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25 YEARS OF CLASS ACTIONS: where are we up to and where are we headed?

INTRODUCTION

March 2017 marks the 25th anniversary of the introduction of the Australian class action regime. This milestone provides an important opportunity to take a step back and consider the current operation of our class action regime, whether and how its operation differs from what was envisaged when first introduced and whether the regime is effectively and appropriately furthering its objectives. Those objectives are well known and have not changed – increasing access to justice, reducing the cost of litigation and promoting the efficient use of resources by achieving finality for multiple claims. However, the landscape in which the class action regime operates has significantly evolved since it was first introduced in 1992.

While we have not seen an avalanche of class action proceedings, there is no doubt that the level of class action activity is higher than the 'small number of additional cases' originally envisaged at the time of its introduction. A large part of that activity is attributable to the rise in the entrepreneurial nature of class action litigation, with the growing role of third party litigation funders and new law firms. In *Class actions today: Is this what was expected?* we discuss the evolution and current landscape of Australia's class action environment.

A further contributor to our active class action environment is the generous judicial interpretation of our class action thresholds, arguably encouraging a variety of relatively speculative class actions. In *Is it time to revisit our class action gateways?* we consider whether the gateways to our class action regime are operating effectively. Do the thresholds truly operate to facilitate access to justice, and the pursuit of claims efficiently and in the interests of group members? We see a real question as to whether this is the case.

There is no doubt that the rise of third party litigation funding was not envisaged 25 years ago. Third party funding and lawyer entrepreneurialism have had a dramatic effect on class actions, not only on the number of class actions but also on how the class action regime operates. In *Class action entrepreneurialism: Is the tail wagging the dog?* we look at the pressures these trends have placed on the regime, including the drive by funders for closed classes and the potential for common fund orders. These developments reflect the growing commercialism of these case that courts are being asked to grapple with. It is not something that we think should go unchecked and is ripe for reform.

Of course, access to justice was not the only objective of our class action regime – efficiencies flowing from the resolution of multiple claims with finality was one of the other objectives. The adoption of the opt out system reflected this. Recent developments reveal that achieving finality through a class action judgment may not always be clear cut. We consider these issues in *Finality through class actions: then and now* and discuss the factors that may ultimately affect the ability of a class action to achieve a final resolution for the parties and the judicial system.

There are no easy answers to many of the issues we pose. Our class action regime recognises, and was designed to balance, competing interests. Whether an appropriate balance is being achieved is something to consider. We hope this collection of short articles provides food for thought.

CLASS ACTIONS TODAY: IS THIS WHAT WAS EXPECTED?

Although the class actions regime in Part IVA of the Federal Court Act has been in place (without significant amendment) for 25 years, class actions law is dynamic and has thrown up a number of complex issues for the courts to consider. This is primarily the result of:

- the evolving ways in which the promoters of class actions have sought to deploy the class action regime; and
- the ways in which the courts have responded to that evolution with the benefit of a broad power to make any order considered appropriate or necessary to ensure that justice is done in a class action proceeding.

In recent years, we have painted a picture of the changing class action landscape (and what that means for class action risk) through our *Class Action Risk* reports. Our 2016 report is available here.

CLASS ACTION FILINGS

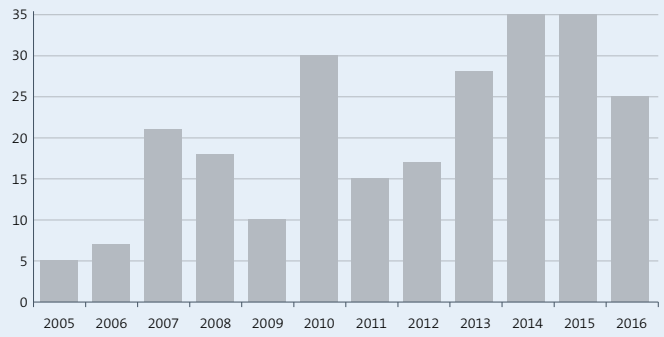
The Federal Attorney-General at the time of the introduction of Part IVA (the Hon Michael Duffy) noted in his second reading speech that it was expected that only a 'small number of additional cases' would be brought under the new class actions regime and that the regime was not anticipated to have a 'significant financial impact'.[1] The government of the day rejected the concerns expressed by the then shadow Attorney-General (the Hon Peter Costello), which included that it would make Australia a litigious society by encouraging the 'proliferation of litigation' and that it would encourage lawyers to 'commence entrepreneurial practice'.[2]

The experience of the regime over the past 25 years has landed somewhere between a 'small number of cases' and a 'proliferation'. There is, however, no doubt that, particularly in recent years, class actions practice has become increasingly entrepreneurial. Indeed, as noted in our *Class Action Risk 2016* report, a new wave of entrepreneurialism among lawyers looking to bring class actions is currently the biggest driver of class action risk (bigger than the risk presented by third party funders).

Although the regime is 25 years old, to really understand what is happening, it is necessary to focus on how the class actions landscape has developed over the past 10 to 12 years. During that time, class actions practice has fundamentally changed and is largely unrecognisable from its early days – among other things, this is because of the acceptance of litigation funding, the emergence of shareholder class actions, the emergence of outwardly entrepreneurial conduct of lawyers in promoting class actions and the increasing public profile the regime has received as a result.

Figure 1 shows class action filings since 2005. Although filings during that period have been variable (and filings in 2016 were down on the two prior years), there has been a marked increase in recent years.

Figure 1: Class actions filings 2005 – 2016



But the filings data is only half the picture. The number of companies facing class actions has actually fallen in recent years. This anomaly in the statistics arises from the increasing number of organisations facing more than one class action in relation to the same conduct. In some cases, this is because multiple law firms have commenced competing class actions in relation to the same conduct. In others, it is because the same firm has brought multiple actions on behalf of different customers – for example, eight class actions have been commenced against Standard & Poor's for its rating of eight different CDOs.

The ultimate exposure from these competing or cluster class actions is not necessarily any higher than it would be from a single class action, but they cause significant complications for the defendant and increase defence costs. Moreover, they significantly challenge one of the core objectives of the class action regime – efficient use of judicial resources.

The reduction in companies facing class actions is not, however, indicative of a downturn in class action activity or risk. On the contrary, there are a number of indicators (discussed throughout this publication) that point to class action activity increasing in the coming years – potentially significantly.

1 Federal Court of Australia Amendment Bill 1991 (Cth) second reading, House of Representatives, Parliamentary Debates, Hansard, 14 November 1991, 3174.

2 Federal Court of Australia Amendment Bill 1991 (Cth) second reading, House of Representatives, Parliamentary Debates, Hansard, 26 November 1991, 3284.

TYPES OF CLASS ACTIONS

In its 1988 report which recommended the introduction of a class action regime[3], the Australian Law Reform Commission identified (on a non-exhaustive basis) the types of proceedings that it envisaged might be brought as class actions. The focus was on consumer claims, small business protection and trade practices matters – including, for example:

- misleading statements that induced consumers to buy goods and/or services;
- misleading statements that induced businesses to enter into arrangements;
- misleading advice from a stockbroker or directors of a company in which persons had invested;
- claims against the directors of a company in relation to the company's compliance with its market disclosure obligations;
- losses sustained as a result of the negligence of a service provider;
- employment issues, including discrimination;
- environmental contamination affecting farming operations; and
- bank customers seeking refunds of miscalculated interest rebates.

As the Chief Justice of the Federal Court noted recently, the types of claims that have actually been filed over the regime's 25-year history reflect a range of commercial and non-commercial issues, including 'personal injury through food, water or product contamination, or through defective products; disaster tort claims; environmental claims; human rights claims; trade union claims; consumer claims for contravention of protective laws; claims by shareholders and investors; and anti-cartel claims'.[4]

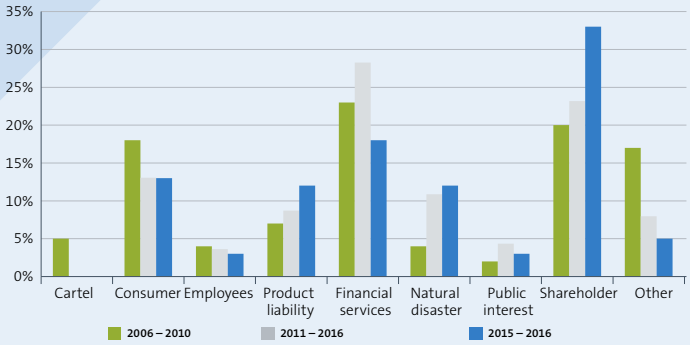
In many respects, this broad range of claims is exactly what the ALRC and Parliament had in mind. That said, the current class action landscape differs in some important respects from what was anticipated.

One such difference is that, perhaps surprisingly, there have been very few claims that might truly be described as 'mass consumer claims' – the most notable exception being the bank fees class actions. This trend is at odds with what the ALRC envisaged – indeed it (and the Parliament when it came to implement Part IVA) saw low-value mass-consumer claims as being well suited to the class action mechanism.

We have also seen the emergence of two distinct categories of claims – shareholder class actions and financial services class actions – which, although within the contemplation of the ALRC and Parliament at the time the regime was enacted, have taken on an unexpected prominence. Indeed, together they have accounted for more than half of all class actions filed over the past decade.

Financial services class actions: While the ALRC identified examples of potential class action claims in the financial services context, it did not foresee (perhaps not surprisingly) the concentration of class actions that would be filed in this sector (approximately 25 per cent of all class actions in the past decade). That said, the vast majority of those claims relate in one way or another to reliance on alleged misleading or deceptive conduct inducing some form of investment. As such, they might loosely be categorised as the types of consumer protection claims that were envisaged would be brought under the new regime. It remains to be seen whether this trend will continue now that the limitation periods have expired in respect of most claims arising from losses suffered during the global financial crisis.

Figure 2: Class action filings by type



Shareholder class actions: Shareholder claims were not a particular focus for the ALRC, although there is mention of the possibility of such claims in its 1988 report.[5] However, the ALRC primarily anticipated that these claims would be a mechanism by which shareholders could hold company directors or professional advisers accountable, rather than as a mechanism to sue the company itself. As it has turned out, shareholder claims against the company itself in respect of alleged inadequacies in market disclosure practices have become the most frequent type of class action filed over the past decade.

It would, of course, be unrealistic to expect the ALRC and Parliament to have predicted how the class action regime would be used 25 years after it was enacted. Nor does the fact that it is being used in different ways mean that the regime is not fulfilling its objectives – it is entirely appropriate (and important) for the regime to be sufficiently flexible to respond to the legal issues of the times. That said, it is still instructive in considering the social utility of the regime to reflect on the possible reasons for the divergences.

The genesis of each of the trends and divergences described above can be traced back to the fact that class actions are ultimately a commercial enterprise by plaintiff lawyers and/or litigation funders. Accordingly, with few exceptions, only those class actions that are expected to adequately compensate those players (or at least present an acceptable risk/reward ratio) will be commenced.

There is, however, one notable exception. The class action regime has been used on a number of occasions to pursue what might be described as public interest causes, often on a pro bono basis. The subject matter of these claims has included refugees, abuse and imprisonment. These claims have accounted for roughly 3 to 4 per cent of class actions filed over the past decade.

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

4 The Hon. Chief Justice J Allsop AO 'Class Actions 2016 Key Topics' (Keynote address at Law Council of Australia Forum on Class Actions, 13 October 2016), [Accessed 12 February 2017] .

5 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* [1988] ALRC 46 at p33.

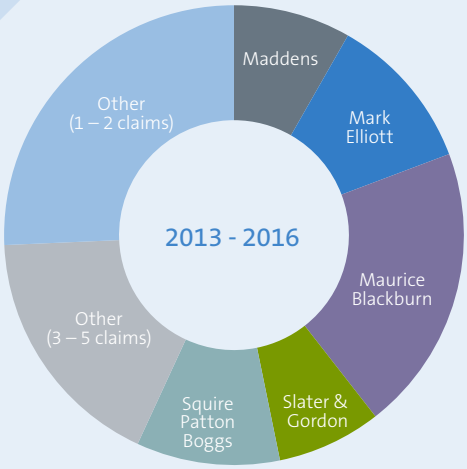
WHO IS BRINGING CLASS ACTIONS?

Perhaps not surprisingly, the ALRC had nothing to say about the lawyers who might bring class actions.

Maurice Blackburn and Slater & Gordon have been the most significant players over the life of the regime. However, more recent trends disclose a different picture. As can be seen from Figure 3, approximately 20 per cent of filings since 2013 can be attributed to Maurice Blackburn. Roughly 54 per cent of claims can be attributed to eight firms that have filed three or more claims during that period – all of which, with the exception of Slater & Gordon, have not traditionally been known as plaintiff class action firms. The remaining 26 per cent is attributable to 29 firms who have filed either one or two claims since 2013.

The implications for this trend are discussed in more detail in the article on entrepreneurialism below.

Figure 3: Who is bringing class actions?



THE EFFECT OF LITIGATION FUNDING

At the time Part IVA was enacted, third party funding for commercial return was arguably illegal. The ALRC did, however, identify certain exceptions including charitable support of claims and the existence of a common interest (such as support by trade unions). Against that background, the ALRC recommended that a special public fund be established to assist with the costs of class action litigation. This recommendation was not, however, taken up by the Parliament.

Over the past decade, third party funders have become increasingly entrenched. While long-term trends indicate a sustained increase in the percentage of class actions that have been third party funded, that percentage has fallen in recent years. This is a direct consequence of the number of claims being brought by less established class action firms, who are less likely to secure funding.

AUSTRALIA IS A REGIONAL OUTLIER

Class action activity in Australia has not been mirrored in other parts of the region or the rest of the world. Indeed, it is often said that Australia has become the jurisdiction outside the United States in which a company is most likely to face a class action.

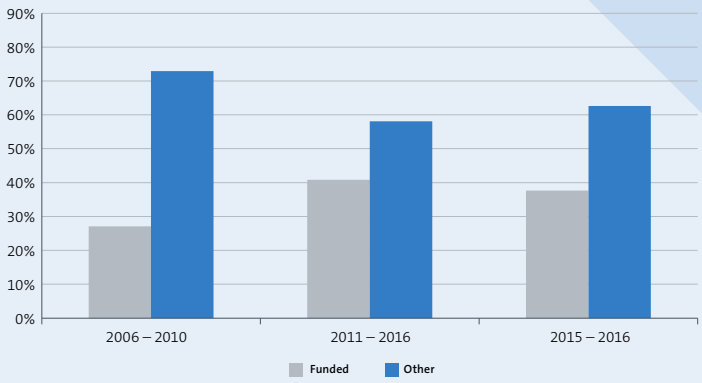
Representative actions in various forms are slowly gaining traction in New Zealand, Hong Kong, China and Singapore – often without the benefit of a formal class actions regime. In Japan, as in many European jurisdictions, class actions are limited to claims brought by registered consumer organisations.

Class actions in those jurisdictions are not currently seen as presenting the same business opportunities for lawyers and funders as in Australia. The most likely places for that to change in the medium term are Hong Kong and New Zealand.

WHAT DOES THE FUTURE HOLD?

The Australian class actions landscape is at an important crossroads. The next few years will be particularly telling. While there have been concerns about the way the landscape has been evolving for some time, the checks and balances built into the system have worked reasonably well to ensure that the system does not surge out of control. Those checks and balances are, however, under increasing pressure from the increasing forces of commercialisation.

Figure 4: Funding of class actions



IS IT TIME TO REVISIT OUR CLASS ACTION GATEWAYS?

When Part IVA was introduced, a decision was made not to include a US-style certification requirement. This was justified on the basis that other safeguards were in place to ensure that proceedings were not abused, or used inappropriately or inefficiently. Twenty-five years on, there is a question about whether these safeguards, and our class action gateways, have in practice achieved this objective and that of access to justice. In our view, it is time for the effectiveness of these mechanisms to be revisited, particularly in the current environment of class action entrepreneurialism.

THRESHOLD REQUIREMENTS AND SAFEGUARDS FOR CLASS ACTIONS – AUSTRALIA'S APPROACH

In the US, the lead plaintiff must satisfy a formal certification requirement, including that there are common questions of law or fact and that the representative parties fairly and adequately represent the interests of the class.[6] A court certifying a class action must appoint class counsel having regard to, among other things, counsel's class action experience and their resources committed to representing the class.[7]

By contrast, in Australia there is no such requirement. Rather, s33C of the Federal Court Act imposes several threshold requirements on representative proceedings.[8] Defendants bear the onus of proof in establishing that these threshold requirements have not been complied with. While defendants have repeatedly brought s33C applications, these are nearly always unsuccessful. This permissive approach to these gateways has allowed unmeritorious proceedings to be commenced, only to be dismissed at a later stage.[9]

In addition to the usual supervisory powers of the court, s33N was intended to be one of the regime's safeguards, allowing defendants to lead evidence demonstrating that 'it is in the interests of justice' that the proceeding no longer continue as a class action. However, in practice, courts have been wary of intervening at early stages of proceedings to make s33N orders. As a result, claims may be allowed to roll on, increasing the costs for defendants and, in some cases, raising real questions about whether the class action is truly representing class member interests.

CLASS ACTION ENTREPRENEURIALISM

This plaintiff-friendly approach to the class action gateways, together with the rise of litigation funding, has facilitated a new trend of class action entrepreneurialism.

Having regard to the commercial benefits to be gained, there is a legitimate concern that new entrants are:

- identifying more speculative claims;
- not giving proper consideration to whether the underlying complaint is actually best addressed through the class action mechanism, for example where individual issues predominate or where there is another forum to obtain a remedy; or
- not considering whether the lead plaintiff adequately represents the interest of the class.

These days, it is par for the course for a report of potential wrongdoing to be followed by an announcement of a class action investigation. There is an element of reverse engineering to make the claim fit the model. Neither the interests of potential claimants nor defendants are served by this approach.

TESTING THE BOUNDARIES OF ENTREPRENEURIAL LITIGATION

The limits of the court's acceptance of entrepreneurial litigation were tested in 2014, through the claims brought by Melbourne City Investments (***MCI***) (controlled by Mark Elliott) against Treasury Wines Estate Pty Ltd, Worley Parsons Limited and Leighton Holdings Limited. MCI had a 'business model' of purchasing small shareholdings in listed companies with the objective of subsequently commencing class actions against some of them for breaches of continuous disclosure obligations. At first instance, although the primary judge was not satisfied that there was anything irregular about the proceedings themselves justifying a s33N order, [10] orders were proposed that the proceedings not continue as class actions while MCI was the representative plaintiff and Mr Elliott acted for MCI. [11] On appeal, the proceedings were held to be an abuse of process and were permanently stayed.[12] In 2016, similar shareholder class actions brought by MCI against Myer were also stayed because the claims were found to be brought for an illegitimate or collateral purpose of generating income or revenue for a third party.[13]

The MCI cases are examples at the extreme end of the spectrum – the real difficulty for courts lies in the more nuanced cases. This is especially so where the critical question relates to whether the class action procedure is the appropriate vehicle to address the complaint.

ADEQUACY OF REPRESENTATION AND APPROPRIATENESS OF THE CLASS ACTION FORUM

The *Pampered Paws* class action highlights the risks associated with this difficult question. In this case, the Federal Court ruled, after four-and-a-half years of litigation and two trials, that only one of the declarations sought by the plaintiff was of assistance to class members. Accordingly, orders were made that the proceeding no longer continue as a class

6 Federal Rules of Civil Procedure (US), r 23(a).

7 Federal Rules of Civil Procedure (US), r 23(g).

8 These are:
- seven or more persons have claims against the same person;
- the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- the claims of all those persons give rise to at least one substantial common issue of law or fact.

9 A similar observation is made in Cynthia Cochrane, 'Class actions – Too pampered in the Federal Court?' (May 2013) *Law Society Journal* 51, 60.

10 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No. 3)* [2014] VSC 340, [61].

11 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No. 3)* [2014] VSC 340, [62].

12 *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* [2014] VSCA 351.

13 *Melbourne City Investments Pty Ltd v Myer Holdings Limited (No 2)* [2016] VSC 655.

action.[14] Section 33C and 33N applications had been made at earlier stages in the proceeding but were rejected on the basis that, with amended pleadings, the action should be permitted to continue at least to the end of the plaintiff's case, limited to the issues that were common to the plaintiff and the class members.[15]

Although class actions may resolve class members' legal claims, class members have little say as to how class actions are run or are concluded. The long -running product liability class action concerning the Vioxx drug highlights the issue of adequacy of representation. In this case, the Full Court found that the personal circumstances of the lead plaintiff stood him 'apart from the ordinary case' because he had issues in establishing causation. The Full Court identified that there may be other class members who, unlike the lead plaintiff, could in fact succeed in establishing causation in their individual claims.[16] The class action was ultimately settled after an initial settlement proposal was rejected by the court. Although a revised settlement was approved by the court, Justice Jessup expressed discomfort in doing so because the settlement offered little benefit to class members with stronger claims who would now be prevented from pursuing them.[17] This litigation demonstrates the need for proper consideration of the precise formulation of class action claims to ensure class members' claims are properly represented.

BURDEN PLACED ON CLASS ACTION DEFENDANTS

The *MCI, Pampered Paws* and *Vioxx* cases highlight the fact that, generally speaking, the onus is on defendants to make applications to the court questioning the appropriateness of proceedings. Although class action defendants are often criticised for making these type of applications, at least one judge has acknowledged extra-judicially that the 'procedural complaints made by defendants often have substance'.[18] Justice Lindgren remarked further that, in his experience, 'respondents often have a good point (or many good points)' in such interlocutory applications and 'that class action lawyers are often too impatient in launching and prosecuting proceedings'.[19] However, despite the merit of defendants' arguments in these interlocutory applications, our experience tells us that, more often than not, these applications are unsuccessful, and the actions are allowed to roll on. In *Vioxx* and *Pampered Paws*, had there been proper scrutiny up front, focusing on core issues such as whether the lead plaintiff adequately represented the interests of the class and whether the class action procedure was the appropriate vehicle to address the complaint, time and resources may have been spared and class members' claims properly protected.

WHERE TO FROM HERE?

The threshold requirements and other safeguards in Part IVA have been in force since 1992 without any reform. Interestingly, the Victorian Law Reform Commission (***VLRC***) has recently been tasked with considering, among other things, whether a certification requirement is appropriate for class actions (particularly in the context of funded proceedings).[20]

The *MCI*, *Pampered Paws* and *Vioxx* cases demonstrate that there is a case for change. When we reflect on the issues raised in these cases, it becomes apparent that some of the key reasons justifying the absence of a US-style certification requirement have not rung true. For example, although avoidance of costs and delays were some of the primary reasons given for why a certification device should not be adopted,[21] at least in some cases time and cost savings have not eventuated.[22] The delays and ultimate result in the *Pampered Paws* litigation are a prime example of this. Similarly, the characterisation of a certification requirement concerning the adequacy of representation as an 'empty gesture'[23] seems inappropriate when the treatment of class members in the *Vioxx* litigation is considered. This case demonstrates the complex issues that emerge when the interests of the representative plaintiff diverge from those of class members.

It will be interesting to see what recommendation the VLRC ultimately makes about the appropriateness of a US-style certification requirement. In our view, there would certainly be benefits to some form of certification regime in the current class action environment. A certification requirement may result in an increased focus on the types of concerns raised by the trend of class action entrepreneurialism. However, even if the VLRC were to recommend a certification requirement, we do not expect class action reform to be high on the political agenda.

In the absence of a certification regime or legislative reform of the threshold requirements and safeguards, our view is that there is a need for greater judicial supervision at the case management stages to address the risk of speculative or reverse engineered or inappropriate claims.

The new Federal Court Class Action Practice Note may provide the court with a platform to consider at an earlier stage whether a claim is inappropriately brought in the form of a class action. This practice note was introduced to reinforce the court's focus on the just resolution of disputes as quickly, inexpensively and efficiently as possible. In addition to the various matters that the practice note requires parties to be in a position to address at the first case management hearing, the court could also require parties to be in a position to address the following points:

- whether the underlying complaint is actually best addressed through the class action mechanism, for example where individual issues predominate or where there is another forum to obtain a remedy; and
- whether the lead plaintiff adequately represents the interest of the class.

Such matters would benefit from upfront scrutiny by the courts as part of their supervisory role, without relying on defendants to identify issues and bring them to the court's attention.

A shift in judicial approach, as opposed to the introduction of a certification device , may allow the class action regime to maintain some flexibility and strike a balance between the competing interests in play. More upfront scrutiny will reduce the risk that unmeritorious or inappropriate claims are allowed to commence only to be discontinued at a later stage, after significant time and expense is incurred by all parties, as well as the court. In doing so, the class action regime's key touchstones of access to justice and efficiency will be promoted.

14 *Pampered Paws (No 11)* [2013] FCA 241, [64]–[68].

15 *Pampered Paws (No 6)* [2010] FCA 295, [2].

16 *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd [No 6]* [2013] FCA 447, [9]–[10], [12] (Justice Jessup).

17 *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 7)* [2015] FCA 123,[6]- [7] (Justice Jessup).

18 Stuart Clarke and Christina Harris *'The Push to Reform Class Action Procedure in Australia: Evaluation or Revolution'* (2008) *Melbourne University Law Review* 32, 75 citing the Hon Justice K Lindgren, 'Class Actions and Access to Justice', keynote address delivered at the International Class Actions Conference 2007, Sydney, Australia, 25-26 October 2007.

19 Ibid.

20 Victorian Law Reform Commission, *Litigation Funding: Terms of Reference*, Access to Justice Litigation Funding and Group Proceeding.

21 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1998), 63 [146].

22 This observation has also been made in Stuart Clark and Christina Harris, 'The Push to Reform Class Action Procedure in Australia: Evolution or Revolution' (2008) *Melbourne University Law Review* 32, 775 citing Rachel Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 1st edition, 2004), 27.

23 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1998), 63 [147].

CLASS ACTION ENTREPRENEURIALISM: IS THE TAIL WAGGING THE DOG?

The defining feature of the current class actions landscape is lawyer and funder entrepreneurialism.[24] More than ever before, class actions are seen as lucrative profit-making opportunities for plaintiff lawyers and third party funders.

The entrepreneurs' pursuits of more and more favourable terms on which to bring class actions have significantly changed the fundamental nature of Australian class actions.

Moreover, the entrepreneurial environment – in which multiple class actions are often commenced in relation to the same conduct and reports of someone investigating a class action closely follow almost any report of potential wrong-doing or harm – raises questions as to whether access to justice has become a by-product, rather than central pillar, of the modern class actions regime. As recognised by the Chief Justice of the Federal Court in a recent speech, it is important that class actions continue to provide social utility and are run for the benefit of litigants – not funders and lawyers.[25]

ENTRENCHMENT OF FUNDING

In the decade following the introduction of the Federal Court regime, Australian class actions were funded by class members themselves or lawyers acting on a 'no win, no fee' basis. Third party funding was unheard of and arguably illegal. Although the legality of third party funding was not confirmed by the High Court until 2006,[26] in the years prior a handful of high-profile funded shareholder class actions were commenced. These claims were the genesis of the modern funded class action and the testing ground for a number of principles that stood in the way of third party funding of class actions becoming a viable proposition.

Although there were some setbacks along the way, by around 2010 most of those issues had been resolved in favour of the funders. In part, this was achieved by the Federal Government stepping in to clear the way for litigation funders on the policy basis that the funding of class actions facilitates access to justice and should therefore be encouraged rather than stymied on legal technicalities.

As a result:

- third party funding has become an accepted and entrenched feature of class actions practice; and
- third party funders are not subject to any specific regulation beyond a basic requirement to have a policy in place for managing conflicts of interest.

ENCROACHMENT OF FUNDING

Funders were not, however, content with acceptance or, indeed, entrenchment. Bit by bit, they have sought to change the fundamental nature of the way class actions are run in order to better serve their commercial objectives. Perhaps the most obvious example of this is their success in establishing a right to bring 'opt in' class actions (also known as 'closed class' class actions) within the opt out regime.

The Australian class actions regime is an opt out model – that is, all persons who fall within the class description are to have their rights determined by the class action unless they opt out of the proceedings. Historically, opt out class actions were not considered particularly desirable for funders because they could not be limited to those persons who had entered into funding agreements but also included so-called 'free riders'.

Rather than accepting that established position, funders started bringing class actions on behalf of the subset of potential class members who had signed funding agreements. When this form of opt in class definition was first used, it was declared by the Federal Court to be an abuse of process and repugnant to the policy of the opt out regime.[27] Some fine tuning of the concept and favourable rulings from the Federal Court have, however, resulted in the concept gaining acceptance and the legislature has not intervened on policy grounds (indeed, the rules of some state regimes now specifically permit it). In our opinion, however, a serious question remains as to whether this outcome is legally correct in jurisdictions in which it is not endorsed by statute. Moreover, to the extent that it is legally correct, it was not what the Parliament intended in implementing an opt out regime.

Opt in classes can give rise to a number of practical challenges for class action defendants. In particular, although they may reduce the size of the class, they deprive defendants of the certainty of addressing all potential claims through the class action process. They have also led to competing class actions being run on behalf of different classes at the same time – this creates an entirely new set of challenges for both the defendant and the court, particularly when actions arising out of the same conduct are approached differently in separate proceedings. It also challenges one of the other key policy objectives of the opt out regime, being to promote efficiency in the judicial system by dealing with a large number of claims arising out of the same or similar issues simultaneously.

COMMON FUNDS – A NEW FRONTIER

Ironically, funders have recently sought further advancements in their position through so-called 'common fund' orders partially on the basis of the undesirability of opt in classes.

In late 2016, funders achieved their biggest breakthrough since the legality of funding was confirmed when the Full Federal Court (sitting as a court of first instance) made a common fund order for the first time.[28] Although on qualified terms that did not fulfil all of the funders' objectives, the order effectively forced funding terms on all class members in an opt out class irrespective of whether they had signed a funding agreement. It remains to be seen how funders respond to the qualified nature of that breakthrough which, among other things, creates significant uncertainty by leaving the funder's commission to be determined by the court at the end of the proceedings. Nonetheless, it is a significant breakthrough that is likely to make Australian class actions an even more attractive proposition for local and offshore funders. It is

24 See our *Class Action Risk 2016* report.

25 The Hon. Chief Justice J Allsop AO 'Class Actions 2016 Key Topics' (keynote address at Law Council of Australia Forum on Class Actions, 13 October 2016).

26 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41.

27 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 1483; at [125]-[126].

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

also likely to change the way class actions are run, including by making early settlements less attractive to promoters.

Moreover, in keeping with the incremental approach to developments funders have taken to date, it would be reasonable to assume that they will continue to chip away with a view to achieving an outcome that more squarely achieves their objectives in due course.

LAWYER ENTREPRENEURIALISM

While litigation funding has been the most significant influence on the class actions landscape over the past decade, the effects of lawyer entrepreneurialism have been more acute in recent years. Not only has the number of 'new' law firms bringing class actions resulted in increased (and more speculative) filings, but it is also a core contributor to the trend for competing class actions and, in our view, to overall class action risk in more subtle ways.

In our experience, the inexperience of the new firms looking to get on the class actions 'bandwagon' has the potential to create significant practical and reputational issues for the defendants they sue. To a large extent, these issues arise from some new (and arguably more established) players not really understanding or grappling with their responsibilities as representatives of a class. Defending these claims (and protecting the reputation of the defendant in these circumstances) requires particular vigilance and insight.

On a different note, it remains to be seen how this trend may be affected if the law is changed to allow lawyers to charge contingency fees. The one certainty is that offering lawyers the opportunity to be remunerated by reference to a percentage of the outcome of class action litigation is not going to reduce the number of firms looking to get a slice of the action.

ACCESS TO JUSTICE?

Entrepreneurialism in class actions is not in itself problematic. The courts and Parliament have long recognised that it is an essential ingredient in facilitating access to justice.

That said, even when remedies are genuinely pursued, the biggest beneficiaries of most class actions are usually the lawyers and funders. Indeed, it is almost inevitable that the plaintiff lawyers and/or funders will be the biggest individual stakeholders in any class action. This creates undeniable conflicts of interests, including in relation to the way in which plaintiff lawyers have increasingly take steps to advance the interests of funders at the expense of the interests of class members. Recent examples include seeking common fund orders in forms which the courts have accepted would (if made) benefit the funder to the detriment of class members and arguing that the court does not have the power to consider the fairness of a contractual funding commission in the course of a settlement approval application. Even when the role of entrepreneurialism in class actions is accepted, these are worrying trends.

There are also an increasing number of class actions that, at the very least, raise questions as to whether they are genuinely brought with a view to securing a remedy for class members. Those cases fall into the following broad categories:

- Competing class actions: As mentioned above, competing class actions have a number of undesirable consequences. In most cases, there is little real justification for paying multiple sets of lawyers to run multiple claims when class members could be effectively represented in a single claim by a single legal team. The primary motivation for the commencement of duplicative claims is the desire to receive legal fees (although this is often overlayed by questions of adequacy of representation).
- Claims that do not appear to have been brought for the primary purpose of seeking a substantive remedy for class members. Some extreme examples have been struck out or stayed on that basis (notably the MCI claims), but other highly speculative claims remain on foot.

IS LEGISLATIVE CHANGE REQUIRED?

We are fast approaching a tipping point – there are signs that the market is changing in a way that will ultimately result in a sustained increase in class action filings, the filing of more speculative claims and the filing of more claims that will cause people to ask who is really benefiting.

The dangers of this situation were acknowledged by the Chief Justice of the Federal Court in a speech late last year:

> If commercial interests and commercial returns (as opposed to professional responsibilities) are seen to drive a substantial section of this work then the cost of defending claims and the public cost of providing the infrastructure for them will come to be seen as an impost on Australian business and public infrastructure that will not be seen as acceptable.[29]

It is time for serious consideration of legislative change to ensure that the class action regime continues to serve its laudable objectives in modern times. The types of measures that we would like to see considered include:

- tighter regulation of litigation funding;
- reaffirmation of the opt out regime by a prohibition on opt in classes; and
- tighter control of gateways, including in respect of competing classes.

There is no indication that any of these measures are currently under genuine consideration. Indeed, all legislative reform to date has facilitated class actions and litigation funding on the basis that both facilitate access to justice, and any measures to wind back those reforms are likely to be unpopular outside the business community. It is likely to take overwhelming evidence that the effects of entrepreneurialism have completely overshadowed the objectives of the class action regime before Parliament will act to rein things in.

29 The Hon. Chief Justice J Allsop AO 'Class Actions 2016 Key Topics' (keynote address at Law Council of Australia Forum on Class Actions, 13 October 2016), [Accessed 12 February 2017].

FINALITY THROUGH CLASS ACTIONS: THEN AND NOW

Two well recognised objectives of the class action regime were increasing access to justice and reducing barriers to remedy. A further benefit was the promise of finality associated with a binding judgment on the issues affecting multiple parties to a dispute. Finality in the determination of common issues would, in theory, prevent a multiplicity of proceedings, inconsistency of judicial decision-making, and uncertainty for the parties involved.

The High Court was recently called on to consider the extent to which finality is achieved from a class action judgment in *Timbercorp Finance Pty Ltd v Collins & Anor v Tomes*.[30] Following an unsuccessful class action in the Victorian Supreme Court, the High Court held that it was not unreasonable for class members to subsequently raise further claims in individual proceedings. In these circumstances, the question arises as to the extent to which class action judgments achieve finality and, correspondingly, efficiency.

A LOOK BEHIND THE CLASS ACTIONS REGIME

The ALRC's 1988 report[31] identified two of the aims behind the introduction of the regime as being 'promoting efficiency in the use of court resources' and 'ensuring consistency in the determination of common issues'.[32] The reforms were intended to 'provide a process for a more efficient, consistent and cost-effective disposition of large claims with common issues'.[33]

The ALRC considered that a notable deficiency of the existing court system at the time was the ability to 'secure a binding decision in respect of all affected' in respect of a 'multiple wrongdoing' – described as a common cause of action causing loss and damage to multiple plaintiffs.[34] The lack of a mechanism that could enable 'common issues to be determined conclusively for all those affected in one determination'[35] was considered particularly problematic:

> Where a number of individual claims arise out of a common wrong but are brought, for example, in different courts, before different judges or at all different times, inconsistent and varying verdicts can result... Such inconsistencies can result in courts being seen as inefficient and unfair.[36]

The ability to sue for damages in a grouped proceeding, where common issues could be determined together, was identified as an effective tool to reduce 'the cost of litigation to the individual' at the same time as 'avoiding a multiplicity of proceedings'.[37] In addition to the case management benefit, reducing a multiplicity of proceedings was viewed as leading to a result in which 'consistency of decision making [would be] promoted'.[38] As the ALRC outlined, '[t]he primary policy goals of such procedures are to enable the most efficient use to be made of resources to ensure consistency in decision making'.[39]

The opt out regime was central to the efficient working of the class action mechanism. A system in which parties were automatically included in the action, unless they expressly opted out, was considered to benefit access to justice and uphold the aims of the class action regime:

> This approach is compatible with all the different purposes served by the grouping of claims, including...ensuring that all persons with the same interest in an issue are bound by a single decision on that issue; if members having identical interests, an action or decision in respect of one can, without injustice, be taken to apply to the others.[40]

This system was to operate with the lead plaintiff having conduct of the proceedings, with the result that any step taken by the lead plaintiff would bind class members.[41] However, the ability of courts to allow for consideration of individual issues was also recognised by the ALRC:

> There may be issues which must be decided separately in relation to each group member, for example, the quantum of damages to which a party is entitled following determination of liability. Where individual issues arise, the Court is able to give a group member the conduct of his or her proceeding so far as it relates to those issues.[42]

Notably, finality of outcome was recognised as an important mechanism by which the aims of access to justice, efficiency and consistency of decision making would be achieved. The ALRC Report stated:

> To achieve maximum economy in the use of resources and to reduce the cost of proceedings, everyone with related claims should be involved in the proceeding and should be bound by the result.[43]

THE TIMBERCORP DECISION

The High Court handed down judgment in *Timbercorp* on 9 November 2016. The court unanimously dismissed Timbercorp Finance's appeal from the Victorian Court of Appeal decision on the question of whether class members were precluded from raising defences to its claims for debt recovery for investments in Timbercorp managed investments schemes (***MISs***).

Before Timbercorp Finance's action for debt recovery, the Victorian Supreme Court had dismissed a long and complex class action against Timbercorp regarding alleged deficiencies in PDSs for the Timbercorp

30 [2016] HCA 44.
31 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) (***Full Report***), Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 Summary (1988) (***Report Summary***), collectively, the ***1988 ALRC Report.***
32 Report Summary at [6].
33 *Class Actions in Australia*, V.
34 Summary Report at [7].
35 Full Report at [66].
36 Full Report at [66].
37 Report Summary at [6].
38 Report Summary at [4].
39 Report Summary at [8].
40 Report Summary at [13].
41 Report Summary at [19].
42 Report Summary at [20].
43 Final Report at [92] (emphasis added).

MISs. Timbercorp Finance contended that the effect of the class action judgment was to preclude borrowers from raising individual defences against demands for payment of the loans.

In dismissing Timbercorp Finance's appeal, the High Court made the following key findings:

The lead plaintiff did not represent class members on individual issues

The court found that the lead plaintiff in the class action was only the 'privy' of class members for common issues, not individual issues.[44]

Class members were not estopped from raising new defences

The court found that *Anshun* estoppel did not apply to restrict the ability of class members to raise defences against demands for loan repayment by Timbercorp Finance, because the class members could not, and were not expected to, have raised individual defences during the class action.[45] The court provided three main reasons for this finding:

- The class action regime is principally intended to deal with common issues, with specific provisions providing for situations in which individual issues will be dealt with outside of a class action.
- Class members only have a limited opportunity to engage in class actions and therefore should not be expected to raise discrete individual issues while the common issues are being determined.[46]
- During the class action, the trial judge had ordered that Timbercorp Finance's counterclaim about outstanding loan amounts was to be deferred for consideration until the determination of common issues had occurred. The common issues were therefore limited to issues regarding the validity of the PDSs. As such, there was no opportunity for class members to raise individual defences specifically in relation to their loans during the class action – to the contrary, it was anticipated that these defences could be raised at a later time when Timbercorp Finance's counterclaim was being considered.[47]

Failure to opt out not relevant to determination of estoppel

It was not unreasonable for the class members to fail to opt out of the class action even if they also had individual defences that could have been raised at the time. The opt out notice did not inform class members that they would lose the ability to raise individual defences if they participated in the class action; rather it warned that they 'would not be able to make the *same* claim in any other proceedings'.[48]

No abuse of process

Finally, as the regime did not require class members to raise individual claims during the class action, the raising of individual defences in loan recovery proceedings instituted by Timbercorp Finance did not constitute an abuse of process.

Interestingly, the court in *Timbercorp* referred to the findings of the 1988 ALRC report, recognising that key aims behind the enactment of the class actions regime included avoiding multiplicity of actions, and consistency of outcome.[49] However, in referring to the origins of the regime, the court highlighted the ALRC's emphasis on there being a 'commonality of interest' in order to find that the lead plaintiff should be taken as representing the class members in respect of pleaded and unpleaded claims, for the purposes of considering whether the principles of estoppel should apply.[50]

In considering Timbercorp Finance's contention that the raising of individual defences in subsequent proceedings constituted an abuse of process, the court emphasised that '[t]he ALRC [in its 1988 report] was not suggesting that a class member should not be permitted to pursue an individual claim outside the group proceeding'.[51] Rather, the regime's purpose was to encourage class actions where there was a common question or issue for determination. Given that the trial judge had deferred the matters relating to Timbercorp Finance's debt recovery for consideration until after the common issues in the *Timbercorp* case had been determined, the court found that raising individual defences to demands for loan repayment did not constitute an abuse of process – instead finding that, '[t]o the contrary, the preclusion of the respondents' defences to the appellant's claims would be unwarranted in principle and therefore unjust'.[52]

IMPLICATIONS OF *TIMBERCORP* FOR FINALITY IN CLASS ACTIONS

The *Timbercorp* decision demonstrates that there are limits to the extent that finality will be achieved once judgment is handed down in a class action. However, there are still a number of questions outstanding as to how the *Timbercorp* decision will affect the class actions regime, and the extent to which, in practice, multiple proceedings may be allowed to proceed.

First, the question of the scope of the 'common issues' in a proceeding will need to be considered in more detail by subsequent courts. A narrow interpretation on common issues could leave open the possibility of numerous new individual proceedings being initiated after the conclusion of an unsuccessful class action. On the other hand, a broad view of the common issues would limit the types of proceedings able to be brought after a class action is concluded.

Second, the question of what issues were determined or relevant at trial is likely to become of increasing relevance. Issues left to be determined at a later stage, or not decided upon by a trial judge, may impact on the ability of class members to raise their claims after judgment in a class action has been handed down.

Third, it remains to be seen whether courts may be prepared to take a broader approach to the scope of the issues resolved in a class action where 'offensive' claims are raised (for example, that a manufacturer's negligence caused loss and damage to class members) as compared with 'defensive' claims, such as those raised in the *Timbercorp* class action. This point was highlighted following the High Court's decision in a judgment on the merits of individual defences raised by four Timbercorp class members. Justice Judd commented:

44 *Timbercorp* at [39].
45 *Timbercorp* at [58].
46 *Timbercorp* at [58].
47 *Timbercorp* at [68].
48 Emphasis added.
49 *Timbercorp* at [43].
50 *Timbercorp* at [47]-[53]
51 *Timbercorp* at [71].
52 *Timbercorp* at [73].

> The questions for determination in this proceeding might, quite plainly, have been formulated as common questions in the class action, because they reflected a common position shared by a large group of investors. Had that been done, it would not have been necessary to set aside these test cases for trial, years after the conclusion of the class action. As common questions in the class action, the answers would have been binding upon members of the group. The decision in these test cases will be binding only upon the parties to them. One observation, arising from the events that have occurred, is the unsuitability of 'defensive' claims proceeding as class actions.[53]

Fourth, the role of opt out notices and the care required in preparation of the notice will undoubtedly come under closer examination in future cases.

Fifth, in circumstances where a class action judgment may only resolve a narrow range of issues and defendants may be left exposed to the potential for a myriad of further litigation, there is a real question as to whether a class action is an efficient and effective means of determining class members' claims. In that circumstance, is continuation of the class action in the interests of justice? It remains to be seen whether, in light of *Timbercorp*, courts are asked to consider, with greater frequency, applications under section 33N for orders that proceedings no longer continue as a class action.

53 *Timbercorp Finance Pty Ltd v Collins & Ors* [2016] VSC 776 at [20] (per Justice Judd).

CONCLUSION

The potential for a class action judgment to finally and efficiently resolve a multitude of claims was one of the identified benefits of a class action regime, both for defendants and our justice system generally. As the answers to issues left unresolved by *Timbercorp* are gradually refined by the courts, the significance and implications of the High Court's judgment on the extent and circumstances in which the class action procedure achieves these objectives will become clearer.

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