THE PUSH TO REFORM CLASS ACTION PROCEDURE IN AUSTRALIA: EVOLUTION OR REVOLUTION?

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[Class actions were introduced in Australia over 15 years ago and, despite their initially slow uptake, are now well entrenched. In many respects, Australian class action procedure is more 'plaintiff-friendly' than its United States counterpart, such that Australia has become the next most likely place after North America where a corporation will find itself defending a class action. However, it has been suggested by commentators that current Australian practice and procedure are hampering the healthy development of class actions, as well as limiting their use, and should thus be reformed. The authors believe that many of the proposed changes run counter to the legislative aims of class action procedure and would remove the remaining safeguards that presently operate to limit the prosecution of claims inappropriately brought in the form of a class action. This article provides a detailed analysis of the most significant proposals for change and why many of them should be rejected.]

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I INTRODUCTION

The birth of Australia's class action system was both slow and controversial. First proposed in the late 1970s, it was not until 1992 that the *Federal Court of Australia Act 1976* (Cth) ('*FCA Act*') was amended to introduce representative proceedings,[1] more commonly known as 'class actions'.

The introduction of the class action procedure was opposed by the business community, which feared that it heralded the emergence of lawyer-driven, United States-style litigation in Australia. These fears were acknowledged by the Australian Law Reform Commission ('ALRC') in its report which recommended the introduction of the class action procedure ('*Grouped Proceedings Report*').[2] The proponents of the new regime sought to address these concerns by pointing to a series of safeguards in the legislation which they argued would differentiate it from the US regime and ensure that the changes would not lead to unmeritorious claims. Specifically, they pointed to the exposure of the representative applicant to adverse costs orders; the court's existing power to dismiss proceedings that are frivolous, vexatious or an abuse of process; and the introduction of a further power of the court to dismiss proceedings which are inappropriate to proceed as class actions.[3]

[1] Part IVA was inserted by the *Federal Court of Australia Amendment Act 1991* (Cth) s 3, and came into effect on 4 March 1992: *FCA Act* note 1.

[2] See Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 34, 144–5, where the Commission also addresses some of these concerns. Note that at the time of the report, the ALRC was still called the 'Law Reform Commission'. However, 'ALRC' is used in the text for the sake of familiarity.

[3] Ibid 64, 144–5.

While plaintiffs were, at least initially, slow to adopt the new procedure, class actions are now a prominent feature of both the Australian legal landscape and the Australian psyche. Indeed, it is now said that Australia is the place outside North America where a corporation will most likely find itself defending a class action.[4] This is not surprising as the Australian class action system is more plaintiff-friendly than that in the US. First, there is no initial certification procedure that requires the court to be satisfied that the proceedings are appropriately brought in class form.[5] Secondly, there is no requirement that the common issues among group members predominate over the individual issues.[6] And, thirdly, the Australian rules, unlike those in the US, expressly allow for the determination of 'subgroup' or even individual issues as part of a class action.[7]

It is therefore surprising that we have seen the emergence of what some might see as a coordinated campaign to 'reform' Australian class action procedure. Specifically, a number of commentators, including those associated with some of the more prominent plaintiff law firms, have suggested that current class action practice and procedure are unnecessarily 'hamper[ing] the healthy development'[8] of class actions and limiting their use. Similar calls for reform have also been expressed by other commentators.[9]

This has coincided with the Victorian government's appointment of Dr Peter Cashman, himself the founding partner of a leading plaintiff law firm often involved in class actions, to lead the Victorian Law Reform Commission's ('VLRC') review of that state's civil litigation system, including its class action procedure. In its final report published in May 2008 ('*VLRC Final Report*'), the VLRC echoed the complaints of plaintiff lawyers and proposed similar changes to Victoria's class actions procedure.[10] These proposals have been criticised as 'read[ing] like a wish list for plaintiff lawyers'[11] and on the basis that they

4 Sundeep Tucker, 'Culture of Class Action Spreads across Australia', *Financial Times* (London), 9 March 2006, 12.

5 In the United States, this certification requirement is found in *Federal Rules of Civil Procedure* r 23(c)(1) (2007).

6 For the US requirements, see *Federal Rules of Civil Procedure* r 23(b)(3) (2007). Australian law merely requires that there be at least one 'substantial common issue of law or fact': *FCA Act* s 33C(1)(c); *Supreme Court Act 1986* (Vic) s 33C(1)(c) ('*VSC Act*').

7 *FCA Act* ss 33Q–33R; *VSC Act* ss 33Q–33R.

8 Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30 *Melbourne University Law Review* 399, 400. See also Peter Cashman, 'Class Actions on Behalf of Clients: Is This Permissible?' (2006) 80 *Australian Law Journal* 738; Bernard Murphy, 'Current Trends & Issues in Australian Class Actions' (Paper presented at the International Class Actions Conference, Maurice Blackburn Cashman, Melbourne, 1–2 December 2005) 10; Peter Gordon and Lisa Nichols, 'The Class Struggle' (2001) 48 *Plaintiff* 6, 8–9.

9 See, eg, 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) 88–90, cited in Peter Cashman, 'Class Action Law Reform in Victoria: The Views of Stakeholders' (Paper presented at the International Class Actions Conference, Maurice Blackburn, Sydney, 25–26 October 2007) 4; Peta Spender, 'Securities Class Actions: A View from the Land of the Great White Shareholder' (2002) 31 *Common Law World Review* 123, 128.

10 VLRC, *Civil Justice Review*, Report No 14 (2008) 524–60, especially 559–60.

11 Rachel Nickless, 'Classy Partner Seeing Plenty of Action', *The Australian Financial Review* (Sydney), 13 July 2007, 61.

'would make Victoria a veritable nirvana for plaintiff lawyers'[12] — indeed, Dr Cashman has agreed that the proposed changes would attract class actions to the state.[13]

In the authors' view, the proposed changes run counter to the legislative aims of the class action procedure and would sweep away the remaining safeguards that presently operate to limit the prosecution of class actions that involve *de minimis* or unmeritorious claims. Accordingly, this article responds to these and other proposals for changes to Australia's class action systems. In so doing, it accepts the express invitation extended by Bernard Murphy and Camille Cameron in a recent article published in this *Review* to engage in the 'debate about the health of Australian class action regimes and about reform priorities.'[14]

First, Part II of this article gives an overview of the federal and Victorian class action procedures, and explains the history and objectives of the class action systems in Australia. Part III then aims to describe the most significant proposals for change that have been put forward, such as the move towards an 'opt in' class action system, the removal of the court's termination power and changes to the costs rules. The authors respond to these proposals for reform in Part IV. Finally, the authors conclude in Part V that Australia already has a plaintiff-friendly class action system that — supplemented by a growing litigation funding industry — ensures that class actions with merit have their fair hearing in court. Thus, many of the reform proposals would in fact undermine the original objectives of introducing the class action procedure, primarily, promoting access to justice while maintaining appropriate safeguards against abuse of the class action procedure.

The authors are commercial litigators who have acted for respondents in numerous class actions, including a number that have helped shape Australia's class action jurisprudence. That experience has, undoubtedly, played a role in informing their perspective. That said, they believe that class actions play a vital role in the civil justice system, particularly in terms of ensuring access to justice. Absent a class action regime, many applicants would be denied such access, either because they lack the resources to pursue the claim or because their cause of action is simply unviable in isolation. The authors submit that their views represent a fair balance between the competing interests of applicants, respondents and the community at large. Accordingly, the views expressed in this article are not simply a reflection of the views of the business community — indeed, some of the authors' views would be anathema to that constituency.[15]

[12] Janet Albrechtsen, *Get Set for Class Action Chaos* (15 July 2007) The Australian <http://blogs.theaustralian.news.com.au/janetalbrechtsen/index.php/theaustralian/comments/get_set_for_class_action_chaos/>.

[13] Ibid.

[14] Murphy and Cameron, above n 8, 401.

[15] For example, the call for lawyers to be allowed to enter into contingency fee agreements: see below Part IV(D)(3)(b).

II AUSTRALIAN CLASS ACTION PROCEDURE

The proposed reforms are said to be necessary to better achieve the aims of Australian class action procedure. In order to assess the accuracy of this assertion, this Part tracks the historical development of the procedure and considers its legislative aims.

A *Overview of Class Action Procedure*

1 *Federal and State Class Action Procedures*

Class actions were introduced into the Federal Court of Australia in early 1992 with the insertion of Part IVA (ss 33A–33ZJ) into the *FCA Act* ('Part IVA').[16]

Victoria also has a class action procedure which has been in effect since 1 January 2000[17] and which is virtually identical to that of the Federal Court. This procedure is found in Part 4A of the *Supreme Court Act 1986* (Vic) ('*VSC Act* Part 4A')[18] and, with minor exceptions, adopts the same section numbers as its federal equivalent. The main features of these procedures are summarised by the authors elsewhere.[19]

Part 4A refers to class actions as 'group proceedings' while the federal provisions in Part IVA refer to 'representative proceedings'. For the sake of simplicity, the authors refer collectively to both as 'class actions' and otherwise adopt the terminology in Part IVA.[20] However, the discussion and analysis applies equally to both procedures. Section numbers in the body of this article refer both to the *FCA Act* and *VSC Act*, unless provisions differ between the two Acts.

2 *Use of Class Action Procedure*

Despite the plaintiff-friendly nature of the Australian procedure and its survival through early constitutional challenges,[21] it is generally agreed that there

16 Part IVA was inserted by the *Federal Court of Australia Amendment Act 1991* (Cth) s 3, and came into effect on 4 March 1992: *FCA Act* note 1.

17 *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic) s 2(2).

18 Part 4A was inserted into the *VSC Act* by the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic) s 13. Part 4A replaced O 18A of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic): *VSC Act* s 33ZK. The order, while near-identical, was subject to an unsuccessful constitutional challenge: see *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545. The procedure was re-enacted as Part 4A to avoid any further challenges to the validity of the procedure contained in the court rules.

19 See S Stuart Clark and Christina Harris, 'Class Actions in Australia: (Still) a Work in Progress' (2008) 31 *Australian Bar Review* 63, 71–85. The main features are: the threshold requirement that at least seven persons have claims against the defendant(s); the threshold requirement that the claims of all plaintiffs arise out of the same, similar or related circumstances; the threshold requirement that the claims of all plaintiffs give rise to at least one substantial issue of fact or law that is common to all plaintiffs; the opt out procedure; the identification of the plaintiff group; the rule that judgment in a class action binds all persons who are members of the group; the various costs rules; the statutory provisions in relation to terminating a class action proceeding; the rules with respect to settling or discontinuing a class action; and the obligation imposed upon plaintiffs to properly plead their case.

20 For example, plaintiffs are referred to as applicants in the Federal Court, and defendants as respondents. Similarly, the persons on whose behalf class actions are brought are referred to as group members: see *FCA Act* s 33A.

21 Both the federal and Victorian procedures have survived such challenges: see *Femcare Ltd v Bright* (2000) 100 FCR 331; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1.

was no initial flood of litigation following the introduction of class actions in 1992. According to the ALRC, at least up until 2000,

> [t]here ha[d] been no flood of class action litigation. Instead there ha[d] 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 [sought] to come to grips with [the] procedure …[22]

Since that time, however, there has been a significant increase in the overall number of class actions in Australia, most recently in securities class actions.[23] The factors driving the initial slow start and recent significant increase in Australian class actions have been considered by the authors elsewhere.[24]

B *History and Aims of Class Action Procedure*

1 *Legislative Background*

Australian class action procedure had a very long gestation period. The Commonwealth Attorney-General first referred the question of class action reform to the ALRC in February 1977,[25] but it took a further 12 years for the ALRC's report, which formed the basis for Part IVA, to be tabled in Parliament.[26] It took another three years for Part IVA to come into force (in March 1992) in the face of continued and strident opposition from some who had hoped that the procedure would be 'stillborn'.[27]

To complicate matters further, in enacting Part IVA the legislature departed from some of the ALRC's proposals, either by rejecting a particular proposal or, while agreeing with a proposal, by enacting a differently worded provision.[28] Nonetheless, as observed by the Full Federal Court, despite Part IVA not following

22 ALRC, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 478 ('*Managing Justice Report*'), quoting Neil Francey, New South Wales Bar Association, *Class Action* (CLE Programme, Sydney, 9 February 1998) [20].

23 See Cara Waters, 'The New Class Conflict: The Efficacy of Class Actions as a Remedy for Minority Shareholders' (2007) 25 *Company and Securities Law Journal* 300, 300–1, especially 301 fn 5.

24 See Clark and Harris, above n 19, 69–71, 85–91. The main reasons for the slow commencement of Australian class actions are the capital constraints of Australia's locally organised profession, a lack of imagination on the part of plaintiff lawyers (who initially followed the US lead), plaintiffs' initial difficulties in complying with the requirements for commencing class actions and difficulty with the funding of class actions. The primary reasons for the recent increase in class actions are the modern tort law reforms, the rise of securities class actions, the emergence of commercial litigation funding and the rise of cartel class actions.

25 Law Reform Commission, *Grouped Proceedings Report*, above n 2, 1.

26 The report was tabled in 1988: Commonwealth, *Parliamentary Debates*, Senate, 13 December 1988, 4010 (Robert Ray, Manager of Government Business in the Senate). In 1989, Senator Janine Haines moved a private members' Bill, the Federal Court (Grouped Proceedings) Bill 1989 (Cth), to enact the recommendations of the *Grouped Proceedings Report*. However, the Bill lapsed: see Commonwealth, *Parliamentary Debates*, Senate, 11 December 1989, 4233 (Janine Haines).

27 Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3019 (Peter Durack).

28 See Commonwealth, *Parliamentary Debates*, Senate, 12 September 1991, 1448 (Michael Tate, Minister for Justice and Consumer Affairs). For example, the legislature rejected the ALRC's proposal to establish a class actions fund.

> precisely the recommendations of the [ALRC] in [the *Grouped Proceedings Report*, nevertheless it] … follows reasonably closely the substance of the [ALRC's] proposals concerning procedural requirements for representative proceedings. … For this reason, the [ALRC's] analysis sheds light on the objectives underlying key provisions now contained in Pt IVA.[29]

Thus, in assessing whether the changes suggested by plaintiff lawyers would better achieve the objectives of Part IVA, the authors refer to the recommendations made in the *Grouped Proceedings Report*, while being careful to highlight aspects which were not adopted in Part IVA. It is important to note here that, with respect to those aligned with the interests of class action plaintiffs generally — and who in the main part are advocating change — the authors refer to them as 'plaintiff lawyers' for the sake of simplicity.

2 *Aims of Class Action Procedure*

As is evident from the following (oft-cited) passage from the second reading speech for the Bill that introduced Part IVA,[30] the primary aims of the class action procedure are to promote access to justice and the efficient use of court resources:[31]

> 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 [cases which the ALRC had labelled as 'individually non-recoverable'[32]]. …
>
> 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 [labelled 'individually recoverable' cases by the ALRC[33]]. The new procedure will mean that groups of persons … will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.

However, what is often overlooked is that the federal government also emphasised the importance of including in the procedure various safeguards against the abuse of class actions, as recommended in the *Grouped Proceedings Report*, to allay the concerns of the Australian business community.[34] Indeed, many of the plaintiff-friendly features of the class action procedure mentioned earlier were

29 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, 511 (Sackville J) ('*Philip Morris*').

30 This Bill became the *Federal Court of Australia Amendment Act 1991* (Cth).

31 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174–5 (Michael Duffy, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 12 September 1991, 1447–8 (Michael Tate, Minister for Justice and Consumer Affairs). Cf Victoria, *Parliamentary Debates*, Legislative Council, 4 October 2000, 429, 431 (Marsha Thomson, Minister for Small Business).

32 See Law Reform Commission, *Grouped Proceedings Report*, above n 2, 10.

33 Ibid 10 fn 7.

34 In the second reading speech, the Attorney-General described '[t]he other main feature of the Bill [as] the comprehensive powers given to the Court to ensure that the proceedings are not abused': Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3175 (Michael Duffy, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 12 September 1991, 1449 (Michael Tate, Minister for Justice and Consumer Affairs).

justified by the ALRC on the basis that there were adequate safeguards in place to prevent abuse of the procedure. For example, the absence of a certification requirement was justified by the availability of other so-called 'safeguards', primarily the respondent's right pursuant to s 33N(1) to challenge the validity of the class action at any time.[35] The ALRC was at pains to emphasise that its recommended procedure 'advance[d] the objectives of access to the courts and judicial economy, while providing safeguards against possible abuse',[36] and that it 'balance[d] the interests of all parties'.[37]

Another frequently ignored aspect of the ALRC's recommendations is that, while the class action procedure was intended, inter alia, to facilitate the pursuit of 'economically non-recoverable' claims, it was never intended to extend to so-called 'non-viable' claims,[38] that is,

> claims which are so small that … the costs of recovery will exceed the total benefits of litigating. … The objective of new procedures should be to reduce the costs of litigation where it is necessary and worthwhile in the interests of justice, not to encourage abuse or the pursuit of the trivial.[39]

The details of these safeguards are discussed in Part IV of this article, as and where relevant to the authors' consideration of the proposed class action reforms summarised in the next Part.

III PROPOSALS FOR CHANGE

There have been numerous calls for change to various aspects of the class action procedure, and the authors appreciate that there are different views among plaintiff lawyers regarding the procedure's operation in Australia. Accordingly, this Part of the article focuses on and endeavours to summarise the most significant proposals for change.

A *Opt In Class Actions*

The 'opt out' provision is one of the cornerstones of the Australian class action system. It is important to understand that there is no requirement that a group member consent to their inclusion in the group.[40] Rather, everyone who falls within the group description is part of the group — and is bound by the outcome of the proceedings — unless and until they take steps to 'opt out'.[41]

It has now been suggested that this fundamental principle be reversed by legislation such that the represented group comprise only those who have consented to the conduct of proceedings on their behalf (that is, an 'opt in'

35 Law Reform Commission, *Grouped Proceedings Report*, above n 2, 63–4.
36 Ibid 2.
37 Law Reform Commission, *Grouped Proceedings in the Federal Court: Summary of Report and Draft Legislation* (1988) 5 ('*Report Summary*').
38 Law Reform Commission, *Grouped Proceedings Report*, above n 2, 10.
39 Ibid 26.
40 See *FCA Act* s 33E(1); *VSC Act* s 33E(1).
41 *FCA Act* ss 33ZB(b), 33J; *VSC Act* ss 33ZB(b), 33J.

system).[42] This follows recent attempts by litigation funders and plaintiff lawyers to limit or close the class in this way so as to exclude the so-called 'free-riders', that is, group members who do not retain the representative applicant's lawyer or who do not enter into an agreement with a litigation funder.

There have been conflicting decisions in both the Federal Court and the Supreme Court of Victoria as to whether a class action may properly be brought on behalf of a subgroup of potential applicants, specifically those who have entered into a litigation funding arrangement and/or those represented by a particular firm of solicitors.[43] This issue has recently been described as the principal source of dissatisfaction among plaintiff lawyers and litigation funders.[44]

It is clear from the legislation that a class action may be commenced by one or more group members on behalf of only some of them;[45] and there is nothing in the procedure which restricts the characteristics by reference to which people may be omitted from the group.

Despite initial conflict among first instance decisions,[46] the Full Federal Court has recently held that:

- it is not permissible to define the group as including only clients of one law firm (or presumably also those who retain a particular litigation funder) where the group members retain that law firm (or funder) after commencement of the class action, as this effectively requires potential group members to 'opt in' to the proceeding;[47] but
- it is permissible to restrict the group to those who enter a funding arrangement with a particular litigation funder (and/or those represented by a particular firm of solicitors) prior to commencement of proceedings, as this does not offend the 'opt out' nature of Part IVA.[48]

42 VLRC, above n 10, 557 (Maurice Blackburn's submissions to the VLRC), 559; Cashman, 'Class Action Law Reform in Victoria', above n 9, 4. See also Murphy and Cameron, above n 8, 418–20; Cashman, 'Class Actions on Behalf of Clients', above n 8; Peter Cashman, *Class Action Law and Practice* (2007) 197–223.

43 On the one hand, these arrangements have been found to be impermissible: see *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394, 425–6, 431 (Stone J) ('*Aristocrat*'); *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449 (Unreported, Hansen J, 18 November 2005) [39], [41]. On the other hand, other cases have allowed such an arrangement: see *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 115–16, 120, 126 (Finkelstein J) ('*Multiplex First Instance*').

44 See Cashman, 'Class Action Law Reform in Victoria', above n 9, 1 (the Victorian Bar Association's initial submission).

45 Section 33C(1) of the *FCA Act* and the *VSC Act* provide that (as long as certain threshold criteria are met) a class action may be commenced by one or more group members 'as representing *some or all* of them' (emphasis added).

46 See *Aristocrat* (2005) 147 FCR 394, 425–6, 431 (Stone J); *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449 (Unreported, Hansen J, 18 November 2005) [39], [41]; cf *Multiplex First Instance* (2007) 242 ALR 111, 115–16, 120, 126 (Finkelstein J).

47 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 280, 282 (Lindgren J), 295, 297 (Jacobson J) (a case involving a group limited to those who retained a particular funder) ('*Multiplex Appeal*'). Although distinguishing the case on the facts, the Court approved of the decision in *Aristocrat* (2005) 147 FCR 394, 431 (Stone J) (involving a group limited to clients of one law firm).

48 *Multiplex Appeal* (2007) 164 FCR 275, 295, 297 (Jacobson J).

However, the Full Federal Court, while acknowledging that s 33C expressly allows class actions to be brought for subsets of applicants, conceded that '[i]t is difficult to see how [such limited groups] can be reconciled with the goals of enhancing access to justice and judicial efficiency in the form of a common binding decision for the benefit of all aggrieved persons.'[49]

B *Reduction of Interlocutory Applications Including Removal of the Termination Power*

Once commenced, a class action will continue unless and until the court orders that the proceedings be discontinued in class form. Such an order may be made pursuant to an application brought by the respondent or of the court's own motion, usually pursuant to s 33N(1), which grants the court power to order the discontinuance of a class action where:

(a) the cost of the class action would be excessive having regard to the costs which would be incurred if each group member conducted a separate proceeding;
(b) the relief sought can be obtained by means of a proceeding other than a class action;
(c) a class action would not provide an efficient and effective means of dealing with the claims of group members; or
(d) it is otherwise inappropriate for the proceedings to continue as a class action.[50]

A class action may also be struck out if the applicant fails to properly plead its claim.[51] The requirement that applicants properly plead their case has created both difficulties for applicants and opportunities for respondents in class action proceedings. While it is relatively easy to satisfy the pleading requirements in relation to a single-event tort affecting many people — for example, an aeroplane crash — it can be extremely difficult where the group members wish to rely on facts separated in time or geography or other circumstances where there are numerous individual issues in dispute. A classic example is a case based upon representations allegedly made by the respondent to group members, often at different times and by different means or individuals.

This has led to a number of class actions being struck out on the ground that the pleadings did not disclose the basis of the group members' case but were merely a smorgasbord of the possible combinations and permutations of claims which may apply to the applicant or any other group member, but in fact applied to none.[52] Where a proceeding is based on separate representations made to

[49] Ibid 292 (Jacobson J). See also at 294, 300.
[50] *FCA Act* ss 33N(1)(a)–(d); *VSC Act* ss 33N(1)(a)–(d).
[51] *Federal Court Rules 1979* (Cth) O 11 r 16; *Court Procedure Rules 2006* (ACT) s 425; *Uniform Civil Procedure Rules 2005* (NSW) r 14.28; *Supreme Court Rules 1987* (NT) O 23 r 2; *Uniform Civil Procedure Rules 1999* (Qld) r 171; *Supreme Court Civil Rules 2006* (SA) r 104; *Supreme Court Rules 2000* (Tas) r 259; *Supreme Court (General Civil Procedure) Rules 1996* (Vic) O 23 r 2; *Rules of the Supreme Court 1971* (WA) O 20 r 19.
[52] See, eg, *Harrison v Lidoform Pty Ltd* (Unreported, Federal Court of Australia, Hely J, 24 November 1998); *Philip Morris* (2000) 170 ALR 487, 524–5 (Sackville J).

group members at different times in different words, the pleadings must demonstrate that the representations were, in substance and effect, the same to each group member, or else they will be struck out.[53]

In most instances, the court will grant the representative applicant leave to re-plead.[54] However, this will not always be the case. In a class action commenced against several major Australian manufacturers and distributors of tobacco products, the Full Federal Court not only struck out the statement of claim (the applicant had had several attempts already) but also refused leave to replead on the basis that, no matter what amendments might be made to the pleading, the proceedings could not possibly be brought as a class action.[55] Accordingly, although defects in pleadings might be cured by amendment, there is a substantive threshold which some Australian applicants have been unable or unwilling to cross.

Those acting for applicants have criticised respondents for being quick to bring applications to strike out class actions relying on these bases, in particular pursuant to s 33N. They describe this as 'satellite litigation'[56] and suggest that it is part of respondents' 'tactical delay and attrition'[57] and is 'antithetical to the aims of class action legislation, reducing efficiency, increasing expense and adding considerable complexity to proceedings.'[58]

Some plaintiff lawyers have gone as far as to propose the blanket removal of the termination power, particularly on the grounds contained in ss 33N(1)(c) and (d), which they argue provide 'too wide' a power of termination.[59] At the very least, they advocate that the termination powers 'ought to be very limited.'[60]

C *Cy-Près Damages*

One of the worst features of the US class action system is the so-called 'coupon' class action. These are class actions that are commenced in circumstances where the alleged loss is so small that damages cannot be economically distributed to class members. Rather, when the case is settled (as it usually is), the class members receive a coupon or other token consideration while the class lawyers

53 *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723, 728 (Drummond J).

54 See, eg, *Johnstone v HIH Insurance Ltd* [2004] FCA 190 (Unreported, Tamberlin J, 5 March 2004); *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2004] FCA 634 (Unreported, Stone J, 20 May 2004); *Guglielman v Trescowthick* (2004) ATPR ¶41-995.

55 See *Philip Morris* (2000) 170 ALR 487, especially 491 (Spender J), 492 (Hill J). Sackville J would have allowed the respondents to replead their case: at 525–6.

56 This is the term used by Maurice Blackburn: see Cashman, 'Class Action Law Reform in Victoria', above n 9, 4; Murphy, above n 8, 23, 30.

57 Cashman, 'Class Action Law Reform in Victoria', above n 9, 4.

58 Murphy and Cameron, above n 8, 412. See also VLRC, above n 10, 557 (Maurice Blackburn's submissions to the VLRC); Murphy, above n 8, 15–16, 30. See further *Bright v Femcare Ltd* (2002) 195 ALR 574, 607–8 (Finkelstein J); Gordon and Nichols, above n 8, 12–13; Patrick Over, 'Representative Proceedings from the Plaintiff's Perspective' (Paper presented at the NSW Young Lawyers CLE Seminar, Sydney, 17 November 1999) 10.

59 Murphy and Cameron, above n 8, 418. Cf Morabito and Epstein, above n 9, 60–1 (particularly advocating the removal of the termination powers in ss 33N(1)(b), (d)).

60 Murphy and Cameron, above n 8, 416 (citations omitted).

get paid their fees.[61] When class actions were first mooted in Australia, their proponents argued that the proposed rules would prevent this occurring here.

It has now been suggested that the court ought to be given the power to order cy-près or 'public interest' distribution of damages in class actions where group members otherwise entitled to damages cannot be identified or where identification and proof of entitlement are not practicable or cost-effective.[62] The proposed form of cy-près distribution of damages is 'price rollback' — a reduction in the cost of the respondent's goods or services — and/or distribution to nominated organisations whose interests are said to be aligned with those of group members.[63]

The most detailed proposal for the introduction of cy-près damages is found in the *VLRC Final Report*, in which the VLRC recommended that the court have discretion to order these remedies where the following conditions have been met:

- where there has been a proven contravention of the law;
- the contravening party has accrued some pecuniary advantage as a result;
- the loss suffered by others or the pecuniary advantage gained is capable of reasonably accurate assessment; and
- it is not practicable to identify some or all of those who have suffered loss.[64]

The *VLRC Final Report* recommended that the court's discretion to award cy-près type remedies be unfettered, specifically recommending that the power to order such remedies should:

- include the ability to order payment into a proposed new litigation funding mechanism entitled the 'Justice Fund' (the reasoning for which is discussed in Part III(D)(3)(c));
- not be limited to distribution of money only for the benefit of group members or those who fall within the general characteristics of group members;
- not be limited to any proposal or agreement of the parties to the class action; and
- not be subject to a general right of appeal.[65]

D *Costs and Funding*

Plaintiff lawyers have focused on a number of issues relating to the costs of class action proceedings, primarily the alleged economic disincentives for the representative applicant due to their potential liability for adverse costs and

61 See Gary L Sasso, 'Class Actions: *De Minimis Curat Lex?*' (2005) 31(4) *Litigation* 16.

62 VLRC, above n 10, 558 (Maurice Blackburn's submissions to the VLRC), 559–60. See also Kim Parker, 'Class Actions: The New Era of Cartel Class Actions in Australia' (Paper presented at the International Class Actions Conference, Maurice Blackburn, Sydney, 25–26 October 2007) 7 <http://www.mauriceblackburn.com.au/news/newsletters/pdfs/KParker_paper.pdf>.

63 VLRC, above n 10, 532–3.

64 Ibid 559–60.

65 Ibid 560.

security for costs.[66] Plaintiff lawyers have subsequently proposed a number of changes. A summary of the main proposals follows.

1 *Changes to Costs Rules*

One approach has been to suggest a change to the usual 'costs follow the event' or 'loser pays' rule. This rule applies to class actions as it does to unitary litigation. However, Australian class action procedure expressly prohibits a costs order being made against group members other than the representative applicant(s) who actually commenced the proceedings.[67]

Consequently, representative applicants alone are potentially liable for adverse costs in the event that the claim fails, just as class action respondents are liable if the claim succeeds. Accordingly, it has been proposed by some plaintiff lawyers that the usual costs rule not apply to class actions since (in combination with the prohibition against awarding costs against group members) it operates as a financial disincentive to taking on the role of representative applicant.[68] Others have suggested that there be a statutory limit to the costs exposure of the representative applicant.[69]

2 *Security for Costs*

Respondents have long suspected that some plaintiff lawyers have, from time to time, nominated a 'person of straw' as the representative applicant — that is, someone who has no assets and who is therefore incapable of satisfying any significant order for costs made in favour of the respondent. Respondents have countered by seeking security for costs against the representative applicant. The courts have historically been reluctant to make such orders in the context of class actions,[70] and have only done so in extreme cases.[71]

66 See, eg, ibid 676–7; Murphy and Cameron, above n 8, 420–3, 432–4. See also Cashman, 'Class Action Law Reform in Victoria', above n 9, 5, 7 (submissions made to the VLRC by Maurice Blackburn and IMF (Australia) Ltd).

67 *FCA Act* s 43(1A); *VSC Act* s 33ZD(b). Note that costs may be ordered against individual group members in respect of the determination of individual or subgroup issues relevant to those persons: *FCA Act* ss 33Q(3), 33R(2); *VSC Act* ss 33Q(3), 33R(2).

68 Murphy and Cameron, above n 8, 411, referring to a recommendation to exclude the 'costs follow the event' rule in Victorian class actions made by Morabito and Epstein, above n 9. See also Spender, 'Securities Class Actions', above n 9, 144–5.

69 Such a cap on costs is suggested by the VLRC in the context of a proposal for establishing a statutory 'Justice Fund' (discussed further below), which would provide financial assistance to the applicant and assume the applicant's liability for adverse costs (limited to the amount of funding): VLRC, above n 10, 614–17. The proposed fund would have standing to apply to the court for an order limiting the applicant's liability for the balance of any adverse costs: at 690–1. This proposal is akin to that effected by s 47 of the *Legal Aid Commission Act 1979* (NSW). See also VLRC Civil Justice Enquiry, *Summary of Draft Civil Justice Reform Proposals as at 28 June 2007: Exposure Draft for Comment* (2007) 52–3 <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/eb4c700164031bf/Exposure%20Draft%20Proposals.pdf>.

70 See, eg, *Ryan v Great Lakes Council* (1998) 154 ALR 584; *Johnstone v HIH Insurance Ltd* [2004] FCA 190 (Unreported, Tamberlin J, 5 March 2004) [97]–[98] (application for security for costs premature); *Milfull v Terranora Lakes Country Club Ltd (in liq)* (2004) 214 ALR 228, 229 (Kiefel J) (application for security for costs brought too late). See also Damian Grave and Ken Adams, *Class Actions in Australia* (2005) 254.

71 See below Part IV(D) below.

Some plaintiff lawyers have criticised both the respondents for making these applications and the decisions granting security,[72] notably the decision of the Full Federal Court in *Bray v F Hoffman-La Roche Ltd* ('*Bray*'), where it was held that the characteristics, including the financial circumstances of group members generally, should be taken into account in determining whether to make an order for security for costs.[73] They argue that this ruling undermines the intent of Part IVA, in particular the general prohibition against making costs orders against group members.[74] They say that respondents should not be entitled to more protection than they have in unitary litigation, in which they are entitled only to an order for security against the plaintiff.[75] While they concede that greater protection (by way of what they characterise as an order for security against group members) would be justified if an impecunious applicant was intentionally chosen, they claim that there is no empirical proof that this occurs in practice.[76]

On this basis, plaintiff lawyers argue for the introduction of legislation which reverses the decision of the Full Federal Court in *Bray* by providing that only the applicant's resources are relevant to the determination of security for costs applications brought by class action respondents.[77]

3 *Third Party Funding*

There have been a number of proposals advanced in relation to the provision of funding by third parties.

(a) Commercial Litigation Funding and Contingency Fees for Lawyers

An agreement between a lawyer and client which provides for the lawyer to receive an agreed proportion or share of any judgment or settlement — that is, a contingency fee agreement — is illegal in all Australian jurisdictions.[78] This, and other restrictions imposed on lawyers acting for plaintiffs, has led to the development in Australia of what has become known as the 'litigation funding industry'. While the prohibition of contingency fee agreements applies to

[72] See, eg, Murphy and Cameron, above n 8, 420–2; Murphy, above n 8, 21–3.

[73] (2003) 130 FCR 317, 374–5 (Finkelstein J). See also at 349–50 (Carr J), 361–2 (Branson J).

[74] See *FCA Act* s 43(1A); *VSC Act* s 33ZD(b).

[75] Murphy and Cameron, above n 8, 421; Murphy, above n 8, 22.

[76] Murphy and Cameron, above n 8, 421. The authors challenge the assertion that impecunious persons are not intentionally chosen as representative applicants in Australian class actions: see below Part IV(D)(2). Indeed, the ALRC, following its review of the operation of the federal class action procedure in 2000, recommended (in ALRC, *Managing Justice Report*, above n 22, 34 (Recommendation 78)) that:

> the Federal Court should consider drafting guidelines or a practice note, relating to the practices of lawyers and parties in representative proceedings, addressing in particular [among other issues] … the choice of the representative party, who should not be chosen primarily as a 'person of straw'.

[77] Murphy and Cameron, above n 8, 421, 422.

[78] See, eg, *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Act 2004* (NSW) s 325(1)(b); *Legal Profession Act 2006* (NT) s 320(1); *Legal Profession Act 2007* (Qld) s 325; *Rules of Professional Conduct and Practice 2003* (SA) r 42; *Legal Profession Act 2007* (Tas) s 309(1); *Legal Profession Act 2004* (Vic) s 3.4.29(1)(b); *Legal Profession Act 2008* (WA) s 285(1).

lawyers, non-lawyers are not so constrained.[79] Thus, a new breed of entrepreneur has emerged in Australia to promote and fund class action litigation. Indeed, Australia is home to two of the world's few publicly listed litigation funders, notably IMF (Australia) Ltd.[80]

The litigation funding mechanism is relatively straightforward. A non-lawyer or corporation, the 'promoter', identifies a potential claim and then enters into agreements with potential applicants. Under these agreements the promoter receives an agreed percentage of any monies that are received by the applicant, either by way of settlement or judgment. This percentage is typically between one-third and two-thirds of the proceeds, although in some insolvency cases it has been as high as 75 per cent.[81] In addition, the applicants assign the benefit of any costs order they may receive to the promoter. The promoter then retains a lawyer who agrees to conduct the litigation on behalf of the promoter on the basis of the 'normal' rules governing the legal profession. The promoter retains a broad discretion to conduct the litigation as it sees fit.

While Australian litigation funders experienced some early setbacks, recent decisions, including some in the High Court of Australia,[82] have approved of these arrangements. Such funding is no longer seen as a threat to the litigation process, perhaps because courts have greater confidence in their ability to control the conduct of litigation. Increasingly, judges are suggesting that commercial litigation funding has an important role to play in ensuring that plaintiffs are able to obtain access to the courts.[83] Given that the High Court has now determined that there are no sound public policy reasons to prohibit litigation funders entering into contingency fee agreements, both plaintiff and defence lawyers are asking why they should be prevented from entering into arrangements that function in the same way.[84]

(b) Uplift Fees for Lawyers

Australian law provides that a lawyer can only take their 'normal' fee plus an agreed 'uplift', any such additional costs being payable on the successful

79 The prohibition in every jurisdiction only extends to 'law practices': see the legislation cited in above n 78.

80 Another private litigation funder, Hillcrest Litigation Services Ltd, is listed on the ASX: see Hillcrest Litigation Services Ltd <http://www.hillcrestlitigation.com.au>.

81 Standing Committee of Attorneys-General, 'Litigation Funding in Australia' (Discussion Paper, 2006) 4 <http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/vwFiles/Litigation_Funding_Discussion_paper_May_06.doc/$file/Litigation_Funding_Discussion_paper_May_06.doc>.

82 In *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, on the question of litigation funding a 5:2 majority of the High Court affirmed the decision of the New South Wales Court of Appeal in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203. In the Federal Court, see also *QPSX Ltd v Ericsson Australia Pty Ltd [No 3]* (2005) 219 ALR 1; *J P Morgan Portfolio Services Ltd v Deloitte Touche Tohmatsu* [2005] FCA 1640 (Unreported, Wilcox J, 16 November 2005). It should be noted that Wilcox J in this last case regarded Westpac, the funder, as 'neither a trafficker in litigation nor a company that carries on the business of funding litigation, as in … *Fostif* and many of the other authorities considered in those cases': at [53].

83 See *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 227 (Mason P).

84 See, eg, VLRC, above n 10, 622 (Maurice Blackburn's proposals); Cashman, 'Class Action Law Reform in Victoria', above n 9, 7. See also Murphy and Cameron, above n 8, 439; VLRC, above n 10, 694.

outcome of the case and usually expressed as a percentage of the so-called normal fee.[85] These are known as 'uplift fee agreements'; they are also known as 'no win–no pay' (or 'speculative') agreements because the fees are only payable in the event that the client succeeds. Until recently, such agreements were the norm.

However, legislative caps have now been introduced on the allowable uplift, with most Australian states imposing a maximum uplift of 25 per cent of legal costs (excluding disbursements).[86] Some states even prohibit altogether fee agreements which provide for an uplift fee on the successful outcome of a claim for damages.[87] These restrictions have effectively limited the amount a lawyer representing a plaintiff can be paid, and have prevented lawyers representing plaintiffs in class actions in Australia from receiving the very considerable fees that some lawyers acting in class actions are accustomed to in the US.

Consequently, there has been a call by some plaintiff firms for 'reform of the rules relating to success fees, including a significant increase in the maximum percentage uplift allowed under current legislation'.[88]

(c) Establishment of a 'Justice Fund'

In another effort to overcome the alleged economic disincentives for applicants to assume the role of representative applicant in class actions, the *VLRC Final Report* has recommended the establishment of a statutory litigation funding mechanism to be known as the 'Justice Fund'. This would provide financial assistance to applicants and indemnify them against any adverse costs and security for costs orders.[89] The Fund's liability for the applicant's adverse costs would be capped at the amount of funding provided, and the applicant would remain liable for any shortfall in costs.[90] However, the Fund would have standing to apply to the court for an order limiting the applicant's liability for such a shortfall.[91]

The Fund itself would be funded from two sources: first, it would receive a portion of any settlement or judgment made in favour of the group in class actions it had financed; secondly, it would potentially be a beneficiary of a judgment or settlement in a cy-près class action of the type referred to in Part III(C).[92]

[85] *Legal Profession Act 2006* (ACT) s 284; *Legal Profession Act 2004* (NSW) s 324; *Legal Profession Act 2006* (NT) s 319; *Legal Profession Act 2007* (Qld) s 324; *Legal Profession Act 2007* (Tas) s 308; *Legal Profession Act 2004* (Vic) s 3.4.28; *Legal Profession Act 2008* (WA) s 284.

[86] See, eg, *Legal Profession Act 2006* (ACT) s 284(4)(b); *Legal Profession Act 2007* (Qld) s 324(4); *Legal Profession Act 2007* (Tas) s 308(4)(b); *Legal Profession Act 2004* (Vic) s 3.4.28(3); *Legal Profession Act 2008* (WA) s 284(4)(b).

[87] See, eg, *Legal Profession Act 2004* (NSW) s 324(1).

[88] VLRC, above n 10, 622 (Maurice Blackburn's proposals); Cashman, 'Class Action Law Reform in Victoria', above n 9, 7. See also Murphy and Cameron, above n 8, 423.

[89] VLRC, above n 10, 615.

[90] Ibid 690–1. The cap would be in place for the first five years of the Fund's operation. Note that the VLRC's original proposal was that the cap would apply at all times: VLRC Civil Justice Enquiry, above n 69, 52–3.

[91] VLRC, above n 10, 622, 690–1, 694.

[92] Ibid 615.

E *Claims against Multiple Respondents*

One of the requirements for commencing a class action is that the group members 'have claims against the same person'.[93] There are conflicting authorities regarding the interpretation of this important threshold requirement.

The Full Federal Court held in *Philip Morris (Australia) Ltd v Nixon* ('*Philip Morris*') that it is not sufficient that one member has a claim against one respondent while other group members have claims against another respondent: to qualify as a class action, *all* group members must have a claim against *all* respondents.[94] This test will be satisfied as long as each group member makes a claim against each respondent[95] — the mere fact that a group member is 'ultimately adjudged to be entitled to succeed against only one respondent, does not mean that the group member makes a claim against only that respondent.'[96] While this position appeared settled, the majority of a separately constituted Full Federal Court has more recently suggested in *Bray* that there is no need for each group member to have a claim against each respondent provided *at least one* group member has a claim against *each* respondent.[97]

Following the decision in *Bray*, there has been a series of contradictory first instance judgments on the point. In *Johnstone v HIH Insurance Ltd*, it was held that the comments in *Bray* were obiter and the Court followed the decision in *Philip Morris*.[98] Later in *Milfull v Terranora Lakes Country Club Ltd (in liq)*, the Court approved the position in *Bray*.[99] The Court has since held that 'the applicant and each member of the group must have a claim against each respondent' on the basis that the finding in *Bray* was merely obiter and that the Court was bound by the decision in *Philip Morris*.[100] Yet another decision has suggested that the holding in *Philip Morris* was, in fact, overruled by the majority in *Bray*.[101]

For reasons detailed in Part IV(E), the authors argue that the better view is that which is in accordance with the Full Court's decision in *Philip Morris*: the law requires — or, if the law is not sufficiently settled, the law *should* require — each group member to have a legal claim against each respondent.[102]

93 *FCA Act* s 33C(1)(a); *VSC Act* s 33C(1)(a).

94 (2000) 170 ALR 487, 520–1 (Sackville J). See also at 489 (Spender J), 491 (Hill J).

95 *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209, 220–1 (Moore J) ('*King v GIO* (trial)').

96 *King v GIO Australia Holdings Ltd* [2000] FCA 1543 (Unreported, Wilcox, Lehane and Merkel JJ, 1 November 2000) [7] (Wilcox, Lehane and Merkel JJ) ('*King v GIO* (appeal)').

97 (2003) 130 FCR 317, 344 (Carr J), 373–4 (Finkelstein J), cf 358–9 (Branson J, disagreeing on this point).

98 *Johnstone v HIH Insurance Ltd* [2004] FCA 190 (Unreported, Tamberlin J, 5 March 2004) [38].

99 *Milfull v Terranora Lakes Country Club Ltd (in liq)* (2004) 214 ALR 228, 229 (Kiefel J).

100 *Guglielmin v Trescowthick [No 2]* (2005) 220 ALR 515, 521–2 (Mansfield J).

101 *McBride v Monzie Pty Ltd* (2007) 164 FCR 559, 561 (Finkelstein J). It should be noted that Finkelstein J was part of the majority in *Bray*.

102 Indeed, plaintiff lawyers point out that the prudent lawyer would advise their clients to expect a narrow reading of s 33C: see, eg, Murphy and Cameron, above n 8, 427; Murphy, above n 8, 27.

Plaintiff lawyers appear to be united in arguing for the removal of this requirement,[103] although they do not necessarily agree on an alternative interpretation of this threshold question. Some have argued that the *representative applicant* must have claims against each respondent but group members need only have a claim against one respondent,[104] while others argue for a lesser requirement that all group members need only have a legal claim against one of the respondents.[105]

F *Communications with Group Members*

A number of changes have been proposed in relation to issues involving communications with group members, in particular those group members who have not retained the representative applicant's lawyer. The first issue relates to the 'opt out notice', while the second relates to the vexed issue of respondents contacting group members.

1 *Opt Out Notice*

Soon after proceedings have been commenced, orders will be made for the giving of notice to group members. The notice informs group members that the proceedings have commenced and of their right to opt out by a date fixed by the court.[106] While the rules leave open the question of who should pay for these advertisements,[107] it has been applicants who have met these initial costs to date. Indeed, the Supreme Court of Victoria has held that the costs incurred in giving notice should, as a general rule, be borne by those instituting and prosecuting the litigation.[108]

The form and content of the notice are at the discretion of the court. It may be given by way of advertisements in newspapers, by broadcast on radio or television, or by direct contact with group members.[109] In 2000, the Federal Court established a website to inform putative class members of the claim in the $750 million class action against insurance company GIO by posting the pleadings on the site. The Court established the website as an alternative to using the website maintained by the applicant's solicitors as the solicitors' website included promotional material.[110] In other cases, opt out notices have provided for copies

103 Professor Rachael Mulheron also argues for a less strict requirement: see Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 163–4.

104 See, eg, VLRC, above n 10, 530, 558 (Maurice Blackburn's proposals).

105 Ibid 529, 559. Litigation funder IMF (Australia) Ltd supports this proposal: at 530. See also Murphy and Cameron, above n 8, 426–7.

106 *FCA Act* ss 33J(1), 33X(1)(a); *VSC Act* ss 33J(1), 33X(1)(a).

107 The rules merely provide that the court may make orders 'relating to the costs of notice': *FCA Act* s 33Y(3)(d); *VSC Act* s 33Y(2)(d).

108 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2001] VSC 284 (Unreported, Gillard J, 17 August 2001) [19]–[20].

109 *FCA Act* ss 33Y(2)–(5); *VSC Act* ss 33Y(1)–(3).

110 *King v GIO Australia Holdings Ltd* [2000] FCA 1869 (Unreported, Moore J, 20 December 2000) [19]–[22] ('*King v GIO* (form of opt out notice proceeding)').

of the statement of claim and fee agreement to be available on the website of the applicant's solicitors.[111]

Plaintiff lawyers have argued that, while there needs to be flexibility in orders made in relation to notice, it would assist if the Federal Court published guidelines concerning the form and content of notices.[112] They have complained about disputes as to the wording of notices and the costs associated with their publication, some even accusing respondents of employing a 'common tactic' of seeking to word the notice 'so that it is biased against participation in the class action.'[113] They suggest that 'robust judicial supervision' has proven to be most effective in controlling the notice process and the time and costs issues that can arise.[114]

2 *Other Communications with Group Members*

In Australia, the professional conduct rules that govern the legal profession prohibit a lawyer from communicating with a third party where that party is represented by another lawyer. To do so can constitute professional misconduct.[115] However, in a class action there will be many group members who have not expressly retained the applicant's lawyers to act on their behalf. A question has arisen in a number of actions as to whether a respondent or its lawyers can communicate with such group members.[116]

The Federal Court has held that a respondent or its lawyers can communicate with a group member in a manner which is not misleading or otherwise unfair, and which does not infringe any other law or ethical constraint such as the professional conduct rule requiring lawyers to communicate with represented persons through their lawyers.[117] Consequently, a respondent may communicate with unrepresented group members to negotiate individual settlements or for other legitimate forensic purposes. The court may consider it appropriate to exercise some degree of control over such communications (such as by requiring the respondents to notify the applicant's lawyers of the terms of the communications prior to making them) in order to ensure that justice is done, for example, as a matter of case management in a large case.[118]

However, some plaintiff lawyers have argued that settlement communications between respondents and unrepresented group members should always take

111 See, eg, *Darwalla Milling Co Pty Ltd v F Hoffmann-La Roche Ltd* [2006] FCA 915 (Unreported, Jessup J, 18 July 2006) [17].

112 See submissions made to the ALRC during its review of Part IVA in 2000: ALRC, *Managing Justice Report*, above n 22, 484.

113 Murphy and Cameron, above n 8, 432; Murphy, above n 8, 29.

114 Murphy and Cameron, above n 8, 432. See also Murphy, above n 8, 30.

115 See, eg, *Solicitors Rules — Revised Professional Conduct and Practice Rules 1995* (NSW) r 31.1. See also *Re Orlov and Pursley* [1995] 4 LPDR 5.

116 See generally Stuart Clark, 'Class Action Defendants Are Free to Communicate with Class Members' (2002) 13 *Australian Product Liability Reporter* 33, 34–5; Brooke Davie, 'Guidelines for Communications with Unrepresented Group Members' (2002) 13 *Australian Product Liability Reporter* 89.

117 *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 183 (Sackville J). See also *Courtney v Medtel Pty Ltd* (2001) 113 FCR 512, 523 (Stone J).

118 *King v AG Australia Holdings Ltd* (2002) 121 FCR 480, 489 (Moore J) ('*King v GIO* (communications application)'). See also *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 183, 186 (Sackville J).

place through the applicant's lawyer[119] or, if this change is not implemented, that clearer guidelines are required regarding the extent to which respondents may communicate directly with group members.[120]

IV RESPONSE TO PROPOSED CHANGES

This Part analyses in detail why most of the proposals for change described in Part III of this article depart from the aims of class action procedure and would sweep away the protections provided by that procedure.

A *Opt In Class Actions*

> *It has been proposed that there be legislative clarification as to the acceptability of a class action being brought on behalf of a subset of all potential applicants who have consented to the conduct of the action on their behalf, even if such a group comprises only those who have retained a particular litigation funder and/or law firm.*

Class action promoters now often attempt to limit groups to those applicants who have entered into the promoters' funding and retainer agreements.[121] While the Full Federal Court has held that Part IVA expressly allows such limited groups (provided the group is formed prior to the commencement of the class action), the Court conceded that it was difficult to reconcile such a restriction of the group with the goals of enhancing access to justice, judicial efficiency and the administration of justice.[122] The consequence of the Court's decision — and the reason why some plaintiff lawyers are advocating so strongly for legislation that confirms the decision — is that it flips the Australian class action system from an 'opt out' to an 'opt in' system. In the authors' view, this is problematic for a number of reasons.

First, it constitutes a fundamental change to one of the principles on which the Australian class action system is based and removes one of the, if not the most, significant justifications for the introduction of a class action system. This is because it leads to a reduction in access to justice as participation in class actions is limited to those applicants who:

- can be identified by the promoter;

119 See Davie, above n 116, 90.

120 Murphy and Cameron, above n 8, 428–31, especially 431. See also Murphy, above n 8, 21 (arguing that 'contact between respondents or their lawyers … with group members ought to be circumscribed to a greater extent').

121 See, eg, *Aristocrat* (2005) 147 FCR 394, 397 (Stone J) (the Aristocrat class action); *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449 (Unreported, Hansen J, 18 November 2005) [23]–[42] (the Media World class action); *Multiplex Appeal* (2007) 164 FCR 275, 280 (Lindgren J) (the Multiplex class action); *Peter Hanne & Associates Pty Ltd v Village Life Ltd* [2008] FCA 719 (Unreported, Jacobson J, 22 May 2008) [3] (the Village Life class action); *Kirby v Centro Properties Ltd* [2008] FCA 1505 (Unreported, Finkelstein J, 10 October 2008) [3] (the Centro shareholder class action); Maurice Blackburn, *AWB Class Action* (2007) <http://www.mauriceblackburn.com.au/areas/class_actions/current/current_action_awb.asp> (the AWB class action).

122 *Multiplex Appeal* (2007) 164 FCR 275, 292, 294, 300 (Jacobson J).

- understand what is proposed, including understanding the risks and benefits associated with a relatively complex set of legal arrangements;
- are prepared to accept the terms of the funding and retainer agreements — in most cases potential group members will have no realistic opportunity to negotiate with the promoter in relation to the terms of the agreement; and
- are willing to forfeit a large proportion — often in the order of 40 per cent or more — of any verdict or settlement to the funder.

In most cases, it also has the consequence of ensuring that those who are not invited or allowed to participate in the class action effectively lose the opportunity to obtain redress.[123] Usually where this occurs, it will be the disadvantaged or unrepresented who are effectively denied access to justice by virtue of the operation of the very system that was intended to overcome this problem. The class action promoter will 'pick the eyes' out of the group of potential group members, run the action and then move on to the next case. The rump of the claims will often include those that are more difficult to run or which may simply be 'uneconomic' in terms of the promoter's desired return on its investment. As a consequence, only those who the promoter permits to participate will have the opportunity to obtain justice.

The authors acknowledge that some in the business community and some respondents' lawyers have not always shared this view — certainly, many still hold the view that opt out class actions should be opposed.[124] Indeed, at the time the ALRC's recommended opt out system was being debated, some members of the business community expressed their opposition on the basis of the potential for large indeterminate classes and on the basis that people should be free to elect to litigate their rights.[125] With respect, they were wrong then and, to the

[123] In recommending an opt out procedure, the ALRC emphasised the importance of enhancing access to legal remedies by overcoming cost barriers and non-cost factors (for example, ignorance of rights, lack of knowledge of the law and fear of embarking on proceedings), and noted that the element of consent mandated by an opt in procedure may defeat this purpose and leave potential applicants with no means of obtaining legal redress: Law Reform Commission, *Grouped Proceedings Report*, above n 2, 50, 55. See also at 9–11, 34.

[124] Consider, for example, the opposition on the part of elements of the business community in the United Kingdom to the concept of an opt out class action system. The UK business community's most recent such opposition has been in response to the recommendation of the Civil Justice Council (an advisory group to the UK Secretary of State for Constitutional Affairs) that courts should decide whether to adopt an opt in or opt out system on a case-by-case basis: Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions — A Series of Recommendations to the Lord Chancellor* (2008) 13–14 (Key Finding 9), 15 (Recommendation 3) <http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf>. Arguments in support of an opt out class action procedure can be found at 67–90. See also at 44–5 (noting businesses' opposition to earlier proposals for an opt out procedure). The concerns raised by these businesses are similar to those raised in the Australian context: see Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (2008) ch 6.

[125] See Commonwealth, *Parliamentary Debates*, Senate, 12 September 1991, 1448 (Michael Tate, Minister for Justice and Consumer Affairs); Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3021–2 (Peter Durack).

extent that they continue to oppose the concept of an opt out class action, they are wrong now.[126]

Secondly, the Full Court's decision in *Multiplex Appeal* may also lead to multiple class actions being allowed to proceed against the same respondent by self-aggregated groups differently represented, which would run counter to the objectives of promoting efficiency in the use of court resources and fairness to respondents who would otherwise be forced to face a number of actions in respect of the same events.

Such a situation has already eventuated in Australia.[127] The Centro Properties group is being forced to defend two separate shareholder class actions in the Federal Court: one by plaintiff law firm Maurice Blackburn on behalf of shareholders who have signed a funding agreement with litigation funder IMF (Australia) Ltd;[128] and the other by plaintiff law firm Slater & Gordon on behalf of shareholders who have not signed such an agreement.[129] Both actions cover slightly different time periods in which the applicants acquired their securities in Centro, but they relate to the same events and allege inadequate market disclosure concerning the extent of the company's debt obligations.

Unlike the US, in Australia there is no procedure for dealing with multiple class actions brought against the same respondent for the same conduct. It thus falls upon the court to manage this undesirable scenario. One possibility raised by the Federal Court in dealing with the multiple class actions in the Centro actions was the establishment of a 'litigation committee' comprising independently-selected group members which, according to the Court, could monitor the class lawyers.[130] However, shortly after making this suggestion the docket judge recused himself from further managing or hearing the class actions on the basis that he was a putative group member.[131] At the time of writing, it remains to be seen how the concurrent class actions will be managed.

[126] As Mulheron explains, the opt out class action procedure is clearly the preferred choice in modern common law systems including the US, Canada and Australia: Mulheron, *The Class Action in Common Law Legal Systems*, above n 103, 35. See also at 29, 34–8 (considering the advantages and disadvantages of an opt out procedure). The ALRC considered the relative advantages and disadvantages of opt out versus opt in procedures and recommended the former as the best way of achieving the policy goals of access to justice, reducing costs, increasing court efficiency and promoting consistency in dealing with multiple claims, provided that class members' autonomy is not compromised by the opt out procedure, which does not require class members' consent to commence a class action (that is, provided class members can elect to opt out of the action): Law Reform Commission, *Grouped Proceedings Report*, above n 2, ch 4 especially 50. See also at 26, 34.

[127] Maurice Dunlevy, 'Centro Could Face a Second Class Action over Share Price Collapse', *The Australian* (Sydney), 13 May 2008, 21.

[128] See *Kirby v Centro Properties Ltd* [2008] FCA 1505 (Unreported, Finkelstein J, 10 October 2008); Maurice Blackburn, *Centro Class Action* (2007) <http://www.mauriceblackburn.com.au/areas/class_actions/current/Centro.asp>.

[129] See *Kirby v Centro Properties Ltd* [2008] FCA 1505 (Unreported, Finkelstein J, 10 October 2008); Slater & Gordon Lawyers, *Centro Shareholder Actions* (2007) <http://www.slatergordon.com.au/pages/_class_actions_centro.aspx>.

[130] See *Kirby v Centro Properties Ltd* [2008] FCA 1505 (Unreported, Finkelstein J, 10 October 2008), especially [30]–[34], [37], [39]–[41].

[131] See *Kirby v Centro Properties Ltd [No 2]* [2008] FCA 1657 (Unreported, Finkelstein J, 14 November 2008). The class actions were referred to the Court's List Manager for reassignment to another judge: at [23].

One of the protections against abuse of the class action procedure recommended by the ALRC in the *Grouped Proceedings Report* was a requirement that all persons with related claims be involved in the one class action so as to achieve maximum economy and reduce costs.[132] The recommended procedure thus provided that if the principal applicant failed to include all group members in the application, the class action could be stayed on the application of a potential group member or the respondent.[133] This safeguard was omitted from Part IVA without any parliamentary or other debate. Moreover, also contrary to the ALRC's recommendations, Part IVA was enacted to expressly allow 'some or all' group members to be included in a class action.

However, eight years after the introduction of the procedure the ALRC stated in its review of the operation of Part IVA that:

> It is obviously unsatisfactory to have multiple representative proceedings in relation to the same dispute. In the absence of an agreement between the parties as to representation the Court will have to decide which representative action should proceed and therefore which law firm has carriage of the representative proceedings.[134]

In light of such concerns about competing representation, the importance of the representative party's lawyers and the lack of legislative guidance, the authors endorse the ALRC's suggestion that this issue should be considered in the context of any review of Part IVA.[135]

'Limited group' class actions, which in the authors' view is merely code for 'opt in class actions', are justified by litigation funders and plaintiff lawyers as being necessary to overcome the costs disincentives of bringing a class action by excluding so-called 'free-riders' — that is, group members who do not contribute to prosecution costs — and by ensuring that group members contribute to such costs. However, as Michael Legg points out,

> while it is economically rational for class action promoters to want to exclude free-riders, the interests of the class action promoter and plaintiffs are not the only interests at stake. The class action aims to 'enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources' which implicates the rights of the tax-paying public who fund the judicial system [and respondents, who should not be required to defend claims regarding the same events in multiple actions].[136]

132 Law Reform Commission, *Grouped Proceedings Report*, above n 2, 44.

133 Law Reform Commission, *Report Summary*, above n 37, 9, 13. The ALRC also suggested that the respondent and potential group members be given the opportunity to apply for the inclusion of further group members, and that if the principal applicant failed to include such persons the court have power to separate the proceedings or appoint another person as principal applicant: see Law Reform Commission, *Grouped Proceedings Report*, above n 2, 66–7, 157 (proposed cl 14).

134 ALRC, *Managing Justice Report*, above n 22, 480–1 (citations omitted).

135 Ibid 482. Note that the ALRC's concerns were directed to multiple class actions covering the same claims, whereas the Centro class actions (see *Kirby v Centro Properties Ltd* [2008] FCA 1505 (Unreported, Finkelstein J, 10 October 2008)) cover different group members' claims. It is submitted, however, that both scenarios raise similar concerns of inefficiency and unfairness to respondents.

136 Michael Legg, 'Institutional Investors and Shareholder Class Actions: The Law and Economics of Participation' (2007) 81 *Australian Law Journal* 478, 487 (citations omitted).

Similarly, access to justice should not be sacrificed so as to support the business model of a small group of entrepreneurs.

In Part IV(D) of this article, the authors consider alternative methods, other than limiting the group, by which group members could still contribute to prosecution costs without compromising the opt out system.

B *Reduction of Interlocutory Applications Including Removal of the Termination Power*

> *It has been proposed that the court's power to terminate a class action pursuant to s 33N(1) of the* FCA Act *be removed or, at the very least, that the court utilise its case management powers to minimise respondents' interlocutory applications.*

In the authors' view, the existence of the termination power in s 33N, and resort to use of that power, is justified — indeed, essential — as a consequence of the class action procedure itself.

First, the termination power was adopted as a substitute for US-style certification,[137] which is essential for filtering out class actions which are 'unsuitable'.[138] As has been observed by some commentators,[139] the termination power initially recommended by the ALRC in its *Grouped Proceedings Report* was expanded by the legislature.[140] The justification for this can be found in the second reading speech introducing the new class action procedure, where the power was said to be 'comprehensive … to ensure that the proceedings are not abused'.[141]

The comprehensive nature of the termination power has been criticised by some as unnecessary in light of the other protections against abuse of the class action procedure contained in Part IVA.[142] In the authors' view, one may assume that the legislature disagreed and recognised that a wide termination power was necessary in the absence of a certification procedure. The termination power is critical because while a certification procedure places the onus on the class plaintiff to satisfy the court that the class action has been properly brought, the

137 Law Reform Commission, *Grouped Proceedings Report*, above n 2, 63; Law Reform Commission, *Report Summary*, above n 37, 8.

138 Rachael Mulheron, 'Justice Enhanced: Framing an Opt-Out Class Action for England' (2007) 70 *Modern Law Review* 550, 568.

139 See, eg, Vince Morabito, 'Group Litigation in Australia — "Desperately Seeking" Effective Class Action Regimes: National Report for Australia' (Paper presented at the Globalization of Class Actions Conference, Oxford University, 13–14 December 2007) 30–2; Vince Morabito, 'The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions' (2004) 42 *Osgoode Hall Law Journal* 473, 491–2.

140 As grounds of termination the ALRC recommended situations where a class action is 'inappropriate', such as where it may be more economical to conduct separate proceedings or where the cost of identifying group members and distributing any monetary relief may be excessive: Law Reform Commission, *Grouped Proceedings Report*, above n 2, 64. To this the legislature added: where the relief sought can be obtained other than by class action (*FCA Act* s 33N(1)(b)); where the class action will not provide an efficient and effective means of dealing with group members' claims (*FCA Act* s 33N(1)(c)); and where it is otherwise inappropriate that the claims be pursued by means of a class action (*FCA Act* s 33N(1)(d)).

141 Commonwealth, *Parliamentary Debates*, Senate, 12 September 1991, 1449 (Michael Tate, Minister for Justice and Consumer Affairs).

142 Morabito, 'Group Litigation in Australia', above n 139, 31. See also Murphy and Cameron, above n 8, 416–18.

Australian system assumes that a class action has been properly brought unless the respondent proves otherwise.[143]

Secondly, it must be noted that the existence of the power to terminate a class action has been relied upon by the High Court to act as a counterpoise to that Court's liberal construction of the threshold requirement in s 33C that there be a substantial common issue.[144]

Put simply, the termination power ensures that actions that satisfy the low threshold requirements in s 33C(1) for commencement of a class action may nonetheless be terminated where it is not appropriate for the action to continue in representative form.[145] The High Court in *Wong v Silkfield Pty Ltd* distinguished ss 33C and 33N in terms of the stage of litigation at which the provisions come into play: s 33C is only relevant at the commencement of a class action, whereas a s 33N application should be made at a later stage, preferably after pleadings have closed.[146] In *Wong v Silkfield Pty Ltd*, it was too early to determine an application pursuant to s 33N.[147] While some s 33N applications have failed, others have met with success.[148] Given the resources that are consumed in class actions that proceed to verdict, both in terms of the cost to the parties and the public purse, the fact that some s 33N applications have succeeded is testament to the benefit the provisions provide in ensuring that inappropriate cases do not continue as class actions.

Indeed, Justice Lindgren of the Federal Court recently remarked, extra-judicially, that:

> in my experience the procedural complaints made by respondents often have substance. They cannot simply be written off as the hollow protests of self-interest. …
>
> It is a familiar feature of [class actions] in the Federal Court that the respondent attacks the form of the application or statement of claim or both. I suspect that the lawyers representing applicants see this practice as an unmeritorious attempt to deny or delay access to justice. …

143 This reversal of onus was highlighted by the ALRC: see Law Reform Commission, *Grouped Proceedings Report*, above n 2, 63.

144 See *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 267 (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

145 Ibid 268.

146 Ibid 266. See also *King v GIO* (trial) (2000) 100 FCR 209, 228 (Moore J).

147 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 268 (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ). In this regard, see also *Milfull v Terranora Lakes Country Club Ltd* (1998) ATPR ¶41-642, 41 105 (Kiefel J); *Guglielmin v Trescowthick [No 2]* (2005) 220 ALR 515, 532–3 (Mansfield J).

148 Comprehensive data showing the outcome of s 33N applications are not available. However, some examples of unsuccessful s 33N strike-outs include: *McBride v Monzie Pty Ltd* (2007) 164 FCR 559, 564–5 (Finkelstein J); *Multiplex First Instance* (2007) 242 ALR 111; *Multiplex Appeal* (2007) 164 FCR 275. Examples of successful s 33N strike-outs include: *Crandell v Servier Laboratories (Aust) Pty Ltd* [1999] FCA 1461 (Unreported, Sackville J, 25 October 1999) [1] (the Fen-Phen class action, where the applicant ultimately consented to a s 33N order); *Aristocrat* (2005) 147 FCR 394; *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449 (Unreported, Hansen J, 18 November 2005). For an early example of a successful s 33N strike-out, see *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (1997) ATPR ¶41-585, 44 084 (the cartel class action).

> In my experience, respondents often have a good point (or many good points). I suspect that class action lawyers are often too impatient in launching and prosecuting proceedings.[149]

On this basis, his Honour also disagreed with the suggestion made by Finkelstein J curially,[150] and pressed by some plaintiff lawyers,[151] that courts should actively prevent such interlocutory disputation and bring on class actions for speedy determination.[152]

For all of these reasons, the authors strongly oppose any suggestion that the court's powers to manage class actions — particularly through utilisation of the termination power in s 33N, whether on the motion of the respondent or of the court — be curtailed in any way. In fact, the authors are of the view that the most urgent need for reform in this area is the need to introduce a certification procedure in which the representative applicant must satisfy the court that the formal requirements for commencement of a class action have been met.

The termination power was included in lieu of an initial, US-style certification hearing in the hope that this would be more cost- and time-effective.[153] As Professor Rachael Mulheron — whose work supports some of the changes that have been advanced by plaintiff lawyers[154] — has observed, the avoidance of costs and delays has not eventuated,[155] such that the decision not to require certification has been 'singularly unsuccessful' and Australian class action litigation has consequently 'been mired in numerous interlocutory applications about issues that could better have been addressed at a certification hearing.'[156]

The introduction of a US-style certification procedure[157] would have many benefits. First, it would ensure that the parties and court focus on addressing at the outset the core issues concerning the form in which the action should proceed, thereby reducing the prospect of the proceedings being derailed at a later stage — often after considerable time and expense had been incurred. Secondly, the fact that the representative applicant would know that its pleadings, and the basis upon which the proceedings are said to be appropriate to proceed as a class action, are to be scrutinised by the court with a view to determining whether or not it should proceed would help to ensure that the claim

149 Justice K E Lindgren, 'Class Actions and Access to Justice' (Keynote address delivered at the International Class Actions Conference, Maurice Blackburn, Sydney, 25–26 October 2007) 2–3. The ALRC has also emphasised the importance of clarity and precision in drafting the applicant's pleadings: see ALRC, *Managing Justice Report*, above n 22, 482–3.

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

151 Murphy and Cameron, above n 8, 415.

152 Lindgren, above n 149, 3.

153 Law Reform Commission, *Grouped Proceedings Report*, above n 2, 63.

154 As discussed above in Part III(E), for example, Mulheron is also critical of the current requirement, in cases involving multiple respondents, that each group member have a claim against each respondent: Mulheron, *The Class Action in Common Law Legal Systems*, above n 103, 150–7, 163–4.

155 Ibid 27.

156 Mulheron, 'Justice Enhanced', above n 138, 568.

157 See, eg, the following US legislation: *Federal Rules of Civil Procedure* r 23(c)(1) (2007). It is useful to compare the following Canadian legislation from British Columbia and Ontario, respectively: *Class Proceedings Act*, RSBC 1996, c 50, s 2; *Class Proceedings Act*, SO 1992, c 6, ss 2, 5.

is properly pleaded at the outset. This would avoid the process whereby the pleadings are 'refined' in a series of expensive and time-consuming applications by respondents.[158] Thirdly, it would address plaintiff lawyers' concerns in that it would have the effect, for the reasons already stated, of eliminating the necessity of many of the interlocutory applications that respondents are forced to bring as a consequence of the current procedure while at the same time ensuring justice for respondents. It would also shift the persuasive burden to the representative applicant as this would be the party that would have to persuade the court to allow the matter to proceed.

The fact that all post-Part IVA law reformers who have reviewed and proposed class action regimes around the world 'have been unwilling to implement a regime without some means of preliminary judicial [certification]'[159] also supports the need for such certification.

C *Cy-Près Damages*

> *It has been proposed that the court have the power to order cy-près type remedies in class actions where the loss suffered (or the benefit obtained by the respondent) is capable of assessment but it is not practicable or cost-effective to identify and/or compensate some or all of the persons who have suffered a loss.*

'Cy-près' means 'as near as (practicable)'. It embodies the idea that where something cannot be carried out exactly, then it should nevertheless be carried out in substance, as close as possible to the desired result. In the context of a class action, it would allow a court to dispense 'approximate justice', whether by way of price rollback or an award of damages to a nominated recipient where all applicants cannot be identified.[160] The proponents of cy-près type remedies argue that they are necessary in order to allow class action promoters to launch class actions in relation to claims where the loss suffered by an individual is so small that it is not only insufficient to justify litigation, but it also renders identification of the 'victims' or distribution of the proceeds uneconomic.[161]

There are a number of problems with such a proposal. First and foremost, the ALRC expressly rejected cy-près remedies for being inconsistent with the class action procedure, which, it stated,

> is not intended to penalise respondents or to deter behaviour to any greater extent than provided for under the existing law. Any money ordered to be paid by

[158] The high watermark of this process must have been the tobacco class action, where the statement of claim came back before the Court on multiple occasions before the matter was finally brought to an end: see *Philip Morris* (2000) 170 ALR 487, 491 (Spender J), 492 (Hill J), 526 (Sackville J).

[159] As noted in Mulheron, *The Class Action in Common Law Legal Systems*, above n 103, 26. See, eg, Alberta Law Reform Institute, *Class Actions*, Final Report No 85 (2000) 79–80; Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) ch 17 (paras [16], [24]–[26]), recommendation 214 <http://www.dca.gov.uk/civil/final/contents.htm>; Manitoba Law Reform Commission, *Class Proceedings*, Report No 100 (1999) 42–3; Scottish Law Commission, *Multi-Party Actions*, Report No 154 (1996) 25–6; South African Law Commission, *The Recognition of Class Actions and Public Interest Actions in South African Law*, Project No 88 (1998) 38–40.

[160] VLRC, above n 10, 531–3.

[161] Ibid 531–2.

> the respondent should be matched, so far as possible, to an individual who has a right to receive it. If this cannot be done, there is no basis for confiscating the residue to benefit group members indirectly, or for letting it fall into Consolidated Revenue, simply because the procedure used was the grouping procedure. It would be a significant extension of present principles of compensation to require the respondent to meet an assessed liability in full even if there is no person to receive the compensation. Any such change would be in the nature of a penalty, and would go beyond procedural reform. It has nothing to do with enhancing access to the courts.[162]

Further, it will be recalled that Part IVA was introduced to promote access to justice and efficiency in determining mass claims, both for 'individually non-recoverable' claims (where the cost of proceedings is high in relation to the amount claimed) and 'individually recoverable' claims (where the amount in issue is more than the cost of recovering it).[163] However, the procedure was never intended to extend to

> claims which are so small that … the costs of recovery will exceed the total benefits of litigating. … The object of new procedures should be to reduce the costs of litigation where it is necessary and worthwhile in the interests of justice, not to encourage abuse or the pursuit of the trivial.[164]

This would keep intact the legal principle of *de minimis non curat lex*.[165] The ALRC accordingly labelled such claims 'non-viable claims',[166] and expressly recognised that, under the class actions procedure, '[t]otal enforcement of every legal right is not possible because the transaction costs of legal enforcement will, in some cases, outweigh the benefits of achieving monetary relief.'[167]

In truth, what is being advocated, in part, is the privatisation of regulation — an extension of the concept that class actions can or should be used in lieu of regulation by a regulator. This was eloquently described by Dr Cashman when he observed that the US class action system encouraged 'entrepreneurial plaintiffs and entrepreneurial lawyers' to pursue the wrongdoer. He went on to say that '[t]here is almost a system of bounty hunters that has developed in the US — they are private attorney-generals seeking to advance the public good, albeit for

[162] Law Reform Commission, *Grouped Proceedings Report*, above n 2, 100. In a similar fashion, the ALRC determined that after aggregate assessment of damages, 'the respondent has no further liability, even if the amount was too little to meet all identified claims.' This is in contrast to the position in Canada, where courts are statutorily empowered to grant cy-près type remedies in class actions, and in the US, where such remedies have sometimes been judicially sanctioned, although not uniformly: see VLRC, above n 10, 533–7, especially 533–4. Some of the relevant Canadian statutes include: *Class Actions Act*, SS 2001, c C-12.01, s 37; *Class Proceedings Act*, SA 2003, c C-16.5, s 34; *Class Proceedings Act*, RSBC 1996, c 50, s 34; *Class Proceedings Act*, SNB 2006, c C-5.15, s 36; *Class Proceedings Act*, SO 1992, c 6, s 26. With respect to the US, the VLRC cites the following US cases: *Superior Beverage Co Inc v Owens-Illinois Inc*, 827 F Supp 477 (ND Ill, 1993); *Re Motorsports Merchandise Antitrust Litigation*, 160 F Supp 2d 1392 (ND Ga, 2001).

[163] Law Reform Commission, *Report Summary*, above n 37, 3–5; Law Reform Commission, *Grouped Proceedings Report*, above n 2, 10, 26.

[164] Law Reform Commission, *Report Summary*, above n 37, 3.

[165] This maxim translates as 'the law does not concern itself with trifles'.

[166] Law Reform Commission, *Grouped Proceedings Report*, above n 2, 10, 26.

[167] Ibid 142.

private gain'.[168] This is not the role of the compensation system in Australia, nor is it appropriate for Australian plaintiff lawyers — let alone corporations floated on the Australian Stock Exchange for the purpose of carrying on the business of promoting and funding litigation — to take on a law enforcement role.

The argument that class actions brought by individuals for personal gain have a role to play in behaviour modification has been accepted in the US and Canada[169] although, as one commentator has highlighted, 'the objective of behaviour modification will not always co-exist with the … objectives of access to justice and judicial economy, especially in a case which involves many small claims.'[170] It must be accepted that class actions, or the threat of a class action, can impact on behaviour.[171] There is, however, a point at which even this justification can no longer be maintained. Not every corporate mistake or oversight can be used to justify the launching of a class action on the basis that it will deter future misconduct or promote ever heightened vigilance. In any event, when damages or legal costs are recovered from a large multinational corporation, it is not the 'guilty' who are paying but rather the shareholders or even consumers in the form of prices that increase to meet 'the cost of doing business'. If the community is really serious about deterring illegal or improper corporate conduct, it will take measures that strike those who are truly responsible — for example, by way of criminal prosecution of those who engage in cartel conduct.[172]

Another difficulty with the cy-près proposal is that it has the hallmarks of a scheme that is intended to allow Australian class actions that are similar to the discredited 'coupon' class actions in the US,[173] albeit with the proceeds being split between a 'public interest fund' and the plaintiffs' lawyers. It will be recalled from Part III(C) that the coupon class action is an action commenced to 'compensate' consumers for a loss that is so small as to be not only uneconomic for any individual to sue but also uneconomic for a class action judgment or settlement to be distributed to the 'victims'. Instead, the victims are compensated by way of a coupon that can be redeemed at the time of a further purchase or transaction (although many are usually never redeemed) or by a general price discount for a limited period. At the same time, the defendant, which almost

168 Michael Pelly, 'Revenge of the Shareholders', *The Sydney Morning Herald* (Sydney), 10 February 2006, 9. Cf Murphy and Cameron, above n 8, 404–5.

169 See Peta Spender, 'The Class Action as Sheriff: Private Law Enforcement and Remedial Roulette' (ANU College of Law Research Paper No 08-24, The Australian National University, 2008).

170 Mulheron, *The Class Action in Common Law Legal Systems*, above n 103, 64. At 65 fn 137, Mulheron cites cases where the courts found that the behaviour modification goal was insufficient on its own to justify class certification: *Kumar v Mutual Life Assurance Co of Canada* (2003) 226 DLR (4th) 112, 128–9 (Rosenberg JA for the Court); *Joanisse v Barker* (Unreported, Ontario Superior Court of Justice, Cullity J, 5 August 2003) [57].

171 See Deborah R Hensler et al, RAND Institute for Civil Justice, *Class Actions Dilemmas: Pursuing Public Goals for Private Gain — Executive Summary* (1999) 9 <http://www.rand.org/publications/MR/MR969.1/MR969.1.pdf>, cited in Spender, 'The Class Action as Sheriff', above n 169, 6.

172 Of course, at some point the quantum of damages may result in action being taken against those responsible. However, this is unlikely in many instances where a cy-près type remedy might be sought.

173 See Sasso, above n 61, 18.

invariably settles these cases, agrees to pay the class plaintiff's lawyers their fees, which often run into millions of dollars.[174]

The coupon class action has become so discredited in the US that Congress finally took action in 2005 by enacting the *Class Action Fairness Act of 2005*, Pub L No 109-2, 119 Stat 4. Coupon settlements must now be scrutinised by an independent expert before judicial approval in order to ensure that the settlement will be of value to the class members[175] and, if the action provides for settlement in coupons, that the class plaintiff's lawyers' fee will be assessed by reference to the value of the coupons actually redeemed by class members.[176]

Some Australian plaintiff lawyers expressly condone a US-style 'coupon' or 'voucher' system as a way of facilitating *de minimis* claims.[177] As can be discerned from the extracts of the ALRC report above, such a system is contrary to the legislative aims of class actions as provided for in Australia and would achieve nothing beyond providing a mechanism for class action promoters to identify potential cases and then pursue them for no real benefit beyond their personal enrichment.

Even outside the coupon settlement context, cy-près distributions have received a 'mixed reception' in the US, with such distributions remaining 'controversial and unsettled in an adjudicated class action context'[178] while being generally permitted in the settlement context — although both are statutorily permitted in Canada.[179] A further problem with the cy-près proposal is that it would require the courts to make what are subjective public policy determinations in relation to where monies might be allocated. In the authors' opinion, this is more properly a matter for the legislature, particularly since cy-près damages were expressly rejected when introducing Australia's otherwise 'plaintiff-friendly' class actions procedure.

Moreover, the VLRC has proposed that the court's powers be largely unfettered. For example, it suggests that the court's power should not be limited to distribution of money for the benefit of group members (or those with the general characteristics of group members), and that its general discretion should not be limited to any proposal or agreement of the parties. Rather, it should have the discretion to act as it sees fit. The fact that the VLRC has coupled this with a

174 For example, in the settlement of one US class action, a manufacturer agreed to redesign its product (which it had undertaken to do independently of the lawsuit), class members received no compensation, and class counsel received almost $20 million in fees. Gary Sasso also refers to a US class action against a bank where class members actually *lost* money because the court allowed the bank to deduct $8.5 million in attorneys' fees from the accounts of the 300 000 class members who joined the settlement. These class members were also denied a rehearing: *Kamilewicz v Bank of Boston Corporation*, 100 F 3d 1348 (7th Cir, 1996).

175 *Class Action Fairness Act of 2005*, 28 USC §1712(d) (2006).

176 *Class Action Fairness Act of 2005*, 28 USC §1712(a) (2006).

177 See, eg, Parker, above n 62, 7.

178 Mulheron, *The Class Action in Common Law Legal Systems*, above n 103, 429, quoting Herbert Newberg and Alba Conte, *Newberg on Class Actions* (4th ed, 2002) 28.

179 Mulheron, *The Class Action in Common Law Legal Systems*, above n 103, 428, citing *Class Proceedings Act*, SO 1992, c 6, ss 26(4), (6). See also Mulheron at 426–32.

proposal that such a decision cannot be the subject of a general appeal[180] only emphasises the arbitrary and unsatisfactory nature of the proposed power.

Finally, the current statutory policy is in direct contrast to this proposal. Not only is there no statutory warrant for such an approach, ss 33M and 33N — which empower the court to strike out a class action, for example, where the cost of identifying group members and distributing any award would be excessive having regard to any likely award — actually *preclude* this approach, such that the VLRC concedes that any 'legislative power to grant cy-près relief would need to be applicable notwithstanding [these] provisions'.[181]

Having regard to what is proposed, it is clear that the introduction of such a power would constitute a radical departure from what was envisaged at the time the Australian class action system was introduced. It would inevitably lead to a proliferation of class actions that would, in truth, benefit nobody directly other than the lawyers promoting and litigating the actions. Indeed, the suggestion that the so-called 'Justice Fund' might be the recipient of 'compensation' payments[182] made in these actions only serves to support this view. The cost to business would be considerable, and would inevitably be passed on to the consumer. If additional consumer protection is required, it should be provided by appropriate regulation and not by self-styled 'private attorneys-general'.

D *Costs and Funding*

1 *Changes to Costs Rules*

> *It has been proposed that the 'costs follow the event' rule not apply to (unsuccessful) class action applicants. Alternatively, it has been proposed that the quantum of applicants' exposure to costs be the subject of a statutory maximum.*

It is the authors' view that the existing costs regime has led to results that are unfair to respondents and that the changes proposed would only exacerbate that injustice. The fact that impecunious persons have acted as representative applicants and the historical reluctance of the courts to order security for costs in class actions has meant that, in practice, successful respondents have been unable to recover costs from unsuccessful applicants. Indeed, those who advocate these changes have themselves conceded the difficulties that successful respondents already face in recovering costs from class representatives of limited means.[183] It is also important to recall that those who advocated the introduction

[180] VLRC, above n 10, 560. The VLRC would restrict the right of appeal to one based on the principles in *House v The King* (1936) 55 CLR 499: at 554.

[181] VLRC, above n 10, 552. It is useful to compare the discretion conferred on the Court by s 33N(1) — which, it will be recalled (see above Part II(B)), has been criticised by some as being too wide — with that proposed by the VLRC in respect of cy-près remedies. The latter is guided only by the Court's assessment of what it 'sees fit' to do: at 559–60. On the other hand, the former is guided by specific criteria: it must be in the interests of justice to strike out the representative form of an action *because* of certain, specified circumstances making a class action inappropriate (ss 33N(1)(a)–(c)) or because of any other reason making it inappropriate to proceed in class form (s 33N(1)(d)).

[182] VLRC, above n 10, 560.

[183] VLRC Civil Justice Enquiry, above n 69, 53.

of class actions argued that the costs disincentive to class representatives (who must theoretically pay respondents' costs in the event of losing a case) would have the effect of preventing a flood of speculative, US-style class action litigation.[184]

Similarly, and perhaps more importantly, the 'loser pays' costs rule was relied upon as a safeguard against applicants commencing unmeritorious class actions in the hope of forcing a settlement (so-called 'blackmail suits').[185] The risk that applicants would have to meet the respondents' costs if the claim failed was considered essential since, in the ALRC's view, the class action procedure 'is not likely to be used unless the chances of success are at least 50% or some form of legal assistance, which includes an indemnity for the respondent's costs if the case is lost, is available.'[186]

As Damian Grave and Ken Adams point out, given that representative parties and not group members are exposed to costs,

> [t]here is a clear financial disincentive for a person to be the representative party rather than a group member …
>
> [However] there is no empirical evidence as to the effect of the financial disincentive on the commencement of perceived meritorious claims. It is not surprising that most claimants would prefer to be group members. It is a different proposition to demonstrate that a representative proceeding with good prospects of success was not commenced because no person was willing to be the representative party …
>
> The role of representative party may appeal to some for personal reasons notwithstanding the financial disincentive …[187]

As with many of the issues relating to class action practice and procedure that are in dispute, there is an absence of data to support the contentions advanced. While many have argued that the risk of an adverse costs order acts as a disincentive to the commencement of meritorious proceedings,[188] there has never been a specific example given of a case where this occurred in Australia, nor to the authors' knowledge, elsewhere. That is not to say that potential representative plaintiffs do not think long and hard before taking on the role and give careful consideration both to the merits of the claim and the potential consequences if it fails. However, that is precisely what should occur. In the absence of any evidence that the financial disincentive — which the ALRC hoped would deter

184 Murphy and Cameron, above n 8, 410.

185 Law Reform Commission, *Report Summary*, above n 37, 9, 11.

186 Law Reform Commission, *Grouped Proceedings Report*, above n 2, 142. See also at 144–5. As the ALRC acknowledged, this is because retaining the usual costs rule means that applicants are liable for higher costs than if they bring individual proceedings: at 130.

187 Grave and Adams, above n 70, 139–40.

188 The authors acknowledge that there is considerable support for this view amongst both commentators and law reform bodies: see, eg, Murphy and Cameron, above n 8, 411, referring to a recommendation to exclude the 'costs follow the event' rule in Victorian class actions made by Morabito and Epstein, above n 9; Manitoba Law Reform Commission, above n 159, 75; Alberta Law Reform Institute, above n 159, 144; Vince Morabito, 'Federal Class Actions, Contingency Fees and the Rules Governing Litigation Costs' (1995) 21 *Monash University Law Review* 231, 232–3; cf Mulheron, *The Class Action in Common Law Legal Systems*, above n 103, 445.

unmeritorious claims — has deterred the pursuit of *meritorious* claims, there is simply no basis for removing this key safeguard.

Indeed, far from justifying any changes to costs rules that would tip the balance further in favour of applicants, there have been calls — which, in the authors' opinion, are well-founded — for legislative reform from those representing respondents. It has been suggested that the court should be permitted to order costs against group members in appropriate circumstances.[189] Save for the possible exception of 'limited group' class actions,[190] this would seem to be impractical in an opt out system. It does, however, emphasise the importance of the court having and being prepared to exercise the power to order security for costs in appropriate cases.

2 *Security for Costs*

> *It has been proposed that Parliament reverse the decision of the Full Federal Court in* Bray *by providing that only the applicant's resources are relevant to the determination of a security for costs application brought by a class action respondent.*

As explained in Part III(D)(2) above, the plaintiff lawyers proposing this change argue that taking into account group members' characteristics, in the sense of the group as a whole, in determining whether to make an order for security for costs[191] undermines the intent of Part IVA, in particular the general prohibition on making costs orders against group members.[192]

Part IVA specifically provides that nothing in that Part affects the operation of any law relating to security for costs.[193] As the Full Federal Court observed,

> an order providing reasonable security for costs [does not operate] indirectly to remove the effect of the immunity provided by s 43(1A). It is one thing for a group member to be saddled with an order for what might be joint and several liability for a very substantial costs order at the end of the hearing of a [class action], but it is another thing to have the choice of contributing what might be a modest amount to a pool by which the applicant might provide security for costs. It is a question of balancing the policy reflected in s 43(1A) against the risk of injustice to a respondent … which, on the admitted facts, has no chance of recovering very substantial costs from the applicant if it is successful in defending the proceedings.[194]

189 For example, where an impecunious person is selected as the representative party to protect wealthy group members from adverse costs orders: Grave and Adams, above n 70, 127, 138.

190 It has been suggested that the policy reasoning behind the costs immunity of group members does not apply to a limited group where group members positively elect to join proceedings, such that those group members should be liable for any adverse costs orders: see Michael Legg, Vanessa McBride and S Stuart Clark, 'The New South Wales Representative Proceeding: A Class Action Half-Way House' (2008) 12 *University of Western Sydney Law Review* (forthcoming).

191 As held in *Bray* (2003) 130 FCR 317, 374–5 (Finkelstein J). See also at 349–50 (Carr J), 361–2 (Branson J).

192 *FCA Act* s 43(1A); *VSC Act* s 33ZD(b).

193 *FCA Act* s 33ZG(c)(v).

194 *Bray* (2003) 130 FCR 317, 348 (Carr J). See also at 361–2 (Branson J), 374 (Finkelstein J).

In the authors' submission, the Full Federal Court's balancing of the interests of both group members and respondents *effects*, rather than undermines, the intent of Part IVA[195] to ensure that respondents are sufficiently protected in class actions, as reflected by the inclusion of provisions which provide group members with a general costs immunity on the one hand but protect respondents by a possible security for costs order on the other. The Court recognised that, given the impecuniosity of the applicant in that case, somebody else must have funded the litigation — most probably the applicant's lawyers — and (at least in that case) the fact that such lawyers stood to gain a success fee was a relevant factor in granting security.[196]

It has been asserted that impecunious persons are not deliberately selected as representative applicants in class actions.[197] While there is currently no systematic empirical data available as to its prevalence in Australia, there is evidence that this tactic has been employed in some cases. Indeed, the possibility that a plaintiff lawyer may even have an obligation to consider this course has been raised:

> 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![198]

The Federal Court ordered security for costs in favour of the respondents in a case where the class applicant was an impecunious incorporated organisation which the Court found was specifically established 12 days before commencement of the proceedings so as to avoid a potential adverse costs order.[199] An order for security for costs was also made in a case concerning allegedly defective harvesters against a corporate applicant of 'extremely modest resources' (unlike its directors) which, it appeared to the Court, may have been selected as class representative to avoid the risk of an adverse costs order.[200] As has already been observed, an order for security for costs in the context of a class action will only be made in the most extreme case.

Given the evidence that the practice has in fact occurred, the authors support the ALRC's recommendation that followed its review of Part IVA in 2000 that the Federal Court

> consider drafting guidelines or a practice note, relating to the practices of lawyers and parties in representative proceedings, addressing [inter alia] … the

195 *Contra* Murphy and Cameron, above n 8, 420–1.
196 *Bray* (2003) 130 FCR 317, 348 (Carr J), 375 (Finkelstein J).
197 Murphy and Cameron, above n 8, 421.
198 *Cook v Pasminco Ltd [No 2]* (2000) 107 FCR 44, 50 (Lindgren J).
199 See *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004 (Unreported, Wilcox J, 14 September 2001) [2], [4], [69], [74].
200 *Nendy Enterprises Pty Ltd v New Holland Australia Pty Ltd* [2001] FCA 582 (Unreported, Whitlam J, 9 November 2001) [4], [7].

choice of the representative party, who should not be chosen primarily as a 'person of straw'.[201]

3 *Third Party Funding*

It has been proposed that lawyers be allowed to enter into true contingency fee agreements.

(a) The ALRC's Proposals

In considering the proposals that have been made in relation to funding class actions, it is helpful to first consider the fee and funding structures which were recommended by the ALRC but not adopted in Part IVA.

Specifically, the ALRC proposed that plaintiff lawyers be allowed to offer fee agreements that provided that no fees would be paid if the case was lost but a 'higher than normal fee' — although not calculated as a percentage of the verdict/settlement — would be paid if the case succeeded. The uplift was intended to compensate for the risk of being paid nothing if the case failed.[202] These 'no win–no pay' uplift agreements were adopted by plaintiff lawyers.

The ALRC also recommended that:

- the legislation make provision for successful group members to contribute to the balance of the applicant's solicitor–client costs not covered by the respondent's payment of party–party costs;[203] and
- that those costs be approved by the court as being fair and reasonable, with prior notice of the application for approval being given to group members.[204]

However, these aspects of the proposal were not included in Part IVA.

The ALRC also considered that public funding might be required to help overcome the costs barriers in 'individually non-recoverable' cases, and thus recommended that a special statutory fund be established.[205] This proposal was also not adopted in Part IVA.

(b) Commercial Litigation Funding and Contingency Fees for Lawyers

The decision of the High Court to remove the shadow that lingered over commercial litigation funding has led to the emergence of a new norm in class actions funded by third parties. The vast majority of shareholder class actions commenced in Australian courts since 2005 are being funded by commercial

201 ALRC, *Managing Justice Report*, above n 22, 492 (Recommendation 78).

202 Law Reform Commission, *Report Summary*, above n 37, 11–12. See also Law Reform Commission, *Grouped Proceedings Report*, above n 2, 118. This is effectively an uplift or 'no win–no pay' agreement, although the ALRC called it a 'contingent' fee agreement, the contingency being success in the case.

203 Law Reform Commission, *Grouped Proceedings Report*, above n 2, 113–14.

204 Ibid 121; ALRC, *Managing Justice Report*, above n 22, 489, 491.

205 Law Reform Commission, *Grouped Proceedings Report*, above n 2, 123–4; Law Reform Commission, *Report Summary*, above n 37, 12. The ALRC envisaged that this fund would be established under statute and funded by parliamentary appropriations, and possibly also by way of interest or unclaimed residue from aggregate awards: see Law Reform Commission, *Grouped Proceedings Report*, above n 2, 128.

litigation funders.[206] Now that the High Court has dispelled the public policy concerns that existed in relation to litigation funding and accepted the concept of a true contingency funding agreement, the prohibition on lawyers entering into contingency fee agreements should be removed. In the authors' opinion, there are no sound public policy reasons for such a prohibition, particularly as lawyers — including their fee and retainer agreements with clients, unlike litigation funders and their agreements — are highly regulated, and removing the prohibition would significantly increase competition in the funding market.[207]

Subject to two concerns, the authors believe that the development of the litigation funding industry has worked to enhance access to justice, particularly when lawyers are prohibited from entering into true contingency fee agreements. The first concern is that there is, as yet, no regulation of litigation funders, who have a direct financial interest in any amount awarded to group members.[208] However, it is expected that some regulation will be introduced.[209]

The second concern is that, while contingency fee agreements have obvious benefits for applicants in terms of access to justice, they can also generate enormous fees for the promoter. The concern in relation to this issue is not the simple fact that the fees are large, but that they are negotiated unfairly. If promoter and applicant have struck a bargain that delivers those returns in the context of a truly competitive market where both parties have the opportunity to negotiate on equal terms and with a proper understanding of the terms of the agreement, there can be no concern.

Whenever this issue is raised, one inevitable response is to assert that respondent lawyers are also well remunerated for their work. This is, no doubt, correct. However, unlike those acting for plaintiffs, respondent lawyers operate in a highly competitive market where the in-house counsel of their corporate clients closely scrutinise both rates and every other aspect of their bills. This is not the case for promoters of class actions, where there are as yet few promoters or law firms offering to conduct the proceedings, no real opportunity for individuals to negotiate rates or regular independent scrutiny of the work being undertaken, nor scrutiny of the bills issued by lawyers who are experts in the field.[210]

206 The authors' analysis of shareholder class actions commenced in Australia reveals that most of these actions are being funded by IMF (Australia) Ltd. This was confirmed in conversation with a partner at Slater & Gordon on 6 February 2009. See IMF (Australia) Ltd's webpage <http://www.imf.com.au/caseoverview.asp> for a list of actions, including class actions, funded by the company.

207 See Stuart Clark and Michael Legg, 'The Continued Rise of Litigation Funding' (2006) 22(9) *Company Director* 34, 36; Stuart Clark, '*Fostif* Decision Opens Contingency-Fee Can of Worms', *The Australian Financial Review* (Sydney), 29 September 2006, 58.

208 According to the Standing Committee of Attorneys-General, the lack of such regulation is problematic because funded parties 'may not always have legal knowledge, and may not be well placed to negotiate a funding contract, to assess the terms they agree to, or to retain adequate control over the proceedings', and 'existing consumer protections may be insufficient' to protect funded parties: Standing Committee of Attorneys-General, above n 81, 8.

209 The regulation of litigation funding is an issue currently before the Standing Committee of Attorneys-General: see Attorney-General for Australia, *Australian Financial Review Legal Conference* (2008) <http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_17June2008-AustralianFinancialReviewLegalConference>.

210 The only protection available to group members is that the court will consider the issue of plaintiff lawyers' costs in the context of determining whether to approve any settlement. This is

While there has been much written on the subject of contingency fees in the US context,[211] Australian contingency fee agreements are potentially even more promoter-friendly than those in the US. This is because, in addition to the agreed percentage of the verdict or settlement, the Australian promoter also receives the benefit of any order for costs made against the respondent,[212] whereas US lawyers are reimbursed their professional costs out of the percentage of the verdict they receive.

Australian class action litigation has become extraordinarily profitable. This is reflected in:

- increased international competition in the litigation funding market as North American litigation funders have entered the market;[213] and
- a $35 million float in May 2007 which saw one of Australia's most prominent class actions firms, Slater & Gordon, become the first law firm in the world to become publicly listed.[214]

We now have a situation where a number of the entities promoting class action litigation in Australia — the major funders and Slater & Gordon — are publicly listed corporations with the attendant pressure to deliver profits and grow shareholder wealth. Australian class action promoters' concern to maximise profits can also be seen in their recent attempts to narrow group membership to applicants who enter funding arrangements with them, ensuring that every group member pays the funder a substantial proportion of any monetary relief obtained and costs if the case succeeds. However, many, including the VLRC, agree that commercial litigation funding comes at a high price and on terms which run

due to the fact that a class action cannot be settled without approval of the court: *FCA Act* s 33V. The court has power to make any (costs) order it thinks necessary: *FCA Act* s 33ZF. Further protection is afforded by the rights a group member has to seek a review or taxation of costs (*FCA Act* s 53AB) — all of which is effectively long after the event.

211 See, eg, Mulheron, *The Class Action in Common Law Legal Systems*, above n 103, 468–71.

212 Australian litigation funding agreements provide for the benefit of such a costs order to be assigned to the funder. For example, cl 1 of the sample IMF (Australia) Ltd multi-party *Investigation, Management & Funding Agreement*, available from <http://www.imf.com.au/forms/IMF_FundingAgreement_Multiparty080806_sample.pdf>, defines resolution sum as:

> the amount or amounts of money or the value of goods, services or benefits for which the Claims are Settled, or for which Judgment is given of for which a proof of debt is admitted in favour of the Applicant in any Proceeding and includes any interest and costs recovered pursuant to a Costs Order or by agreement.

The Agreement then directs that all resolution sums be paid into the trust account to be held for the benefit of IMF (Australia) Ltd: cl 9.1(b).

213 For example, US company Commonwealth Legal Funding LLC is providing funding in *Kirby v Centro Properties Ltd* [2008] FCA 1505 (Unreported, Finkelstein J, 10 October 2008): see Slater & Gordon Lawyers, 'US Funder for Centro Class Action' (Press Release, 22 April 2008) <http://www.slatergordon.com.au/docs/MediaReleases/Centro%20Properties%20Group.pdf>. Canadian funder International Litigation Funding Partners Inc is funding the group members in the *Multiplex* litigation: *Multiplex First Instance* (2007) 242 ALR 111, 112, 119 (Finkelstein J); *Multiplex Appeal* (2007) 164 FCR 275, 280 (Lindgren J), 286 (Jacobson J). This class action is ongoing in the Federal Court.

214 A lawyer from that firm stated that the initial public offering was effectively asking the public 'to invest in [the firm's] capacity to keep making money': see Shaun Drummond, 'Familiar Waters for ABL in Public Float', *Lawyers Weekly* (online), 17 May 2007 <http://www.lawyersweekly.com.au/articles/Familiar-waters-for-ABL-in-public-float_z69565.htm>.

counter to the philosophy underlying the introduction of the opt out scheme.[215] This would only be exacerbated by the introduction of limited or opt in class actions, said to be necessary to address the supposed disincentives to bringing a class action and to ensure that group members do not free-ride but rather contribute to the cost of the action.[216]

A better solution would be legislation adopting the US 'common fund' approach to the remuneration of the class lawyers. The 'common fund' doctrine developed in the US allows the applicant's lawyer to recover reasonable fees from an award in favour of the class even though the lawyer has no contract or retainer with the individual group members.[217] This is a better approach not only because it prevents free-riding while maintaining the opt out system, but also because it ensures that the court determines what is a reasonable fee rather than leaving it to 'negotiation' between funder and group member.[218] A similar result could be achieved by adopting the ALRC's proposal to allow fee agreements which provide for successful group members to contribute to the applicant's costs, but which must be approved by the court as being fair and reasonable.[219] The ALRC's proposal expressly adopted the US approach and its premise — namely that, although group members may not have expressly retained the applicant's lawyer, it is only fair that they contribute to the costs of the action where damages or settlement monies are obtained.[220]

While a successful applicant may already apply to the court for an order that any shortfall between their solicitor–client costs and the costs recoverable from the respondent be met from damages awarded to the class,[221] this does not apply to settlements[222] and places the costs burden on the applicant. This is in contrast to the common fund approach which would, subject to court approval, allow class action promoters to take a share of all group members' recovery to fund the class action.

The common fund approach as applied in the US has itself been the subject of criticism for a variety of reasons. For example, it is sometimes criticised as being overly generous to the class lawyer and on other occasions because it leaves the plaintiff lawyer in the unsatisfactory position of not knowing how their remuneration will be calculated (whether as a percentage of the total fund or a multiplier of work actually done, the latter requiring much judicial effort to determine the extent and reasonableness of work done).[223] It is beyond the scope

215 VLRC, above n 10, 615–16, 676.
216 Ibid 524–8, 556.
217 *Boeing Co v Van Gemert*, 444 US 472, 478–9 (Powell J for Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell and Stevens JJ) (1980).
218 See further Legg, above n 136, 488.
219 Law Reform Commission, *Grouped Proceedings Report*, above n 2, 113–14, 121.
220 Ibid 119–20.
221 *FCA Act* s 33ZJ; *VSC Act* s 33ZJ.
222 Section 33ZJ can only be invoked where the court has made an award of damages: *FCA Act* s 33ZJ(1); *VSC Act* s 33ZJ(1). This is a so-called 'glitch' that has attracted criticism from some plaintiff lawyers: see, eg, VLRC, above n 10, 677.
223 Deborah R Hensler et al, *Class Actions Dilemmas: Pursuing Public Goals for Private Gain* (2000) 77–9.

of this article to explore the finer details of such an approach.[224] However, it is submitted that such an approach would ensure real access to justice while allowing the court to ensure the reasonableness of fees paid by group members to class action promoters, thereby removing much of the criticism currently levelled at plaintiff lawyers.

(c) Uplift Fees for Lawyers

> *It has been proposed that the rules relating to success fees be changed. In particular, there should be a 'significant' increase in the statutory maximum uplift that plaintiff lawyers may charge over and above their 'normal' fees.*

As discussed in Part III(D)(3)(b), uplift fee agreements (or 'no win–no pay' agreements) were until recently the norm, with plaintiff lawyers using a range of strategies to maximise the amount they could charge as their so-called 'normal' fee under the rules. These agreements are not subject to the approval of the court,[225] although fee agreements have been tendered in applications for approval of class action settlements, where the court must consider the reasonableness of costs to be paid as part of the proposed settlements.[226]

There is a very real concern as to the ability of many group members to fully appreciate the consequences of what are typically complex agreements, let alone to negotiate their terms. Indeed, the authors have been provided with copies of an uplift fee agreement that was utilised by a prominent Australian plaintiff law firm in the Democratic Republic of the Congo in relation to an Australian class action involving an Australian-based company operating in the Congo. It is hard to believe that the provisions of the *Legal Profession Act 2004* (Vic) were understood by the villagers who signed the agreements, notwithstanding the fact that they had been translated into French!

For this reason alone, the authors endorse the ALRC's recommendation that the court be empowered to approve fee agreements between the applicant and/or group members and the applicant's lawyers at any stage of proceedings.[227]

224 For example, the ALRC proposal was that fee agreements only allow an uplift fee: Law Reform Commission, *Grouped Proceedings Report*, above n 2, 123, 181. In contrast, fees under the US common fund are calculated either on a contingency basis (that is, a percentage of damages of settlement monies) or pursuant to the 'lodestar' method (based on the work actually done with a multiplier): see Mulheron, *The Class Action in Common Law Legal Systems*, above n 103, 469–70.

225 This is in contrast to the position in the US and Canada, where fee agreements with class representatives and class members must be approved by the court: see Mulheron, *The Class Action in Common Law Legal Systems*, above n 103, 477–9. In Canada, this is mandated by the *Class Proceedings Act*, RSBC 1996, c 50, ss 19(6)(e), 38(1), (2); *Class Proceedings Act*, SO 1992, c 6, ss 17(6)(d), 32(1), (2). In the US, see *Mills v Electric Auto-Lite Co*, 396 US 375, 391–2 (Harlan J for the Court) (1970). See also *Boeing Co v Van Gemert*, 444 US 472, 478 (Powell J for the Court) (1980).

226 See *FCA Act* s 33V; *VSC Act* s 33V.

227 See Law Reform Commission, *Grouped Proceedings Report*, above n 2, 121; ALRC, *Managing Justice Report*, above n 22, 489, 491, 493 (Recommendation 80). Approval should ideally occur before the opt out date to enable group members to make an informed choice about whether to remain in the class: ALRC, *Managing Justice Report*, above n 22, 490.

(d) Establishment of a 'Justice Fund'

> *It has been proposed that a new statutory funding body, the Justice Fund, be established to provide financial assistance to class action applicants and to provide a limited indemnity for any adverse costs order or order for security for costs made against such applicants.*

The VLRC suggests that its 'Justice Fund' would address the failure to establish the class action fund recommended by the ALRC.[228] However, the Fund has been described as '[p]robably the most controversial aspect' of the VLRC's proposals,[229] and for good reason.

First and foremost, the proposed fund is unnecessary in light of the emergence of both commercial litigation funders that provide funding to class action applicants and the 'no win–no pay' arrangements with plaintiff law firms.[230] In fact, the VLRC itself concedes that the 'void' arising as a consequence of Parliament's failure to establish a statutory class action fund has been filled by commercial litigation funders who are prepared to finance cases, provide security for costs and provide indemnity for adverse costs.[231]

Secondly, depending upon the rules that are established for the deployment of funds and the attitude of those controlling the Fund, it is possible that the proposed Fund would become a funder of last resort, funding the less meritorious claims rejected by commercial litigation funders.[232] Litigation funders are businesses established to generate profits. As a consequence, they understandably will only fund actions that have an acceptable prospect of success and return on investment.

Thirdly, the Fund would be allowed to seek an order 'capping' the amount of costs that a respondent would be entitled to recover from an unsuccessful applicant.[233] This has been proposed in order to ensure the Fund's financial viability.[234] The legislation establishing the New South Wales Legal Aid Commission has a similar — albeit automatic — provision,[235] the operation of which has often demonstrated the injustice that can arise. A particularly egregious example is the Gravigard litigation,[236] a quasi class action which resulted in first instance verdicts for the defendants in each claim.[237] A limited grant of legal aid

228 VLRC, above n 10, 614.

229 See Mallesons Stephen Jaques, *Class Actions Bulletin* (July 2008) <http://www.mallesons.com/publications/update-combine.cfm?id=1414302>.

230 Similar submissions were made to the VLRC by various respondent law firms in opposition to the proposed fund: VLRC, above n 10, 621.

231 Ibid 615–16, 676. The VLRC, however, takes issue with litigation funders limiting participation in class actions to group members who enter funding agreements with them, because this compromises the opt out system.

232 See submission made to the VLRC by Corrs Chambers Westgarth in opposition to the proposed Fund: ibid 621.

233 Ibid 691.

234 Ibid 690–1.

235 See *Legal Aid Commission Act 1979* (NSW) s 47.

236 *Denzin v The Nutrasweet Co* [1999] NSWSC 106 (Unreported, Bruce J, 22 February 1999). One of the authors was the solicitor for the defendants.

237 These first instance verdicts were subsequently set aside and new trials ordered after counsel for the defendants conceded that the reasons provided by the trial judge in his judgment were inade-

was made a few days before the start of a two-year trial (and some years after the proceedings commenced), which had the effect of limiting the amount that could be recovered by the defendants to $12 000 in relation to each of the 10 lead plaintiffs.

E *Claims against Multiple Respondents*

> *It has been proposed that there be no requirement that all group members have legal claims against all respondents in class action proceedings, but merely that each group member must have a legal claim against at least one of the respondents (there being disagreement between plaintiff lawyers as to whether or not the representative applicant must have claims against each respondent).*

In the authors' opinion, preservation of a legal requirement that all group members have legal claims against all respondents in class action proceedings is essential to ensuring the efficient and fair conduct of class action litigation. It is a cornerstone of the present regime. So much is clear from the unanimous decision of the Full Federal Court in *Philip Morris*, as discussed in Part III(E) above.[238]

Some plaintiff lawyers argue that the Full Court in *Philip Morris* merely affirmed a concession made by counsel for the applicant in that case and that the obiter comments made by a later Full Court majority in *Bray*, which disapproved of the decision in *Philip Morris*, should be preferred.[239] With respect, the Full Court in *Philip Morris* accepted the parties' concession that s 33C(1)(a) requires that each group member have a claim against each respondent on the basis that the concession

> follows from the language of s 33C(1)(a) itself and is consistent with the approach taken by the [ALRC] in [its *Grouped Proceedings Report*]. It is also consistent with the structure of the legislation. For example, s 33D(1)(a) (which provides that a person who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding *against that person* on behalf of other persons referred to in s 33C(1)(a)) is clearly drafted on the assumption that all applicants and represented persons will have claims against the same person.[240]

The Full Court had earlier in its decision analysed the relevant parts of the *Grouped Proceedings Report*[241] and concluded that the ALRC, based on a concern to ensure that the class action procedure was effective,

> plainly did not envisage that the … procedure could be employed to bring a proceeding against more than one respondent, in circumstances where some

quate: see *Moylan v The Nutrasweet Co* [2000] NSWCA 337 (Unreported, Sheller, Beazley and Giles JJA, 24 November 2000) [15], [80] (Sheller JA). The term 'quasi class action' has been used to describe a procedure adopted to deal with mass tort claims prior to 1992. The Gravigard litigation was conducted by way of trying the cases of 'lead plaintiffs' whose claims were said to be 'representative' of the claims of some 265 other plaintiffs. It was hoped that the determination of the cases of the lead plaintiffs would resolve the claims of all.

238 See above nn 94–102 and accompanying text.

239 See, eg, Murphy and Cameron, above n 8, 425 fn 111, 426.

240 *Philip Morris* (2000) 170 ALR 487, 514 (Sackville J) (emphasis in original).

241 Ibid 511.

> members of the group make a claim against one respondent only and others make a claim against another respondent.[242]

In the authors' view, this reasoning is more persuasive than that of the Full Court majority in *Bray*, which reasoned that the result in *Philip Morris* was 'so undesirable that it should be avoided at all costs unless … parliament has mandated it in clear and unambiguous language',[243] and that 'there are sufficient procedural safeguards in s 33C(1)(b) and (c) to protect the integrity of the court's processes' and against misuse of the class action procedure.[244]

Rather than being a safeguard against abuse of the procedure, the authors understand that the requirement that each group member have a claim against each respondent operates to ensure some degree of commonality in class actions, and should be preserved in the interests of efficiency and to ensure fairness for all parties.

In respect of the former, individual issues of fact and law are exacerbated in a class action proceeding involving numerous group members and multiple respondents. The ALRC in its *Grouped Proceedings Report* emphasised the necessity of ensuring that group members' causes of action be sufficiently connected to be conducted efficiently together. Consequently, it recommended that the connecting factors be: an identity, similarity or relatedness of the facts giving rise to the claims; and at least one question common to all claims.[245] In making this recommendation, the ALRC expressed concern that a test based solely on common or related circumstances would not ensure that the advantages of grouping were not outweighed by diversity and unmanageability of the issues.[246]

Adopting the majority opinion in *Bray* (rather than the unanimous decision in *Philip Morris*) would increase the risk that differing claims would be included in such a proceeding and thus the risk of an increase in the cost, length and complexity of the class action. Indeed, even the VLRC identified this as an area of contention and acknowledged submissions that this may lead to increased costs and delays in class action litigation.[247] In terms of fairness, a party brought in as a respondent into a class action where group members make different claims against different respondents faces the prospect that its claim will not be determined in a speedy, just and efficient manner. By reason of its joinder, that respondent will incur costs associated with and generated by its mere (long term) presence in the proceedings.[248]

The Australian class action system already allows claims of a complexity that is simply not allowed in the US, where the common issues are required to predominate over the individual issues.[249] Without this requirement, the Austra-

242 Ibid 512.
243 *Bray* (2003) 130 FCR 317, 373 (Finkelstein J).
244 Ibid 345 (Carr J). See also at 344 (Carr J). *Contra* 358–9 (Branson J dissenting on this point).
245 Law Reform Commission, *Grouped Proceedings Report*, above n 2, 57–60.
246 Ibid 59.
247 VLRC, above n 10, 529.
248 Ibid 530 (Clayton Utz's submission to the VLRC).
249 *Federal Rules of Civil Procedure* r 23(b)(3) (2007).

lian class action system can be used to litigate claims where, in the final analysis, the question of liability to each group member will turn on factors that are unique to that individual. Take, for example, a class action involving an allegedly defective drug or medical device. While there may be a number of common issues that can be determined, ultimate liability may turn on a myriad of issues unique to each patient, including the warnings that they were given, their underlying medical condition or interactions with other drugs they were taking. Where such a claim is tried as a class action in Australia, the court will determine the representative applicant's claim and, if they succeed, the parties face the prospect of further litigation in relation to the subsequent group members unless a 'global settlement' can be achieved.[250] It is for this reason that the courts in the US have consistently refused to allow drug and device claims to proceed to trial as class actions.[251] To add yet another level of complexity to the mix, by joining different group members potentially having different claims against different respondents, will ultimately serve only to further increase costs and reduce the likelihood of speedy and efficient resolution of claims.

To the extent, therefore, that the law in this area requires clarity, the authors suggest that s 33C(1) be amended to specify that each group member must have a claim against each respondent.

F *Communications with Group Members*

1 *Opt Out Notice*

It has been proposed that the court publish guidelines concerning the form and content of notices to group members.

With respect, the authors support the view expressed by the ALRC at the conclusion of its review of Part IVA in 2000 that the question of the form and content of class notice is best left to be determined by the court on a case-by-case basis.[252]

Some plaintiff lawyers have made complaints in relation to disputes which have arisen regarding their proposed wording of, and costs associated with, class notices. First, they cite two cases where the respondents allegedly propounded changes to the text of the notices that were intended to influence recipients to opt out of the proceedings.[253] However, in both cases the Court agreed with the

[250] The Federal Court faced this prospect in the first such case to proceed to trial, the *Courtney v Medtel Pty Ltd* litigation. The Court determined the claim of Mr Courtney and it was then left to the parties to resolve the balance of the class claims: *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219.

[251] See, eg, *Re Northern District of California, Dalkon Shield*, 693 F 2d 847, 853 (Goodwin J) (9th Cir, 1982). See also the examples cited in Mulheron, *The Class Action in Common Law Legal Systems*, above n 103, 183 fn 113: *Re American Medical Systems Inc*, 75 F 3d 1069, 1085–6 (Suhrheinrich J) (6th Cir, 1996); *Valentino v Carter-Wallace Inc*, 97 F 3d 1227, 1235 (Schroeder J) (9th Cir, 1996).

[252] ALRC, *Managing Justice Report*, above n 22, 484, 484 fn 288.

[253] Murphy and Cameron, above n 8, 432, citing: *King v GIO* (form of opt out notice proceeding) [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) ('*King v GIO*

respondents' objections to the applicants' proposed wording and found that the text proposed by the applicants was, in fact, misleading. In one case the Full Federal Court,[254] and in the other a single judge of the Federal Court,[255] were of the view that to render the notices accurate, group members had to be informed about the limited extent of representation by the applicant's lawyers and the costs consequences of not opting out — that is, that the applicant's lawyers may seek an order under s 33ZJ for payment of their costs out of any damages award, and that the applicant's lawyers would not act for group members who seek to prove their individual loss unless retained by group members. It is submitted that the Courts' changes to the notices is testament to the substance of the respondents' objections and the hidden complexities of an opt out system.

Secondly, some plaintiff lawyers have suggested that respondents advocate extensive and prohibitively expensive forms of notice,[256] citing the Longford class actions as one such instance where multiple large advertisements were published in newspapers throughout Australia.[257] Again, an examination of the facts reveals that notice had to be published twice because the applicant originally commenced proceedings in the Federal Court but had to re-advertise (and specifically notify persons who had opted out of the Federal Court action or had registered an interest with the applicant's lawyers in that action) when the matter was transferred to the Supreme Court of Victoria.[258] The group was also broadly described by the applicant as all persons and businesses in Victoria which used gas supplied from the Longford Plant on 25 September 1998 and suffered damage as a result of the explosion which occurred on that day, such that '[t]he number of members could run into millions.'[259] Consequently, both the Federal Court and Victorian Supreme Court determined that it was appropriate that there be 'extensive advertising',[260] the cost of which should be borne by the applicant.[261]

While taking issue with the assertion that respondents have displayed ulterior motives in their submissions in relation to the form or content of class notice, the authors agree that continued robust judicial supervision is the most effective way to control the notice process and to ensure that what is published is complete and accurate.

(form of opt out notice appeal)'); *Petrusevski v Bulldogs Rugby League Club Ltd* [2003] FCA 1056 (Unreported, Sackville J, 3 October 2003).

254 See *King v GIO* (form of opt out notice proceeding) [2000] FCA 1869 (Unreported, Moore J, 20 December 2000) [15]–[18]; revd [2001] FCA 270 (Unreported, Sackville, Hely and Stone JJ, March 2001) [13]–[15].

255 See *Petrusevski v Bulldogs Rugby League Club Ltd* [2003] FCA 1056 (Unreported, Sackville J, 3 October 2003) [10]–[11], [14]–[15].

256 Murphy and Cameron, above n 8, 432.

257 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2001] VSC 284 (Unreported, Gillard J, 17 August 2001) [8].

258 Ibid [2]–[8].

259 Ibid [5].

260 Ibid [8].

261 Ibid [14], [19], [26]–[33].

2 *Other Communications with Group Members*

> *It has been proposed that settlement communications between respondents and group members be allowed to take place only through the applicant's lawyers; alternatively, it is proposed that guidelines are required on the extent to which and the manner in which respondents may communicate directly with group members.*

There has been a number of decisions where the applicant has sought to prevent respondents or their lawyers from communicating directly with group members who had not retained a lawyer to act on their behalf in the proceedings (the authors refer to such group members as 'unrepresented group members').[262] As explained in Part III(F)(2), the Federal Court has held that prima facie such communications are permissible provided that they are fair and not misleading[263] and do not attempt to circumvent the provisions requiring court approval of a settlement.[264]

From a respondent's perspective, direct communication with unrepresented group members is consistent with a desire for the early resolution of claims. Some plaintiff lawyers, however, are concerned that they should at least be allowed to monitor these communications because, they argue, the interests of group members and respondents do not coincide, there is often a differential in knowledge between a corporate respondent and an individual group member, and settlement of the unrepresented group members' claims might undermine the financial viability of the class action.[265] Given that unrepresented group members are invariably the so-called 'free-riders', it is hard to see how settling their claims can undermine the viability of the action unless they are hoping to force the respondent to pay an amount towards the costs of the unrepresented group members directly to them as part of any 'global settlement', something that has occurred on a number of occasions.[266]

The first and second concerns expressed by plaintiff lawyers are already addressed by the requirement that the respondent ensure that any communication not be misleading or otherwise unfair and complies with the professional conduct rules for lawyers. In this regard, the court is entitled to assume, indeed expect, that lawyers acting for respondents will act in accordance with their professional obligations. Thus, in a key case in which this issue has arisen — *Courtney v Medtel Pty Ltd* — where settlement offers were made directly to

262 See, eg, *Courtney v Medtel Pty Ltd* (2001) 113 FCR 512 (before opt out date), where orders were unsuccessfully sought precluding any further communications between the respondents and unrepresented group members; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 187–8 (Sackville J) (prior to the opt out procedure being completed), where the Court refused to prevent the respondents from communicating directly with unrepresented group members but directed the respondents to provide the applicant's lawyers with a copy of the proposed communication 21 days prior to its dispatch.

263 *Courtney v Medtel Pty Ltd* (2001) 113 FCR 512.

264 *King v GIO* (communications application) (2002) 121 FCR 480.

265 Davie, above n 116, 89–90; Murphy and Cameron, above n 8, 429–31.

266 See, eg, *Courtney v Medtel Pty Ltd [No 5]* (2004) 212 ALR 311, 315–16, where the applicant's lawyers received over $2 million in fees while the 482 group members only received between $375 and $8000 each in damages. See also Leonie Lamont, 'Victims Get Slim Pickings as Lawyers Take $2m', *The Sydney Morning Herald* (Sydney), 10 November 2004, 3.

unrepresented group members, the respondents' lawyers recommended in writing that group members obtain legal advice in relation to the offer and provided the telephone numbers and other contact details for Legal Aid and the class lawyers.[267] It is also open to the class lawyer to communicate their recommendations to the group members.

The third concern expressed by plaintiff lawyers should not be considered relevant. In commencing a class action, the applicant takes on a number of risks, including that some or indeed many group members will opt out of the action. In the authors' opinion, separate settlement with unrepresented group members is consistent with the right of private autonomy and of group members to opt out of the action.[268]

Perhaps just as importantly, although less often considered, is the issue of ensuring that communications with group members by the promoters of the class action, be they a lawyer or funder, not be misleading or otherwise unfair. The Federal Court has recently reaffirmed its power to make orders to protect the integrity of the opt out process[269] by ensuring the accuracy of public representations made by the applicant's lawyer in using the press to communicate with group members during the opt out period. The Federal Court exercised its power to extend the opt out period and order the applicant's lawyers in a cartel class action to correct misleading statements made in the press regarding the damages expected to be recovered in a class action.[270] In that case, the statements of the lawyers incorrectly attributed to the Australian Competition and Consumer Commission estimates of the damages that might be awarded in the case. The Court found that, by attributing these views to the Commission, the lawyers' comments may have caused group members to give the estimates more weight (especially in making their opt out decision) than if they were simply made by the lawyers.[271]

As with notice, the authors submit that there is no need for additional rules or guidelines to regulate communications with group members, and that robust judicial supervision is the most effective way to ensure the accuracy of such communications.

V Is There a Need to Change Class Action Procedure?

While those who advocate changes to Australia's class action system speak in general terms of the need for 'legislative clarification' and what are described as

267 (2002) 122 FCR 168.

268 Cf Law Reform Commission, *Grouped Proceedings Report*, above n 2, 91–2 (a group member is 'capable of expressing an opinion which should be taken into account. … [A] group member should be able, at any stage before judgment is given, without leave, to settle the group member's proceeding').

269 Under *FCA Act* ss 23, 33J, 33K, 33X; *VSC Act* ss 33J, 33K, 33X. See also *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2008] FCA 575 (Unreported, Tamberlin J, 29 April 2008) [9]–[11].

270 *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2008] FCA 575 (Unreported, Tamberlin J, 29 April 2008) [16]–[19].

271 Ibid [17]–[18].

the disincentives and barriers to the commencement of yet more class actions,[272] little or no empirical evidence has been provided to support these claims. Rather, the current state of affairs suggests that a thriving and successful class action 'industry' has emerged in Australia. Both the most prominent plaintiff law firm, Slater & Gordon, and the leading commercial litigation funder, IMF (Australia) Ltd, are successful publicly listed companies whose published results and share price suggest that the business model is far from broken.[273] The question has to be asked: was this really what the authors of the original ALRC report recommending the introduction of a class action system envisaged? It would be fair to say that it was certainly what members of the business community feared.

The fact is that Australia already has a plaintiff-friendly class action system supported by a commercial litigation funding industry that ensures that claims with merit are commenced. Much of what is being proposed under the guise of improving access to justice — for example, by flipping the system from opt out to opt in — is really designed to improve the 'business model' in a way that would have the opposite effect and lock out some of the most vulnerable members of our society. Similarly, the introduction of so-called cy-près class actions would in truth deliver little, if any, benefit to the victims of the alleged wrongs. Rather, it would create another 'product line' for class action promoters and their shareholders.

In most instances, the authors do not believe that the case for change has been established. The courts have made it clear that the class action mechanism is not to be construed narrowly so as to make it difficult to commence class actions or to place barriers in the way of doing so. As a result, when key procedural issues have come before the courts — for example, in relation to the definition of the group, the role of the class applicant, identification and notification of group members, funding and security for costs, the court's power to terminate class actions and court approvals of settlements — the courts have been willing to facilitate the bringing of class actions, save in a very limited number of cases where they were manifestly inappropriate.

Much of what has been proposed constitutes not reform of Australia's class action procedure but revolution — a revolution that would sweep away most of the remaining safeguards against the acknowledged excesses of a class action regime. If that were to happen, it would not just be the business community that would suffer, but so too would many potential claimants for whose benefit the class action regime was first introduced.

272 See, eg, Murphy and Cameron, above n 8, 400; Cashman, 'Class Actions on Behalf of Clients', above n 8; Spender, 'Securities Class Actions', above n 9, 128.

273 For example, IMF (Australia) Ltd's reported profit growth was 188%, equating to a net profit of $17.2 million in 2008. It is anticipating receiving some $36.5 million in profit from one case alone (the Aristocrat litigation), an amount so large that it will underwrite IMF (Australia) Ltd's profits for the year: see IMF (Australia) Ltd, *2008 Annual Report* (2008) 4, 14 <http://www.imf.com.au/pdf/AnnualReport2008.pdf>; Chris Merritt, 'Gloom Spells Boom for IMF', *The Weekend Australian* (Sydney), 8 November 2008, 33.