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CORPORATE ACCOUNTABILITY, THIRD PARTIES AND CLASS ACTIONS

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Dr Vince Morabito*

I. INTRODUCTION

In its November 2005 discussion paper on corporate social responsibility, the Corporations and Markets Advisory Committee provided a salutary reminder of the fact that:

> Companies are subject to a range of Federal, State and Territory laws of general application that are designed to protect various interest groups or public values, including environmental protection, occupational health and safety, workplace relations, consumer protection, anti-discrimination and anti-corruption statutes.
>
> Directors cannot ignore or subordinate these corporate obligations because of any notion either that the financial or other interests of shareholders are paramount or that compliance with these laws may reduce shareholder returns.[1]

Consequently, an important aspect of the corporate social responsibility debate, which is often overlooked by commentators and scholars, is the effectiveness of our legal system in dealing with breaches of the *Corporations Act 2001* (Cth) and other laws committed by companies and their directors. There is little practical point in imposing legal obligations on companies and their directors - designed (a) to protect the interests of non-shareholder stakeholders[2] and (b) to enhance corporate social responsibility - if those harmed by the illegal behaviour of corporations and/or their directors are not able to seek legal redress with respect to the losses caused by such corporate misconduct. Furthermore, as pointed out by Justice Kirby of the High Court, "we cannot be content with a legal system which prides itself on fair substantive laws, but laws which are not, in reality, available for enforcement by the ordinary citizen".[3]

The first aim of this paper is to draw attention to the fact that the class action device has the potential to enable similarly situated victims of illegal corporate conduct (including non-shareholder stakeholders) to secure access to justice. The second aim of this paper is to demonstrate that this potential will only be totally fulfilled: (a) if major amendments are made to the legislative regimes that currently govern Australia's two class action regimes in the Federal Court and in the Victorian Supreme Court; and (b) if there is a significant change in the approach implemented by Australian judges when interpreting and applying such regimes.

II. THE CLASS ACTION DEVICE

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[1] Corporations and Markets Advisory Committee, *Corporate Social Responsibility* (Discussion Paper; November 2005), para 2.5.

[2] For the purposes of this paper, the term "stakeholders" is defined broadly to encompass not only employees, consumers, public interest bodies but also "regulators, the financial markets, the media, governments and the community generally": ibid para 1.4.1.

[3] M Kirby, *Reform of the Law – Essays on the Renewal of the Australian Legal System* (1983), 161.

A. What is a Class Action?

The main differences between a traditional proceeding and a class action have been described as follows by the Alberta Law Reform Institute:

> In an ordinary action, each litigant is a party in their own right. In a class action, one party commences an action on behalf of other persons who have a claim to a remedy for the same or similar perceived wrong. That party conducts the action as "representative plaintiff". Only the "representative plaintiff" is a party. Other persons having claims that share questions of law and fact in common with those of the representative plaintiff are members of the "class". Once the class has been determined, the class members are bound by the outcome of the litigation even though, for the most part, they do not participate in the proceedings. A number of statutory safeguards and an expanded role for the court help to ensure that the interests of the class members are protected. Instead of multiple separate proceedings deciding the same issues against the same defendant or defendants in proceedings brought by different plaintiffs, class actions decide common issues in one courtroom at one time.[4]

Groups of similarly situated claimants have been able to institute class proceedings in the Federal Court of Australia, since March 1992, pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) and in the Supreme Court of Victoria, since January 2000, pursuant to Part 4A of the *Supreme Court Act 1986* (Vic).[5]

B. Policy Goals of the Class Action Device

Michael Duffy, the then Federal Attorney-General, made the following comments in Parliament in 1991, when explaining the purposes of the Part IVA regime:

> The Bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action [the access to justice goal].
>
> The second purpose of the Bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions [the judicial economy goal].[6]

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[4] Alberta Law Reform Institute, *Class Actions* (Report no 85; December 2000), para 57 ("ALRI Report"). It is interesting to note that last month Gummow, Hayne and Crennan JJ of the High Court observed that "in the submissions, the parties tended to speak of 'class actions' as if they were a single, distinct kind of proceedings available by that name. However, the rules governing representative or group proceedings vary greatly from court to court": *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, para 40.

[5] Part 4A was actually enacted in November 2000 but was deemed to have come into operation in January 2000: see *Cook v Pasminco Ltd* [2000] VSC 534, para 10 (per Hedigan J). Representative action and class action procedures are also provided for, under both Federal and State legislation, in a number of areas of law, including trade practices, discrimination, migration, industrial relations and privacy: see P Cashman, *Class Actions – Law and Practice* (forthcoming), ch 9.

[6] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Mr Michael Duffy - Attorney-General). See also *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation* 526 FSupp 887, 892 (ND Cal 1981): "in a complex society such as ours, the phenomenon of numerous persons suffering the same or similar injuries as a result of a single pattern of misconduct on the part of a defendant is becoming increasingly frequent.
The judicial system's response to such repetitive litigation has often been blind adherence to the common law's traditional notion of civil litigation as necessarily private dispute resolution. In situations where this traditional model of litigation threatens to leave large numbers of people without a speedy and practical means of redress

Similar reasoning was embraced by the Victorian Attorney-General, Mr Hulls, when he unveiled Part 4A.[7] Another purpose of the class action device, frequently referred to as the behaviour modification goal, has been described as follows by the Supreme Court of Canada: "class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public".[8] These three objectives of the class action device have also been recognised internationally.[9]

It becomes apparent from the discussion above that whilst the class action device is nothing more than a procedural device (and as such it does not create substantive rights for victims of illegal conduct), it does possess a "substantive" dimension given that "the class action rule … empowers plaintiffs to bring cases that otherwise either would not be possible or would only be possible in a very different form".[10] Recently, Kirby J drew attention to the fact that "the importance of access to justice, as a fundamental right which ought to be readily available to all, is clearly a new consideration that stimulates fresh thinking about representative or 'grouped' proceedings".[11]

C. Impact of Class Actions in Australia

(i) Overview

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

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and simultaneously threatens to expose defendants to a continuing punishment for the same wrongful acts, the class action device is a powerful tool to accomplish its proclaimed goals of judicial economy and fairness".

[7] Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2000, 1252.

[8] *Hollick v Toronto (City)* (2001) 205 DLR (4th) 19, 28-29. See also Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report no 46; 1988), para 67 ("ALRC 1988 Report"): "enabling people to have increased access to legal remedies in court proceedings could render the substantive law more enforceable and thus encourage a greater degree of compliance with laws the purpose of which is to prevent or discourage activities which cause loss or injury to others. This is an important consequence of any change in procedural remedies. Respect for the law should be enhanced if access to remedies is facilitated".

[9] See, for instance, *Western Canadian Shopping Centres Inc v Bennett Jones Verchere* (2001) 201 DLR (4th) 385, 397; DA Crerar, "The Restitutionary Class Action: Canadian Class Proceedings Legislation as a Vehicle for the Restitution of Unlawfully Demanded Payments, Ultra Vires Taxes, and Other Unjust Enrichments" (1998) 56 *University of Toronto Faculty of Law Review* 47, 79; JS Emerson, "Class Actions" (1989) 19 *Victoria University of Wellington Law Review* 183, 187-189; Ontario Law Reform Commission, *Report on Class Actions* (Report no 48; 1982), 117-146 ("OLRC Report"); *Hawaii v Standard Oil Co* 405 US 251, 266 (1972); Manitoba Law Reform Commission, *Class Proceedings* (Report no 100; 1999), 23-30; *Gottlieb v Wiles* 11 F3d 1004, 1009 (10th Cir 1993); and Scottish Law Commission, *Multi-Party Actions* (Report no 154; 1996), para 2.10.

[10] DR Hensler, B Dombey-Moore, B Giddens, J Gross, EK Moller and NM Pace, *Class Action Dilemmas - Pursuing Public Goals for Private Gain* (Report; RAND Institute for Civil Justice; Santa Monica; 2000), 9 ("Hensler Report"). See also D Grave and J Betts, "United States and Australian Practitioners' View of Class Actions: The Australian View" (paper presented at the Joint Federal Court of Australia and Law Council of Australia Seminar on Corporations Law; 25 March 2006), 25 ("neither class actions, nor commercial litigation funding, create or enhance rights an applicant has against a respondent. They facilitate the exercise of substantive legal rights. Substantive rights that are procedurally or financially incapable of exercise are, or are nearly, worthless. It may be said to follow that procedural and financial support which enhances access to justice complements the judicial system").

[11] *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, para 145.

competitive behaviour such as price fixing and market sharing arrangements.[12] The attainment of the desirable goal of enhanced access to justice, through the employment of the class action device, may be illustrated through a consideration of a number of successful proceedings that have been brought pursuant to the Federal and Victorian class action regimes. One such proceeding is Australia's first shareholder class action, the *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)*[13] Part IVA proceeding.

(ii) Australia's First Shareholder Class Action

In this proceeding, the class representative, on his own behalf and on behalf of more than 67,000 class members who were shareholders in AG Australia Holdings Ltd ("GIO") at the relevant time, claimed damages for loss resulting from alleged misleading and deceptive conduct and negligence suffered when GIO advised its shareholders not to accept a takeover offer made by AMP Ltd in August 1998. The 12 respondents were GIO, its directors and advisors. The *GIO* proceeding was settled in August 2003 in favour of the class representative and 22,051 identified class members for $97 million, plus costs. This payment represented between 55% and 63% of the estimated actual loss, per share. As noted by Murphy:

> Mr King [the class representative in the *GIO* proceeding], who brought an action for about $3,000 damages for himself, could not have sued GIO, its directors and advisors for that sum because of the legal costs involved on both sides. The legal costs spent in opposing the claim totalled approximately $30 million. Because of the class action regime, 22,000 shareholders received compensation of $97 million for corporate behaviour which had been roundly condemned by the commentators, and the subject of an ASIC prosecution. No shareholder would have received compensation without the class action.[14]

(iii) Australia's First Anti-Cartel Class Proceeding

Another illustration of the benefits that may be secured through the employment of the class action device is furnished by the so-called vitamins class action in *Bray v F Hoffman-La Roche Ltd*.[15] The representative plaintiff sought, on behalf of the represented group, damages and other relief in respect of an international price fixing and market sharing arrangement by a number of companies. The impugned behaviour related to vitamin products manufactured and sold by the respondents or their subsidiaries for human and animal consumption.[16] The group represented by the representative plaintiff encompassed:

> Persons who between 5 March 1992 and 5 July 1999 purchased in Australia all or some of vitamins A, B1, B2, B5 (Pantothenic Acid), B6, B9 (folic acid), B12, C, E, Beta Carotene, Canthaxanthin, Astaxanthin … either directly or indirectly by way of the purchase of foods, beverages, vitamin pills or capsules or other products which contained one or more class vitamins supplied by one or more of the respondents.[17]

Approximately four years after the proceeding was instituted, the representative plaintiff was given leave to amend the statement of claim. The substance of the amendment was described as follows by Justice Merkel:

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[12] See generally D Grave and K Adams, *Class Actions in Australia* (Lawbook Co; 2005), 26-28; B Murphy, "Current Trends and Issues in Australian Class Actions" (paper presented at the International Class Actions Conference; Melbourne; December 2005), paras 2.1.1-2.1.7; Cashman, above n 5, ch 8; and R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford; Hart Publishing; 2004), 13.
[13] [2003] FCA 980.
[14] B Murphy, "Difficulties for Applicants in Class Actions" (paper presented at the University of Melbourne; March 2005), 6.
[15] [2003] FCA 1505.
[16] Ibid para 1.
[17] Ibid para 2.

> The amendments will confine the claims to certain animal nutrition and health vitamins and will narrow the definition of group members to manufacturers, distributors and suppliers of those vitamins or pre-mix or other health or nutrition products or food which contain the vitamins, and producers of livestock who purchased stock feed containing vitamins, provided those group members expended at least $2,000 in respect of the relevant products.[18]

It was recently reported in the media that this proceeding was settled in favour of the applicant and the class members for $30.5 million, plus costs (of over $10 million).[19] It is again apparent that it would not have been possible for the applicant or any of the class members to secure legal redress pursuant to "traditional litigation".

(iv) Class Proceedings Brought by the Australian Competition and Consumer Commission

Reference should also be made to the two Part IVA proceedings brought by the Australian Competition and Consumer Commission ("ACCC") in *Australian Competition and Consumer Commission v Chats House Investment Pty Ltd*[20] and in *Australian Competition and Consumer Commission v Golden Sphere International*.[21] In the former class proceeding, the ACCC commenced a Part IVA proceeding seeking injunctive relief against the respondents and the payment of damages to the group members other than the ACCC. The first respondent had held itself out to the public as being willing and able to act for members of the public in respect of foreign exchange trading. The ACCC sought to represent members of the public who had paid moneys to the first respondent for investment. The ACCC claimed that the first respondent misled its clients into believing that they were engaging in foreign exchange trading when, in fact, no such trading was taking place. In commencing this proceeding, ACCC relied on the standing conferred upon it by s 80 of the *Trade Practices Act 1974* (Cth) ("TPA"). We will return to this provision later.

In *Golden Sphere* the three respondents were alleged to have promoted, or have taken part in the promotion of, a pyramid selling scheme to which s 61(2A) of the TPA[22] applied. The ACCC instituted the proceeding on its own behalf but also on behalf of those persons who had participated in the pyramid selling scheme. The representative plaintiff sought injunctive relief against the three respondents. It also sought, on behalf of the other group members, a declaratory order that those members who had participated in the scheme were entitled to be repaid any money that they had paid in respect of the scheme. In both cases the Court awarded substantial damages to the class members other than the ACCC: $550,000 in *Golden Sphere* and $822,803 in *Chats House*.

(v) Claims Regarding Insecticides

In *McMullin v ICI Australia Operations Pty Ltd*[23] a Part IVA proceeding was initiated by Mr and Mrs McMullin against ICI Australia Operations Pty Ltd and its related companies. The proceeding concerned losses allegedly suffered as a result of the accumulation of chlorfluazuron in tissues of cattle. The contamination was said to have occurred when the cattle were fed cotton waste that had been sprayed with an insecticide called Helix. The applicants carried on business as farmers and graziers in New South Wales. They represented other persons, such as graziers and abattoirs, who

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[18] Ibid para 9.
[19] See L Gettler, "Settlement Shakes Amcor and Visy", *Age*, Tuesday 18 July 2006; and M Davis, "Big Vitamin Firms To Pay for Gouging", *The Australian*, Tuesday 18 July 2006.
[20] (1996) 142 ALR 177.
[21] (1998) 83 FCR 424.
[22] Section 61(2A) prohibits the promotion by a company of a scheme under which a payment is made by a person who participates in a scheme to or for the benefit of, among others, the company and the inducement for making the payment is the holding out to the person who makes the payment the prospect of receiving payments from other persons who may participate in the scheme.
[23] (1997) 72 FCR 1.

suffered the losses described above. The trial judge, Justice Wilcox of the Federal Court, described the progress and outcome of this class proceeding as follows:

> The trial on liability occupied 20 days. When I gave judgment on that issue, I set aside a week to hear the many cross claims. However, before the end of the second day, they had all been settled (mainly by abandonment). All the damages claims were different and their assessment threatened to be extremely time-consuming. However, with the benefit of extensive mediation, only a handful of cases went to a hearing. I spent about eight days in court on damages issues. A judicial registrar … probably spent a little longer. In the end, 499 separate claims were disposed of. I understand the total pay out was near $100m. In terms of court time, it seems to me this represents a good advertisement for the procedure.[24]

(vi) Other Successful Class Proceedings

Other successful class actions include the $32 million settlement in favour of 472 identified class members in the Esso Part 4A proceeding (concerning the explosion at the Longford Gas Plant in September 1998 which caused the cessation of gas supply in Victoria); a settlement payment of $4.7 million to the class representative and identified class members in a Part 4A proceeding that was instituted on behalf of those persons who, in April 2000, suffered Legionnaires disease as a result of visiting, or being in the vicinity of, the Melbourne Aquarium; settlement payments of $646,000 to each of 136 identified class members in the Thanh Pty Part 4A proceeding (concerning the eating of food supplied by the defendant and contaminated by salmonella); and a total settlement fund of $1.7 million for 154 identified class members in a Part IVA proceeding brought on behalf of investors in a managed investment scheme.[25]

III. SECTION 1324 OF THE *CORPORATIONS ACT*

In the event that company directors were legally required to take into account and advance the interests of non-shareholder stakeholders, s 1324 would assume great practical importance. Subsection (1) of this provision reads as follows:

> Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
>
> (a) a contravention of this Act;
> (b) attempting to contravene this Act:
> …
> the Court may, on the application of the [Australian Securities and Investments] Commission, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction on such terms as the Court thinks appropriate, restraining the first mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring a person to do any act or thing.

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

The terms of subss (1) and (10) would appear to exhibit, with respect to conduct that is in contravention of the *Corporations Act*, a similar approach to the philosophy that underpins the class action device.[26] This similarity becomes apparent from three aspects of this provision. The first is the

[24] Letter to the author dated 17 July 2006.
[25] See V Morabito, "An Australian Perspective on Class Action Settlements" (2006) 69 *Modern Law Review* 347, 379-380.
[26] In 1989 Baxt noted that "another interesting part of [s 1324] which seems to have gone unnoticed for many years is the possibility of a 'class action' that may be brought in relation to proceedings that are initiated under

conferral on the Australian Securities and Investments Commission ("ASIC") of the power to seek injunctive and monetary relief on behalf of those harmed by conduct that is in contravention of the *Corporations Act*. The second is the extremely broad manner in which s 1324(10) has been drafted.[27] In fact, this subsection would appear to authorise one victim of illegal conduct to seek damages on behalf of other victims of the same unlawful conduct despite the fact that these "other victims" are not formal parties to the s 1324 proceedings. As noted in Part II above, this ability to bind those who are not formal parties to the litigation represents the most distinctive feature of the class action device.[28] The broad similarity between s 1324(1) and s 80 of the TPA should also be noted. The latter provision[29] reads as follows:

> Subject to subsections (1A), (1AAA) and (1B), where, on the application of the [ACCC] or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:
>
> (a) a contravention of ... a provision of Part IV, IVA, IVB, V or VC …;
> (b) attempting to contravene such a provision;
> (c) aiding, abetting, counselling or procuring a person to contravene such a provision; ...
>
> the Court may grant an injunction in such terms as the Court determines to be appropriate.

As highlighted in Part II above, s 80 of the TPA was relied upon by the ACCC in *Chats House* and *Golden Sphere* to secure monetary compensation, through the vehicle of the class action procedure, for those persons who were harmed by conduct that was held to be in contravention of provisions of the TPA. One difference between these provisions is that s 80 extends standing to "any other person", that is, any member of the public regardless of whether they have been harmed by the relevant conduct that is alleged to be illegal.[30] Section 1324, on the other hand, confers standing only upon "a person whose interests have been, are or would be affected by the conduct" in question.

In light of the scenario depicted above, it appears surprising that s 1324 has not resulted in extensive litigation over the last 25 years. But, as a number of commentators have aptly pointed out, this state of affairs appears attributable to a number of substantive factors, including conflicting judicial pronouncements, ambiguities in the way this provision was drafted and real uncertainty as to which groups of non-shareholder stakeholders may be able to rely on this provision.[31]

[it]": R Baxt, "Will Section 574 of the Companies Code Please Stand Up! (And Will Section 1323 of the Corporations Act Follow Suit)" (1989) 7 *Company and Securities Law Journal* 388, 390.

[27] See, for instance, *Permanent Trustee Australia Ltd v Perpetual Trustee Co Ltd* (1995) 13 ACLC 66, 69 (per Cohen J) ("it will be seen that this section can have far-reaching effects").

[28] As noted by Wilcox J of the Federal Court, the evident purpose of provisions governing class proceedings is to overcome the common law standing rule pursuant to which A may not bring a damages action on behalf of B against C: *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 149 ALR 261, 264. See also *Femcare Ltd v Bright* [2000] FCA 512, para 97 (per Black CJ, Sackville and Emmett JJ): "the representative procedure developed in the Court of Chancery accorded the representative party standing to make claims on behalf of members of the represented group. [Part IVA] merely continues and adapts the same long-standing principle".

[29] "This section is wider in scope than s 16 of the *Clayton Act 1914* (US) which entitles a private party to seek injunctive relief against 'threatened loss or damage by violation of the antitrust laws'": *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616, para 67 (per Gummow J).

[30] "It has been established for more than 20 years that s 80 means what it says. In *Phelps v Western Mining Corporation Ltd* [(1978) 20 ALR 183] the Full Court of the Federal Court rejected an argument that the words 'any other person' in s 80 should be read down as meaning that only persons who are affected by a contravention of Pt V [of the TPA] could seek relief under s 80": *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616, para 13 (per Gleeson CJ and McHugh J).

[31] See, for instance, L Thai, "Statutory Injunction – Call For Amendment to Section 1324 of the Corporations Act" (2006) 24 *Company and Securities Law Journal* 41.

From a procedural/practical perspective, no guidance is provided by s 1324 with respect to the numerous and difficult issues raised by multi-party proceedings, including whether or not consent is required from persons who are to sought to be bound by the outcome of s 1324 proceedings ("intended beneficiaries"), the position of persons under disability, the right of intended beneficiaries to opt out of such proceedings, alterations to the description of the group, the ability of the named plaintiff to settle or discontinue proceedings without judicial approval and/or the approval of the intended beneficiaries and the giving of various notices to such persons. These and other relevant issues are addressed by Part IVA and Part 4A. In this context, it is interesting to note that in *Chats House* and *Golden Sphere* and several other cases,[32] the ACCC preferred to rely on the Part IVA regime instead of the specific regime available pursuant to s 87(1B) of the TPA itself.[33] This latter provision currently provides as follows:

> The Commission may make an application under paragraph (1A)(b) on behalf of one or more persons identified in the application who:
> (a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E), IVA, IVB, V or VC; and
> (b) have, before the application is made, consented in writing to the making of the application.[34]

Before 2001, s 87(1B) read as follows:

> Where, in a proceeding instituted for an offence against section 79 or instituted by the [ACCC] or the Minister under section 80, a person is found to have engaged (whether before or after the commencement of this subsection) in conduct in contravention of a provision of Part IVA or V, the [ACCC] may make an application under subsection (1A) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by the conduct, but the [ACCC] shall not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.[35]

Section 1325(3) of the *Corporations Act* is broadly similar to s 87(1B) of the TPA (and in particular the pre-2001 version) as it provides that:

> Where, in a proceeding instituted for a contravention of Chapter 5C, 6CA or 6D or Part 7.10 or instituted by ASIC under section 1324, a person is found to have engaged in conduct in contravention of Chapter 5C, 6CA or Part 7.10, ASIC may make an application under subsection (2) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by the conduct, but ASIC must not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.

If ASIC does not avail itself of s 1325, in seeking monetary relief on behalf of aggrieved stakeholders, but relies instead on the Federal class action regime, it will be able to employ the opt

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[32] See, for instance, *Australian Competition and Consumer Commission v Internic Technology Pty Ltd* (Unreported, Federal Court, Lindgren J, No NG 395 of 1998, 14 July 1998).

[33] In *Chats House* Branson J was not satisfied that the Commonwealth Parliament intended Part IVA to be read down by reason of an existing provision such as s 87(1B) of the TPA: (1996) 124 ALR 177, 182.

[34] Justice Mansfield of the Federal Court has recently revealed that "the necessity for the consent of the complainants provides the assurance of knowing that they do not wish to prove facts in support of the claim for compensation that is different from the facts as found in the action. If that were the case, the consent would be withheld and they (or any of them) could bring separate proceedings for compensation": *Australian Competition and Consumer Commission v Keshow* [2005] FCA 989, para 6.

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

out device. In fact, s 33E of Part IVA provides that "the consent of a person to be a group member in a representative proceeding is not required".[36] In order to accommodate this opt out model, it is provided that an application commencing a Part IVA proceeding, in describing or otherwise identifying class members to whom the suit relates, need not "name, or specify the number of, the group members".[37] Class members have the right to opt out of the class action before a date fixed by the Court and, except with the leave of the Court, the hearing of the action is not to commence earlier than the date before which a group member may opt out of the proceeding.[38] A judgment handed down in a Part IVA proceeding "binds all such persons [described or otherwise identified in the judgment] other than any person who has opted out of the proceeding".[39]

Once the categories of potential beneficiaries of the remedies made available under s 1324 is extended beyond shareholders, reliance on the class action device will become inevitable. Consequently, the state of "health" of Australia's class action regimes must be regarded as an issue that is of direct relevance to the corporate social responsibility debate. Attention will now be turned to this issue. It will be shown that Australia's class action regimes have not fulfilled their full potential as a result of (a) the failure of the drafters of these regimes to adopt a number of important recommendations made in 1988 by the Australian Law Reform Commission ("ALRC") and (b) the narrow judicial construction of these regimes. In order to fully appreciate these two general problems it is necessary to go back in time by considering the events that preceded the enactment of Part IVA and Part 4A.

IV. CLASS ACTION REFORM IN AUSTRALIA

A. Overview

In February 1977, the ALRC was asked by the Federal Attorney-General to report on the adequacy of the existing law relating to class actions in the Federal Court and other courts whilst exercising federal jurisdiction or in courts exercising jurisdiction under any law of any Territory.[40] It was not until December 1988 that the ALRC's report was tabled in Parliament. As noted by Senator Durack, "I am unaware of any other report that took such a long time as the one on the subject of class actions. It is quite clear that the [ALRC] was considerably divided on the subject".[41] This report contained a proposal to introduce in the Federal Court a new grouped proceeding model. A major rationale for the introduction of the grouped proceeding model was the need to avoid the problems that had prevented victims of mass wrongs from utilising the representative action procedure to gain access to the courts. In the Federal Court of Australia, representative actions are governed by Order 6 rule 13 of the *Federal Court Rules*, which provides that:

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[36] This state of affairs does not apply to the Commonwealth, a State or a Territory, or a Minister, officer or certain agencies of the Commonwealth, a State or a Territory.

[37] Section 33H(2). The corresponding provisions of the Victorian regime are almost identical.

[38] Section 33J.

[39] Section 33ZB. As noted by a Canadian commentator, "the merit of the class action procedure lies in the *res judicata* effect of the judgment that will be pronounced at its conclusion. Judgment in a class action binds not only the plaintiff and the defendant but also those whom the plaintiff represents, the class members. It is this characteristic that makes the class action such a convenient method of determining the claims of a large number of individuals who are essentially in the same legal situations as regards the defendant": N Williams, "Consumer Class Actions in Canada - Some Proposals for Reform" (1975) 13 *Osgoode Hall Law Journal* 1, 13.

[40] ALRC 1988 Report, above n 8, para 1.

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

> where numerous persons have the same interest in any proceeding the proceeding may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.[42]

The availability of this procedure had been significantly restricted as a result of the narrow judicial construction of the "same interest" prerequisite[43] and the failure of the rules governing this procedure to provide guidance to the courts and litigants with respect to the numerous and complex issues raised by multi-party proceedings. The ALRC's regime addressed this problem: (a) by providing more liberal and precise requirements for the commencement of a grouped proceeding; (b) by making it clear that a number of judicial principles, which significantly restricted the circumstances in which the "same interest" requirement could be adhered to, could not be applied to restrict access to the new regime;[44] and (c) by providing courts with extensive powers to deal with the various phases of group litigation.[45]

The ALRC was of the view that the introduction of the grouped proceeding procedure, that it recommended, would advance "the objectives of access to the courts and judicial economy, while providing safeguards against possible abuse".[46] This is because:

> Such a procedure could enable people who suffer loss or damage in common with others as a result of a wrongful act or omission by the same respondent to enforce their legal rights in the courts in a cost effective manner. It could overcome the costs and other barriers which impede people from pursuing a legal remedy. People who may be ignorant of their rights or fearful of embarking on proceedings could be assisted to a remedy if one member of a group, all similarly affected, could commence proceedings on behalf of all members. The grouping of claims could also promote efficiency in the use of resources by enabling common issues to be dealt with together. Appropriate grouping procedures are an essential part of the legal system's response to multiple wrongdoing in an increasingly complex world.[47]

In December 1989, Senator Janine Haines, the then leader of the Australian Democrats, adopted the ALRC's proposed legislation and introduced it into the Senate as a private member's Bill.[48] The Federal Government took no action in relation to the ALRC's proposals until 12 September 1991 when the Federal Court of Australia Amendment Bill 1991 was unveiled in the Senate. This Bill contained Part IVA. It was passed without any amendments and Part IVA came into operation in March 1992.[49]

The enactment of Victoria's counterpart to Part IVA, Part 4A, was also the result of a long and difficult process. A report, which evaluated the Victorian law on multi-party litigation and which was commissioned by the Victorian Attorney-General's Law Reform Advisory Council ("Victorian

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[42] Similar provisions may be found in the rules of Court that govern litigation in many Australian and Canadian jurisdictions: see, respectively, Grave and Adams, above n 12, 578-584; and S Penney, "Mass Torts, Mass Culture: Canadian Mass Tort Law and Hollywood Narrative Film" (2004) 30 *Queen's Law Journal* 205, 216.

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

[44] ALRC 1988 Report, above n 8, paras 132-138.

[45] Ibid chs 4-7.

[46] Ibid para 2.

[47] Ibid para 69.

[48] See *Parliamentary Debates*, Senate (Cth), 11 December 1989, 4233.

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

Council"), was completed in August 1995.[50] After consulting many groups within both the legal profession and the wider community, the Victorian Council adopted, two years later, the report's principal proposal and recommended to the Victorian Government that a legislative regime similar to Part IVA be introduced in Victoria. There was no response by the Victorian Government to the Victorian Council's recommendation. This legislative inactivity prompted the Supreme Court of Victoria to take the initiative.[51] In fact, the Supreme Court added a new Order 18A to the *Supreme Court (General Civil Procedure) Rules 1996*. This new Order introduced in Victoria, from January 2000, a class action regime which was virtually identical to Part IVA. However, shortly after Order 18A came into operation, a challenge to its validity was launched. Essentially, the challenge was based on the argument that Order 18A exceeded the power conferred upon the Court by the Victorian Parliament to draft rules of court. The challenge was rejected by three of the five justices of the Court of Appeal of Victoria.[52] The defendant sought leave to appeal to the High Court of Australia. The fear that the High Court might declare Order 18A invalid prompted the Victorian Parliament to introduce a legislative framework for class actions very similar to the regime created pursuant to Order 18A and thus Part IVA.[53]

B. Hostility Towards Class Actions

Why such hesitation, on the part of the ALRC, the Victorian Council and the Commonwealth and Victorian legislatures, before eventually embracing class action reform? The answer to this question lies in the existence of strong opposition to the class action device by many sectors of Australia's business community, major law firms (whose major clients are more likely to be defendants than plaintiffs in legal proceedings, including multi-party proceedings), Australia's conservative political parties[54] and a significant number of judges.[55] It is therefore not surprising that both the ALRC's report and Part IVA were vigorously opposed by the Liberal Party (then in Opposition), the biggest law firms, the Business Council of Australia and several legal commentators.[56] Similarly, the proposals contained in the report commissioned by the Victorian Council were opposed by, among others, the County Court of Victoria and some justices of the Supreme Court of Victoria. Some of the reasoning underlying this opposition was explained as follows, in the Federal Parliament during the Second Reading of Part IVA, by Peter Costello (then Shadow Attorney-General):

> The proposals contained in this Bill are an attack on the way legal rights have been traditionally exercised under our system of law … [where] individual rights are exercised by judicial choice. Individual rights are exercised on behalf of individuals who choose to take their claims to court.

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

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

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

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

[54] It is therefore somewhat surprising that the request to the ALRC to study class actions came from a Liberal government and that Victoria had a Liberal government when, in 1995, the Victorian Council commissioned the study of multi-party litigation referred to above.

[55] As noted in Mulheron, above n 12, 6 n25, "it has been suggested that Australian commentators persist with the use of the terminology 'representative proceeding' rather than 'class action' precisely to avoid the negative perceptions and poor reputation which accompany the US class action".

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

> Firstly, under the proposals … individual rights will be exercised on behalf of individuals thrown into classes at the choice of people who decide to initiate class actions …
>
> Secondly, this Bill is a step on the way to making Australia a more litigious society. It will encourage the proliferation of litigation in this country … and this is not in the interests of the public in the long term.[57]

The philosophy underpinning the first criticism set out above, which views unfavourably procedural devices that enable a proceeding started and run by a claimant to bind other claimants whose only connection with the plaintiff is that they suffered similar injuries, was embraced by a majority of Australian and English Courts with respect to the representative action procedure.[58] The judicial endorsement and application of this philosophy was largely responsible for the narrow interpretation of the rules governing this procedure, adverted to above.[59] Unfortunately, this philosophy was adhered to by five High Court justices as recently as last month in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*.[60]

Similarly, as will be shown throughout this paper, a significant number of Australian judges have interpreted and applied the provisions of Part IVA and Part 4A in a fairly narrow manner thereby preventing the attainment of the policy goals that these devices were intended to secure and which were spelt out above. A striking illustration of this judicial hostility towards the concept of class actions is provided by the comment made by Justice Spender of the Federal Court with respect to a Part IVA proceeding brought with respect to smoking-related diseases. His Honour described it as the "Ben Hur of ambulance chasing".[61] Similarly, the following comments made in 2002 by Justice Callinan of the High Court of Australia, whilst considering the constitutional validity of Part 4A, evince a significant dose of judicial scepticism as to the benefits that flow to the public from the availability of class proceedings:

> The question here is not whether, by their nature, group or class proceedings are oppressive to defendants, give rise to entrepreneurial litigation, in fact proliferate and prolong court proceedings, undesirably substitute private for public law enforcement or are contrary to the public interest, with disadvantages outweighing a public interest in enabling persons who have been damnified but who would not, or could not bring the proceedings themselves, to be compensated for their losses …
>
> the problems to which I have just referred are likely to be aggravated by the increasingly competitive entrepreneurial activities of lawyers undertaking the conduct of class or group actions, in which, in a practical sense, the lawyers are often as much the litigants as the plaintiffs themselves, and with the same or even a greater stake in the outcome than any member of a group.[62]

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[57] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1991, 3284-3285.

[58] Judicial hostility towards representative actions often produced harsh assessments of the motives of representative plaintiffs. See, for instance, *Markt and Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021, 1040 (per Fletcher Moulton LJ) ("it is entirely contrary to the spirit of our judicial process to allow one person to interfere with another man's contract where he has no common interest"); and *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382, 404 (per Meagher JA) ("they [the representative plaintiffs] are seeking to intermeddle in the commercial relationship between Esanda [the defendant] and its customers").

[59] See *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, para 135 (per Kirby J).

[60] [2006] HCA 41.

[61] See P Gordon and L Nichols, "The Class Struggle" (2001) 48 *Plaintiff* 6, 10; and Murphy, above n 12, para 3.4. See also *Bray v F Hoffmann-La Roche Ltd* (2003) 200 ALR 607, 660 (per Finkelstein J) ("the solicitor does stand to benefit from the action (especially as regards the additional fee) if the action is ultimately successful, as the solicitor will then be able to recover his costs").

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

This extremely negative approach towards (a) group litigation and (b) those who initiate such proceedings was unfortunately embraced by Heydon and Callinan JJ in *Fostif*.[63] In light of this scenario Justice Charles of Victoria's Court of Appeal was entitled to observe that:

> Class actions are unlikely to flourish in Australia without a change in attitudes, both in the profession and the judiciary ... Many Australian judges may still view class actions as predatory litigation instituted for the advantage of entrepreneurial lawyers.[64]

It is also fascinating to note that arguments broadly similar to Costello's "interference with individual rights" criticism formed the basis of a constitutional challenge to the validity of Part IVA.[65] This constitutional challenge was dismissed by the Full Federal Court.[66] The prediction by Costello, and other class action opponents, that class actions would convert Australia into an excessively litigious society has proved to be incorrect. The ALRC noted in 2000 that:

> [class action] legislation was received with trepidation by some potential respondents, concerned at "legal entrepreneurialism", "US style litigation" and "sensational" claims. Some lawyers and companies continue to express these concerns, although in consultations with the Commission, some lawyers agreed that there is no present evidence of unmeritorious claims or any litigation explosion as a result of the [class] proceedings.[67]

Furthermore, in December 2005 Chief Justice Black of the Federal Court of Australia revealed, at a conference on class actions, that only 158 class actions have been commenced and finalised in the Federal Court since Part IVA came into operation in March 1992.[68] Contrary to some of the claims that have been reported in the media, the number of shareholder class actions that have been instituted in Australia has also been very small indeed. In fact, as noted by Murphy and Watson in June 2006:

> In the last ten years in Australia there have been 9 shareholder class actions – hardly a flood of litigation. The corresponding figure in the US is 2,352. Even allowing for differences in population this represents a frequency of such actions in the US in the last decade 18 times greater than the frequency of class actions in Australia.[69]

It is therefore reasonable to conclude that the introduction of class actions in Australia "has not resulted in the opening of the litigation floodgates. Indeed, there has barely been a ripple. The number of proceedings instituted has been small indeed".[70] These findings clearly confirm the fact

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[63] As aptly noted by Kirby J, the judgments of Heydon and Callinan JJ in *Fostif* "disclose an attitude of hostility to representative procedures that is a left-over of earlier legal times. They are incompatible with the contemporary presentation of multiple legal claims. And, more importantly, they are fundamentally inconsistent with the rules made under statutory power and the need to render those rules effective": [2006] HCA 41, para 148.

[64] Justice Charles, "Class Actions in Australia" (paper presented at the Australian Bar Association Conference, San Francisco, 1996) 32.

[65] Gordon and Nichols, above n 61, 8.

[66] *Femcare Ltd v Bright* (2000) 100 FCR 331. There has also been a constitutional challenge, based on other grounds, to the validity of Part 4A. It was rejected by the High Court in *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161.

[67] Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System* (Report no 89; 2000), para 7.89 ("ALRC 2000 Report").

[68] See M Drummond, "ASIC Talks Up Class Actions", *Australian Financial Review*, Monday 5 December 2005, 5.

[69] B Murphy and A Watson, "Shareholder Class Actions and the Duties and Discretions of Superannuation Trustees" (paper presented at the 5th Annual ACSI Conference; Melbourne; June 2006), 6.

[70] Grave and Adams, above n 12, 13. See also Murphy, above n 12, para 2.2 ("it is more of a trickle than a flood"); and EF Sherman, "Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions" (2002) 52 *DePaul Law Review* 401, 402-403.

that excessive litigation in the US[71] is attributable more to the unique features of the US legal system than to the availability of class actions. Such features include the fact that the losing side is, generally speaking, not liable for the costs of the winning side, the employment of strict liability doctrines with respect to tort actions, "extensive jury trials, the frequent award of exemplary damages, and the availability of contingency fees by reference to a percentage of the verdict".[72]

The fact that Victoria has been the only Australian jurisdiction to implement the following recommendation - made in 1994 by a committee established by the Federal Parliament, the Access to Justice Advisory Committee - provides further evidence of the widespread opposition to class actions in Australia: "fair and efficient [class] action procedures should be available in all Australian jurisdictions. The Commonwealth provision for [class] actions in the Federal Court is, we think, a suitable model".[73]

Whilst the Federal and Victorian legislatures rejected the criticisms of the class action device, they were nevertheless clearly influenced by vigorous opposition to their regimes. The outcome of this scenario was that not all of the ALRC's recommendations were adopted by the Federal and Victorian legislatures. As explained throughout this paper, these departures from the ALRC's proposed regime have been a major cause of many of the problems that have been encountered in relation to Australia's class proceedings.

The problems created by the non-implementation of some of the ALRC's recommendations and by the narrow judicial interpretation of the Federal and Victorian legislative provisions governing class proceedings may be considered under two general categories: funding of class actions and the mechanisms for determining which proceedings should be conducted as class proceedings.

V. FUNDING OF CLASS PROCEEDINGS[74]

A. Cost Barriers

As already indicated, class members are bound by the outcome of a class proceeding without being formal parties to the litigation. This confers upon them an immunity from adverse cost awards. This state of affairs is expressly confirmed by s 43(1A) of Part IVA and s 33ZD of Part 4A. In the absence of retainer agreements, entered into between individual class members and the lawyers hired by the class representatives, class members are not liable for the costs and fees incurred in running the proceeding on the plaintiff's side. The term "free riders" has thus been used on a regular basis to describe the position of class members.[75] In many circumstances, it would not be financially rational for aspiring class representatives to institute class actions, unless they are able to shift to others the liability for (a) the fees and disbursements of the class representative's lawyers; (b) any costs awarded to the defendants in the event of a loss for the class; and (c) any security for costs orders granted to the defendants. This state of affairs was aptly described as follows by Justice Wilcox of the Federal Court of Australia:

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[71] See, however, Murphy, above n 12, para 3.4.3 where it is noted that "the question whether there is any empirical proof for claims about a litigation explosion has been hotly debated".

[72] Mulheron, above n 12, 72. See also ALRI Report, above n 4, paras 77-79; Murphy, above n 12, para 3.4.4; Grave and Adams, above n 12, 10-11; Sherman, above n 70, 402-403; and Law Reform Commission of Ireland, *Consultation Paper on Multi-Party Litigation (Class Actions)* (Consultation Paper no 25; 2003), para 2.05.

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

[74] This part is based on the analysis found in V Morabito, "Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors" (2007) 29 *Sydney Law Review* (forthcoming). See also Cashman, above n 5, ch 4.

[75] See V Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 *Monash University Law Review* 231, 235-239 and the references cited therein.

> The problem is that a representative party is exposed to the risk of an order to pay the costs of a respondent or respondents (the amount of which will usually be increased by the very fact that the proceeding is a representative one), without gaining any personal benefit from the representative role. So there is little or no incentive for a person to act as a representative party. Unless the person's potential costs are covered by someone else, there is a positive disincentive to taking that course.[76]

Where the class representative's individual claims would not warrant individual litigation, it would make little sense for such claimants to bear the financial burden of a far more costly and complex type of litigation, namely, a class proceeding.[77] The validity of this latter description may be gauged by considering the costs entailed in furnishing to class members opt out notices, that is, notices that advise class members of the commencement of the class proceeding, the claims being pursued on behalf of the class, the description of the represented group and the right of the members of such group to exclude themselves from the litigation. Such notices are usually published in newspapers. If this advertising is limited to one State it will cost at least $20,000 whilst, if this advertising is undertaken nationally, as is frequently the case, it will cost at least $100,000.[78] In light of these and other significant costs entailed in running a class suit, the commencement of a traditional proceeding, where the individual claim of the claimant in question is individually recoverable, would again constitute a more appealing option than acting on behalf of a group of similarly situated claimants.

In its 1988 study of the class action procedure, the ALRC recognised that the general rules governing litigation costs, if applied unaltered to class actions, could constitute "a disincentive to bringing grouped proceedings and might in fact create yet another barrier to access to legal remedies of the kind which the recommended procedure itself aims to overcome".[79] To address these problems, the ALRC recommended that the financial burdens be shifted from the class representatives to a class action fund and to their solicitors.

With respect to the former strategy, the ALRC proposed the creation of a special fund to provide for the costs of parties involved in class proceedings.[80] This fund would apply a merit test to any application for financial assistance. The ALRC was of the view that "while there may be special cases where means should be taken into account, the focus of any special fund should be to provide funding based on merit".[81] This fund would be used to "provide support for the applicants' proceedings and to meet the costs of the respondent if the action is unsuccessful".[82]

The other strategy proposed by the ALRC was that class representatives should be allowed to execute conditional fee agreements pursuant to which the class solicitor charges nothing if the case is lost and a higher than scale fee if the case is successful. This strategy would provide a means of financing group litigation and of overcoming the costs disincentives to the institution of class actions.[83] Under the ALRC's proposed regime, such arrangements could not come into effect until approved by the Court. Before giving this approval, the Court would need to be satisfied that the method of calculating the fees was fair and reasonable.[84] Before the Court commenced its assessment of fee

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

[77] Murphy and Watson have perceptively drawn attention to the fact that whilst "class actions are expensive to conduct … they are not as expensive as running hundreds or thousands of separate claims by the victims of mass civil wrongs": Murphy and Watson, above n 69, 9.

[78] Affidavit of Bernard Michael Murphy, dated 31 March 2005, filed in the *Dorajay Pty Ltd v Aristocrat Leisure Limited* No N362 of 2004 Part IVA proceeding, 12-13.

[79] ALRC 1988 Report, above n 8, para 252. See also OLRC Report, above n 9, 647; Law Reform Committee of South Australia, *Report Relating to Class Actions* (Report no 36; 1977), 6; and Lord Woolf, *Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996), 239.

[80] ALRC 1988 Report, above n 8, para 309.

[81] Ibid para 310.

[82] Ibid para 308.

[83] Ibid para 286.

[84] Ibid para 293.

agreements, notice would be given of the fee agreement to the class members in order to provide them with the opportunity to appear before the Court and to argue against approval.[85]

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

> I do not believe this particular proposal will lead Australia to go down the United States road – as it is sometimes referred to – and become an overly litigious society … I do not think we are going down that road by means of this proposal because we have set our face firmly against some features of the American legal system, such as contingency fees, which appear, from my observations over there recently, to drive the American legal system rather than the merits of the issues themselves.[86]

It is important to remember that, contrary to what Senator Tate indicated in the passage quoted above, the ALRC *did not* recommend the employment of contingency fees pursuant to which solicitors acting for the class representatives would be entitled to receive a percentage of the proceeds won on behalf of the class. The rejection of this recommendation provides an illustration of the problem canvassed in Part IV above, of the drafters of Part IVA being unduly influenced by the unjustified attacks on the class action device.

B. Funding of Class Actions by Solicitors and Litigation Funders

Fortunately, the rejection of the conditional fee recommendation has been superseded by the enactment, in several State jurisdictions, of legislation that authorises such arrangements in most proceedings, including class proceedings.[87] Pursuant to such conditional fee arrangements, class representative's lawyers are the ones that underwrite the high costs of the class proceedings in the hope that a successful outcome for the class will ensue. In the *GIO* proceedings mentioned above, for instance, approximately 13 months before a settlement agreement was executed by the parties and approved by the Court, Justice Moore of the Federal Court revealed that the "[class representative's law firm] is not a party to the proceeding though it has not sought to disguise the fact that it is underwriting the costs of the litigation brought by Mr King [the class representative] which, to date, amount to almost five million dollars".[88] Furthermore, as noted by Murphy, "there is massive expenditure on barristers, experts and solicitor time involved and these expenses have to be carried for five to six years before payment. If the case is unsuccessful, that expenditure is lost".[89] As already noted, in meeting these costs, no reliance may be placed on public funding.

Until recently, this has been the principal mechanism for financing class proceedings in Australia. However, in the last few years commercial litigation funders have entered the class action arena. Last

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[85] Ibid.

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

[87] However, Grave and Adams have recently drawn attention to the fact that in Australia "the legislative pendulum in respect of conditional uplift costs agreements appears to have swung in the opposite direction with the New South Wales Parliament's decision [which came into effect in 2005] to prohibit uplift [fees] for damage claims": above n 12, 482.

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

[89] Murphy, above n 12, para 3.5.2.

month in *Fostif* the High Court held (by a 5:2 majority) that such involvement does not constitute an abuse of process. Litigation funders usually pay "all legal costs and disbursements … incurred by the Solicitors … for the sole purpose of the commencement, and prosecution, of the proceedings",[90] as well as any adverse costs orders (including orders that the class representative provide security for costs).[91] They are usually entitled to receive, in the event of a victory by the plaintiff class, reimbursement of its expenditures as well as the payment of between 20% and 40% of the compensation that the class members will receive from the litigation.[92] The restriction of the representative group to the clients of the class representative's lawyers has been an integral part of their involvement in class proceedings. The reasons for this strategy have been described as follows:

> A litigation funder needs a defined pool of investors with whom it has agreements so that it can recover a portion of any settlement or judgment sum. If investors are required to pursue their claims as an open class and cannot reject freeloaders it will be difficult, sometimes impossible, to access litigation funding.[93]

This strategy was implemented in three recently instituted shareholder class actions.[94] This restriction of the plaintiff class to clients of a particular law firm (referred to as the "MBC criterion") prompted Justice Stone of the Federal Court, the trial judge in one of these proceedings, to invite the parties to make submissions as to whether the litigation should be allowed to continue as a class proceeding.[95] After receiving these submissions, her Honour made the following ruling:

> I find that the requirement that group members opt in to the proceeding to be inconsistent with the terms and policy of Part IVA. It is inappropriate that the proceeding continue under Part IVA while the MBC criterion is part of the description of the representative group. I also find that, in the way in which the MBC criterion subverts the opt out process, it is an abuse of the Court's processes as established by Part IVA.
>
> The second, perhaps even more fundamental, objection to the MBC criterion is that it dictates who should represent group members. I find it an extraordinary proposition that the definition of the representative group should be used to confine a representative group to the clients of one solicitor, however narrowly the group is otherwise defined. In my view there is no support in principle or authority for this proposition and it is repugnant to the policy of the Act.[96]

The trial judge in one of the other two shareholder class proceedings where the MBC criterion has been employed, Justice Hansen of the Supreme Court of Victoria, relied on Justice Stone's analysis to prevent the continuance of the proceeding, as a Part 4A proceeding, as long as the represented group was restricted to the clients of the representative plaintiff's solicitors.[97] It is important to note that this client criterion mechanism has also been employed in several proceedings that did not entail the involvement of litigation funders.

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[90] *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2005] FCA 1483, para 14 (per Stone J).
[91] *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2005] FCA 1483, para 77; and B Slade, "Australian Shareholders and Extraterritorial Class Actions" (paper presented at the International Class Actions Conference; Melbourne; December 2005), para 9.3.
[92] *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2005] FCA 1483, para 77 (per Stone J).
[93] Slade, above n 91, para 7.5.
[94] See, for instance, *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2005] FCA 1483, para 3 (per Stone J) ("this proceeding is commenced by the Applicant on its own behalf and on behalf of the other persons for whom the solicitors for the Applicant have instructions to act at any particular time, who at some time during the period between 20 September 2002 and 26 May 2003 inclusive … acquired an interest in shares in Aristocrat and who suffered loss and damage by or resulting from the conduct of Aristocrat …").
[95] *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2005] FCA 588, paras 3-4 (per Stone J).
[96] *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2005] FCA 1483, paras 125-126 (per Stone J).
[97] *Rod Investments (Vic) Pty Ltd v Adam Clark* [2005] VSC 449. In the third class proceeding in question, all of the class members were joined as formal parties to the proceeding as a result of the trial judge's adverse comments on the MBC criterion: *Cadence Asset Management Pty Ltd v Concept Sports Limited* (unreported judgment; VID 1605 of 2004; Finkelstein J of the Federal Court of Australia; 23 December 2005), para 1.

C. Critique

Restricting the ambit of a class proceeding to those claimants who have, not just expressed their interest in participating in the proceeding, but have in fact taken the significant step of expressly instructing the class representative's solicitors to act on their behalf in the class action, may be said to constitute a far cry from the class action landscape that was envisaged by the ALRC and by the Commonwealth Parliament when they selected the opt out mechanism.[98] This becomes even more apparent when one considers the fact that class members are not parties to the proceedings and, as such, are immune from adverse cost awards. *Dorajay Pty Ltd v Aristocrat Leisure Limited*[99] and *Rod Investments (Vic) Pty Ltd v Adam Clark*[100] (the two proceedings mentioned above where the MBC criterion was judicially rejected) suggest that the aggrieved shareholders who were also clients of the class representative's solicitors constitute a small category of the total number of shareholders who were harmed by the relevant conduct of the respondents. In fact, the clients in *Dorajay* were approximately 600 whilst there appear to be several thousand adversely affected shareholders.[101] In *Rod*, Justice Hansen noted that "if the group included all persons who met the criteria in s 33C, putting aside the MBC client criterion for this purpose, the group could comprise all registered shareholders in MWC which appeared to be over 2000 persons. Further, the share register records only the legal title to shares and not the beneficial interest in shares".[102]

But what if the effect of the judicial rejection of a client criterion is that it will substantially decrease the employment of the class action device and thus render more difficult the attainment of the desirable goals of access to justice and judicial economy that Australia's class action regimes were created to attain? In such a scenario the use of a client criterion may be said to represent the lesser of two evils as a class proceeding that benefits a limited number of victims represents a superior option to having no class proceeding at all. As aptly noted by Cashman:

> The understandable policy objective to ensure that there are as many beneficiaries as possible of cases where the applicant succeeds, and correspondingly as many persons as possible bound by a judgment in favour of the respondent, can only be properly addressed with reference to the constraints on large opt out groups arising out of the presently restrictive fee arrangements, the economic disincentives faced by applicants and the absence of any form of class action fund of the type proposed by the ALRC.[103]

It is apparent that measures must urgently be introduced by the Federal and Victorian legislatures to help class representatives overcome the formidable financial barriers to the employment of the class action device.[104] A way must also be found of enabling class actions to benefit as many claimants as possible whilst, at the same time, ensuring that commercial litigation funders continue to provide financial support to class representatives.

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[98] See, for instance, Commonwealth, *Parliamentary Debates*, House of Representatives (Cth), 14 November 1991, 3175 (Mr Michael Duffy) ("the Government believes that an opt out procedure is preferable on grounds both of equity and efficiency. It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately").

[99] [2005] FCA 1483.

[100] [2005]VSC 449.

[101] The respondent's solicitors were of the view that approximately 18,275 shareholders acquired shares or additional shares in Aristocrat during the relevant period: Affidavit of Michael Rose sworn 30 March 2005 in the *Dorajay* proceeding, para 18.

[102] *Rod Investments (Vic) Pty Ltd v Adam Clark* [2005] VSC 449, para 20. As a result of the MBC criterion mechanism, only 127 of these aggrieved shareholders were bound by this Part 4A proceeding.

[103] Cashman, above n 5, ch 4.

[104] See generally Mulheron, above n 12, ch 12; Cashman, above n 5, ch 7; Morabito, above n 75; and Grave and Adams, above n 12, ch 15.

VI. MECHANISMS FOR DETERMINING WHICH PROCEEDINGS SHOULD BE CONDUCTED AS CLASS PROCEEDINGS

A. Overview

One of the most crucial issues that must be grappled with, by those entrusted with the task of drafting a legal framework to authorise and regulate class proceedings, is to determine what prerequisites a proceeding needs to adhere to before it may be instituted and conducted as a class proceeding. If these requirements are too difficult to satisfy, the attainment of the goals of access to justice and judicial economy will be largely out of reach. If these criteria are satisfied even where there is only a superficial link between the individual claims of the various class members, class proceedings may generate unfair results for both class members and defendants.

A second and directly related issue is whether a certification regime should be implemented to ensure that only those proceedings that comply with the commencement requirements are allowed to be brought and conducted pursuant to the class action device. As noted by a Canadian commentator, "the first issue in any proposal for class action legislation is whether there is a need for a preliminary step in the process called 'certification' or 'authorization'".[105] Under a certification regime those proposing to assume the role of representative plaintiffs are required to seek the authorisation of the Court before being able to avail themselves of the class action regime. The final dimension/aspect of designing a mechanism - for determining which multi-party litigation should be conducted as a class proceeding - entails a determination as to whether the trial judge should be empowered to discontinue a properly instituted class proceeding, that is, a proceeding that complied with the commencement prerequisites. Attention will now be turned to how Australia's class action regimes deal with each of these three issues.

B. Commencement Prerequisites

(i) The ALRC's Proposal

Pursuant to the regime proposed by the ALRC, a grouped proceeding could only be brought where two requirements were satisfied. The first requirement was that the material facts giving rise to each claim for relief, as pleaded in the statement of claim in respect of each class member's proceeding, had to be the same as, or similar or related to, the material facts giving rise to a claim for relief in the representative plaintiff's proceeding. The other requirement recommended by the ALRC was that there needed to be at least one question which was the same or common in the principal proceeding and in each class member's proceeding. The objective of the first condition was "to ensure a community of interest between the principal applicant and group members and to prevent disparate matters from being brought together".[106] The ALRC was of the view that unless the second requirement was "imposed the advantages of grouping may easily be outweighed by diversity and unmanageability of the issues".[107]

(ii) The Legislative Threshold Criteria

Part IVA and Part 4A provide that a proceeding is not properly commenced, as a class proceeding, unless it satisfies each of the three threshold criteria specified in s 33C(1):[108]

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

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[105] R Rogers, "A Uniform Class Actions Statute" (Appendix O to the Proceedings of the 1995 Meeting of the Uniform Law Conference of Canada), 4 (available at http://www.law.ualberta.ca/alri/ulc/95pro/e95o.htm).
[106] ALRC 1988 Report, above n 8, para 134.
[107] Ibid para 136.
[108] See *Wong v Silkfield Pty Ltd* (1999) 165 ALR 373, 381 (per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); and *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, 514 (per Sackville J).

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

Adherence to these prerequisites enables the commencement of a class proceeding by one of the seven or more claimants "as representing some or all of them". Section 33C(2)(a) provides that a class suit may be commenced whether or not the relief sought is, or includes, equitable relief; consists of, or includes, damages; includes claims for damages that would require individual assessment; or is the same for each person represented. Section 33C(2)(b) provides that a proceeding may be brought as a class proceeding whether or not the proceeding is concerned with separate contracts or transactions between the defendant in the proceeding and individual group members; and whether or not it involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.[109]

There are two major differences between the criteria selected by the ALRC and those found in s 33C(1). The requirement of seven persons having a claim against the same person was not a commencement prerequisite under the ALRC's proposed regime, although the lack of a class comprising at least seven class members would enable the Court to determine whether the group litigation should be allowed to continue.[110] Section 33C(1) also differs from the ALRC's proposal to that extent that para (c) contains the requirement that the common issue of law or fact be "substantial".[111]

The former departure from the ALRC's proposed regime has generated some uncertainty as to whether it is in fact essential that the class representative be able to establish the existence of at least seven class members. This uncertainty stems from an apparent inconsistency between this requirement and other features of Part IVA and Part 4A. In fact, s 33H provides that an application commencing a class proceeding, in describing or otherwise identifying class members to whom the suit relates, need not "name, or specify the number of, the group members". This provision simply reflects, and accommodates, the legislative preference for an opt out regime. As noted by Justice Lehane of the Federal Court, the lack of a requirement of express consent by the class members, under such a regime, means that "in many cases a substantial number of members of the represented group will be unknown".[112]

The lack of clarity on this issue was intensified by s 33L which provides that where, at any stage of the class action, it appears likely that there are fewer than 7 class members, the Court has the discretion to order, inter alia, that the proceeding continue as a class action. This "tension" between the opt out device and s 33L, on the one hand, and the threshold requirements of s 33C(1)(a), on the other hand, has resulted in conflicting views, among trial justices, as to how the discretion provided to the Court by s 33L should be exercised.[113] With respect to s 33C(1)(a), this problem has been addressed, by a number of trial judges, by holding that this provision is complied with where the

[109] See *Wong v Silkfield Pty Ltd* (1999) 165 ALR 373, 376 (per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).
[110] ALRC 1988 Report, above n 8, para 140.
[111] See V Morabito, "Class Actions and the Right to Opt Out under Part IVA of the *Federal Court of Australia Act 1976* (Cth)" (1994) 19 *Melbourne University Law Review* 615, 623; *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723, 731 (per Drummond J); and *Silkfield Pty Ltd v Wong* (1998) 159 ALR 329, 343 (per O'Loughlin and Drummond JJ).
[112] *Bright v Femcare Ltd* [2000] FCA 1179, para 19 (per Lehane J). See also *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424, 428 (per O'Loughlin J).
[113] Compare, for instance, *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 118 ALR 510 with *Falfire Pty Ltd v Roger David Stores Pty Ltd* (Unreported, Federal Court, Kiefel J, No QG 201 of 1995, 25 September 1996) and *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (Unreported, Federal Court, Drummond J, No QG 190 of 1996, 9 July 1997).

representative plaintiff can demonstrate that it is *likely* that the group consists of at least seven members.[114]

The second departure from the ALRC's proposed regime noted above, concerning the addition of the requirement that the common issue of law or fact needs to be substantial, has resulted in conflicting judicial interpretations of s 33C(1)(c).[115] The intervention of the High Court, as to the ambit of the term "substantial", was thus required. Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ of the High Court held in 1999 that:

> clearly, the purpose of the enactment of Pt IVA was not to narrow access to the new form of representative proceedings beyond that which applied under regimes [the traditional representative action procedures] considered in cases such as *Carnie*. This suggests that, when used to identify the threshold requirement of s 33C(1), "substantial" does not indicate that which is "large" or "of special significance" or would "have a major impact on the ... litigation" but, rather, is directed to issues which are "real or of substance".[116]

(iii) Multiple Respondent/Defendant Class Actions

Significant problems have been generated by the way in which s 33C(1) has been judicially interpreted with respect to the following question: can a proceeding against more than one respondent/defendant be brought, as a class proceeding, where not all of the class representatives and class members have an individual claim against each of the defendants/respondents? This question is of great practical significance in light of the fact that, more often than not, illegal conduct that affects adversely a class of persons is engaged in by more than one person/entity. This fact appears to have been recognised by Justice Sackville of the Federal Court when he noted that "it is becoming increasingly frequent for representative proceedings to be brought by more than one representative applicant against more than one respondent".[117] This is particularly the case where the alleged illegal conduct entails contraventions of the *Corporations Act*. It will be recalled, for instance, that in the *GIO* shareholder class action there were 12 respondents.

The Full Federal Court of Australia has considered this issue on two occasions, in 2000 and 2003. On the first occasion, the Court unanimously held, in *Philip Morris (Australia) Ltd v Nixon*,[118] that a multiple defendant proceeding may not be brought under Part IVA unless each class representative and each class member has an individual claim against each of the respondents. As a result of *Philip Morris*, a number of Federal and Victorian proceedings brought against multiple respondents/defendants were not allowed to proceed, as class proceedings, thereby precluding access to justice to the relevant claimants.[119]

A differently constituted Full Federal Court considered this issue again in 2003 in *Bray v F Hoffmann-La Roche Ltd*.[120] Justices Carr and Finkelstein rejected the principle, enunciated in *Philip Morris*, that compliance with s 33C requires, in litigation involving more than one defendant, each

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[114] See *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 118 ALR 510, 514 (per Wilcox J); *Marks v GIO Australia Holdings Ltd* (1996) 63 FCR 304, 315 (per Einfeld J); *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164; and *.Au Domain Administration Limited v Domain Names Australia Pty Ltd* [2003] FCA 1106, paras 8-10 (per Finkelstein J).

[115] See V Morabito, "*Dinning v Federal Commissioner of Taxation* - The Dawn of a New Era in Tax Litigation in Australia?" (2000) 7 *Canterbury Law Review* 487.

[116] *Wong v Silkfield Pty Ltd* (1999) 165 ALR 373, 381.

[117] *Hunter Valley Community Investments Pty Ltd v Bell* [2001] FCA 201, para 57.

[118] (2000) 170 ALR 487.

[119] See, for instance, *Bright v Femcare Ltd* [2000] FCA 742, para 81 (Lehane J); *Batten v CTMS Ltd* [2000] FCA 915; *Hunter Valley Community Investments Pty Ltd v Bell* [2001] FCA 201 and [2001] FCA 1148; *Sereika v Cardinal Financial Services Ltd* [2001] FCA 1715; *Milfull v Terranora Lakes Country Club Limited* [2002] FCA 178; and *Cook v Pasminco Ltd* [2000] VSC 534.

[120] (2003) 200 ALR 607.

class member making a claim against each defendant. The remaining justice, Justice Branson, was of the view that *Philip Morris* should be followed unless and until it is overruled by the High Court. But Justice Branson also made some comments, concerning what compliance with *Philip Morris* entails, which clearly suggested a far less strict approach, to standing in multiple defendant proceedings, than that embraced by the Court in *Philip Morris.* The approach followed by the majority justices in *Bray* brings the Australian law on this issue closer to the principles formulated by Courts in Ontario and British Columbia and to the approach that had been followed by several single justices of the Federal Court of Australia before *Philip Morris*.[121] But, more importantly, it facilitates the attainment of the policy goals of access to justice and judicial economy.

Unfortunately, a majority of trial judges have held that *Philip Morris*, rather than *Bray*, represents the law governing this issue.[122] An additional dimension to this unsatisfactory state of affairs was generated by the recent enactment of proportionate liability legislation by, among others, the Commonwealth and Victorian legislatures. The requirements of this legislation and its adverse impact on multiple defendant class actions, as a result of *Philip Morris*, have been aptly described by Grave and Adams:

> The legislation provides for the apportionment of liability so that the concurrent wrongdoer's liability is limited to the proportion of the damage the court considers just having regard to the extent of the concurrent wrongdoer's responsibility for the loss … The defendants to an apportionable claim are not liable to contribute to the contribution recovered from another concurrent wrongdoer … For a plaintiff to recover in full in one proceeding the plaintiff must join all possible wrongdoers or risk the court apportioning some damage to a non-party and the need for further proceedings. This is particularly problematic for [class] proceedings if each group member is required to have a claim against each respondent.[123]

(iv) Ideological Class Representatives

Another significant issue concerning commencement prerequisites, that needs to be considered when devising a class action regime, is whether entities that desire to institute a class proceeding, on behalf of a group of persons who have suffered harm from the same defendant(s) in similar circumstances, may do so where they lack individual standing to sue the defendant(s) in question. The drafters of the Commonwealth and Victorian regimes provided a negative answer to this important question. Section 33D(1) of both regimes provides that:

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

This provision thus confirms the existence of the requirement that emerges from the terms of s 33C(1), namely, that the class representative needs to be one of the seven or more persons, mentioned in s 33C(1)(a), who have claims against the defendant. The unsatisfactory nature of this approach may best be illustrated by considering its inconsistency with the access to justice goal of class actions. Broadly speaking, there are two types of barriers that impede persons with a legal grievance from pursuing a legal remedy, and which the class action device is intended to overcome: financial barriers and non-financial barriers. As succinctly noted by the Ontario Law Reform Commission, "many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers".[124] Where no member of the relevant group of claimants is able to overcome both types of

[121] See V Morabito, "Standing to Sue and Multiple Defendant Class Actions in Australia, Canada and the United States" (2003) 41 *Alberta Law Review* 295.
[122] See Grave and Adams, above n 12, 103.
[123] Ibid 111-112.
[124] OLRC Report, above n 9, 139. See also *1176560 Ontario Ltd v The Great Atlantic & Pacific Co of Canada Ltd*, 2002 Ont Sup CJ LEXIS 2263, at 34 where Justice Winkler of the Ontario Superior Court of Justice

barriers, no class proceeding will be instituted on behalf of the relevant group. As noted by a Canadian commentator, "is it reasonable to expect that, of those afraid to sue for themselves, one will emerge to sue for all?".[125] This means that the class action device will not be employed precisely in those circumstances where it is needed the most and where it is intended to operate. If, on the other hand, class proceedings could be commenced by well-resourced "ideological" plaintiffs, such as, for instance, consumers associations or environmental associations, then this problem may be addressed, at least in some circumstances.

Fortunately, the Federal Court of Australia has held that in order to have a "claim" for the purposes of s 33C(1), and thus be able to institute a class proceeding, it is not necessary to have suffered personally from the relevant conduct of the defendants. All that is necessary is that the representative plaintiffs have standing to sue. This requirement may, in turn, be satisfied through legislative provisions which allow any member of the public (or specified persons or entities) to institute legal proceedings with respect to certain types of illegal conduct.[126] This approach appears to be dictated by a judicial recognition of the important role that ideological plaintiffs can play in the operation of the class action device. It is unlikely that the class proceedings in *Chats House* and *Golden Sphere* would have been initiated by one of the members of the relevant classes of claimants. But even if this conclusion is incorrect, it appears reasonable to assert that the resources and expertise of the ACCC were at least equal to the resources and expertise of any individual member of the relevant group. It is, therefore, not difficult to agree with the following observations of the Ontario Law Reform Commission:

> a particular individual, because of some special ability or experience, may be not only an adequate class representative but the most adequate class representative. This may be the case even though he himself has not suffered any injury, has no individual standing to sue the defendant and, *a fortiori*, is not a member of the class.[127]

A similar desirable scenario may be attained in the company law arena, by ASIC, through the joint use of s 1324 and the class action device. An even more desirable scenario would be secured through an amendment to s 1324 that would result in any member of the public being able to rely on this provision to seek legal redress on behalf of those persons who have been harmed by conduct that is alleged to be in contravention of the *Corporations Act*.

(v) Defendant Class Actions

Another important dimension of the process of drafting appropriate commencement criteria entails a determination as to whether the proposed class action regime should permit the institution of defendant class proceedings, that is, proceedings brought against one or more defendants as representatives of a class of defendants. Defendant class actions may not be brought pursuant to Part IVA and Part 4A. Litigation against representative defendants (including litigation brought on behalf of groups of claimants) may only be brought pursuant to the traditional representative action procedure. This represents an unsatisfactory scenario when one considers that, as indicated in Part IV above, the class action device is intended to remove the numerous and significant problems that have been encountered in group litigation brought pursuant to the traditional representative action procedure. Equally significant is the fact that, as noted by a Canadian judge, defendant class actions

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explained that "although class proceedings serve a primary purpose of permitting meritorious, non-economic claims to be litigated, there are cases where economic considerations are not the only barriers to litigation".

[125] HP Glenn, "Class Actions in Ontario and Quebec" (1984) 62 *Canadian Bar Review* 247, 267 n128.

[126] See V Morabito, "Ideological Plaintiffs and Class Actions - An Australian Perspective" (2001) 34 *University of British Columbia Law Review* 459.

[127] OLRC Report, above n 9, 349. See also Crerar, above n 9, 92: "the most important modern Canadian jurisprudence has come about as a result of social and political organizations exercising a watchdog role through litigation. Similarly, there exist many consumer and taxpayer organizations that would be well-motivated to launch a suit even where individual recovery would be slight".

have the potential to secure benefits similar to those available through the institution of plaintiff class actions:

> a defendant class action is a civil action brought against one or more persons defending on behalf of a group of persons similarly situated. It provides an efficient procedural mechanism for the determination of common issues in a complex proceeding involving multiple parties. It offers a means of binding all interested parties and, therefore, prevents relitigation of the same issues in a multitude of law suits. The advantages of a defending class action include the conservation of judicial resources and private litigation costs, both absolutely, by preventing relitigation of the same issues, and relatively, by spreading expenses and resolving common issues over a large number of defendants. In this sense, greater access to the courts, by plaintiffs and defendants alike, is achieved.[128]

In this respect, Australia's class action regimes compare unfavourably with the class action regimes that operate in US Federal Courts, in the Federal Court of Canada and in the Canadian province of Ontario which all permit and regulate defendant class actions.[129] The ability to institute proceedings against a representative defendant would be very beneficial in the company law arena given that, as already noted, numerous respondents/defendants would usually be involved in such proceedings.

C. Certification Regimes

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

> The preliminary matter of the form of the proceedings has often been more complex and taken more time than the hearing of the substantive issues. Because the court's discretion is involved, appeals are frequent, leading to delays and further expense. These expenses are wasteful and would discourage use of the procedure. There is no need to go to the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure at any time.[130]

The rejection of a certification model was also based on the ALRC's conclusion that, where the claims of the class members are individually non-recoverable, the denial of certification, on the basis that the interests of the class members would not be adequately protected, would represent a grossly unsatisfactory measure. This is because, by definition, the class action device constitutes the only means by which persons, with those types of claims, may seek access to legal remedies.[131]

The drafters of the Commonwealth and Victorian regimes implemented this recommendation. Unfortunately, this desired scenario - of not expending excessive time and resources on deciding whether the use of the class action device is appropriate - which prompted the ALRC's rejection of the certification procedure, has not been attained. In many class proceedings, defendants have sought to persuade the Court that the proceedings should not proceed as class proceedings because of a failure to comply with the commencement criteria or, alternatively, because it was appropriate for the Court to exercise its power to terminate properly constituted class proceedings. This strategy,

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[128] *Chippewas of Sarnia Band v Canada (Attorney General)* (1996) 29 OR (3d) 549, 558-559 (per Adams J).

[129] See V Morabito, "Defendant Class Actions and the Right to Opt Out – Lessons for Canada from the United States" (2004) 14 *Duke Journal of Comparative and International Law* 197.

[130] ALRC 1988 Report, above n 8, para 146. A more colourful criticism of the certification procedure was provided by a Canadian commentator who lamented that "anything but the traditional A versus B litigation is treated as if it were a legal freak, a Frankenstein monster so dangerous that it must be kept in a cage until the plaintiff (or plaintiff's lawyer) has devoted a massive investment of time and money to a largely irrelevant ordeal": A Roman as cited in Rogers, above n 105, 6.

[131] ALRC 1988 Report, above n 8, para 147.

together with challenges to other aspects of class proceedings, such as pleadings, have been primarily responsible for a grossly undesirable scenario which was recently described as follows by Justice Finkelstein of the Full Federal Court:

> there is a disturbing trend that is emerging in representative proceedings which is best brought to an end. I refer to the numerous interlocutory applications [lodged by defendants], including interlocutory appeals, that occur in such proceedings. This case is a particularly good example. The respondents have not yet delivered their defences yet there have been approximately seven or eight contested interlocutory hearings before a single judge, one application to a Full Court and one appeal to the High Court. I would not be surprised if the applicants' legal costs are by now well in excess of $500,000. I say nothing about the respondents' costs. This is an intolerable situation, and one which the court is under a duty to prevent, if at all possible. One possible approach in these types of cases (that is, product liability or mass torts claims) is to bring the action on for speedy determination. By giving appropriate directions the court can ensure that the parties get on with the litigation and do not become bogged down in what are often academic or sterile arguments about pleadings, particulars, practices and procedures. It is not unknown for respondents in class actions to do whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful.[132]

It is submitted that it is highly inappropriate to confer upon Courts the power to terminate class proceedings for reasons that are unrelated to a judicial finding that the commencement criteria have not been adhered to. Attention will now be turned to this aspect of Australia's class action regimes.

D. Judicial Termination of Properly Instituted Class Actions

In Canada and in the US, once proceedings are certified as class actions, the power of the Court to stop the proceedings from progressing as class proceedings, is limited to a judicial determination that the certification prerequisites no longer exist or never existed. That is to say, certification regimes do not empower Courts to terminate properly constituted class actions pursuant to criteria or factors that are different from those that are considered during the certification hearing. In some Canadian jurisdictions, this power to decertify may not be exercised by the Court on its own motion. Australia's Courts can bring to an end Part IVA and Part 4A proceedings, where they accept the arguments of the respondents/defendants that the threshold criteria have not been satisfied. Part IVA and Part 4A also vest trial Courts with broad powers to terminate proceedings which have adhered to the commencement prerequisites. In fact, these termination powers, unlike the power of US and Canadian Courts to decertify, are not dependent on a finding that the commencement prerequisites no longer exist or never existed. Instead, these powers are based on additional criteria, some of which confer on the Court a very broad power.[133]

The discretion that s 33L confers upon Australian Courts to terminate a class proceeding where there are less than seven class members, has already been referred to. Another relevant provision is s 33M which empowers the Court to order the termination of a Part IVA/Part 4A proceeding where the cost to the defendant of identifying the class members and distributing to them the damages won by the representative plaintiff would be excessive, having regard to the likely total of those amounts. This power may only be exercised upon an application by the respondent/defendant. This section

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

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

implements a recommendation of the ALRC. The ALRC justified this power on the basis that that "a primary goal of the proposed procedure is that of achieving legal redress where this can be done efficiently, rather than imposing punishment on a respondent".[134]

The most significant, and troublesome, termination power is contained in s 33N(1). It allows the Court to order that the proceeding no longer continue as a class proceeding where it is satisfied that it is in the interests of justice to do so because:

(a) the costs that would be incurred if the proceeding were to continue as a class proceeding are likely to exceed the costs that would be incurred if each class member conducted a separate proceeding; or

(b) all the relief sought can be obtained by means of a proceeding other than a class proceeding; or

(c) the class proceeding will not provide an efficient and effective means of dealing with the claims of group members; or

(d) it is otherwise inappropriate that the claims be pursued by means of a class proceeding.

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

> where the Court determines that a proceeding commenced under Part IVA is not authorised by s 33C to be commenced as a representative proceeding or where it orders, under any of ss 33L, 33M or 33N, that a representative proceeding no longer continue under Part IVA, the effect of such a determination is to extinguish the representative aspect of the proceeding but to leave unaffected its character as a proceeding brought for the benefit of the representative party itself. The implication in each of ss 33L(b), 33M(c) and 33N(1) is that once an order terminating the representative character of a proceeding brought under Part IVA is made, that same proceeding continues, but as an action brought by and for the sole benefit of the representative party. What is implied in these provisions is expressly stated in s 33P(a).[135]

In Part IV above, it was mentioned that the drafters of Australia's class action regimes were influenced by the strong opposition to class actions by some sectors of both the legal community and the wider community. No counterparts to paras (b), (c) and (d) of s 33N may be found in the regime proposed by the ALRC. The enactment of these provisions provides a vivid illustration of an attempt on the part of the Commonwealth and Victorian legislatures to demonstrate that strong measures, in addition to those proposed by the ALRC, were included in order to prevent the potentially undesirable effects of class action legislation. In fact, the rationale behind "termination" powers such

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[134] ALRC 1988 Report, above n 8, para 151. See also J Donnan, "Class Actions in Securities Fraud in Australia" (2000) 18 *Company and Securities Law Journal* 82, 86. This philosophy was also embraced by the government responsible for Part IVA. See Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3035 (Senator Tate – Minister for Justice and Consumer Affairs): "if for one reason or another ... compensation cannot be easily paid ..., the defendant should not be disadvantaged".

[135] *Silkfield Pty Ltd v Wong* (Unreported, Federal Court, O'Loughlin and Drummond JJ, No QG 8 of 1998, 17 December 1998), 3. See also *Huang v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 134, 138 (per Lehane J); and *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)* (1999) 166 ALR 74, 122 (per Lindgren J).

as s 33N was described by the then Commonwealth Attorney-General as the conferral on class action Courts of "comprehensive powers … to ensure that the proceedings are not abused".[136]

But Part IVA, and Part 4A, already contain sufficient powers to prevent abuse of the class action device and these powers were based on the recommendations of the ALRC. The effect of these extremely wide termination powers has instead been the discontinuance of class actions in circumstances where the institution and continuance of such proceedings were dictated by the access to justice and judicial economy goals of Part IVA and Part 4A. A striking illustration of this unsatisfactory judicial stance is provided by *Murphy v Overton Investments Pty Ltd*.[137] The class representative in this Part IVA proceeding sought to persuade the Court not to accede to the defendant's request for a s 33N order by drawing attention to the fact that most of the class members were residents of a retirement village. Accordingly, it was reasonable to presume that most, or at least some, of them might not be able to assume the burdens associated with being a named plaintiff in a Court proceeding. Emmett J dismissed this proposition in the following manner:

> That is not a weighty consideration to be taken into account in determining the inappropriateness or otherwise of the claims being pursued by means of representative proceedings. Procedures are available, for example, whereby guardians *ad litem* can be appointed for incapacitated or disabled parties.[138]

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

> It is necessary to emphasise the particular vulnerability of the plaintiffs in this case. The individual class members are deaf or blind or both. Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members.[139]

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

> whether or not it is in the interests of justice to make [a s 33N] order has to be weighed against the public interest in the administration of justice that favours class actions. That requires one to consider the principal objects of the class action procedure. They are: (1) To promote the efficient use of court time and the parties' resources by eliminating the need to separately try the same issue; (2) To provide a remedy in favour of persons who may not have the funds to bring a separate action, or who may not bring an action because the cost of litigation is disproportionate to the value of the claim; and (3) To protect defendants from multiple suits and the risk of inconsistent findings.[140]

The application of this general principle to the Part IVA proceeding in *Bright* produced the following result:

> It seems to me that if these women [the class members in question] are not permitted to bring a group claim, it is likely that many of them will not pursue an individual claim because the potential gain would not justify incurring the risk of costs. In that sense it would be contrary to the interests of justice to make an order under s 33N.[141]

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[136] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3175 (Mr Michael Duffy).
[137] [1999] FCA 1123.
[138] Ibid para 120.
[139] (2001) 205 DLR (4th) 39, 57 (per McLachlin CJ).
[140] (2002) 195 ALR 574, 605. See also ibid 576 (per Lindgren J).
[141] Ibid 607 (per Finkelstein J).

VII. CONCLUSION

A proper study of the crucial issue of corporate social responsibility must encompass an evaluation of the effectiveness of our legal system in ensuring that those harmed by corporate misconduct are able to seek legal redress against the companies in question and/or their officers. This paper has sought to consider an important dimension of this issue through an evaluation of the procedural devices that are available to deal with proceedings that involve similarly situated claimants.

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