

JUDICIAL RESPONSES TO CLASS ACTION SETTLEMENTS THAT PROVIDE NO BENEFITS TO SOME CLASS MEMBERS

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Class proceedings may be instituted in only two Australian Courts, the Federal Court of Australia and the Supreme Court of Victoria. The settlement of class proceedings raises unique and challenging issues given that the outcome of such proceedings binds not only the formal parties – the class representatives and the defendants – but also the claimants represented by the class representatives, the class members. This is one of the reasons why a class proceeding may not be settled without the approval of the Court. The aim of this article is to explore the approach of these two Courts when confronted with settlements that provide no benefits to some categories of class members. Federal Courts in the United States have been required to approve class action settlements since 1938. This has resulted in an extensive, and extremely useful, body of case law and legal literature on class action settlements. Consequently, the US jurisprudence on class action settlements is also considered in some detail.

Class actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest. This fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems.¹

[C]lass actions accomplish many salutary goals; at the same time, they can cause great mischief. In both instances, the legal profession, judges and lawyers alike, are responsible for the result.²

I INTRODUCTION

In many common law jurisdictions, traditional (non-group) legal proceedings may be settled without any judicial involvement or approval.³ In such proceedings:

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¹ *Mars Steel Corp v Continental Illinois National Bank*, 834 F 2d 677, 678 (7th Cir, 1987).

² *Piambino v Bailey*, 757 F 2d 1112, 1139 (11th Cir, 1985).

³ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [216] ('ALRC Report'); *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F 3d 768, 784 (3rd Cir 1995); Deborah Hensler et al, RAND Institute for Civil Justice, *Class Action Dilemmas - Pursuing Public Goals for Private Gain* (2000) 15, 76 ('Hensler Report'); South African Law Commission, *The Recognition of A Class Action in South African Law*, Working Paper No 57 (1995) [5.20.1] ('SALC Report'); Scottish Law Commission, *Multi-Party Actions: Court Proceedings and Funding*, Discussion Paper No 98 (1994) [7.44] ('SLC Paper').

A settlement agreement is 'as binding, final, and as conclusive of rights as a judgment' when the settlement is not illegal or against public policy and is fairly arrived at and properly entered into, that is knowingly and voluntarily and not by fraud or coercion.⁴

Order 6 rule 13 of the *Federal Court Rules* (Cth) provides that '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'. Similar provisions may be found in the rules of procedure that govern litigation in England⁵ and in most Australian⁶ and Canadian jurisdictions.⁷ These representative action rules are silent as to the principles that are to regulate the ability of representative plaintiffs to terminate or settle representative actions.⁸ The traditional approach adopted by Courts presiding over representative actions, with respect to this issue, has been that the representative plaintiff 'can discontinue, settle or otherwise deal with the action as he or she pleases without reference to any other members of the group'⁹ and without judicial approval.¹⁰

In 1992, the Commonwealth Parliament, acting pursuant to the recommendations of the Australian Law Reform Commission ('ALRC'),¹¹ inserted a new Part IVA into the *Federal Court of Australia Act 1976* (Cth). Part IVA contains a comprehensive regime that provides detailed guidance with respect to the numerous and complex issues that are raised by multi-party litigation and which are not expressly dealt with by the representative action rules. In 2000 a new Part

⁴ *Allen v Alabama State Board of Education*, 612 F Supp 1046, 1050 (DC Ala, 1985) citing *Thomas v State of Louisiana*, 534 F 2d 613, 615 (5th Cir, 1976). See also *United States v City of Alexandria*, 614 F 2d 1358, 1362 (5th Cir, 1980); *Mars Steel* 834 F 2d 677, 681 (7th Cir, 1987).

⁵ *Civil Procedure Rules* (UK) r 19.6.

⁶ Damien Grave and Ken Adams, *Class Actions in Australia* (2005) 578-84; S Stuart Clark and Christina Harris, 'Multi-Plaintiff Litigation in Australia - A Comparative Perspective' (2001) 11 *Duke Journal of Comparative and International Law* 289, 293; Barry Lipp, 'Mass Tort Class Actions under the Federal Court of Australia Act: Justice for All or Justice Denied?' (2002) 28 *Monash University Law Review* 360, 362-3.

⁷ Steven Penney, 'Mass Torts, Mass Culture: Canadian Mass Tort Law and Hollywood Narrative Film' (2004) 30 *Queen's Law Journal* 205, 216.

⁸ *Esanda Finance Corp Ltd v Carnie* (1992) 29 NSWLR 382, 388 (Gleeson CJ); Julian Donnan, 'Class Actions in Securities Fraud in Australia' (2000) 18 *Company and Securities Law Journal* 82, 89, 96. Ironically, a similar problem exists with respect to the regime governed by r 34 of the *Supreme Court Rules 1987* (SA) which was introduced in 1987 and was designed to address some of the problems experienced with the traditional representative action procedure.

⁹ SLC Paper, above n 3, [5.5]. The rationale for this approach was described as follows by Brooking J of the Appeal Division of the Supreme Court of Victoria in *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203, 222: 'it was because the plaintiff acted upon his own motion that the view was taken that he was *dominus litis* and could discontinue the proceedings, both according to the Chancery practice ... and under the Judicature Act'. See also Ontario Law Reform Commission, *Report on Class Actions*, Report No 48 (1982) 787-9 ('OLRC Report').

¹⁰ In light of the High Court's decisions in *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 ('*Carnie*') and *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 ('*Mobil Oil*'), one would expect contemporary Courts to impose some restrictions on the ability of representative plaintiffs to settle or discontinue representative proceedings. In both cases the High Court drew attention to the fact that trial judges presiding over representative actions possess sufficient powers to ensure that the interests of class members are fully protected: *Carnie* (1995) 182 CLR 398, 408 (Brennan J), 422 (Toohey and Gaudron JJ); *Mobil Oil* (2002) 211 CLR 1, 30 (Gleeson CJ).

¹¹ ALRC Report, above n 3.

4A was added by the Victorian Parliament to the *Supreme Court Act 1986* (Vic). This regime is based on, and is very similar to, Part IVA.¹² While Part IVA and Part 4A use the terms representative proceedings and group proceedings, respectively, to describe the proceedings that they authorise and regulate, such proceedings are commonly referred to by commentators as class actions/proceedings.¹³

These class action regimes, unlike the rules governing the traditional representative action procedure, deal expressly with the issue of settlement and discontinuance. Section 33V of Part IVA and s 33V of Part 4A¹⁴ provide that a proceeding commenced under these regimes may not be settled or discontinued without the approval of the Court. They also empower the Court to make such orders as are just with respect to the distribution of any money paid under a settlement or paid into Court.¹⁵ Similar provisions may be found in the class action regimes that currently operate in the US and in Canada.¹⁶

An undesirable scenario is sometimes encountered in class action settlements. This is where the settlement agreement, agreed upon by the representative plaintiff and the defendant,¹⁷ provides a remedy for only some of the claimants represented by the representative plaintiff, the class members. The aim of this article is to evaluate the manner in which the Federal Court of Australia and the Supreme Court of Victoria have exercised the s 33V power when confronted with this scenario.

II CLASS ACTION SETTLEMENTS

An analysis of the approach of these two Courts, when confronted with settlements that provide no benefits to certain categories of class members, may

¹² The extent of the similarity may be gauged from the simple fact that the Victorian regime uses the same section numbers as the Federal regime.

¹³ The Scottish Law Commission has described the class action procedure 'as a sophisticated and improved version' of the representative action procedure: SLC Paper, above n 3, [6.1]. See, generally, Rachael Mulheron, 'From Representative Rule to Class Action: Steps Rather than Leaps' (2005) 24 *Civil Justice Quarterly* 424.

¹⁴ Part 4A replaced the class action regime that was regulated by the now repealed ss 34 and 35 of the *Supreme Court Act 1986* (Vic). These provisions did not deal with settlement or discontinuance: see generally Vince Morabito and Judd Epstein, *Class Actions in Victoria – Time for a New Approach* (1997) ch 3 (Report commissioned by the Victorian Attorney-General's Law Reform Advisory Council).

¹⁵ As noted in Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 390: 'the requirement of judicial approval of class settlement agreements ... is one of the factors that most sets class actions apart'.

¹⁶ *United States Federal Rules of Civil Procedure*, r 23(e); *Code of Civil Procedure of Quebec*, RSQ, c C-25, book IX, arts 1016, 1025; *Class Proceedings Act*, SO 1992, c 6, s 29 (Ontario); *Class Proceedings Act*, RSBC 1996, c 50, s 35 (British Columbia); *Class Actions Act*, SS 2001, c C-12.01, s 38 (Saskatchewan); *Class Actions Act*, SNL 2001, c C-18.1, s 35 (Newfoundland); *Class Proceedings Act*, SM 2002, c 14 – Cap C130, s 35 (Manitoba); *Federal Court Rules 1998* (SOR/98 - 106), r 299.31, 299.32; *Class Proceedings Act*, SA 2003, c C-16.5, s 35 ('Alberta Act').

¹⁷ In the Federal Court plaintiffs are, of course, referred to as applicants whilst defendants are known as respondents. But in this article the conventional terms of plaintiffs and defendants will be employed.

not be undertaken satisfactorily without an appreciation of the basic features of class proceedings, the policy underpinning the judicial approval of class action settlements and the dynamics of, and the US experience with, class action settlements. Attention will now be turned to these important issues.

A The Class Action Device

Class proceedings constitute an exception to the orthodox litigation model pursuant to which, generally speaking, the only persons bound by legal proceedings are the persons who are formal parties to the proceedings and thus present before the Court.¹⁸ Under Part IVA and Part 4A, a class proceeding may be brought where seven or more persons have claims against the same person, arising out of the same, similar or related circumstances, and giving rise to a substantial common issue of law or fact.¹⁹

Where these three requirements are met, a class proceeding may be instituted without the consent or knowledge of the members of the relevant class of claimants.²⁰ But 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 class member may opt out of the proceeding.²¹ Consequently, notice is required to be given to class members of the commencement of the proceeding and of the right of the class members to opt out of the proceeding before the date fixed by the Court.²² However, the Court is empowered not to require notices to class members where the relief sought on behalf of the class does not include damages.²³ The form and content of the notice must be approved by the Court.²⁴ The Court must also specify who is to give the notice and the way in which it is to be given.²⁵ Notice

¹⁸ *Hansberry v Lee*, 311 US 32, 40-1 (1940); Alberta Law Reform Institute, *Class Actions*, Report No 85 (2000) [57] ('ALRI Report'); Julian Burnside and Stuart Anderson, 'Class Actions' (Paper delivered at the Victorian Bar Compulsory Legal Education Program, 10 August 2004) [69]; *Martin v Wilks*, 490 US 755, 762 n 2 (1989); *General Telephone Co of the Southwest v Falcon*, 457 US 147, 155 (1982); *Califano v Yamasaki*, 442 US 682, 700-1 (1979); *Research Corp v Pfister Associated Growers Inc*, 301 F Supp 497, 501 (ND Ill, 1969).

¹⁹ *Federal Court of Australia Act 1976* (Cth) pt IVA, s 33C(1); *Supreme Court Act 1986* (Vic) pt 4A, s 33C(1).

²⁰ *Federal Court of Australia Act 1976* (Cth) pt IVA, s 33E; *Supreme Court Act 1986* (Vic) pt 4A, s 33E.

²¹ *Federal Court of Australia Act 1976* (Cth) pt IVA, s 33J; *Supreme Court Act 1986* (Vic) pt 4A, s 33J. It is interesting to note that the Victorian opt out regime contains two provisions which are not found in pt IVA. Section 33J(5) of pt 4A provides that 'unless the Court otherwise orders, a person who has opted out of a group proceeding must be taken never to have been a group member'. Section 33J(6) provides that 'the Court, on the application of a person who has opted out of a group proceeding, may reinstate that person as a group member on such terms as the Court thinks fit'.

²² *Federal Court of Australia Act 1976* (Cth) pt IVA, s 33X(1)(a); *Supreme Court Act 1986* (Vic) pt 4A, s 33X(1)(a). See also s 33X(5) of both statutes which empowers the Court at any stage to 'order that notice of any matter be given to a group member or group members'.

²³ *Federal Court of Australia Act 1976* (Cth) pt IVA, 33X(2); *Supreme Court Act 1986* (Vic) pt 4A, s 33X(2).

²⁴ *Federal Court of Australia Act 1976* (Cth) pt IVA, s 33Y(2); *Supreme Court Act 1986* (Vic) pt 4A, s 33Y(2). It has recently been held by Jacobson J of the Federal Court that 'there is nothing on the face of s 33Y(2) which precludes the Court from approving the form and content [of the notice] retrospectively': *Tongue v Council of the City of Tamworth* [2004] FCA 1472, [9].

²⁵ *Federal Court of Australia Act 1976* (Cth) pt IVA, 33Y(3); *Supreme Court Act 1986* (Vic) pt 4A, s 33Y(3).

may be given by means of press advertisement, radio or television broadcast, or by any other means chosen by the Court.²⁶ The Court may order that notice be given personally to each class member only where it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.²⁷

A judgment handed down in a class action 'binds all such persons [described or otherwise identified in the judgment] other than any person who has opted out of the proceeding'.²⁸ The failure of a class member to receive or respond to a notice does not affect a step taken, an order made or a judgment given in a proceeding brought under these regimes.²⁹

B Agency Costs

A further dimension is added by the use of conditional fee agreements as the means of remunerating the lawyers hired by the representative plaintiffs.³⁰ Since the enactment of Part IVA, the legislatures of several States have enacted statutes that allow plaintiff lawyers to enter into conditional fee agreements with their clients, pursuant to which uplift fees may be charged in the event of a successful outcome of the proceeding.³¹ Entering into such agreements with, not only the named plaintiffs, but also the class members, has become a standard practice for plaintiff lawyers involved in class proceedings.³² In Victoria, the *Legal Profession Act 2004* (Vic) ('*LP Act*') allows, and regulates, the use of conditional costs agreements which are defined as costs agreements pursuant to which 'the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate'.³³ Conditional costs agreements in Victoria may provide for the payment of 'a reasonable premium on the legal costs (excluding unpaid disbursements) otherwise payable under the agreements on the successful outcome of the matter to which those costs relate'.³⁴ This uplift fee

²⁶ *Federal Court of Australia Act 1976* (Cth) pt IVA, s 33Y(4); *Supreme Court Act 1986* (Vic) pt 4A, s 33Y(4).

²⁷ *Federal Court of Australia Act 1976* (Cth) pt IVA, s 33Y(5); *Supreme Court Act 1986* (Vic) pt 4A, s 33Y(5).

²⁸ *Federal Court of Australia Act 1976* (Cth) pt IVA, s 33ZB; *Supreme Court Act 1986* (Vic) pt 4A, s 33ZB.

²⁹ *Federal Court of Australia Act 1976* (Cth) pt IVA, s 33Y(8); *Supreme Court Act 1986* (Vic) pt 4A, s 33Y(8). It is interesting to note that s 27(3) of the Alberta Act provides that, with leave of the Court, a class member or a subclass member who did not receive notice of the certification order or, by reason of mental disability, did not respond within the specified time set out in the certification notice is to be treated as if that class member had opted out of the class proceeding. This provision is based upon a recommendation of the Alberta Law Reform Institute: ALRI Report, above n 18, [274].

³⁰ Frederick Gower Hawke, 'Class Actions – The Negative View', 1998 *Torts Law Journal* 7, 17. See also *Cook v Pasmenco Ltd (No 2)* (2000) 107 FCR 44, 54 (Lindgren J): 'this kind of arrangement is permitted in order to facilitate the bringing of claims that might otherwise not be brought at all'.

³¹ Law Reform Commission of Hong Kong, Conditional Fees Sub-Committee, *Conditional Fees*, Consultation Paper (2005) ch 5; Grave and Adams, above n 6, 466-75; Mulheron, above n 15, 476.

³² See, eg, Grave and Adams, above n 6, 467; B Slade, 'Class Actions: Watch Out for the Details' (2002) 16(3) *Commercial Law Quarterly* 3, 5; Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System*, Report No 89 (2000) [7.122] ('ALRC 2000 Report'); *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317, 374 (Finkelstein J); *Courtney v Medtel Pty Limited (No 5)* (2004) 212 ALR 311, 322 (Sackville J).

³³ *Legal Profession Act 2004* (Vic) s 3.4.27(1).

³⁴ *Legal Profession Act 2004* (Vic) s 3.4.28(1).

must not exceed 25% of the legal costs (excluding unpaid disbursements) otherwise payable.³⁵ The execution of conditional costs agreements involving uplift fees is not, however, allowed 'unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely'.³⁶ Furthermore, the following matters need to be disclosed to the client before the execution of such agreements: the law firm's usual fees, the uplift (expressed as a percentage of those fees) and reasons why the uplift fee is warranted.³⁷ The *LP Act* prohibits any costs agreements pursuant to which the amount payable to the solicitors is calculated by reference to (a) the value of any property or of any transaction involved in the matter to which the agreement relates; or (b) the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.³⁸

The contingent nature of the lawyer's remuneration creates a strong financial incentive for the lawyer to 'accept a small settlement in order to ensure some fees, rather than risk losing at trial and recovering nothing'.³⁹ This incentive to settle for sub-optimal⁴⁰ amounts would appear to exist in relation to both uplift fees⁴¹ and percentage fees.⁴² An obvious solution to this problem is for the client not to

³⁵ *Legal Profession Act 2004* (Vic) s 3.4.28(3).

³⁶ *Legal Profession Act 2004* (Vic) s 3.4.28(4).

³⁷ *Legal Profession Act 2004* (Vic) s 3.4.14. All conditional costs agreements whether or not involving uplift fees: (a) must set out the circumstances that constitute the successful outcome of the matter to which it relates; (b) may provide for disbursements to be paid irrespective of the outcome of the matter; (c) must be in writing, in clear plain language and signed by the client; (d) must contain a statement that the client has been informed of the client's right to seek independent legal advice before entering into the agreement; and (e) must contain a cooling-off period of not less than 5 clear business days during which the client, by written notice, may terminate the agreement (s 3.4.27(3)).

³⁸ *Legal Profession Act 2004* (Vic) s 3.4.29.

³⁹ Christopher Lu, 'Procedural Solutions to the Attorney's Fee Problem in Complex Litigation' (1991) 26 *University of Richmond Law Review* 41, 62. See also Sylvia Lazos, 'Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations' (1985) 84 *Michigan Law Review* 308, 314-15; Geoffrey Miller, 'Some Agency Problems in Settlements' (1987) 16 *Journal of Legal Studies* 189; Murray Schwartz and Daniel Mitchell, 'An Economic Analysis of the Contingent Fee in Personal Injury Litigation' (1970) 22 *Stanford Law Review* 1125; Kevin Clermont and John Currihan, 'Improving on the Contingent Fee' (1978) 63 *Cornell Law Review* 529, 570. It is interesting to note that the head of Australia's largest class action practice has drawn attention to the fact that solicitors acting for class action defendants are reluctant to settle class proceedings. This is because these solicitors benefit, financially, from the class action litigation only as long as the litigation is in progress: Bernard Murphy, 'Difficulties for Applicants in Class Actions' (paper presented at the University of Melbourne, March 2005) 21.

⁴⁰ The term 'sub-optimal settlement' is used to describe settlements which do not reflect the merits of the plaintiff's case. It must be noted, however, that sub-optimal settlements are common, even in the absence of conditional fees as 'uncertainty, delay, and fear of payment of costs have placed tremendous pressures on the injured party to settle': John Vargo, 'The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice' (1993) 42 *American University Law Review* 1567, 1610. See also Janet Alexander, 'Do the Merits Matter? A Study of Settlements in Securities Class Actions' (1991) 43 *Stanford Law Review* 497.

⁴¹ It has been argued that uplift fees create 'a strong incentive for cheap settlements on the eve of the trial. By that point, the attorney typically has expended nearly all of the time that determines her compensation and has no logical reason to accept the risks of going to trial; a large recovery for the client will not substantially affect her own fee award': John Coffee, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action' (1987) 54 *University of Chicago Law Review* 877, 888 ('Coffee, Chicago'). See also Alexander, above n 40, 541.

⁴² Jonathan Macey and Geoffrey Miller, 'The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform' (1991) 58 *University of Chicago Law Review* 1, 25.

accept settlement terms which are contrary to her own best interests. Unfortunately, the fear of losing,⁴³ 'the client information disadvantage and the inability to evaluate'⁴⁴ the validity of the settlement package recommended by the lawyer may result in the client's authorisation of inferior recoveries.

The losses incurred as a result of the conflicts of interest that exist between principals and agents are described by economic scholars as 'agency costs'.⁴⁵ Given the unreliability of monitoring by the client, as a means of reducing agency costs, reliance must be placed on other safeguards such as the legal regulatory system and the importance placed by lawyers on maintaining a good reputation.⁴⁶ It is difficult to see, however, how the prospect of disciplinary action or loss of reputation⁴⁷ can provide an effective means of eliminating agency costs in the context of settlements given that the lawyers in question are able to point to the objective fact that they have achieved a victory on behalf of their clients.⁴⁸ Furthermore, as Macey and Miller have pointed out, the devices to reduce agency costs 'are themselves costly'.⁴⁹

Agency costs are exacerbated in class actions as a result of a number of factors. For most class members (and, indeed, class representatives) the cost of monitoring the class lawyer exceeds the value of his/her own claim⁵⁰ and, in any event, 'any increase in the settlement award derived from close supervision of the attorney must be shared with all other class members, making it unlikely that the benefits of supervision will outweigh the costs'.⁵¹ But even where it is financially

⁴³ As indicated by Shavell, 'the general effect of the plaintiff's risk aversion is to reduce the likelihood of suit, for going to trial involves uncertainty, which by definition the risk-averse plaintiff but not the risk-neutral plaintiff finds disadvantageous': Steven Shavell, 'Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs' (1982) 11 *Journal of Legal Studies* 55, 61.

⁴⁴ Trade Practices Commission, *Study of the Professions – Legal*, Draft Report (1993) 240.

⁴⁵ 'The term "agency costs" refers to both the costs the principal must incur to keep an agent loyal and to the losses that occur as a result of agent disloyalty that are not worth preventing': John Coffee, 'Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions' (1986) 86 *Columbia Law Review* 669, 680. See also Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economy* 305; Macey and Miller, above n 42, 12-19; Coffee, Chicago, above n 41, 882-5.

⁴⁶ Herbert Kritzer et al, 'The Impact of Fee Arrangement on Lawyer Effort' (1985) 19 *Law and Society Review* 251, 253; Macey and Miller, above n 42, 15-8; Janet Smith and Steven Cox, 'The Pricing of Legal Services: A Contractual Solution to the Problem of Bilateral Opportunism' (1985) 14 *Journal of Legal Studies* 167, 169.

⁴⁷ 'Reputations are inexact, suffer from time lag effects, and are subject to being "cashed in" by firms willing to sacrifice their reputations in exchange for increased short-term profits': Macey and Miller, above n 42, 17.

⁴⁸ The issues in question are 'highly subjective and imprecise': *ibid* 46.

⁴⁹ *Ibid* 19.

⁵⁰ *In re Oracle Securities Litigation*, 829 F Supp 1176, 1179 (ND Cal, 1993); Deborah Hensler et al, RAND Institute for Civil Justice, *Class Action Dilemmas - Pursuing Public Goals for Private Gain* (1999) 9 ('Hensler Summary'); *Mars Steel* 834 F 2d 677, 681 (7th Cir, 1987). This is especially the case where the claims of the class are individually non-recoverable: see Note, 'Developments in the Law - Class Actions' (1976) 89 *Harvard Law Review* 1318, 1356 ('Harvard Note') ('a claim is individually nonrecoverable if it would not justify the expense to an individual of independent litigation but would justify the lesser expenditure required to obtain a share of a class judgment').

⁵¹ Lazos, above n 39, 319. See also Judith Resnik, 'Litigating and Settling Class Actions: The Prerequisites of Entry and Exit' (1997) 30 *University of California Davis Law Review* 835, 854 ('we know that it is meaningless to speak of the discipline of clients monitoring attorneys when "the clients" number in the thousands').

rational for the class members to closely supervise the activities of class counsel, they lack the expertise to do so in an effective manner.⁵² Furthermore, as noted by an American Court, 'the purpose of [the class action procedure] would be subverted by requiring a class member who learns of a pending suit involving a class of which he is a part to monitor that litigation to make certain that his interests are being protected'.⁵³

Consequently, the solicitors acting for the class representative are usually the persons in control of the class action on the plaintiff's side.⁵⁴ Equally significant is the fact that the representative plaintiff's solicitors generally underwrite the costs of the class proceedings. Justice Moore of the Federal Court has recently drawn attention to this important aspect of Australia's class action landscape: '[the law firm acting for the class representative] 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 named plaintiff] which, to date, amount to almost \$5 million'.⁵⁵ It is therefore not surprising that Justice Callinan of the High Court has noted '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'.⁵⁶

⁵² See, eg, Mary Kane, 'Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer' (1987) 66 *Texas Law Review* 385, 394 ('the complexity of the litigation ... is difficult if not impossible to explain to the layperson'); *In re WICAT Securities Litigation* 671 F Supp 726, 741 (D Utah, 1987) ('class litigation is a process that seems strange to many class members and participation in that process would seem to be fairly intimidating'). See also Natalie Scott, 'Don't Forget Me! The Client in a Class Action Lawsuit' (2002) 15 *Georgetown Journal of Legal Ethics* 561, 582; Michael Legg, 'Judge's Role in Settlement of Representative Proceedings: Lessons from United States Class Actions' (2004) 78 *Australian Law Journal* 58, 64; *Dunn v HK Porter Co Inc*, 602 F 2d 1105, 1109 (3rd Cir, 1979).

⁵³ *Gonzales v Cassidy* 474 F 2d 67, 76 (5th Cir, 1973). See also *Phillips Petroleum Co v Shutts*, 472 US 797, 810 (1985) where it is explained that 'unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection'.

⁵⁴ As noted by an appellate Court in the US, 'experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry': *Greenfield v Villager Industries Inc*, 483 F 2d 824, 831 (3rd Cir, 1973). See also *Van Gemert v Boeing Co*, 590 F 2d 433, 435 (2nd Cir 1978); John Coffee, 'Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation' (2000) 100 *Columbia Law Review* 370, 384-5; Edward Cooper, 'Class Action Advice in the Form of Questions' (2001) 11 *Duke Journal of Comparative and International Law* 215, 220, 239; *Mars Steel*, 834 F 2d 677, 678 (7th Cir, 1987).

⁵⁵ *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 FCR 480, 485 ('King'). See also *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317, 375 (Finkelstein J) ('it is commonly the case in a class action that a person will stand behind (I mean fund) the applicant. Usually this will be the applicant's solicitor, who will sometimes charge what is referred to as a "contingency fee" for the privilege').

⁵⁶ *Mobil Oil* (2002) 211 CLR 1, 77. See also Resnik, above n 51, 854; *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317, 375 (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').

A further dimension is provided by the greater complexity⁵⁷ and significantly higher cost⁵⁸ of class proceedings. This scenario is partly attributable to the fact that in a class proceeding there are far more claimants than in a traditional proceeding. But the high costs of running a class proceeding are also attributable to the tactics that have frequently been employed by well-resourced defendants. Justice Finkelstein of the Federal Court has recently explained this problem as follows:

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 ... 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.⁵⁹

- ⁵⁷ As noted by an American Court, 'virtually all class actions result in long, complex and expensive trials': *In re Corrugated Container Antitrust Litigation* 643 F 2d 195, 217 (5th Cir, 1981). See also *Tiemstra v Insurance Corporation of British Columbia* (1996) 22 BCLR (3d) 49, 61 (Esso CJ); Jason Betts, 'Are We Becoming More American? Class Action Litigation: Australia v the US' *Lawyers Weekly* (Australia), 20 August 2004, 14, 17; ALRC Report, above n 3, [252]; Bruce Debelle, 'Class Actions for Australia? Do They Already Exist?' (1980) 54 *Australian Law Journal* 508, 512; Slade, above n 32, 5; *Cotton v Hinton* 559 F 2d 1326, 1331 (5th Cir, 1977); Justin Emerson, 'Class Actions' (1989) 19 *Victoria University of Wellington Law Review* 183, 206.
- ⁵⁸ See Adolf Homburger, 'State Class Actions and the Federal Rule' (1971) 71 *Columbia Law Review* 609, 649; H Patrick Glenn, 'Class Actions in Ontario and Quebec' (1984) 62 *Canadian Bar Review* 247, 264-8; Peta Spender, 'Securities Class Actions: A View from the Land of the Great White Shareholder' (2002) 31 *Common Law World Review* 123, 144; Justice Murray Wilcox, 'Representative Proceedings in the Federal Court of Australia: A Progress Report' (1996-97) 15 *Australian Bar Review* 91, 94; Garry Watson, 'Class Actions: The Canadian Experience' (2001) 11 *Duke Journal of Comparative and International Law* 269, 275.
- ⁵⁹ *Bright v Femcare Limited* 195 ALR 574, 607-8 (Finkelstein J). 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) 130 FCR 317, 374. See also *Milfull v Terranora Lakes Country Club Limited (In Liquidation)* (2004) 214 ALR 228, 228-9, 232 (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'); Justice Murray Wilcox, 'Class Actions in Australia' (paper presented at the 13th Commonwealth Law Conference, Melbourne, 13-17 April 2003) as cited in Mulheron, above n 15, 71 n 24 ('a well-resourced respondent might advocate a mega-hearing concerning all issues, and continuing over many months, in the hope of exhausting the representative plaintiff's finances'); Bernard Murphy, 'Current Trends and Issues in Australian Class Actions' (paper presented at the International Class Actions Conference, Melbourne; 1-2 December 2005) [3.6].

Compliance with the many requirements that Part IVA and Part 4A impose on class representatives, in order to safeguard the interests of class members, also increases the costs incurred by the solicitors conducting the litigation. The publication of an opt out notice, for instance, entails a significant expenditure given that 'the Court has typically required opt out notices to be advertised in metropolitan or regional newspapers so that notice of the proceeding and of the ability to opt out is most likely to come to the attention of potential group members'.⁶⁰

This state of affairs further enhances the lawyer's financial incentive to negotiate and recommend sub-optimal settlements.⁶¹ At the same time, the remuneration that such lawyers receive from class proceedings, in the event of a successful outcome for the plaintiff class, is usually higher than the compensation that is generally available in traditional proceedings.⁶² This is largely attributable to the employment of the opt out device which has the effect of significantly expanding the size of the plaintiff class and thus the potential liability of the defendant opposing the class. The substantive dimensions of the choice between the opt out regime and the opt in regime are highlighted by the following description of the effect of the change in the US in 1966 from the opt in to the opt out device with respect to damage class actions:

Whereas, previously, individuals desiring to share in the benefits of such a class had to come forward and declare themselves class members (ie, 'opt in'), now *all* those who shared a particular characteristic – for example, all purchasers of a particular product – were automatically considered members of the class unless they came forward and asked to be *excluded* (ie, 'opt out'). Because the incentives for so excluding oneself were often modest or nil, classes certified under the revised Rule ... were almost certain to be larger – and the sum of their potential damages, therefore, much larger – than classes certified under the old rule.⁶³

In light of the picture depicted above, it is not surprising that the US Supreme Court has lamented that:

In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defence would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.⁶⁴

⁶⁰ Burnside and Anderson, above n 18, [65]. See also ALRC Report, above n 32, [7.104]; Affidavit of Bernard Michael Murphy, dated 31 March 2005, filed in the *Dorajay Pty Ltd v Aristocrat Leisure Limited* No N362 of 2004 pt IVA proceeding, para 15(c) ('sending s 33X notices to unidentified group members ... costs approximately \$20,000.00 for advertising in one state and if conducted nationally as is frequently required, more that \$100,000.00'); and *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2001] VSC 284, [30] (Gillard J) ('*Johnson*') ('the costs of advertising in the Federal Court were somewhere in the vicinity of \$150,000').

⁶¹ See, eg, Scott, above n 52, 582-3.

⁶² *Ibid* 582.

⁶³ Hensler Report, above n 3, 15. See also Cooper, above n 54, 230.

⁶⁴ *Ortiz v Fibreboard Corp*, 527 US 815, 853 (1999). See also *In re Oracle Securities Litigation*, 829 F Supp 1176, 1179 (ND Cal, 1993).

Conversely, the class members have a strong financial incentive to litigate as no liability for costs attaches to them should the class suit fail.⁶⁵ This conflict of interest between plaintiff lawyers and class members is exacerbated by the role played by defendants in class action settlements. This potential problem was described in the following terms by Justice Sackville of the Federal Court:

Defendants are interested primarily in the total pay-out figure, not how it is to be divided; consequently, settlements in the United States are sometimes structured so as to increase the fees paid to the lawyer, at the expense of the represented group.⁶⁶

This concern for ‘collusive’ settlements⁶⁷ prompted Federal Courts in the US in the late 1970s and the early 1980s to consider whether or not the formal parties to a class proceeding should be allowed to negotiate legal costs simultaneously with, or indeed as part of, settlement discussions. A number of appellate Courts prohibited such a practice on the basis that when ‘attorney’s fees are negotiated as part of a class action settlement, a conflict frequently exists between the class lawyers’ interest in compensation and the class members’ interest in relief’.⁶⁸ In 1986 a different assessment of this issue was provided by the US Supreme Court:

The adverse impact of removing attorney’s fees and costs from bargaining might be tolerable if the uncertainty introduced into settlement negotiations were small. But it is not. The defendants’ potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits.⁶⁹

No similar judicial debate has taken place in Australia. Indeed, the only comment by Australian Courts to touch upon this issue, that the author was able to locate, was the following comment made by Justice Gyles of the Federal Court in 2004: ‘a question arises as to whether a lump sum settlement inclusive of costs is appropriate in settlement of a class action, particularly where there is no

⁶⁵ For class members, ‘a defendant’s judgment may mean simply the defeat of an expectation, often of relatively small amount; for his lawyer it can mean the loss of years of costly effort by himself and his staff’: *Saylor v Lindsay*, 456 F 2d 896, 900 (2nd Cir, 1972).

⁶⁶ *Courtney v Medtel Pty Limited (No 5)* (2004) 212 ALR 311, 317 (Sackville J) citing Legg, above n 52, 70. See also Susan Koniak and George Cohen, ‘Under Cloak of Settlement’ (1996) 82 *Virginia Law Review* 1051, 1111-12; Macey and Miller, above n 42, 12-27; Coffee, Chicago, above n 41, 883-9; *Prandini v National Tea Co*, 557 F 2d 1015, 1020 (3rd Cir, 1977); *Weinberger v Great Northern Nekoosa Corp*, 925 F 2d 518, 525 (1st Cir, 1991); *Reynolds v Beneficial National Bank*, 288 F 3d 277, 282 (7th Cir, 2002); Kent Lambert, ‘Class Action Settlements in Louisiana’ (2000) 61 *Louisiana Law Review* 89, 101-2.

⁶⁷ An American commentator has concluded that ‘the collusive “sweetheart” settlement, in which the plaintiffs’ lawyer sacrifices the interests of the class for a high return in fees, is perhaps the most common and insidious of plaintiffs’ lawyer abuses’: Julie Rubin, ‘Auctioning Class Actions: Turning the Tables on Plaintiffs’ Lawyers’ Abuse or Stripping the Plaintiff Wizards of their Curtain’ (1997) 52 *Business Lawyer* 1441, 1443.

⁶⁸ *Jeff D v Evans*, 743 F 2d 648, 651-2 (9th Cir, 1985). See also *Mendoza v United States*, 623 F 2d 1338, 1352-3 (9th Cir, 1980); *Prandini v National Tea Co*, 557 F 2d 1015, 1020-1 (3rd Cir, 1977); Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 FRD 238, 266 (1985) (‘Third Circuit Report’).

⁶⁹ *Evans v Jeff D*, 475 US 727, 734 (1986). See also Third Circuit Report, above n 68, 267.

contradictor. An inherent conflict of interest exists'.⁷⁰

C Managerial Role of Class Action Courts

In light of the picture depicted above,⁷¹ it is not surprising that class action Courts are required to adopt a very active, managerial role⁷² and are under a responsibility (a) to act as 'protector of the absent class members';⁷³ and (b) 'to supervise the conduct of the parties so as to preserve the integrity of the class action'.⁷⁴ The clearest example of this philosophy that underpins the Federal and Victorian regimes is furnished by the broad power conferred on the trial judge to make 'any order... [it] thinks appropriate or necessary to ensure that justice is done in the proceedings'.⁷⁵

In the context of settlements, the ambit of the Court's responsibility to class members was described as follows by an American Court and by Justice Bongiorno of the Supreme Court of Victoria, respectively:

The Court has a 'fiduciary responsibility, as the guardian of the rights of the absentee class members' when deciding whether to approve a settlement agreement.⁷⁶

[The principles upon which the requirement of judicial approval of class action settlements is based] might be said to be those of the protective jurisdiction of the Court, not unlike the principles which lead the Court to

⁷⁰ *Reiffel v ACN 075 839 226 Pty Limited (No 2)* [2004] FCA 1128, [11]. But this concern did not prevent Justice Gyles from making an order under s 33V although he stressed that he did 'not wish to be taken to have expressed any general approval of a settlement structured in this way': at [12]. See also *Petrusevski v Bulldogs Rugby League Club Limited* [2004] FCA 1712, [5] (Gyles J); and the quote accompanying n 66 above.

⁷¹ 'Because absentees are not parties in any real sense, and probably would not have brought their claims individually, ... attorneys or plaintiffs can abuse the suit nominally brought in the absentees' names': *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F 3d 768, 784 (3rd Cir, 1995). See also *Courtney v Medtel Pty Limited* (2002) 122 FCR 168, 182 (Sackville J) ('Courtney'); *Trong v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 42 ALD 255, 260 (Merkel J).

⁷² *Hoffmann-La Roche Inc v Sperling*, 493 US 165, 170-1 (1989). See also *In re Air Crash Disaster at Florida Everglades*, 549 F 2d 1006, 1012 n 8 (5th Cir, 1977); *Gates v Cook*, 234 F 3d 221, 227 (5th Cir, 2000).

⁷³ *Sommers v Abraham Lincoln Federal Savings & Loan Association*, 79 FRD 571, 580 (ED Pa, 1978). See also *Guy v Abdulla*, 57 FRD 14, 18 (ND Ohio, 1972); *Chevalier v Baird Savings Association*, 72 FRD 140, 147 (ED Pa, 1976); *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F 3d 768, 784 (3rd Cir, 1995); *Carrabba v Randalls Food Markets Inc*, 191 F Supp 2d 815, 823 (ND Tex, 2002); *Greenfield*, 483 F 2d 824, 832 (3rd Cir, 1973); *Deposit Guaranty National Bank v Roper*, 445 US 326, 331 (1980); *Grinin v International House of Pancakes* 513 F 2d 114, 123 (8th Cir, 1975); *Courtney* (2002) 122 FCR 168, 183 (Sackville J); *Mobil Oil* (2002) 211 CLR 1, 27 (Gleeson CJ); *In re Quintus Securities Litigation* 148 F Supp 2d 967, 969 (ND Cal, 2001).

⁷⁴ *In re Potash Antitrust Litigation*, 896 F Supp 916, 920 (D Minn, 1995). See also Scott, above n 52, 571-2.

⁷⁵ *Federal Court of Australia Act 1976* (Cth) pt IVA, s 33ZF(1); *Supreme Court Act 1986* (Vic) pt 4A, s 33ZF(1). See *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1, 4 (Wilcox J); *Courtney* (2002) 122 FCR 168, 182 (Sackville J).

⁷⁶ *In re Matzo Food Products Litigation*, 156 FRD 600, 604 (DNJ, 1994) citing *Girsh v Jepsen*, 521 F 2d 153, 156 (3rd Cir, 1975). See also *Grinin*, 513 F 2d 114, 123 (8th Cir, 1975); *Reynolds v Beneficial National Bank*, 288 F 3d 277, 279-80 (7th Cir, 2002); *Malchman v Davis*, 706 F 2d 426, 433 (2nd Cir, 1983); *Sala v National RR Passenger Corp*, 721 F Supp 80 (ED Pa, 1989).

require compromises on behalf of infants or persons under a disability to be approved.⁷⁷

D Class Action Settlements in the US

Rule 23 of the *United States Federal Rules of Civil Procedure*, which has been regulating class actions in American Federal Courts since 1938, ‘is considered to have ushered in “the dawn of the modern age of class proceedings”’.⁷⁸ This rule, which was completely redrafted in 1966 and amended in 2003, has always contained a requirement that class actions brought pursuant to it could not be settled or discontinued without the approval of the Court.⁷⁹

The general approach followed by American Courts, when considering the settlement of Rule 23 proceedings proposed by parties to such proceedings, has been to determine whether the proposed settlement scheme is ‘fair, reasonable and adequate’.⁸⁰ Since December 2003 Federal Courts are expressly directed by Rule 23(e)(1)(C) to ‘approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate’. This new paragraph actually falls short of the amendments to Rule 23 that had been proposed several years ago⁸¹ by the Civil Rules Advisory Committee - the Committee that initiates the long process that needs to be followed in order to alter the US Federal Rules of Civil Procedure⁸² - and by a number of commentators.⁸³ The proposed amendments entailed specifying in Rule 23 the criteria that Federal Courts should employ when applying the rather ambiguous and elastic ‘fair, reasonable and adequate’ test.⁸⁴

Federal Courts have, nevertheless, applied a number of criteria when reviewing

⁷⁷ *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457, [4].

⁷⁸ ALRI Report, above n 18, [65]. See also Law Reform Commission of Ireland, *Consultation Paper on Multi-Party Litigation (Class Actions)*, Consultation Paper No 25 (2003) [2.01] (‘LRCI Paper’).

⁷⁹ Vince Morabito, ‘Judicial Supervision of Individual Settlements with Class Members in Australia, Canada and the United States’ (2003) 38 *Texas International Law Journal* 664, 720-1. For judicial discussions of the rationale for this requirement, see *Duhaime v John Hancock Mutual Life Insurance*, 183 F 3d 1, 6 (1st Cir, 1999); *Webster Eisenlohr Inc v Kalodner* 145 F 2d 316, 320 (3rd Cir, 1944); *Moreland v Rucker Pharmacal Co*, 63 FRD 611, 615 (WD La, 1974); *Nesenoff v Muten* 67 FRD 500, 502 (EDNY, 1974); *Rodgers v United States Steel Corp*, 70 FRD 639, 642 (WD Pa, 1976); *In re General Motors Corp Engine Interchange Litigation* 594 F 2d 1106, 1139-40 (7th Cir, 1979); *Weight Watchers of Philadelphia v Weight Watchers International* 455 F 2d 770, 773 (2nd Cir, 1972). See generally Mulheron, above n 15, 390-1.

⁸⁰ In Joshua Threadcraft, ‘The Class Action Settlement: When the Good can Become the Bad and the Ugly’ (2001) 25 *Journal of the Legal Profession* 227, 234 it is revealed that this approach ‘originated in an unpublished opinion from the Southern District of New York, where the court merely required the settlement to be “fair, adequate and reasonable”’.

⁸¹ See Cooper, above n 54, 241.

⁸² The Civil Rules Advisory Committee’s proposals need to be approved ‘by the Standing Committee, the Judicial Conference (the executive body of the federal judiciary), the US Supreme Court and, ultimately, Congress’: Hensler Report, above n 3, 30. See also Stephen Yeazell, ‘Judging Rules, Ruling Judges’ (1998) 61 *Law and Contemporary Problems* 229, 235.

⁸³ See the articles listed in Mulheron, above n 15, 397 n 57. For a discussion of what criteria Courts should consider see Hensler Summary, above n 50, 32; Resnik, above n 51, 848.

⁸⁴ One commentator has expressed the view that this ‘test is akin to the “reasonable man” test utilised in negligence’: Threadcraft, above n 80, 234.

proposed settlements.⁸⁵ For present purposes, the most important of these criteria are the extent of the opposition to the settlement by the class members and whether 'particular segments of the class are treated significantly differently from others'.⁸⁶ The former factor highlights an important aspect of the process followed by US Federal Courts when reviewing Rule 23(e) applications. This entails giving to class members the right to, inter alia, formally object to the proposed settlement in writing and/or by appearing at the hearing where the proposed settlement is considered by the Court, usually referred to as the 'fairness hearing'.⁸⁷ Again, as a result of the December 2003 amendments, this practice is now expressly recognised in Rule 23.⁸⁸ In fact, Rule 23(e)(4)(A) provides that 'any class member may object to a proposed settlement, voluntary dismissal or compromise that requires court approval'. Rule 23(e)(4)(B) further provides that such an objection may be withdrawn only with the Court's approval.⁸⁹

A number of Courts have regarded the lack of or small number of objections as an indication of the fairness of the proposed settlement.⁹⁰ But, at the same time, 'a combination of observations about the practical realities of class actions has led a number of'⁹¹ Courts to conclude that minimal objection to the proposed

⁸⁵ Alba Conte and Herbert Newberg, *Newberg on Class Actions* (4th ed, 2002) vol 4, 120ff; Legg, above n 52, 69; *In re Prudential Ins Co America Sales Practice Litigation Against Actions*, 148 F 3d 283, 316-24 (3rd Cir, 1998).

⁸⁶ Conte and Newberg, above n 85, 121 citing *Manual for Complex Litigation* (3rd ed) [30.41].

⁸⁷ *Reynolds v Beneficial National Bank*, 288 F 3d 277, 282 (7th Cir, 2002); *Petway v American Cast Iron Pipe Co*, 576 F 2d 1157, 1169 (5th Cir, 1978); *Mandujano v Basic Vegetable Products Inc*, 541 F 2d 832, 835 (9th Cir, 1976); *Bennett v Behring Corp*, 737 F 2d 982, 986 (11th Cir, 1984); *Mayfield v Barr*, 985 F 2d 1090, 1092 (DC Cir, 1993); Note, 'Leading Cases: II. Federal Jurisdiction and Procedure' (2002) 116 *Harvard Law Review* 332, 340. A similar practice is followed in Canada: see, eg, *Brimner v Via Rail Canada Inc* (2000) 50 OR (3d) 114, 122 (Brockenshire J); ALRI Report, above n 18, [324].

⁸⁸ *Report of the Civil Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure* (2002) 106 (available at <<http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf>> at 19 July 2006) ('Rules Committee Report').

⁸⁹ The Civil Rules Advisory Committee has explained that 'approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass': *ibid* 107.

⁹⁰ See, eg, *In re Beef Industry Antitrust Litigation*, 607 F 2d 167, 180 (5th Cir, 1979); *Fickinger v CI Planning Corp*, 646 F Supp 622, 631 (ED Pa, 1986); *In re Art Materials Antitrust Litigation*, 100 FRD 367, 382 (ND Ohio, 1983); *Lake v First Nationwide Bank*, 900 F Supp 726, 732 (ED Pa, 1995); *In re Candant Corp Litigation*, 264 F 3d 201, 235 (3rd Cir, 2001); *In re Automotive Refinishing Paint Antitrust Litigation*, 2003 US Dist LEXIS 18123, 7-8 (ED Pa); *Heit v Van Ochten*, 126 F Supp 2d 487, 491 (WD Mich, 2001); *Altman v Liberty Equities Corp*, 54 FRD 620 (SDNY, 1972); *Derdarian v Futterman Corp*, 38 FRD 178 (SDNY, 1965). A settlement can be fair notwithstanding a large number of class members who oppose it: *Cotton*, 559 F 2d 1326, 1331 (5th Cir, 1977); *Petway*, 576 F 2d 1157, 1215 (5th Cir, 1978); *Flinn v FMC Corp*, 528 F 2d 1169, 1173 (4th Cir, 1975); *Bryan v Pittsburgh Glass Co*, 494 F 2d 799, 803 (3rd Cir, 1974); *TBK Partners Ltd v Western Union Corp*, 675 F 2d 456, 462 (2nd Cir, 1982); *Grant v Bethlehem Steel Corp*, 823 F 2d 20, 23 (2nd Cir, 1987); *Thomas v Albright*, 139 F 3d 227, 232 (DC Cir, 1998).

⁹¹ *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F 3d 768, 812 (3rd Cir, 1995). See also *In re Oracle Securities Litigation*, 829 F Supp 1176, 1179 (ND Cal, 1993) ('the paucity of objections is of little moment, however, because agency costs often discourage meaningful objection in securities class actions'); *National Super Spuds Inc v New York Mercantile Exchange*, 660 F 2d 9, 16 (2nd Cir, 1981) ('lack of objection by the great majority of claimants means little when the point of objection is limited to a few whose interests are being sacrificed for the benefit of the majority'); *Reynolds v King*, 790 F Supp 1101, 1109 (MD Ala, 1990) ('where the class is large and there is no evidence that most of its members are particularly interested in the litigation, a court should view the absence of any objections from this majority with caution').

settlement may not necessarily be equated to approval of the settlement by the class.⁹² An appellate Court made this point succinctly when it drew attention to the fact that ‘acquiescence to a bad deal is something quite different than affirmative support’.⁹³ More importantly, judicial emphasis has also been placed on the fact that the absence of a significant number of formal objections to the settlement by class members ‘does not relieve the judge of his duty and, in fact, adds to this responsibility’.⁹⁴ As a consequence, judicial approval under Rule 23(e) has been denied notwithstanding little or no objection by the class members to the settlement. More often than not, this scenario has been encountered where the proposed settlement discriminated against certain categories of class members.⁹⁵

E Class Action Settlements in Australia

Contrary to the recommendations of the ALRC,⁹⁶ s 33V provides no guidance to trial Courts as to the factors that are to be considered when determining whether to approve a settlement proposed by the representative plaintiff and the defendant. When faced with s 33V applications, Australian Courts have usually applied the following criteria, enunciated by Justice Goldberg of the Federal Court, to assess the fairness and reasonableness of the proposed settlements:⁹⁷ (a) the amount offered to each class member; (b) the prospects of success in the proceeding; (c) the likelihood of the class members obtaining judgment for an

⁹² Conversely, a minimum level of objection is judicially regarded as significant where the relevant class members are sophisticated: *In re Corrugated Container Antitrust Litigation*, 643 F 2d 195, 217 (5th Cir, 1981); *Pozzi v Smith*, 955 F Supp 218, 223 (ED Pa, 1997); *State of Western Virginia v Chas Pfizer & Co*, 314 F Supp 710, 743 (SDNY, 1970); *Lachance v Harrington*, 965 F Supp 630, 645 (ED Pa, 1997).

⁹³ *In re General Motors Corp Engine Interchange Litigation*, 594 F 2d 1106, 1137 (7th Cir, 1979). See also *County of Suffolk v Long Island Lighting Co*, 710 F Supp 1428, 1437 (EDNY, 1989); *In re Corrugated Container Antitrust Litigation*, 643 F 2d 195, 217-8 (5th Cir, 1981) (‘a low level of vociferous objection is not necessarily synonymous with jubilant support’).

⁹⁴ *Norman v McKee*, 290 F Supp 29, 32 (ND Cal, 1968). See also *In re General Motors Corp Engine Interchange Litigation*, 594 F 2d 1106, 1137 (7th Cir, 1979); *Heddendorf v Goldfine*, 67 F Supp 915, 926 (D Mass, 1958).

⁹⁵ See, eg, *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F 3d 768, 818 (3rd Cir, 1995) (‘this settlement does not even appear to treat all members of the class equitably’), and at 808 (‘the fact that the ... settlement benefits certain groups of the class more than others suggests that the district Court did not adequately discharge its duties to safeguard the interests of the absentees’); *Piambino v Bailey*, 610 F 2d 1306, 1329 (5th Cir, 1980) (‘[vacatur] is demanded by the failure to assess the interests of the categories of plaintiffs and whether the settlement was fair, adequate and reasonable as to each’); *Piambino v Bailey*, 757 F 2d 1112, 1140 (11th Cir, 1985); *National Super Spuds*, 660 F 2d 9, 18-9 (2nd Cir, 1981); *Holmes v Continental Can Co*, 706 F 2d 1144, 1148 (11th Cir, 1983); *Petruzzi’s Inc v Darling-Delaware Company Inc*, 880 F Supp 292, 299 (MD Pa, 1995) (‘approximately 50% of the class will not receive any ‘premium certificates’, but their claims against Moyer will be discharged. This disparate treatment of class members has not been justified by the settlement proponents, and is sufficient reason in and of itself to disapprove the proposed settlement’); *In re Ford Motor Co Bronco II Prods Liability Litigation*, as discussed in Conte and Newberg, above n 85, 140; *In re General Motors Corp Engine Interchange Litigation* 594 F 2d 1106, 1128 (7th Cir, 1979).

⁹⁶ ALRC Report, above n 3, 163; ALRC 2000 Report, above n 32, [7.108]. See also Morabito and Epstein, above n 14, [6.39]; Manitoba Law Reform Commission, *Class Proceedings*, Report No 100 (1999) 96 (‘MLRC Report’); ALRI Report, above n 18, [328] (recommendation no 14); LRCI Paper, above n 78, [4.88]; Mulheron, above n 15, 397-8.

⁹⁷ See, eg, *Lukey v Corporate Investment Australia Funds Management Pty Ltd* [2003] FCA 1602, [7] (Emmett J) (‘Lukey’); *Tongue v Council of the City of Tamworth* [2004] FCA 972, [22] (Allsop J); *Courtney v Medtel Pty Limited (No 5)* (2004) 212 ALR 311, 317-8 (Sackville J).

amount significantly in excess of the settlement offer; (d) the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding; (e) the likely duration and cost of the proceeding if continued to judgment; and (f) the attitude of the class members to the settlement.⁹⁸

These criteria do not expressly require Courts to consider whether particular groups of class members are being treated significantly differently from others. In determining the relevance of these criteria where it is intended that some of the class members will receive no compensation from the proposed settlement scheme, it is useful to note that such settlements may be arrived at in one of two ways. The first alternative is to seek a change to the description of the represented group so as to exclude from such group those class members who are not to receive any remedy under the settlement. Once this amendment comes into effect, the only class members who will be bound by the settlement scheme will be those who are to receive a remedy pursuant to it.⁹⁹

It is immediately apparent that if the judicial review of the fairness and reasonableness of class action settlements is undertaken with respect to the modified and smaller class, the protection of the interests of class members that s 33V will provide will be largely illusory. It must be conceded, however, that a potential advantage of this strategy, for those class members who will be taken out of the settlement, is that they will still be able, subject to any statutes of limitations problems,¹⁰⁰ to institute fresh proceedings against the defendants as their causes of action have not been extinguished by the settlement. But, as aptly explained by an American Court, in most circumstances this option is largely theoretical:

The named plaintiffs argue that, if certain [class members] were dissatisfied with the settlement terms, they could simply opt out of the class and pursue their own relief individually. While such an argument might theoretically be true, it ignores the realities of pursuing small claims. It would cost considerably more to litigate individual claims than the litigant could recover.¹⁰¹

⁹⁸ *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, 465. See also *Wong v Silkfield Pty Ltd* [2000] FCA 1421, [18] (Spender J) ('Wong'); *Neil v P & O Cruises Australia Limited* [2002] FCA 1325, [7] (Weinberg J); *Lukey* [2003] FCA 1602, [7] (Emmett J).

⁹⁹ See, eg, *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459; *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399; *Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd* [2004] FCA 1114.

¹⁰⁰ *Federal Court of Australia Act 1976* (Cth) pt IVA, s 33ZE and *Supreme Court Act 1986* (Vic) pt 4A, s 33ZE suspend, in relation to each claim of a class member to which the class action relates, the running of the limitation period from the date the class proceeding is commenced. The suspension is lifted if the class member opts out or if the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the class member's claim. For a discussion of these provisions see Mulheron, above n 15, 373-88; Grave and Adams, above n 6, ch 16; Vince Morabito, 'Statutory Limitation Periods and the Traditional Representative Action Procedure' (2005) 5 *Oxford University Commonwealth Law Journal* 113, 132-4.

¹⁰¹ *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F 3d 768, 809 (3rd Cir, 1995). See also *In re General Motors Corp Engine Interchange Litigation*, 594 F 2d 1106, 1136 (7th Cir, 1979); Note, 'Judicial Prerequisites to Class Actions in Illinois: Policy, Practice, and the Need for Legislative Reform' [1976] *University of Illinois Law Forum* 1159, 1167.

The second available strategy is to leave unaltered the description of the represented group. All class members will be bound by the settlement, including those persons who are not to receive any benefits under it. However, an opportunity to opt out is usually extended to the class members who are intended to be covered by the settlement.¹⁰² As explained in Part III B 2 below, the right to opt out of settlements has played a major role in the judicial approach to the scrutiny of settlement agreements that do not provide legal relief to all class members.

Regardless of which of the two strategies mentioned above is implemented to limit the beneficiaries of a settlement one matter seems clear. Justice Goldberg's criteria, for determining the fairness and reasonableness of a settlement scheme, require the exclusion of any class members from the 'fruits' of a settlement to be supported by reference to the merits of the substantive claims of the excluded members. This conclusion logically follows from the fact that the factors enunciated by Justice Goldberg essentially require a comparison between what is being offered to class members and what the class members are likely to receive if the class proceeding is allowed to continue.¹⁰³ Similarly, the US Supreme Court¹⁰⁴ has explained that '[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement'.¹⁰⁵

Furthermore, the Kraft peanut butter settlement provides a salutary reminder that the fact that the causes of action of some of the class members are (relatively) weak does not automatically justify the denial of any benefits whatsoever to such represented persons:

The obligations of the representative to all class members was in the minds of Slater and Gordon, solicitors for the representative in the 'Kraft peanut butter case'. The settlement agreement between the parties in that case provided compensation for people who were not part of the original class action, and who had not notified the plaintiff solicitors of their claim at the time of settlement. It also provided compensation to be paid to people who had less

¹⁰² See, eg, *Wong* [2000] FCA 1421; *Verschuur v Vynotas Pty Ltd* [2004] VSC 130; *Courtney v Meditel Pty Limited (No 5)* (2004) 212 ALR 311.

¹⁰³ Similarly, one of the factors that, in the ALRC's view, should be taken into account in determining whether the proposed settlement should be approved is 'the amount offered and the likelihood of success in the proceeding': ALRC Report, above n 3, 163 (cl 28(3)(b)). See also MLRC Report, above n 96, 96; ALRI Report, above n 18, [328] (recommendation no 14); LRCI Paper, above n 78, [4.88].

¹⁰⁴ It is interesting to note that legislation drafted by the US Department of Justice in 1979 would have authorised the Court to 'require or permit limited discovery on the merits supervised by the Court to determine the fairness of a settlement': OLRC Report, above n 9, 805. See also Hensler Report, above n 3, 21.

¹⁰⁵ *Carson v American Brands Inc*, 450 US 79, 88 n 14 (1981). See also *In re General Motors Corp Engine Interchange Litigation*, 594 F 2d 1106, 1132 (7th Cir, 1979); *Protective Committee for Independent Stockholders of TMT Trailer Ferry Inc v Anderson*, 390 US 414, 424-5 (1968); *Weinberg v Kendrick*, 698 F 2d 61, 73 (2nd Cir, 1982); *In re Traffic Executive Association – Eastern Railroads* 627 F 2d 631, 633 (2nd Cir, 1980); *Malchman*, 706 F 2d 426, 433 (2nd Cir, 1983); *In re Oracle Securities Litigation*, 829 F Supp 1176, 1179 (ND Cal, 1993); *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F 3d 768, 796 (3rd Cir, 1995); *Van Horn v Trickey*, 840 F 2d 604, 607 (8th Cir, 1988).

evidence, such as pathology reports, to prove their claim. The settlement could have covered only those people in the group who had the best evidence of food poisoning, which would have left those within the class who had a weaker case with no compensation.¹⁰⁶

It is now possible to undertake a critical review of the approach of Australian Courts to proposed settlements that do not provide any remedies to particular categories of class members.

III EXCLUSION FROM CLASS ACTION SETTLEMENTS OF 'PARASITICAL FREELoadERS'

A *Wong v Silkfield Pty Ltd*

One of the first attempts to seek judicial approval of a class action settlement, that did not provide any remedy to some of the class members, was in *Wong v Silkfield Pty Ltd*.¹⁰⁷ These Part IVA proceedings were brought on behalf of the purchasers of units in two buildings in Brisbane with respect to misrepresentations found in statements issued to the purchasers by the defendants pursuant to s 49 of the *Building Units & Group Titles Act 1980* (Qld) ('s 49 statements').

Justice Spender indicated that the class members who were to receive a remedy, under the settlement agreement, were willing to accept the proposed settlement. His Honour then turned his attention to those class members who had not expressed their willingness to participate in the proposed deed of settlement. The Court first considered the position of Mr McGahan and Mr and Mrs Harfield. It was noted that these class members were aware of the settlement proposal and the application seeking judicial approval of it. These class members had also not instituted their own proceedings. No information was available to the Court as to whether these class members had relied on the s 49 statement or, if so, whether they had suffered any damage as a result of it. These facts led the Court to conclude that:

there is nothing unfair or unreasonable in the deed of settlement, which excludes them from any share in the proceeds. In particular, the position of Mr McGahan indicates to me that he is seeking to have an unquantified benefit conferred on him without him having contributed or having been involved in the settlement process. The fact is that he has not made out a claim for damages, and one rhetorically asks whether in fact he has suffered any. His position seems to me to typify that of a parasitical freeloader who is not prepared to do anything in his own self-interest which may have a cost to him.¹⁰⁸

¹⁰⁶ Public Interest Advocacy Centre, *Representative Proceedings - Supplement* (1997), 22. This class proceeding was brought against Kraft and its subsidiary on behalf of consumers who became ill as a result of eating Kraft peanut butter that was contaminated by salmonella.

¹⁰⁷ [2002] FCA 1421 ('*Wong*').

¹⁰⁸ *Ibid* [24].

The Court then considered the position of the remaining two represented persons, Mr and Mrs Van Drongelen, who were not provided with a remedy under the proposed deed of settlement. After considering some correspondence between these class members and the solicitors acting for the plaintiffs, Justice Spender made the following ruling:

It is plain from the correspondence viewed overall ... that the Van Drongelens' position is that they wish to have a settlement different from that proposed, but without any personal involvement by way of submission and inferentially by way of cost. They have certainly been aware of the proposed settlement, and of their exclusion from the benefits of it, and notwithstanding repeated communications have not attended or made any submissions concerning either the appropriateness of the settlement or their loss, if any ... Having regard to all of the material, and in particular to the inferences which I draw that, in a sense, the Van Drongelens want to have some of the cake without contributing in any way to the preparation of it, I do not think it either unreasonable or unfair for the deed of settlement to exclude them from participation in the proposals.¹⁰⁹

B Critique of Wong

To some extent, the judicial approval of the proposed deed of settlement and the extremely adverse description of the excluded class members in *Wong* may be attributed to the reasonably unique circumstances of the case. The class members, other than the excluded class members, contributed to the costs of the litigation and had a direct involvement in the process of reaching a settlement of their claims with the defendants. It also appears that the class members who were to receive a monetary remedy pursuant to the settlement had initiated individual proceedings against the class action defendants.

But, on a more general level, the reasoning and conclusion of Spender J in this case were clearly premised on a very narrow understanding of the ambit of the fiduciary duty owed by the Court to class members when confronted with the types of settlements reviewed in this article. The philosophy embraced by Justice Spender was that the Court's duty, in s 33V applications, is primarily to provide the class members with notice of (a) the proposed settlement; and (b) their right to opt out of the settlement or to make the Court aware of their objections to the proposed settlement. Pursuant to this stance, there is no further role for the Court to play if the class members who will be adversely affected by the settlement do not take action to safeguard their interests by either opting out of the settlement or by formally advising the Court of their objection to the proposal. The great importance placed by Spender J on the need for class members to be properly advised of any proposed settlement, so as to be in a position to protect their interests, is apparent from the following comments:

¹⁰⁹ Ibid [28], [30].

it is relevant to observe that notice is the key element which protects the interests of members of a particular group, as identified by para 147 of the Law Reform Commission Report No 46 ... That report recommended procedures to provide specific safeguards to protect the interests of both group members and respondents, and the essence of the recommendations ... underlines the importance of providing notice of any proposed settlement to group members and allowing them an opportunity to respond.¹¹⁰

1 Settlement Notices

In light of the importance attributed by Justice Spender to the notice regime governing settlements, it is important to briefly consider the essential features of this regime. In both Part IVA and Part 4A, we find s 33X(4) which provides that, unless the Court is satisfied that it is just to do so, an application for approval of a settlement under s 33V must not be determined unless notice has been given to class members.¹¹¹ Since this provision was entirely based on one of the recommendations of the ALRC, the rationale for this provision may be ascertained through a review of the ALRC's report. Such a review reveals that the purpose of this requirement was not to deal with any potential unfairness, flowing from proposed settlements, by delegating to the adversely affected class members the task of assessing the fairness of such settlements. Its aim is, instead, to provide the Court with as much useful information as possible when it undertakes the onerous task assigned to it under s 33V of determining whether it should approve the proposed settlement. The philosophy underpinning s 33X(4) is unequivocally shown by the following comment appearing in the ALRC's report:

Group members should also be given notice of a proposed settlement a reasonable time before the application to approve the settlement is heard so that their views on the settlement can be made known to the Court.¹¹²

The desirability of the Court being advised of the views of even one or two class members becomes apparent when one considers the nature of the process that is followed to secure the judicial approval of a class action settlement. In hearings concerning class action settlements the class representative, her lawyers and the defendant are united in their desire to have their settlement agreement approved by the Court. Consequently, these hearings do not adhere to the adversarial model of litigation that constitutes an integral feature of legal systems in common

¹¹⁰ Ibid [16].

¹¹¹ Justice Gillard of the Supreme Court of Victoria has explained that 'whether or not the Court would dispense with notice must, of course, depend on all the circumstances': *Johnson* [2004] VSC 466, [14]. See also *Courtney v Medtel Pty Limited (No 5)* (2004) 212 ALR 311, 315 (Sackville J); *Grave and Adams*, above n 6, 387-8; *Crawford v Bank of Western Australia Ltd* [2005] FCA 949, [22] (Lee J).

¹¹² ALRC Report, above n 3, [188]. It is therefore not surprising that clause 28(3) of the grouped proceeding legislation that the ALRC drafted required Courts to consider a number of factors, when assessing a proposed settlement, including 'whether the discontinuance, compromise, settlement or acceptance of money is in the interests of the group member having regard to the views, if they are made known to the Court, of the group member'.

law jurisdictions.¹¹³ It will also be recalled that there are no real incentives, on the part of class action defendants, to reject settlement proposals that produce unfair results for all (or some) of the class members. It is, therefore, clear that objections from class members and others ‘represent an outside source of information about the substance of the settlement and its impact on class members’.¹¹⁴ It is also not surprising that several years ago the Civil Rules Advisory Committee recommended amendments to Rule 23 that were designed to bolster the position of good objectors.¹¹⁵

The useful role that settlement notices can potentially play, in the Court’s determination of s 33V applications, becomes apparent when one considers *Tongue v Council of the City of Tamworth*.¹¹⁶ In this Part IVA proceeding, Allsop J’s refusal to approve a proposed settlement was predominantly based on the fact that more than half of the class members complained that the monetary compensation available under the settlement was substantially less than the damage suffered by the represented group. As explained in Part V below, the recent judgment of Justice Mandie of the Supreme Court of Victoria in *Verschuur v Vynotas Pty Ltd*¹¹⁷ demonstrates that s 33X(4) notices may attain the desirable goal - of providing the Court with valuable information with respect to proposed settlements - even where these notices elicit the response of only one class member.¹¹⁸

2 Opting Out of Settlements

The information gathering purpose of the settlement notice regime is also evinced by the fact that Part IVA and Part 4A do not expressly authorise the Court to extend to class members the opportunity to opt out of settlements. The only opt out opportunity that is expressly provided for in Part IVA and Part 4A is at the commencement of the proceedings. The Federal Court and the Supreme Court of Victoria have, nevertheless, developed a practice of usually extending to class

¹¹³ See, eg, Macey and Miller, above n 42, 46; Koniak and Cohen, above n 66, 1104; Hensler Report, above n 3, 89-90; Cooper, above n 54, 240; Lambert, above n 66, 90; Spender, above n 58, 158; Legg, above n 52, 70; Susanna Kim, ‘Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?’ (1998) 66 *Tennessee Law Review* 81, 126; *Courtney v Medtel Pty Limited (No 5)* (2004) 212 ALR 311, 317 (Sackville J).

¹¹⁴ Thomas Willging, Laurel Hooper and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, Washington DC, Federal Judicial Center (1996) 58 (‘FJC Report’). See also *Mandujano*, 541 F 2d 832, 835 (9th Cir, 1976); Hensler Report, above n 3, 494, 497; *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F 3d 768, 803 (3rd Cir, 1995); *Reynolds v Beneficial National Bank*, 288 F 3d 277, 288 (7th Cir, 2002).

¹¹⁵ Cooper, above n 54, 240. See also Hensler Summary, above n 50, 34-5 where the conclusion is reached that ‘to assure that key aspects of settlements are brought to light, judges should seek assistance from knowledgeable but disinterested parties’ and at 24 where it is noted that ‘from a societal perspective, the balance of benefits and costs was more salutary when judges ... invited the participation of legitimate objectors and intervenors’.

¹¹⁶ [2004] FCA 209.

¹¹⁷ [2004] VSC 130.

¹¹⁸ See also *Petruzzi’s Inc*, 880 F Supp 292, 294 (MD Pa, 1995); Rules Committee Report, above n 88, 104 where attention is drawn to the fact that objections to proposed settlements ‘may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses’.

members the opportunity to opt out of the settlement, in the event that the settlement receives judicial approval under s 33V. In so doing, Australian Courts have emulated a number of US Courts which have extended to class members the opportunity to opt out of settlements in those class actions where damages is the principal remedy sought on behalf of the class.¹¹⁹ Damage class actions are the only Rule 23 actions where a right to opt out of the class proceeding is extended to class members.¹²⁰

This judicial practice was 'codified' in the US in December 2003. From that date Rule 23(e)(3) provides that in an action certified as a class action, 'the Court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but who did not do so'.¹²¹ This amendment was based on a recognition, on the part of the drafters of the US Federal rules of civil procedure, of the various benefits associated with the use of an opt out regime in settlements.¹²² The most significant virtue of such regimes is that they provide an additional safeguard for class members. Those class members who feel that the settlement agreement will adversely affect their interests may opt out of the settlement if they fear that it will be approved by the Court.¹²³

The main drawback of this practice¹²⁴ is that it may reduce the incentive of defendants to settle given that there is the possibility that a significant number of class members will opt out of the settlement.¹²⁵ But this problem has been dealt with in the US by the inclusion in settlement agreements of a clause that allows

¹¹⁹ *Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States* (September 2002) 16 (available at <<http://www.uscourts.gov/rules/jc09-2002/Report.pdf>> at 19 July 2006) ('Judicial Conference Report').

¹²⁰ Non-damage class actions are often referred to as 'mandatory' class actions because with respect to such suits 'Rule 23 does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right': *Ortiz*, 527 US 815, 833 (1999).

¹²¹ The Civil Rules Advisory Committee has emphasised that the decision 'whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion. The court may make this decision before directing notice to the class ... or after the [fairness] hearing. Many factors may influence the court's decision. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims': Rules Committee Report, above n 88, 106.

¹²² *Ibid* 106; Judicial Conference Report, above n 119, 14-16.

¹²³ Judicial Conference Report, above n 119, 14-5; Jonathan Beach, 'Representative Proceedings - Some Current Issues' (paper presented at a seminar on Recent Developments in Class Actions, Melbourne, 12 October 2000), [22]; Legg, above n 52, 71; *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F 3d 768, 792 (3rd Cir, 1995); *Courtney v Medtel Pty Limited (No 4)* [2004] FCA 1233, [15] (Sackville J).

¹²⁴ Another problem is that 'the greater the number of dissatisfied [class] members, the greater the burden placed on the judicial system by [class] members who opt-out of the settlement and pursue their individual claims': *Pettway*, 576 F 2d 1157, 1218 (5th Cir, 1978).

¹²⁵ Judicial Conference Report, above n 119, 16; Donnan, above n 8, 90; Scott, above n 52, 580-1. Such a scenario is inconsistent with the goal that class action defendants seek to attain, namely, 'a final, global solution to all liability claims without the defendant having to risk a ... trial': Darren Franklin, 'The Mass Tort Defendants Strike Back: Are Settlement Class Actions A Collusive Threat or Just a Phantom Menace?' (2000) 53 *Stanford Law Review* 163, 165. See also *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation* 55 F 3d 768, 790 (3rd Cir, 1995).

defendants to withdraw from the settlement in the event that more than a specified percentage of class members opt out of the settlement.¹²⁶ Similar clauses are beginning to appear in class action settlement agreements in Australia.¹²⁷

But the ability of class members to exclude themselves from a settlement does not diminish the responsibility of the Court when confronted with an application under s 33V. A settlement agreement that is unfair and unreasonable, partly or mainly because it unjustifiably denies compensation to some of the class members, is not rendered acceptable by the failure of the adversely affected class members to opt out or to formally object to the settlement. As indicated by an appellate Court in the US, ‘the right of parties to opt out does not relieve the Court of its duty to safeguard the interests of the class and to withhold approval from any settlement that creates conflicts among the class’.¹²⁸ American Courts have also wisely recognised that ‘because the class action settlement process is more susceptible than adversarial adjudication to certain types of abuse, a court faced with a settlement in a class action has a heavy, independent duty to ensure that the settlement is “fair, adequate, and reasonable”’.¹²⁹

The Court in *Wong* was not in a position to determine the merits of the individual causes of action of the excluded class members as it had no information available with respect to such claims. But that problem could have been addressed by adopting a procedure that is commonly employed to determine which of the class members are entitled to receive compensation following either a judgment in favour of the class or a settlement approved by the Court pursuant to which a monetary fund is available for the benefit of the represented class. This procedure generally requires class members to provide evidence of their claim within a specified time before being allowed to receive compensation.¹³⁰ This procedure finds a general legislative basis in s 33ZA of Part IVA and Part 4A. Section 33ZA provides that when the Court orders the establishment of a fund consisting of the money to be distributed to the class members, a class member is required, within six months or more of the establishment of the fund, to ‘make a

¹²⁶ Judicial Conference Report, above n 119, 16; Theodore Eisenberg and Geoffrey Miller, ‘The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues’ (2004) 57 *Vanderbilt Law Review* 1529, 1538. Furthermore, as pointed out by the Civil Rules Advisory Committee, ‘the terms set for permitting a new opportunity to [opt out] ... may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate’: Rules Committee Report, above n 88, 106.

¹²⁷ See, eg, *Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd* [2004] FCA 1114, [7] (Crennan J) where the settlement agreement provided that ‘it will only be effective if less than 10% of Group Members opt out of this proposed settlement (Caltex may waive this requirement)’.

¹²⁸ *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F 3d 768, 809 (3rd Cir, 1995). See also *In re General Motors Corp Engine Interchange Litigation* 594 F 2d 1106, 1136 (7th Cir, 1979) where the Court aptly pointed out: ‘we fail to see that [a class] member’s knowledge that he may be treated unfairly excuses committing the injustice’.

¹²⁹ *Reynolds v King*, 790 F Supp 1101, 1105 (MD Ala, 1990). See also *Holmes* 706 F 2d 1144, 1147 (11th Cir, 1983); *Mars Steel*, 834 F 2d 677, 682 (7th Cir, 1987); *Pettway* 576 F 2d 1157, 1169 (5th Cir, 1978); *Reynolds v Beneficial National Bank*, 288 F 3d 277, 279 (7th Cir, 2002); *Cotton* 559 F 2d 1326, 1330 (5th Cir, 1977).

¹³⁰ See, eg, *Lopez v Star World Enterprises Pty Ltd* (1999) ATPR 41-678, 42-669-70 (Finkelstein J); *Johnson* [2004] VSC 466, [26]-[29] (Gillard J); *King* (2002) 191 ALR 697, [40] (Moore J).

claim for payment out of the fund and establish his or her entitlement to the payment'.¹³¹

Consequently, the philosophy embraced by Justice Spender may be challenged, on a more general level, on the basis that it is irreconcilable with the trial Court's responsibility to act as the protector of the interests of the class members. Unfortunately, several months after Spender J's s 33V approval, Justice Goldberg of the Federal Court also placed significant importance on the ability of class members to take positive action to protect their interests - after receiving notice of the proposed settlement - in justifying his approval of a s 33V settlement. As explained in Part IV below, the settlement approved by Justice Goldberg denied any remedy to a particular category of class members.

IV REPRESENTED CLASS MEMBERS V UNREPRESENTED CLASS MEMBERS

A *Williams v FAI Home Security Pty Ltd (No 4)*

Doubtless [the law firm hired by the class representative] could not ... legitimately seek to narrow the definition of the represented group so as to exclude unrepresented remaining Group Members from a settlement, if the object was to prefer the firm's own interests to those of the unrepresented remaining Group Members: cf *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925, at [22] (the example is hypothetical only).¹³²

The case referred to above by Justice Sackville, *Williams v FAI Home Security Pty Ltd (No 4)*,¹³³ entailed a Part IVA proceeding that was instituted against FAI Home Security Pty Ltd (the first defendant) and FAI Finance Pty Ltd (the second defendant). The class members represented by the named plaintiffs were those who entered (after 9 July 1993) into a sales contract with the first defendant to purchase an alarm system, who entered (after 9 July 1993) into a loan contract with the second defendant to finance the purchase of the alarm system, who relied on certain representations by the first defendant and who suffered loss as a result.

Justice Goldberg was asked to approve a settlement agreement which was conditional upon the Court ordering that the definition of the class members, to whom the proceeding related, be changed to encompass only those class members who had signed fee and retainer agreements with the solicitors hired by the class representative ('the represented class members'). The settlement agreement envisaged payment of \$1,000 to each of the 495 represented class

¹³¹ See also *Supreme Court Act 1986* (Vic) pt 4A, s 33ZG.

¹³² *Courtney* (2002) 122 FCR 168, 184-5 (Sackville J). See also Peter Cashman, 'Consumers and Class Actions' (2001) 5 *University of Western Sydney Law Review* 9, 24 ('there are obvious difficulties where people who have an interest in the outcome of the case are making allocation decisions about which sections of the class should get which benefits, particularly when they have a direct pecuniary interest in the benefits payable to their own clients').

¹³³ (2000) 180 ALR 459 ('*Williams*').

members only. The Court summarised quite accurately the substance and effect of what it had been asked to approve:

I consider that a potential conflict of interest arises where a representative party in a representative proceeding seeks to settle the proceeding by limiting or narrowing the definition of the group so as to exclude some of the group members from the settlement. It is in the interests of those who can obtain a benefit under the settlement to have it approved rather than to have the proceeding continue. It is not in the interests of those who will not obtain a benefit under the settlement to have it approved with the result that the proceeding will terminate. Rather it is in their interests for the proceeding to continue, at least until it generates an offer of settlement which will give them a benefit. If the proposed settlement is approved, then they will be cast adrift from any representative proceeding and they will become group members without the benefit of a representative proceeding ... This potential conflict of interest must be resolved by considering how best to have regard to the interests of the present group members who are not beneficiaries of the settlement.¹³⁴

B Critique of Williams

Unfortunately, the excellent assessment above did not prompt his Honour to decline to issue a s 33V order. Instead, he decided that the class members excluded from the proposed settlement should be given notice of the proposed settlement and thereby be given the opportunity to put their views before the Court before a determination was made whether to approve the settlement. As a result of the publication of the notice, 88 class members contacted the solicitors for the plaintiff to advise them that they objected to the proposal to amend and settle the proceeding on the basis that no offer had been to them.¹³⁵ Once these 88 class members were added as beneficiaries of the settlement, the settlement was approved by Justice Goldberg.¹³⁶

With respect to those class members who received no benefit from the settlement, Justice Goldberg placed emphasis on the fact that any rights which the unrepresented class members will have against the defendants in relation to the alarm systems, the subject of the proceeding, will not be affected or diminished.¹³⁷ The unsatisfactory nature of this line of reasoning may be gauged by considering that four months earlier his Honour himself had rejected, as follows, the submission put forward by counsel for the class representative that the proposed settlement scheme was fair because, inter alia, the excluded class members were still able to initiate, against the defendant, individual proceedings or another class proceeding:

¹³⁴ (2000) 180 ALR 459, [22], [23].

¹³⁵ *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399, [9].

¹³⁶ *Ibid* [27].

¹³⁷ *Ibid* [20].

This may be true as a matter of theory and principle, but ... it fails to recognise the practical advantage of the current representative proceeding. The whole purpose of a representative proceeding is to enable persons with relatively small claims to have their claims pursued, where the costs of pursuing individual claims is impractical having regard either to the quantum or nature of the claim.¹³⁸

A more fundamental problem with Goldberg J's approach is revealed by considering the desirable philosophy advocated by Justice Weinberg of the Federal Court with respect to the Court's responsibility, in the context of a s 33V application, to those class members who do not enter into a contractual relationship with the class lawyers ('the unrepresented class members'):

Ordinarily, not all group members to a representative proceeding will have retained the applicants' solicitors, or any other solicitors for that matter. In those circumstances the Court must be mindful of the interests of 'unrepresented' group members, and would give careful consideration to the question whether the proposed settlement was in the interests of all group members.¹³⁹

1 Incorrect Judicial Interpretation of the Non-Responsiveness of Class Members

The settlement approved in *Williams* could not be said to be in the interests of all unrepresented class members. It only safeguarded those unrepresented class members who voiced their objections to the settlement. This undesirable outcome appears to be attributable to a belief, on the part of his Honour, that those unrepresented class members who did not respond to the notice were not interested in becoming beneficiaries of the proposed settlement. It was thus not unfair to deny them any compensation. At first glance, this line of reasoning appears persuasive. But a different conclusion is arrived at when one considers the major policy objective of class action devices. This goal is to provide access to the Courts for those claimants who are unable to initiate individual proceedings, to enforce their legal rights, as a result of financial and/or non-financial barriers.¹⁴⁰ Attainment of this goal of the class action device compels the rejection of an opt in procedure:¹⁴¹

¹³⁸ *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, [39]. See also *Pettway*, 576 F 2d 1157, 1182 (5th Cir, 1978); *Deposit Guaranty*, 445 US 326, 339 (1980); *Bray* (2003) 200 ALR 607, [119] (Carr J); *Guglielmin v Trescowthick (No 2)* [2005] FCA 138, [10], [77] (Mansfield J); OLCRC Report, above n 9, 345; Conte and Newberg, above n 85, vol 2, 247; Vince Morabito, 'The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions' (2004) 42 *Osgoode Hall Law Journal* 473, 509 n 166.

¹³⁹ *Neil* [2002] FCA 1325, [7] (Weinberg J).

¹⁴⁰ *Hollick v Toronto (City)* (2001) 205 DLR (4th) 19, 28-9 (McLachlin CJ); *Western Canadian Shopping Centres Inc v Bennett Jones Verchere* (2001) 201 DLR (4th) 385, 397 (McLachlin CJ); 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; Emerson, above n 57, 187-9; MLRC Report, above n 96, 23-30; OLCRC Report, above n 9, 117-46; *Hawaii v Standard Oil Co*, 405 US 251, 266 (1972); *Gottlieb v Wiles*, 11 F 3d 1004, 1009 (10th Cir, 1993); Scottish Law Commission, *Multi-Party Actions*, Report No 154 (1996) [2.10] ('SLC Report'); *General Telephone*, 457 US 147, 149 (1982); *United States Parole Commission v Geraghty*, 445 US 388, 402-3 (1980).

An opt in requirement would be fundamentally inconsistent with the access to justice rationale endorsed as a basic justification for expanded class proceedings legislation. That is to say, making justice available is the predominant policy concern and inclusiveness in the class should be promoted.¹⁴²

This philosophy was embraced by Michael Duffy, the then Commonwealth Attorney-General. He revealed in Parliament, during the Second Reading of Part IVA, that an opt out procedure is preferable because 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’.¹⁴³ The results of empirical studies undertaken in the US clearly substantiate the Government’s line of reasoning.¹⁴⁴

American empirical studies also reveal that few class members opt out of settlements and that class members attend settlement hearings and/or object to settlements infrequently. A 2004 study, for instance, revealed that ‘on average, less than 1 percent of class members opt-out and about 1 percent of class members object to class-wide settlements’.¹⁴⁵ Several US Courts and commentators have concluded that such low opt out and objection rates are attributable to factors other than support, by the vast majority of class members, for the settlement agreed upon by the representative plaintiff and the defendant.

One such factor is a failure, on the part of class members, to comprehend the contents and effect of the settlement notice. An illustration is provided by *Buchet v IIT Consumer Financial Corp* where ‘the Court received a significant number of letters and telephone calls from class members who thought the [settlement] notice meant that they were being sued’ by the defendant.¹⁴⁶ Another Court has drawn attention to the fact that ‘in many class actions, the vast majority of class members lack the resources either to object to the settlement or to opt out of the

¹⁴¹ An example of an opt in procedure was provided by ss 34 and 35 of the *Supreme Court Act 1986* (Vic). One of the commencement requirements of this regime was that all persons being represented in the proceeding had, before the commencement of the proceeding, consented in writing to being represented; and had been named in the originating process; and that the written consents had been filed in the Court at the same time as the originating process was commenced.

¹⁴² ALRI Report, above n 18, [242]. See also Cashman, above n 132, 22; Cooper, above n 54, 230.

¹⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3175 (Michael Duffy, Attorney General). See also *Verschuur v Vynotas Pty Ltd* [2004] VSC 130, [84] (Mandie J).

¹⁴⁴ They are discussed in Vince 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, 629-35.

¹⁴⁵ Eisenberg and Miller, above n 126, 1532. See also FJC Report, above n 114, 57, 135. A similar scenario appears to exist in Australia. See, eg, *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980, [10]-[11] (Moore J); *Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd* [2004] FCA 1114, [7] (Crennan J); *Petrusevski v Bulldogs Rugby League Club Limited* [2004] FCA 1712, [8] (Gyles J); *Johnson* [2004] VSC 466, [18] (Gillard J) where no class members opted out of, or objected to, the settlement.

¹⁴⁶ 845 F Supp 684, 691 (D Minn, 1994). Perhaps confusion was also experienced by the 57 unrepresented class members who contacted the plaintiff’s lawyers, after publication of the settlement notice in *Williams*, to advise them that they did not object to the proposed settlement: *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399, [9] (Goldberg J). See also Resnik, above n 51, 855; Hensler Report, above n 3, 488; *Bell Atlantic Corp v Bolger*, 2 F 3d 1304, 1313 n 15 (3rd Cir, 1993) where attention was drawn to the ‘low response rates of class members to settlement notices notifying them they are entitled to money and need merely fill out a short form to obtain it’, as evidence of the dangers entailed in regarding a low objection rate as support for a proposed settlement.

class and litigate their individual cases'.¹⁴⁷ Attention has also been drawn by an American commentator to the fact that:

More often than not ... notice fails to elicit intervention of absentee class members for the same reason that class members fail to control their representatives: an active class member incurs significant expenses without receiving commensurate benefits.¹⁴⁸

This last comment aptly captures the circumstances in *Williams*. The notice that the defendants were required to give to class members, and which was published in various newspapers, simply advised unrepresented class members that if they desired to object to the settlement or the proposed orders, they could appear before the Court on 28 March 2001 and advise the Court of their objections.¹⁴⁹ Consequently, a rational assessment of this notice could not have created the expectation that responding to this notice - by formally objecting to their exclusion from the proposed settlement - would automatically (or be likely to) result in the unrepresented class members being brought within the ambit of the settlement.¹⁵⁰

The need for the Court's approach to s 33V applications - not to be premised on the assumption that class members (particularly those who are unrepresented) will be able to take whatever steps are necessary to protect their interests - was aptly explained by Justice Sackville of the Federal Court:

The principal difficulty concerns the position of group members, particularly those who are not legally represented. While they are able to opt out of the proceedings, often they will not appreciate the significance of that course or indeed of remaining as part of the represented group. It is for this reason that the Court must be alert 'to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it'.¹⁵¹

2 Judicial Implementation of Opt In Procedures

An increasing number of trial judges have introduced an opt in requirement, in

¹⁴⁷ *In re Corrugated Container Antitrust Litigation*, 643 F 2d 195, 218 (5th Cir, 1981). See also OLRC Report, above n 9, 799; Comment, 'Factors Considered in Determining the Fairness of a Settlement' (1974) 68 *Northwestern University Law Review* 1146, 1153. It is also important to note that 'in a group proceeding, *ex hypothesi*, there may be persons, in the community who can be affected by such settlement but know nothing of it, despite extensive advertising': *Tasfast* [2002] VSC 457, [4] (Bongiorno J). See also *Courtney* (2002) 122 FCR 168, 182 (Sackville J).

¹⁴⁸ Lazos, above n 39, 324. See also Lu, above n 39, 61; Arthur Miller, 'Problems of Giving Notice in Class Actions' 58 FRD 313, 321-2 (1973); Hensler Report, above n 3, 86 ('fairness hearings may be held at a time and place that make it unlikely that an average class member could appear. In any event, class members have little to gain from participating when the individual damages are small').

¹⁴⁹ *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399, [8]. Furthermore, no indication was provided in the notice as to the compensation that was to be made available to represented class members. Instead, it was merely indicated that unrepresented class members 'could obtain a copy of the documents which would be before the Court on 28 March 2001 including a copy of the terms of settlement, from the applicants' solicitors'.

¹⁵⁰ See also Hensler Report, above n 3, 86-8, 120.

¹⁵¹ *Courtney v Medtel Pty Limited (No 5)* (2004) 212 ALR 311, 317 (Sackville J).

conjunction with the opt out procedure already referred to, when considering s 33V applications.¹⁵² Under this approach, the settlement notice advises class members that within a specified date they need to either opt in or opt out of the settlement. Compliance with this opt in requirement is usually achieved by lodging a document or form. It is important to note that this opt in requirement is, usually, in addition to, and in fact precedes, the requirement, already highlighted, that class members generally need to establish their entitlement to any compensation that is made available to the class members pursuant to a settlement agreement.¹⁵³ In essence the effect of this model is that those class members who neither opt out of the settlement nor opt in will be bound by the proposed settlement (if approved by the Court) but will receive no benefit under it.¹⁵⁴

The reduction in the number of class members who will receive the benefits available under the settlement scheme, that results from the employment of this device, is evident from the settlement scheme that was implemented with respect to a Part IVA proceeding brought against the NSW Government's Sydney Water Corporation, on behalf of people who suffered economic loss or damage because of water quality alerts. Out of 12,000 class members, only '3,000 opted in and were sent claim packs, and 1,600 continued with the claims process'.¹⁵⁵

This judicial practice of 'closing the class' has also been employed in stages of class proceedings other than settlements¹⁵⁶ but the outcome of such practice has been the same, namely, a reduction in the number of class members who will be entitled to receive any of the benefits that will be available to the class, in the event of an unfavourable outcome of the proceedings for the defendants.¹⁵⁷ The grossly unsatisfactory effect of this judicial practice clearly highlights its inappropriateness.¹⁵⁸ But an equally significant issue is whether Part IVA and Part 4A empower trial judges to implement such a measure, in the first place.¹⁵⁹

As noted above, an opt out model was chosen for each of the two Australian regimes. One of the essential characteristics of such a model is that those

¹⁵² Beach, above n 123, [21]-[22].

¹⁵³ See Note, 'Class Action? Act Fast!' (2001) 11(10) *Risk* 11.

¹⁵⁴ See, eg, *Lopez* [1999] FCA 104 where the settlement notice distributed to class members contained the following instruction: 'if you wish to make a claim you must by [a specified date]: (i) opt in to the settlement scheme; or (ii) advise that you wish to opt out of the settlement. *If you fail to take steps (i) or (ii) you will lose your right to claim*' (emphasis added).

¹⁵⁵ Note, above n 153. See also *Reiffel v ACN 075 839 226 Pty Limited (No 2)* [2004] FCA 1128. In this case the 123 class members were asked to register, by a specified date, a claim for damages. This requirement had the practical effect of reducing the class to 102. These class members were then asked to file statements of evidence and a list of documents. Only 89 class members filed evidence and lists of documents.

¹⁵⁶ See generally Grave and Adams, above n 6, 375-82.

¹⁵⁷ See, eg, *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 1420, [9] (Moore J) where the judicially imposed requirement of completing and returning a form, in order to continue as class members, resulted in a drastic reduction in the number of unrepresented class members: from 25,806 to 1,957.

¹⁵⁸ For a somewhat different assessment, see Beach, above n 123, [22]; ALRC 2000 Report, above n 32, [7.116]; Jocelyn Kellam and Madeleine Kearney, 'Product Liability - A Decade of Change' (2001) 12 *Australian Product Liability Reporter* 49, 58.

¹⁵⁹ *Reiffel v ACN 075 839 226 Pty Limited (No 2)* [2004] FCA 1128, [13] (Gyles J).

claimants who fall within the description of the represented group will be bound by the class proceeding - and will thus be prima facie entitled to receive whatever benefits may flow from the conclusion of such litigation - without being required to expressly indicate their desire to be represented by the named plaintiffs. The only positive action that is required of class members is to complete and return an opt out form, if they wish to 'exit' the proceedings.¹⁶⁰ As already noted, they may also be required to establish their entitlement to a remedy upon the successful outcome of the proceedings.

This inconsistency with the opt out device, a device which represents a cardinal aspect of the Australian class action regimes,¹⁶¹ clearly suggests that a far stronger and more specific legislative basis, for closing the class, must be found than provisions such as s 33V(2), s 33ZF and s 33Z(1)(g) of both legislative regimes. Section 33V(2) empowers the Court to make such orders as are just with respect to the distribution of any money paid, including interest, under a settlement or paid into Court while s 33ZF confers on the trial Court the power to make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding. Section 33Z(1)(g) provides that the Court may, in determining a matter in a class action, 'make such other order' as the Court thinks just.¹⁶² In 2000 the ALRC had a similar concern as to the power of the Federal Court to close the class. In light of the ALRC's positive assessment of such a practice, it recommended an amendment to Part IVA to enable the Federal Court 'to close the class at a specified time before judgment'.¹⁶³ This recommendation appears to have been accepted by the Victorian legislature. In fact, s 33ZG of Part 4A provides that the Court may: (a) set out a step that class members or a specified class of class members must take to be entitled to any of the benefits arising out of the Part 4A proceeding; and (b) specify a date after which, if the step in question has not been taken by the relevant class member, the class member is not entitled to any of the specified benefits.¹⁶⁴ The Explanatory Memorandum to the Bill that contained Part 4A refers to the s 33ZG power as the 'power to make an order closing the group on a specified date'.¹⁶⁵ But no similar provision appears in Part IVA.

In light of the analysis above, it is disappointing to note that in October 2005 Justice Stone of the Federal Court concluded that the approach adopted by Justice

¹⁶⁰ *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 459 (Wilcox J); *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 30-33 (Gaudron, Gummow and Hayne JJ); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)* [2003] VSC 212, [132] (Gillard J); ALRC 2000 Report, above n 32, [7.88]; Scott, above n 52, 570; LRCI Paper, above n 78, [4.03].

¹⁶¹ Chief Justice Black of the Federal Court has recently remarked that 'the choice of an "opt-out" procedure, ... was one of the most contested policy issues': 'Foreword' to Grave and Adams, above n 6, vi.

¹⁶² *Courtney v Medtel Pty Limited (No 5)* (2004) 212 ALR 311, 321 (Sackville J).

¹⁶³ ALRC 2000 Report, above n 32, [7.116].

¹⁶⁴ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)* [2003] VSC 212, [65]-[72] (Gillard J).

¹⁶⁵ *Explanatory Memorandum, Courts and Tribunals Legislation (Miscellaneous Amendments) Bill 2000 (Vic) 7*. See also s 33KA of pt 4A which empowers the Supreme Court to order, at any time, whether before or after judgment, that a person cease to be a group member or that a person not become a group member. This power may be exercised where the Court is of the opinion that the person does not have sufficient connection with Australia to justify inclusion as a group member or where for any other reason it is just or expedient that the person should not be or should not

Goldberg in *Williams* was fully authorised by the terms of s 33Z.¹⁶⁶ What renders her Honour's conclusion even more puzzling is that, in the same judgment, she ordered the termination of a properly instituted Part IVA proceeding partly on the basis that the proceeding was instituted and conducted in a manner which was directly inconsistent with Part IVA's opt out regime.¹⁶⁷ The feature of this shareholder class action which, according to Justine Stone, was irreconcilable with the opt out regime was that to be a class member in this proceeding it was not sufficient to be a shareholder who suffered the injury in question at the relevant time. A shareholder was also required to instruct the representative plaintiff's solicitors to act in his/her/its behalf in the proceedings.¹⁶⁸

As indicated by Lipp,¹⁶⁹ the only judicial response to the proposed settlement that would have safeguarded the interests of all class members in *Williams* would have been a refusal to issue a s 33V order.¹⁷⁰ This is confirmed by the fact that the representative plaintiff could not possibly argue (let alone establish) that the denial of a remedy to the unrepresented class members was attributable to their substantive claims having less merit than the claims of the represented class members. As noted by an American Court, 'while disparate treatment of class members may be justified by a demonstration that the favored class members have different claims or greater damages ..., no such demonstration has been made here'.¹⁷¹

A judicial refusal to issue a s 33V order means, of course, that representative plaintiffs are forced to continue to litigate. But, as aptly explained by Justice Allsop of the Federal Court in *Tongue v Council of the City of Tamworth*, 'the applicant began this case. He may not want to continue it. However, having begun it, he can only extricate himself from it by a settlement, if I am of the view that I should approve it'.¹⁷² The judicial approach that has been advocated here with respect to *Williams* is precisely the strategy that was recently implemented

(footnote 165 cont'd)

become a group member. The purpose of this provision is 'to reflect common law principles regarding the Court's capacity to exercise jurisdiction over the parties and subject matter of proceedings': *Explanatory Memorandum, Courts and Tribunals Legislation (Miscellaneous Amendments) Bill 2000 (Vic) 7*. See also *Dagi v Broken Hill Proprietary Company Limited* [2000] VSC 486; Beach, above n 123, [8]-[9].

¹⁶⁶ *Dorajay Pty Ltd v Aristocrat Leisure Limited* (2005) 147 FCR 394, 430 (Stone J) ('*Dorajay*'). A similar conclusion was arrived at by Justice Stone with respect to the opt in/close the class device implemented in *King* (summarised, above n 157): at 430-1.

¹⁶⁷ *Ibid* 430. See also *Rod Investments (Vic) Pty Ltd v Adam Clark* [2005] VSC 449.

¹⁶⁸ *Dorajay* (2005) 147 FCR 394, 398.

¹⁶⁹ Lipp, above n 6, 393.

¹⁷⁰ In the absence of such a judicial response, 'appropriate action ... would have involved, at the very least, the designation of [the unrepresented class members] as a subclass with the right to have separate counsel un beholden to [class counsel]': *Piambino v Bailey*, 757 F 2d 1112, 1145 n 88 (11th Cir, 1985). See also *Mandujano*, 541 F 2d 832, 835-6 (9th Cir, 1976); *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation* 55 F 3d 768, 801 (3rd Cir, 1995); *Reynolds v Beneficial National Bank* 288 F 3d 277, 282 (7th Cir, 2002).

¹⁷¹ *Petruzzi's Inc*, 880 F Supp 292, 300-1 (MD Pa, 1995). See also *In re General Motors Corp Engine Interchange Litigation*, 594 F 2d 1106, 1133 (7th Cir, 1979) ('convenience and expediency cannot justify the disregard of the individual rights of even a fraction of the class'); Hensler Summary, above n 50, 18; *National Super Spuds*, 660 F 2d 9, 19 (2nd Cir, 1981).

¹⁷² [2004] FCA 972, [21]. See also *Lopez* [1999] FCA 104, [16] (Finkelstein J).

by Justice Mandie of the Supreme Court of Victoria in *Verschuur v Vynotas Pty Ltd*.¹⁷³

Before considering Mandie J's approach in some detail it is interesting to note that in several Part IVA proceedings, each of the class members to whom the settlement proceeds were distributed were clients of the class representative's solicitors. In December 2004, for instance, Justice Gyles of the Federal Court approved a settlement, in *Petrusevski v Bulldogs Rugby League Club Limited*,¹⁷⁴ pursuant to which monetary compensation was provided to 'known group members', namely, 59 class members who had instructed the representative plaintiff's lawyers to act on their behalf.¹⁷⁵ This proposed settlement was judicially sanctioned following publication of the settlement notice which resulted in 'no additional person claiming to be a group member [communicating] with the solicitors for either party ... and no such person ... appeared at the [fairness] hearing'.¹⁷⁶

V VERSCHUUR V VYNOTAS PTY LTD

This class action was brought pursuant to Part 4A on behalf of all persons, other than the defendants, 'who own or have at any time owned, any lot on registered plan of subdivision No 324041E'.¹⁷⁷ The representative plaintiff was seeking, on behalf of the class, damages in negligence and contract in respect of, among others, design and construction defects in the residence constructed on the land comprised in the relevant registered plan of subdivision.¹⁷⁸ Every lot owner was a member of the Body Corporate managing the development and the representative plaintiff was the chairman of the Body Corporate Committee.

The deed of settlement agreed upon by the representative plaintiff and the defendants did not provide for the actual receipt of moneys by individual owners. It was intended that all settlement moneys would be paid to the Body Corporate and utilised in rectifying defects within the development, including the common property and individual apartments. The rationale for not extending any benefits to original owners who were no longer current owners in the development was explained as follows by the lawyer acting for the representative plaintiff:

The settlement negotiations have always been on the basis that any resolution of the dispute was to rectify defects in body corporate property ... Past owners have the option to pursue their individual claims ... if they choose to opt out.¹⁷⁹

¹⁷³ [2004] VSC 130.

¹⁷⁴ [2004] FCA 1712. See also *Neil v P & O Cruises Australia Limited* [2002] FCA 1325, [7] (Weinberg J); *Reiffel v ACN 075 839 226 Pty Limited (No 2)* [2004] FCA 1128, [10] (Gyles J); *Petrusevski v Bulldogs Rugby League Club Limited* [2004] FCA 1712, [4] (per Gyles J); *Crawford v Bank of Western Australia Ltd* [2005] FCA 949, [22] (Lee J).

¹⁷⁵ [2004] FCA 1712, [4], [5].

¹⁷⁶ *Ibid* [8].

¹⁷⁷ [2004] VSC 130, [4].

¹⁷⁸ *Ibid* [5].

A notice, approved by the Court, was sent to all class members advising them (a) of the terms of the proposed deed of settlement; and (b) of their right to either object to the settlement or opt out.¹⁸⁰ A number of former lot owners (29 out of 66) lodged opt out notices.¹⁸¹ Only one class member - Hannan's Star - also a past owner, filed an objection to the settlement. The essence of the objection was that past owners had suffered loss and damage and the proposed settlement was thus unfair and inequitable for not providing any compensation or benefit to such class members.¹⁸² At the hearing subsequent to this objection, the Court requested that a Senior Counsel's opinion be obtained as to the reasonableness of the proposed settlement in light of the position of original owners who had sold their apartments.¹⁸³ The Court also ordered that a notice be sent to original, but not current, owners of apartments. This notice, in addition to repeating the information included in the previous notice, advised the past owners of the essence of the objection by Hannan's Star and gave them an additional opportunity to opt out by a certain date or to file a notice of objection supported by affidavit. Past owners were also invited to seek legal advice, either from Hannan's Star's solicitors or from their own solicitors.¹⁸⁴

The advice of a Senior Counsel that had been requested by the Court contained the conclusion that the proposed deed of settlement was 'not fair and reasonable in relation to the interests of present or former members of the group who are not current owners of a unit'.¹⁸⁵ The second notice did not result in any of the past owners either opting out or filing with the Court an objection to the settlement.

Justice Mandie noted the broad similarity between the settlement here and the settlement in *Williams* given that in the latter case the settlement 'was limited to the clients of the solicitors acting for the applicants. This may be compared with the present case where the settlement benefits only those who currently own an apartment in the development'.¹⁸⁶ But, as explained below, Mandie J's reasoning and conclusion were quite different from those adopted in, not only *Williams*, but also *Wong*.

In fact, Justice Mandie concluded that the proposed settlement was unfair and unreasonable in relation to the interests of original owners who have sold their apartments.¹⁸⁷ The representative plaintiff had placed significant reliance on the fact that despite having been provided with a further notice and opportunity to obtain legal advice and representation, none of the past owners, apart from Hannan's Star, had either opted out of the proceeding or elected to object to the

¹⁷⁹ *Ibid* [48].

¹⁸⁰ *Ibid* [49].

¹⁸¹ *Ibid* [60].

¹⁸² *Ibid* [69].

¹⁸³ *Ibid* [55].

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid* [62].

¹⁸⁶ *Ibid* [78].

¹⁸⁷ *Ibid* [80].

deed of settlement. This demonstrated, according to the representative plaintiff, that there was no injustice involved in denying compensation to past owners who had shown no interest in obtaining compensation after being given a number of opportunities to object or put in a claim.¹⁸⁸ His Honour correctly concluded that:

It would be unreasonable to disregard the possible claims of other formal original owners merely because they had taken no positive action (or, for that matter, had opted out). A major aspect of the Court's role with regard to the settlement of group proceedings is to protect the interests of unrepresented group members.¹⁸⁹

The attainment of the essential goal described above by Mandie J compelled the judicial rejection of the proposed deed of settlement given that it was clear that 'the causes of action of subsequent owners are based upon a much shakier foundation than that of the original owners'.¹⁹⁰

The fundamental difference between the judicial approach in this case and the approach in *Wong* and *Williams* becomes even clearer when attention is drawn to Mandie J's rejection of certain submissions made by the representative plaintiff. These submissions placed emphasis on the fact that Hannan's Star had been aware of the approach taken by the Body Corporate and that Hannan's Star had made no contribution to costs since the sale of its apartment, the proceeding having been funded by Body Corporate fees. It will be recalled that in *Wong* the less than flattering judicial description of the class members who were denied relief were predominantly due to the lack of contribution by such persons to the costs of the proceeding and their non-involvement in the settlement process.

Justice Mandie also rejected one of the options proposed by the representative plaintiff of approving the deed of settlement but providing for an inquiry as to the fair and reasonable compensation which should be made payable to Hannan's Star out of the settlement sum.¹⁹¹ Adding Hannan's Star (but not the other past owners who had taken no action to protect their rights) to the list of the beneficiaries of the settlement would have been equivalent to Goldberg J's decision in *Williams* to extend the scope of the settlement to encompass only those unrepresented members who had responded, in a negative fashion, to the settlement notice.

It is immediately apparent, from the analysis contained in Pt III above, that the approach adopted by Justice Mandie is the approach that Courts presiding over class actions are intended to implement when reviewing settlements under s 33V and, in general, when managing group litigation.¹⁹² In fact, the ruling in *Verschuur* ensured the judicial protection of the interests of all class members and not just the interests of those class members who were able to take whatever

¹⁸⁸ *Ibid* [64].

¹⁸⁹ *Ibid* [84].

¹⁹⁰ *Ibid* [85].

¹⁹¹ *Ibid* [84].

action was required to protect their own interests in the proceeding. Consequently, the proposed settlement could not be said to be fair and reasonable. As noted by an American Court:

The paramount question before the Court is whether the proposed settlement is fair to *all* members of the plaintiff classes. The Court cannot sacrifice claims of absent class members in order to avoid litigation.¹⁹³

But, as Part VI below will demonstrate, Federal Court judges have not embraced Mandie J's approach when confronted with the proposed settlement of Part IVA proceedings that discriminated against some categories of class members.

VI RECENT JUDICIAL APPROVALS OF SETTLEMENTS THAT DISCRIMINATED AGAINST CERTAIN CATEGORIES OF CLASS MEMBERS

A Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd

In August 2004 Justice Crennan of the Federal Court (as she then was) handed down a judgment in this Part IVA proceeding recording her approval of a settlement agreement proposed by the named parties.¹⁹⁴ The class members on whose behalf the class proceeding was brought were described as:

All persons who have, as franchisees, entered into a franchise agreement with the first named Respondent, as franchisor, (whether by way of original agreements, assignment, renewal or otherwise) in connection with the operation of a petrol station site or sites.¹⁹⁵

The representative plaintiffs claimed essentially that the first defendant had breached the terms of the franchise agreements it had entered into with the representative plaintiffs and the class members as a result of the defendant's decision to enter into an arrangement with Woolworths to operate co-branded service stations.¹⁹⁶

Justice Crennan revealed that in July 2004 she had made orders for the statement of claim to be amended so that the definition of class members for the purposes of the proposed settlement was as follows:

¹⁹² *Johnson* [2004] VSC 466, [15] (Gillard J) where it is explained that 'clearly by reason of the nature of the group proceeding, the interests of the plaintiffs and the group members, being not only those entitled to recover but those who are not entitled to recover and whose rights are affected by the compromise, are to be considered in the light of the proposed compromise'. See also *Australian Competition and Consumer Commission v Chats House Investment Pty Ltd* (1996) 71 FCR 250, 258 (Branson J); *Crawford v Bank of Western Australia Ltd* [2005] FCA 949, [16] (Lee J); *Tasfast* [2002] VSC 457, [7] (Bongiorno J); *Lopez* [1999] FCA 104, [16] (Finkelstein J).

¹⁹³ *Reynolds v King*, 790 F Supp 1101, 1111 (MD Ala, 1990). See also *Pettway*, 576 F 2d 1157, 1214 (5th Cir, 1978); *Cotton*, 559 F 2d 1326, 1330-2 (5th Cir, 1977).

¹⁹⁴ *Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd* [2004] FCA 1114 ('*Jarrama*').

¹⁹⁵ *Ibid* [3].

¹⁹⁶ *Ibid* [5].

The Group Members to whom the Application relates are all persons who have entered into a Franchise Agreement with the First Respondent, being any documented agreement or agreements, including options to renew under those agreements, that were in force as at 2 January 2004 and remain in force as at 30 July 2004, between any person and the First Respondent, for that person to sell at a particular site on a retail basis, under the Caltex or Ampol brand (but not under the co-branded Caltex-Woolworths brand), fuel directly supplied by or on behalf of the First Respondent, and where the person occupies the site pursuant to a lease or license from the First Respondent, and/or any one or more members of the Caltex Group of companies doing business in Australia.¹⁹⁷

There were two major benefits provided, under the settlement, to the members of the class highlighted above.¹⁹⁸ The first was a change to the economic model used by the defendants to determine any profitability assistance that may be granted to a particular franchisee depending upon the circumstances of their franchise. The effect of this change was to increase the amount of assistance potentially available to franchisees who required profitability assistance. This model was designed to ensure that all franchisees continued to have viable businesses in the circumstances. The second major benefit available under the proposed settlement was the conferral on those class members - who participated in the settlement and who operated a site located within 5 km of a co-branded Caltex-Woolworths site - of the right to an early termination of the site agreements relating to that site and to an 'exit payment' at the time of the early termination.

The only explanation provided by Justice Crennan, as to the reasons for the approval of both the narrowing of the description of the represented class and the settlement proposed by the parties, is contained in the following passage:

[The] settlement is fair and reasonable and adequate having regard to the known group members, leave already having been granted to the applicants to amend the Statement of Claim to ensure that unknown group members or members who have chosen to opt out of either the proceeding or the settlement will not have their rights affected or diminished by the approval of the deed of settlement. The profitability assistance in the deed of settlement ensures fairness, in any event, in respect of all franchisees *inter se*. The benefits under the deed are not money sums offered to each Group Member, as is perhaps more common, but are the benefits referred to above.¹⁹⁹

It will be recalled, however, from the discussion above that the second major benefit provided under the deed of settlement - the ability to terminate early the site agreement and to receive a payment upon such termination - was only available to what the Court referred to as the 'known' class members, ie, those

¹⁹⁷ Ibid [4].

¹⁹⁸ Ibid [7].

¹⁹⁹ Ibid [11].

class members who were bound by the deed of settlement. *Jarrama* highlights the fact that distributing the ‘fruits’ of a successful class suit only to those class members whose identities are known to the formal parties to the litigation at the time settlement discussions take place, is a practice that is becoming common in Australian class actions. The fundamental problems with this practice have already been highlighted above, as part of the critique of *Williams*.²⁰⁰

This increasing ‘fondness’ of class action protagonists for class action settlements that only bind known/identified class members, together with the frequent judicial imposition of an opt in requirement, as a prerequisite to class members being entitled to the benefits available under a settlement scheme, lead to the inescapable conclusion that the Federal and Victorian class action regimes are based on the opt out model only in part. In practice, they operate on a model that also comprises features that are consistent only with an opt in device. This hybrid model that currently operates in Australia bears some similarity to the regimes proposed in England and Wales in July 1996 by Lord Woolf,²⁰¹ by the South African Law Commission in 1998,²⁰² by the Civil Rules Advisory Committee in 1993²⁰³ and by the US Justice Department in 1979.²⁰⁴

A few months after *Jarrama* Justice Sackville of the Federal Court was asked to approve a deed of settlement, executed by the parties to another, unrelated, Part IVA proceeding, which provided no compensation to certain groups of class members. Attention will now be turned to this case.

B Courtney v Medtel Pty Limited (No 5)

These proceedings²⁰⁵ arose out of a ‘Hazard Alert’ issued on 5 June 2000 by the Therapeutic Goods Administration. The Hazard Alert related to a particular batch of pacemakers produced by the second defendant in the US and distributed in Australia by the first defendant. The proceedings were essentially instituted on behalf of those persons who had received in Australia a surgical implant of the pacemaker and the legal personal representatives of deceased persons in whom such a pacemaker had been surgically implanted in Australia.

The deed of settlement executed by the representative plaintiff and the defendants denied compensation to three categories of class members. The approach adopted by Sackville J exhibited some similarity to the approach implemented by

²⁰⁰ See also *Amchem Products Inc v Windsor*, 521 US 591, 627 (1997) where the US Supreme Court explained that class action settlements must provide ‘structural assurance of fair and adequate representation for the diverse groups and individuals affected’.

²⁰¹ Lord Woolf, *Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, Final Report (1996) 236. The Group Litigation Order regime that was introduced in England and Wales in 2000 operates, in effect, pursuant to an opt in device given that each of the claimants is a formal party to the group litigation: Neil Andrews, ‘Multi-Party Proceedings in England: Representative and Group Actions’ (2001) 11 *Duke Journal of Comparative & International Law* 249, 249.

²⁰² SALC Report, above n 3, [5.11.4]. The South African Government has not implemented the class action regime proposed by the Commission.

²⁰³ FJC Report, above n 114, 97.

²⁰⁴ Hensler Report, above n 3, 21. The Bill that contained this proposal was never passed.

²⁰⁵ *Courtney v Medtel Pty Limited (No 5)* [2004] FCA 1406 (‘*Courtney*’).

Mandie J in *Verschuur* while, at the same time, displaying some of the unsatisfactory features that were evident in the judicial review of the *Williams* settlement. The similarity with *Verschuur* was evident from Sackville J's review of the legal basis that had been advanced by the representative plaintiffs to justify the denial of compensation to three sub-groups of class members. With respect to the first two categories, this review led his Honour to conclude that the absence of compensation was fair and reasonable.

More difficult issues arose with respect to the final category of class members who were provided with no remedy under the proposed settlement scheme. This category comprised the representatives of persons who received pacemaker implants but who died prior to the commencement of the proceedings. The justification that was provided to the Court for excluding this category from compensation was that the deceased persons could have no personal interest in the proceedings, since they did not know of the litigation. It was also said that, in any event, they could have opted out of the proceedings. Justice Sackville noted that the legal nature of the claims of these class members 'in principle, seem to be no different from the claims of those who died after the proceedings commenced and who are to receive compensation of up to \$6,500 (less a contribution to costs)'.²⁰⁶

Unfortunately, this conclusion did not prompt Justice Sackville to hold that it was neither fair nor reasonable for the settlement scheme to deny compensation to this sub-group. Instead, Justice Sackville adopted a similar strategy to that followed in *Williams*. He noted that 'fairness demands that the representatives of the deceased persons who died before the proceedings were commenced have an opportunity to make an informed judgment about whether they should opt out of the proceedings'.²⁰⁷ In light of the fact that 17 class members could not be located and thus were not notified of the proposed settlement and that it was not known whether any of these 17 persons were members of the third sub-group mentioned above, the Court made approval of the settlement subject to two requirements. One of those requirements was that further steps should be taken to ensure that the members of the third category who were to receive no compensation have a fully informed opportunity to opt out of the proceeding.

As a result of these steps being taken, the Court was satisfied that, on the balance of probabilities, there were no class members who fell within this third category.²⁰⁸ The judicial approach implemented in *Courtney*, before it was discovered that no such third category existed, again highlights an inappropriate judicial practice. This practice entails reliance on the ability of excluded class members to look after their interests, by opting out, as a means of dealing with the unfairness that is caused by a denial to them of any compensation. As was the case in *Williams*, this strategy was judicially followed despite the fact that the denial of compensation to this third category of class members did not appear to have a sound legal basis.

²⁰⁶ *Ibid* [51].

²⁰⁷ *Ibid* [53].

²⁰⁸ *Courtney v Medtel Pty Limited (No 6)* [2004] FCA 1598, [3] (Sackville J).

VII CONCLUSION

The analysis developed in this article has revealed that when faced with settlements that provide no benefits to certain categories of class members, more often than not, Australian Courts have not adequately discharged their fiduciary duties to safeguard the interests of class members. This unsatisfactory scenario is largely attributable to a misplaced judicial belief that an adequate measure to deal with the unfairness that stems from the settlements adverted to above is to extend to the adversely affected class members the opportunity to either opt out of the proceeding or to advise the Court of their objections to the class representative's proposed settlement. The results of a recent and comprehensive study of US class actions confirm the inappropriateness of this judicial approach:

Our study provides perspective on the inference, frequently found in the cases, that the reaction of the class provides valuable data about the fairness of the settlement. It suggests that courts should give little or no weight to opt out rates ... Overall, notwithstanding frequent statements in judicial decisions to the contrary, the level of dissent is at best weak evidence of the fairness, adequacy, and reasonableness of class action settlements.²⁰⁹

A number of measures that may prompt judges to scrutinise more closely the settlements that have been explored in this article come to mind. One such measure is, as the ALRC and several other law reform bodies have recommended,²¹⁰ to provide a 'legislative' list of the factors that Courts are to consider when determining whether to approve class action settlements. One of these factors should be whether class members are treated equally or distinguished according to appropriate criteria.²¹¹ Measures designed to render fairness hearings more adversarial, such as the employment of 'contradictors',²¹² or special counsels/masters as they are sometimes called in the US,²¹³ should also be introduced.

The Federal and Victorian legislatures should carefully consider whether the judicial implementation of opt in/close the class devices is consistent with the access to justice and judicial economy goals of class action procedures. They should also consider (a) whether legal costs is an issue that should be taken out of the settlement negotiations conducted by the parties to class proceedings; and (b) whether the recommendation made in the US by the Civil Rules Advisory Committee - to insert a provision that authorises the referral of settlement or

²⁰⁹ Eisenberg and Miller, above n 126, 1564.

²¹⁰ See n 96 above.

²¹¹ Resnik, above n 51, 848.

²¹² See, eg, *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 1420, [15] (Moore J).

²¹³ Lazos, above n 39, 324; Macey and Miller, above n 42, 47-8; Kane, above n 52, 399-400; Josef Cooper and Tracey Kirkham, 'Class Action Conflicts' (1981) 7 *Litigation* 35, 60; Lu, above n 39, 64; FJC Report, above n 114, 64; Hensler Report, above n 3, 92; Alon Klement, 'Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers' (2002) 21 *Review of Litigation* 25; Stephen Murray and Linda Harang, 'Selection of Class Counsel: Is It a Selection of Counsel for the Class, or a Selection of Counsel with Class?' (2000) 74 *Tulane Law Review* 2089, 2110. See, however, Hawke, above n 30, 18; Koniak and Cohen, above n 66, 1110-11.

dismissal proposals to magistrate judges for evaluation - ²¹⁴ is an appropriate measure for Australia's class action regimes. The former issue should be considered in the context of a broader inquiry that examines whether a provision similar to Rule 23(g)(2)(C), that came into operation in the US in December 2003, should be introduced in Australia. As explained by the Civil Rules Advisory Committee, 'attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. [Rule 23(g)(2)(C)] therefore authorises the court to provide directions about attorney fees and costs when appointing class counsel'.²¹⁵ This issue is, of course, beyond the scope of this article.

In light of the established practice of persuading class members to enter into conditional uplift fee agreements with the class representative's solicitors,²¹⁶ Australian Courts should also consider 'appointing a committee of unrepresented class members in ... class actions ... where class members ... include represented and unrepresented parties, to serve as spokespeople for the latter'.²¹⁷ But, ultimately, the measures suggested here - or indeed any strategy aimed at ensuring that the interests of all class members are not jeopardised by settlements proposed by parties to the class proceeding - will not succeed unless they are accompanied by an unequivocal rejection, on the part of class action Courts, of the notion that 'a bad settlement is almost always better than a good trial'.²¹⁸

Equally crucial is the introduction of measures that will address the circumstances/factors that prompt the representative plaintiff's solicitors to agree to settlement schemes that only benefit identified class members, instead of proceeding with the litigation until a favourable outcome, for the class as a whole, has been procured whether through a judgment or through another settlement agreement. The extremely high costs of running a class action, outlined in Part II B above, constitute a very strong incentive, for such solicitors, to accept such settlement agreements instead of incurring the additional (and significant) costs entailed in either persuading the defendant to offer settlements that provide compensation to unidentified class members or in continuing with the litigation in the absence of such an offer. Consequently, measures designed to reduce the costs barriers to the institution and conduct of class proceedings may have the

²¹⁴ FJC Report, above n 114, 64. See also Hensler Report, above n 3, 495 ('judges should also seek assistance in evaluating the quality of settlements from neutral experts'); above n 115. It is interesting to note that Justice Wilcox of the Federal Court indicated in 1999 that 'it is safe to predict that, when the [Federal Magistrates] Court becomes well-established, transfers of assessments of damages in representative proceedings will become common, thus alleviating the burden of this work on the Federal Court': Justice Murray Wilcox, 'Challenges for Applicant Representatives' (Paper presented at Australian Plaintiff Lawyers Association National Conference, Sydney, 21-23 October 1999) 8 as cited in Grave and Adams, above n 6, 324.

²¹⁵ Rules Committee Report, above n 88, 111-12. The Civil Rules Advisory Committee added that, pursuant to this provision, '[c]ourts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court's later determination of a reasonable attorney fee': at 115.

²¹⁶ See generally Grave and Adams, above n 6, 466-78; Mulheron, above n 15, 468-79.

²¹⁷ Hensler Summary, above n 50, 35. See also above n 170.

²¹⁸ In re Warner Communications Sec Lit, 618 F Supp 735, 740 (SDNY, 1985).

beneficial effect of preventing s 33V applications, being lodged by the parties to class proceedings, with respect to the types of settlement agreements that have been reviewed in this article. While this issue of the costs and funding of class actions²¹⁹ is beyond the scope of this article, an essential measure may be mentioned, namely, the creation of a class action fund for the purpose of providing financial assistance to representative plaintiffs. Class action funds are employed in several Canadian jurisdictions²²⁰ and their establishment was recommended by the ALRC²²¹ and several overseas law reform bodies.²²²

²¹⁹ See generally Mulheron, above n 15, ch 12; Grave and Adams, above n 6, ch 15.

²²⁰ Vince Morabito, 'Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs' (1995) 21 *Monash University Law Review* 231, 265-70; Thomas Rowe Jr, 'Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions' (2003) 13 *Duke Journal of Comparative and International Law* 125, 136-8, 145-6; LRCI Paper, above n 78, [2.24], [4.126]-[4.129]; Watson, above n 58, 276; Mulheron, above n 15, 454-9; Report of the Attorney-General's Advisory Committee on Class Action Reform (Toronto) (1990) ch 5 ('Ontario Committee').

²²¹ ALRC Report, above n 3, [301]-[304].

²²² Rules Committee of the Federal Court of Canada, *Class Proceedings in the Federal Court of Canada*, Discussion Paper (2000) 102-3; Ontario Committee, above n 220, 54-55; Lord Woolf, above n 201, 242. See also Law Reform Committee of South Australia, *Report Relating to Class Actions*, Report No 36 (1977) 10.