, most of the elements of their respective causes of action, whether the elements be of law or fact, are common. Indeed it is difficult to see in what respects their cases will differ, apart from the difference states of knowledge as to the risks, if any, associated with the sterilisation procedure they undertook.

Second, if the group B members were to succeed, the quantum of the damages to which the members would be entitled would

not be great. It seems to me that if these women are not permitted to bring a group claim, it is likely that many of them will not pursue an individual claim because the potential gain would not justify incurring the risk of costs. In that sense it would be contrary to the interests of justice to make an order under section 33N.

It follows, in my opinion, that as the condition for the exercise of the power to make an order under section 33N was not satisfied on an objective assessment of the material, the judge could not have made the order she did. In that circumstance it is not necessary to consider whether there has been any error in the discretionary aspects of the decision under appeal.

That is all I wish to say about the appeal proper. There is, however, one other matter to which I wish to direct some comments. 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 7 or 8 contested interlocutory hearings before a single judge, one application to a Full Court and one appeal to the High Court... By giving appropriate directions the court can ensure that the parties get on with the litigation and do not become bogged down in what are often academic or sterile arguments about pleadings, particulars, practices and procedures...'

SETTLEMENT AND JUDGMENTS

Importantly, all group members of a representative proceeding who have not opted out are bound by any judgment given by the Federal Court in the representative proceedings: see sections 33Z, ZA, and ZB.

The relevant class action rules in Part IVA of the Act also make express provision as to the way in which a representative action may be settled. In essence, the legislation provides that a representative proceeding may not be settled or discontinued without the approval of the court: see section 33V.

The reason for this is to ensure that group members are properly protected, and that settlements are in their collective interests. Associated with this rule is the requirement that the court must not approve a class action settlement under section 33V unless appropriate notice has been given to group members: see section 33X (4). Special rules also operate where the representative wishes to settle his or her own claim and withdraw as representative party: see section 33W.

A number of cases have involved attempts by respondents in class action proceedings to negotiate settlements with group members who have either opted out of the representative proceeding or who have not opted out but have not retained the representative party's solicitors to act for them.

In *King v AG Australia Holdings Ltd*²⁵, representative proceedings were commenced on behalf of approximately 75,000 shareholders in an insurance company, GIO. The proceedings alleged that the company, its directors and various others had breached duties to the shareholders in resisting a hostile takeover bid. The shareholders did

not sell their shares, and the essence of their case was that by retaining the shares the group members had suffered significant loss.

Approximately 20,000 of the class of shareholders retained the representative's lawyers to act for them in the class action. A number opted out. And a residual number of approximately 50,000 shareholders remained in the group but without legal representation.

The respondent to the class action wished to engage in settlement negotiations with the unrepresented group members, and to effect individual settlements with them without obtaining court approval. It seemed to be common ground between the applicant and the relevant respondent that section 33V would not prevent settlements as between individual group members and the respondent (because the legislation only seemed to be directed to the settlement of the group proceeding as a whole, rather than the settlement of individual claims comprising the group proceeding). Moore J, whilst contemplating that section 33V may well operate in this fashion, nonetheless made directions that the respondent first send to the representative's lawyers copies of any settlement letters which were proposed to be sent to the unrepresented group members. If the lawyers considered these letters to be inadequate or unfair in any way, they were then given leave to bring the matter before the court for further order. Similar orders were made by Sackville J in the subsequent case of *Courtney v Medtel Pty Ltd*.²⁶

Very few class action settlements are rejected by the Court. In April 2016, however, Justice Murphy of the Federal Court rejected the proposed settlement for victims of the Willmott Forests managed investment schemes.²⁷

The settlement proposed included the following terms:

- no compensation was to be paid to group members;
- costs of \$4.1 million were to be reimbursed to the plaintiff's lawyers; and
- loans were to be declared enforceable.

Justice Murphy rejected the settlement on the basis that it was not fair and reasonable as between class members. Specifically:

- Only a small proportion of the class members were entitled to receive any benefit from the settlement (i.e. those who contributed to the security for costs in the proceedings). The terms of the settlement included binding admissions which would preclude all class members from defending the enforcement of loan agreements on any basis (i.e. including a defence based on claims or defences not pleaded in the class action); and
- A number of conflicts of interest existed which were not properly addressed in the terms of the settlement. These included the conflicting interests of:

- those class members who contributed to the security for costs and those who did not;
- those class members who were clients of the applicants' solicitors and those who were not; and
- class members and the applicants' solicitors (who have an interest in recovering their legal costs).

The settlement included an amount for the solicitors' costs. Murphy J considered that the supervisory role of the Court extends to the reasonableness of the costs charged to class members. The solicitors were required to put evidence before the Court as to the reasonableness of these costs.

COSTS

A party to legal proceedings typically faces two types of costs exposure as a result of the proceedings. The first is the litigants' liability to pay its own lawyers. The second is the litigants' potential liability to pay its opponent's legal costs, should the litigant fail in the proceedings and the opponent prevail.

The potential liability of a litigant to pay its opponent's legal costs should the litigant be unsuccessful in proceedings is a long established feature of our legal system.

The class action litigation alters this in two ways.

First, pursuant to section 43(1A) of the Act, class members, although not their representative, are not liable to adverse costs orders. This is a significant benefit to represented group members, and greatly reduces the financial risk to them of being unsuccessful in the proceedings. Section 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 the representative proceeding commenced under Part IVA - section 33Q or 33R; or
- in the case of the proceeding representative character commenced under another Act - any provision in that Act'.²⁸

Secondly, if a member of a represented group decides not to opt out of the litigation, and yet also decides not to retain the representative's lawyers to act in the proceedings, then the group member would not be liable for the legal fees of the representative's lawyers. This creates the potential for division within a represented group, with some group members paying for legal representation and with other group members declining to do so and thereby obtaining a 'free ride'.

It should be noted that the court has power under section 33ZJ to order that costs reasonably incurred by the representative in prosecuting a class action, to the extent

that they exceed any costs recoverable from a respondent, be paid to the applicant out of any damages. The terms of section 33ZJ can, however, be obviated if there is a settlement of the proceedings (rather than a damages judgment).

Costs can be and generally are awarded to the successful party in Australian class actions, which encourages plaintiff lawyers and litigation funders to pursue class actions, but on the other hand can deter unmeritorious and speculative claims. This is probably a major reason why there has been a steady increase but not an explosion in major class actions.

SECURITY FOR COSTS

The Willmott Forests Group litigation also considered the issue of security for costs in class actions.

The ordering of security for costs is not prohibited in Federal Court class actions, but requires an examination of the group members' financial circumstances and whether such an order would be likely to stultify the action.

In this case, where the group consisted largely of individual investors, the first instance judge declined to order security for costs. However, the decision was successfully appealed to the Full Court.²⁹

Security for costs is a significant burden for claimants, particularly class action claimants who are not funded. The Full Federal Court decision in Willmott Forests is an important development in Australian class actions. Among other things, it points to the need for injustice to respondents to be taken into account in the Court's balancing exercise, as well as the relevance of the availability of litigation funding.

LITIGATION FUNDING

By their nature class action proceedings, whether under the Federal Court or the state class action legislation are expensive. The legal costs of initiating and conducting such litigation are extensive. A significant commercial factor in the prevalence, or otherwise, of class actions is, therefore, the availability to representatives and class members of litigation funding.

Most major class actions are now funded by third parties and this trend is likely to continue given the potential for profit, as well as the support expressed to date for litigation funding from the government and the judiciary on the basis that it increases access to justice.

MAINTENANCE AND CHAMPERTY

In Australia, it was generally unlawful for non-party's to litigation to maintain the conduct of legal proceedings by one person against another, or to share in the proceedings

of such litigation. Conduct of this nature constituted the crimes and torts of maintenance and champerty. Such conduct could also constitute an abuse of process.

The High Court of Australia considered the validity of litigation funding in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*.³⁰ That case involved seventeen separate representative proceedings commenced in the Supreme Court of New South Wales by groups of tobacco retailers against their respective wholesalers. In the representative proceedings the retailers were seeking to recover licence fees paid by the retailers to the wholesalers pursuant to legislation found by the High Court to have been constitutionally invalid.³¹ The result of the invalidity of the legislation was the refunding of the license fees by the State Government to tobacco wholesalers, and the tobacco retailers commenced the representative proceedings seeking, in turn, a remission of the fees to them.

The representative proceedings were commenced shortly prior to the expiration of the limitation period by lawyers retained by a firm of entrepreneurial accountants. The accountants were funding the litigation, and were exercising control over the lawyers and experts acting for the represented group, and were to receive a considerable 'success fee' of approximately one third of any monies received in respect of the tobacco licence fees.

Although maintenance and champerty were no longer crimes or torts in New South Wales, Einstein J at first instance nonetheless stayed the representative proceedings on the basis that they were an abuse of process. The abuse of process was said by the primary judge to have arisen because the litigation funder in the case was, in effect, improperly 'trafficking in litigation' in such a way as to create a risk of 'improper meddling in the litigation'. On appeal, however, the Court of Appeal unanimously found that there was no such abuse of process in the *Fostif* matter.³²

The High Court of Australia held that the concept of litigation funding was neither an abuse or process not contrary to public policy. Questions of whether a litigation funding arrangement may or will compromise the court's processes is a matter to be determined on the facts of each case (see further below).

Since this landmark High Court decision, class actions are seen as profit making opportunities for plaintiff lawyers and third party funders. According to Professor Morabito's 2016 study of Australian class actions, almost one out of every two Part IVA proceedings filed in the last six years received support from commercial litigation funders.³³

A number of litigation funders have entered the Australian market including:

- IMF Bentham Ltd (**IMF**);

- International Litigation Funding Partners Pte Ltd (**ILF**);
- JustKapital Litigation Partners Ltd (**JustKapital**); and
- Melbourne City Investments Pty Ltd and Mark Elliot (**MCI**).

Some examples of high profile class actions underwritten by litigation funders include the following claims:

- Billabong International Ltd (CLF funded);
- ANZ Bank fees case, Centro Properties Ltd (IMF funded);
- Leighton Holdings Ltd (ILF funded); and
- Worley Parsons Ltd (JustKapital and MCI funded).

Funders may structure the representative proceeding so that:

- it is limited to group members who have entered into a funding agreement (**Closed Class**); or
- it is not a Closed Class and some or all group members will not have entered into funding agreement and will have no contractual (including costs) obligations to the funders or the lawyers. Such group members have sometimes been referred to as 'free riders'.³⁴

Closed classes have been the subject of a number of applications in which respondents have argued it is an abuse of process to limit group membership to those persons prepared to agree to terms with a particular law firm or litigation funder. The decision of the Full Court in *Multiplex Ltd v P Dawson Nominees Pty Ltd*³⁵ confirmed that closed classes are not inconsistent with the policy of Pt IVA of the Act.³⁶

In some cases, Courts have sought to address the perceived inequity which arises when funded class members bear the obligation to compensate the funder while unfunded class members enjoy the 'free ride' by making a 'funding equalisation order'. These types of orders have been made to redistribute the additional amounts received by unfunded class members pro rata across the class as a whole.

Issues surrounding whether a 'funding equalisation order' is to be preferred to the alternative, 'common fund order' is considered further in this paper in regards to the Full Federal Court decision of *Money Max Int Ltd (Trustee) v QBE Insurance Group Ltd*.³⁸

MCI AND MARK ELLIOT

It should be noted, however, that some proceedings funded by third parties are found to compromise the court's processes and to be an abuse of process. One notable example of this is various proceedings involving Mark Elliott, a former partner of Minter Ellison and

MCI, his private investment company, of which he is the sole director and shareholder.

MCI's business model involved commencing class actions against large publicly listed companies alleging breaches of continuous disclosure law or misleading and deceptive conduct.

It is generally perceived that Mr Elliott's motivation in using MCI to buy small parcels of shares across many publicly listed companies, and then bringing class actions in the name of MCI when there is an opportunity to sue over potential failures in market disclosures, is a means of generating fees through legal action.

In *Melbourne City Investments v Myer Holdings Ltd (No2)*³⁹, the court outlined its disapproval the Victorian Supreme Court has shown so far to Mr Elliott and MCI, in relation to their tactics and strategy concerning speculative class action claims.

Proceedings commenced by MCI against Myer were stayed because the claims were found to be brought for an illegitimate purpose of generating income or revenue for a third party.⁴⁰

Other notable proceedings brought by MCI include the following defendants.

- Worley Parsons Pty Ltd (**Worley Parsons**);
- Treasury Wines Estate Pty Ltd (**TWE**);
- UGL Ltd;
- Banksia Securities Ltd; (**Banksia**);
- Camping Warehouse Australia Pty Ltd (**Camping**); and
- Leighton Holdings Ltd (**Leighton**).

The proceedings against:

- TWE and Leightons are permanently stayed as an abuse of process (the basis of the abuse was a finding that the predominance purpose for commencing the proceedings was for Mr Elliot to earn legal fees)⁴¹;
- Worley Parsons were dismissed on the basis that MCI did not have standing to bring the proceeding⁴²;
- Banksia and Camping Warehouse were settled; and
- UGL are ongoing (with a stay application pending).

TRENDS IN SHAREHOLDER CLASS ACTIONS

In more recent times, there has been an increasing trend towards shareholder class actions. According to Professor Morabito's 2016 study of Australian class actions, shareholder class actions have now become one of the most common type of class action claim in Australia.⁴³

Professor Morabito's study reveals the following trends, from:

- 1992 to 2004 the most commonly litigated class actions were product liability matters (25.9%) and claims by shareholders were only 4.7%; and
- 2004 to 2016, however, claims by shareholders rose to 24.8% and product liability matters reduced to 10.4%.⁴⁴

Australia's broad statutory prohibition against corporate conduct that is either misleading or deceptive or is likely to mislead or deceive, together with continuous disclosure provisions for companies listed on the Australian Stock Exchange (**ASX**) are strong drivers of these types of claims.

In addition, the large proportion of Australians now owning shares (either directly or through investments in managed funds and private superannuation) has increased to close to 55% of adult Australians.⁴⁵ The result is a larger number of institutions and individuals concerned about the performance of their shareholdings and seeking new more vigilant processes to enforce their rights as corporate stakeholders.⁴⁶

Associate Professor Michael Legg, from the University of New South Wales has explained how developments in the law and society have combined to promote shareholder class actions. He says that the:

... effect of these factors in combination, has been to increase the likelihood of shareholder class actions – the so-called “perfect storm”. The factors he identifies may be summarised as follows:

- willingness to blame;
- improved prospects of success;
- reduced cost;
- class action promoters.⁴⁷

The first shareholder class action in Australia was commenced in 1999 against GIO, alleging misleading representations in connection with a takeover.⁴⁸ The class action was settled in 2003 for \$112 million. Other significant securities class action settlements include the following:

- 2008 - Aristocrat Leisure Ltd (\$144.5million);
- 2012 - Centro Properties Ltd and Centro Retail Ltd (\$200million);
- 2014 - Leighton Holdings Ltd (\$70million);
- 2016 - Newcrest Mining Ltd (\$36million); and
- 2016 – Billabong International Ltd (\$45million).

YPOL has been involved in many of the significant Australian class action claims and related litigation in recent years including the following:

LEIGHTON HOLDINGS LTD

Two major shareholder class actions have been brought against Leightons since 2013, one relating to a significant profit downgrade announced by the company in 2011 and the other relating to allegations of bribery involving the company's operations in Iraq. Both of these matters were also the subject of investigation by regulators.

The profit downgrade case was resolved in mid-2014 for a figure of just under \$70 million. The settlement was approved by the Supreme Court of Victoria. The alleged bribery case has been the subject of multiple interlocutory decisions, appeals and an unsuccessful application for special leave to appeal to the High Court of Australia.

STORM FINANCIAL LTD

Storm collapsed in 2009, leaving a large number of customers unable to service their highly leveraged investment loans. Following the collapse, class action claims were brought against a number of banks who had provided finance to Storm customers. The collapse also attracted the attention of regulators and the Federal Government.

The Commonwealth Bank of Australia and the Bank of Queensland settled investor class actions for \$34 million and \$17 million respectively.

In late 2014, Storm investors brought a class action against the Australian Securities and Investments Commission (ASIC), claiming that the regulator could have stepped in. In February 2016, the claim was struck out on the basis that it failed to disclose a reasonable cause of action.

GREAT SOUTHERN GROUP

This litigation concerned 16 group proceedings and numerous individual actions commenced after companies in the Great Southern Group went into administration, on behalf of investors who had acquired interests in various managed investment schemes. Great Southern was one of a series of collapses of tax-driven agribusiness schemes in Australia.

After a 90 day hearing, the parties reached a settlement two days before the trial judge was due to deliver judgment. The settlement amount was \$23.8 million, of which \$20 million was to reimburse legal costs already paid to the claimants' lawyers.

The trial judge's decision was released, not with effect as a judgment of the Court but as part of the settlement approval process. As the judge would have found against the claimants, the group members were put in a better position by the settlement, despite the minimal return to investors (less than \$17 per \$10,000 invested), and the settlement was approved.

This well-publicised action is a good illustration of the stakes in major class actions and the reasons why there is

a palpable reluctance among participants to take them to judgment.

BILLABONG INTERNATIONAL LTD

This is another class action resulting from a profit downgrade. Following the announcement of a \$70-75 million downgrade in December 2011, Billabong's share price fell by 51%. The class action was commenced in 2015 and was scheduled for trial in March 2017.

In October 2016, the Federal Court made orders approving the settlement of \$45million.

OTHER RECENT DEVELOPMENTS

CAUSATION

One reason that a number of the class actions commenced by shareholders and other security holders are resolved is due to the uncertainties surrounding the question of causation.

Typically, as detailed above, the claims in a securities class action will be based on allegations of misleading or deceptive conduct in respect of inaccurate or incomplete statements or a failure to disclose certain information and/or breach of a listed company's continuous disclosure obligations. In either case, even if breach is established, causation is a significant issue. That is, the plaintiff must establish that they relied on the misleading or deceptive conduct, or the false or misleading statement, or that they would have acted differently if the material fact had been disclosed.

In April 2016, the Supreme Court of New South Wales represents the first decision by an Australian Court that the indirect market-based theory of causation is applicable in shareholder claims against listed companies.⁴⁹ In *HIH Insurance Ltd (in liquidation)*⁵⁰ Justice Brereton considered:

- whether the shareholders could claim damages on the basis of indirect causation, without proving direct reliance; and
- if so, how the shareholders' loss would be measured.

His Honour held that indirect causation was available to the shareholders as a means of connecting the company's contravening conduct to the shareholders' loss and damage and direct reliance did not need to be proved.

The chain of causation was that:

- HIH released misleading results to the market;
- the market misapprehended that HIH trading more profitably than it really was and had greater net assets than it really had;
- HIH shares traded on the market at an inflated price; and
- shareholders paid that inflated price for their shares and thereby suffered loss.

His Honour held that the appropriate measure of loss was the difference between the inflated price paid by shareholders and the price they would have paid had the contravening conduct not occurred.

QBE/Common Fund

In December 2013, QBE Insurance Group Ltd (**QBE**) publicly announced that it was not going to meet earlier profit and financial performance guidance and was expecting to incur a loss of around \$250 million. Following the announcement, QBE shares fell 30% over two days.

In September 2015, an ‘open class’ action was commenced against QBE alleging that it:

- breached its continuous disclosure obligations;
- engaged in misleading or deceptive conduct; and
- made false or misleading statements in contravention of applicable corporate and consumer legislation and the ASX listing rules.

The class action is funded by ILF and is brought on behalf of all persons who acquired an interest in QBE shares in the defined period and who claim to have suffered a loss as a result of QBE’s conduct.

On 26 October 2016, the full Court of the Federal Court made ‘common fund’ orders in the proceedings.⁵¹ The effect of the order is that the funders are entitled to receive a funding commission from all participating class members and not just from those who had signed the funding agreements. The Court will not, however, determine an appropriate funding commission until the end of the proceedings.

The Court indicated the rate will be approved at less than the 32.5% or 35% agreed between ILF and the funder class members. The Court:

- agreed this was reasonable as it would encourage open class actions, promoting access to justice; and
- also said that by encouraging open class proceedings, a common fund approach may reduce the prospects of overlapping or competing class actions and reduce the multiplicity of actions that sometimes occurs with class actions.

SLATER & GORDON

In 2007, Slater & Gordon became the first publicly listed law firm in the world. It embarked on a robust expansion plan, acquiring smaller firms in Australia before pursuing the same strategy in Britain. The \$1.3 billion acquisition in the UK of the professional services division of Quindell PLC and the impact of proposed legislative changes in the UK, together with the withdrawal of revenue and earnings guidance, have had a severe impact on the firm’s share price.

Slater & Gordon shares have lost over 90% of their value since April 2015. More than 1,750 shareholders have signed up to a possible class action promoted by rival firm Maurice Blackburn.

NEW FEDERAL COURT PRACTICE NOTE

In 2015, the Federal Court began implementing the National Court Framework (**NCF**), an overhaul of its case management practices intended to increase efficiency and develop expertise within the Federal Court.

On 26 October 2016, as part of the NCF, the Federal Court issued 26 new national practice notes, including a new practice note - ‘GPN-CA’, concerning class actions.

Very briefly, the most significant features of the new practice note include the following:

- disclosure of costs agreements and litigation funding agreements to the court;
- disclosure of litigation funding agreements to other parties;
- case management initiatives including the introduction of a:
 - class action registrar; and
 - case management judge (to specifically deal with interlocutory matters).

CONCLUSION

In conclusion, it can be seen that, over the past 25 years, there has been a significant and growing amount of class action litigation in Australia - and a correspondingly significant and growing amount of jurisprudence in the class action area - the threatened ‘avalanche’ of class action litigation has not however materialised.

In recent times, however, there has been an increasing trend towards securities and shareholder class action proceedings. This trend is expected to continue.

(Endnotes)

¹All Australian jurisdictions have rules permitting ‘representative’ actions (as opposed to US-style class actions). These rules derive from the old rules permitting representative actions in the courts of equity. For example, in the State of New South Wales Part 7 Rule 7.4 of the *Uniform Civil Procedure Rules* provides:

‘7.4(1) This rule applies to any matter in which numerous persons have the same interest or same liability in any proceedings.

(2) Unless the court orders otherwise, the proceedings may be commenced and carried on by or against any one or more of them.’

For the purposes of this paper, we will not focus, however, on these procedures.

²Explanatory commentary on draft Corporations Amendment Regulations to exclude class actions from managed investment schemes www.treasury.gov.au.

³Australian Institute of Company Directors submission on the draft regulations.

⁴It should be noted that, as a matter of terminology, the expression ‘class action’ is usually taken to refer only to group proceedings conducted under the specific class action legislation, and not to group proceedings conducted under the reinvigorated representative action rules. The latter, of course, share distinct similarities with the former.

⁵See s 33B of the *Federal Court of Australia Act 1976* (Cth)

⁶See *Bright v Femcare Ltd* (2002) 195 ALR 574

⁷Sometimes referred to as ‘pendent’ jurisdiction: see *Adamson v West Perth Football Club* (1979) 39 FLR199 at 221.

⁸This arises under s 52 of the *Trade Practices Act 1974* (Cth) (the **TPA**) and its successors, the *Competition and Consumer Act 2010* (Cth) (the **CCA**).

⁹This arises under various provisions of the TPA, including s 52, and also Part VA which provides for the strict liability of manufacturers and importers of defective goods, subject to certain defences. The combined effect of the conferred jurisdiction and the ancillary jurisdiction is to give the Federal Court wide ranging power to hear many types of product liability class action claims via the 2011 *Australian Consumer Law* in Schedule 2 to the CCA..

¹⁰This arises because of the Federal government’s conferred power to legislate in relation to corporations : see the *Corporations Act 2001*, and also the *Australian Securities and Investments Commission Act 2001* (Cth) (misleading or deceptive conduct in relation to a financial product or service); s12DA of the ASIC Act (misleading or deceptive conduct in relation to financial services); and s674 of the *Corporations Act 2001* (Cth) (continuous disclosure obligations in market listing rules).

¹¹This arises Schedule 2 to the CCA of the *Australian Consumer Law*.

¹²*Philip Morris (Australia) Pty Ltd v Nixon* (2000) 170 ALR 487

¹³(2003) 130 FCR 317

¹⁴[2014] FCAFC 111

¹⁵(1993) 45 FCR384

¹⁶(1999) 199 CLR 255

¹⁷*Silksfield Pty Ltd v Wong* (1998) 90 FCR 152 (reversed by the High Court)

¹⁸Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ

¹⁹[2001] VSC 284

²⁰It should be noted that Part IVA permits the determination of individual or subgroup issues within the framework of a class action proceeding. In appropriate circumstances this may involve the appointment of a separate subgroup representative: see section 33Q.

²¹*Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 1)* [2001] VSC 167

²²Ibid at p.131.

²³(2002) 195 ALR 574

²⁴[2002] FCAFC 243

²⁵(2002) 121 FCR480

²⁶(2002) 122 FCR168

²⁷*Kelly v Willmott Forests Ltd (in liquidation) (No.4)* [2016] FCA 323

²⁸Sections 33Q and 33R relate to situations where the court permits individual issues to be determined as part of a class action. In that instance, the individual subgroup members involved would be at risk of an adverse costs order, rather than the representative party.

²⁹*Madgwick v Kelly* [2013] FCAFC 61

³⁰(2006) 229 CLR 386

³¹*Ha v State of New South Wales* (1997) 189 CLR 465

³²Per Mason P, Sheller and Hodgson JJA.

³³53 (49.5%) out of a total of 107 class actions. See Morabito, Vince ‘An empirical Study of Australia’s Class Action Regimes (Fourth Report) Facts and Figures on Twenty-Four Years of Class Actions in Australia’, 29 July 2016, p. 8.

³⁴D Grave, K Adams and J Betts ‘Class Actions in Australia’ (Lawbook Co, 2012) p.819.

³⁵(2007) 164 FCR 275

³⁶D Grave & Ors op.cit. p.836

³⁷*Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626

³⁸[2016] FCAFC 148

³⁹[2016] VSC 655

⁴⁰Ibid

⁴¹*Melbourne City Investments Pty Ltd v Leighton Holdings Limited* [2015] VSCA 235 and *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585

⁴²*Melbourne City Investments Pty Ltd v WorleyParsons Limited (No 2)* (2014) 104 ACSR 15

⁴³Morabito, Vince ‘An empirical Study of Australia’s Class Action Regimes (Fourth Report) Facts and Figures on Twenty-Four Years of Class Actions in Australia’, 29 July 2016, p.10.

⁴⁴Ibid p.12.

⁴⁵J Betts ‘The Rise of Shareholder Class Actions in Australia’ Findlaw Australia (Thomson Reuters)

⁴⁶Ibid

⁴⁷D Grave & Ors op.cit. p.891.

⁴⁸*King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980

⁴⁹Although the case was not a class action, it involved 117 shareholders.

⁵⁰[2016] NSWSC 482

⁵¹*Money Max Int Ltd (Trustee)v QBE Insurance Group Ltd* [2016] FCAFC 148

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NOTES

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