the jury that if, but only if, the sum that they had in mind to award as compensatory damages was inadequate to punish the defendant for her conduct could they award exemplary damages. This ground of appeal was based on one of three "considerations" expressed by Lord Devlin in *Rookes v Barnard* ([1964] AC 1129, at 1227), which is one of the leading English authorities on the issue of exemplary damages. The trial judge held that this principle was inconsistent with Brennan J's rejection of *Rookes v Barnard* in the *XL Petroleum* case. The Court of Appeal, however, found that the differences in law between England and Australia did not provide a basis for rejecting Lord Devlin's principle. It would seem, therefore, at least in Victoria, juries must now be directed that exemplary damages can only be awarded if compensatory damages are insufficient to punish the defendant.

Having decided that each if these misdirections had a tendency to inflate the exemplary damages awarded by the jury, the majority set about the task of reassessing them. Their judgement, however, offers very little guidance as to the method to be adopted in performing this task. Apart from stating that it would be *"an over-simplification to merely subtract the $60,000 award of compensatory damages from the award exemplary damages, leaving the punitive element at $65,000, and the total award at $130,000"*, and that it was not relevant to consider whether the defendant was insured, the decision to reduce the exemplary damages to $60,000 was unaccompanied by any explanation other than the unilluminating comment that *"in the end it is a matter of impression what value in monetary terms should be placed on the contumelious disregard of [the plaintiff's] interests by [the defendant's] behaviour"* (at 216).

The judgements in this case exhibit a very cautious, conservative approach to the issue of exemplary damages. The fact that the damages awarded by the jury were reduced by more than 50% despite the majority's belief that the defendant's behaviour *"was rightly seen by the jury as calling for condemnation and rightly ... calling for a substantial award of exemplary damages"* sets an unfortunate precedent, from the point of view of plaintiffs, for future claims. The judgement of Tadgell JA gives even more cause for concern: he not only thought the award of exemplary damages was *"perversely high by a factor of between three and four"*, but he expressed doubts as to whether the case was an appropriate one to award such damages at all. Given the egregious nature of the defendant's conduct in this case, it is hard to imagine any circumstances in which His Honour would consider exemplary damages to be appropriate.

The overwhelming impression from the judgements of the Court of Appeal is that the circumstances in which exemplary damages will be awarded in personal injury actions are likely to remain rare, and the few awards that are made will be strictly scrutinised by superior courts.

The plaintiff was refused special leave to appeal to the High Court on 5 August 1996. ■

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Class actions: do they have a future?

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Many in the manufacturing and insurance industry are opposed the introduction of reforms that improve the position of consumers. Since the introduction of Part IVA of the *Federal Court Act*[1] we have witnessed a steady increase in anti-class action propaganda in the press in Australia. Much of this can be traced, in origin, to industry lobbying and media campaigns for 'tort law reform' first commenced in the USA over 30 years ago.

The general focus of this campaign has been to portray manufacturers and insurers as the 'victims' of greedy unmeritorious plaintiffs and of a legal system in need of serious 'reform'. The sorts of 'reforms' advocated involve any step that will make it difficult for ordinary people to litigate against suppliers and manufacturers of goods and services on anything resembling a level playing field. 'Reforms' such as caps on damages, abrogation of judicial control over expert evidence, shorter limitation periods, increased cost and procedural penalties against litigants, the abolition of lawyer advertising, elimination of joint and several liability, elimination of strict product liability etc.[2] Class actions are one element on this hit list for 'tort reform'. They were vehemently opposed from the outset and will continue to be opposed so long as they represent any threat to the status quo.

The reality is, of course, quite different and does not make good press. This is particularly the case with class actions. For example, Part IVA of the Act did not create new rights, it merely defined a new procedure. In the last 5 years since Part IVA was introduced there have been very few class actions commenced in Australia and many of those which have been filed have been stayed on procedural grounds.[3] There is no explosion of class actions in Australia, nor will there likely ever be, when regard is had to the structural and legal hurdles placed in the way of plaintiffs wishing to access this procedure.

The promise and the reality

Class actions have the potential to:

- increase access to justice;
- make it economic for numerous small claims to be effectively litigated;

- promote compliance with the law by unscrupulous providers of goods and services;
- assist in the efficient allocation of legal resources.[4]

Unfortunately, class actions represent a paradigm shift for judges preconditioned to the individual proceedings model. Group proceedings demand close, intelligent, and creative judicial supervision by judges who are committed to ensuring the aims of the reforms are met.

This specialised area of procedural reform should be administered by judges willing to experiment and develop this area of procedure. Sadly, the reforms appear poorly understood by many judges and are at risk of withering on the vine by judicial attempts to limit, as opposed to developing, this area of practice. In other cases, knowledgable judges with empathy for the class action model are seemingly frustrated by semantic black spots within Part IVA of the *Federal Court Act*.

Litigants presently face numerous problems in resorting to class actions. The following paragraphs examine some of these difficulties. Chief among these problems is uncertainty. Uncertainty creates risk, and in litigation, risks benefit 'repeat players' such as insurers and other institutional defendants. Risks dissuade 'one shot players' unfamiliar with the legal process.[5]

1. Few courts willingly entertain class actions

Since 5 March 1992 it has been possible to commence class action proceedings in the Federal Court provided the Federal Court is not exclusively exercising cross vested Jurisdiction.[6] The only other states to have implemented some sort of formal class action procedure, albeit unsuccessfully, are Victoria and South Australia.[7]

In other jurisdictions it recently became possible to commence class proceedings relying on analogues of the old English 'representative action' rule. This rule was, for many years, interpreted so narrowly so as to preclude any utility where damages were sought or where each individuals claim arose out of different tortious or contractual events. In 1995 the High Court in *Carnie v Esanda*[8] opened the door to each state court's use of the representative action rule to develop useful class action procedures. Unfortunately, the invitation has not been taken up with any enthusiasm. For example, in the *Carnie* case the NSW Supreme Court ultimately directed that the matter proceed on an 'opt-in' basis rather than an 'opt-out' basis as under the Federal model. When Esanda declared it would pursue unpaid interest against persons who 'opted-in' but not those who 'opted-out' the prospects of a class dissipated.[9]

While it is possible to commence a class action in the Federal Court for matters arising outside the scope of Part IVA, by relying on the *Carnie* decision, there is no guarantee the Federal Court would apply the same 'rules' as are enshrined under Part IVA. Indeed, it is possible the court may apply some more problematic opt-in type of procedure, thereby limiting the practical benefits of class actions to rare situations.

2. Opt-in verses opt-out and *Carnie v Esanda*

Part IVA of the *Federal Court Act* provides a class action procedure in which all class members are in the class unless and until the elect to 'opt-out'. In other jurisdictions it will be a matter for the court to direct, absent rules clarifying the position, whether a *Carnie* type class is to be continued on an opt-in or an opt-out basis.

The distinction between 'opting-in' and 'opting-out' is crucial. It is unlikely many people will ever elect to opt-in where there is even the perception of a disincentive for doing so. In many instances the mere fact of being identified can expose an individual to retaliation, as occurred in *Carnie's* case. By their nature, an opt in procedure encourages all parties to engage in public media campaigns in an attempt to win the hearts and minds of prospective class members. While media wars may be good for the profile of individual plaintiff and defendant firms they rarely portray lawyers and the legal system in a good light.

In contrast, opt-out proceedings enjoy a number of practical advantages to plaintiffs in that all claimants are automatically in unless they opt-out. While few claimants elect to 'opt-in' if a disincentive exists, fewer claimants will opt-out unless they receive a clear advantage from doing so. In consequence, opt-out classes encourage defendants to consider settlement issues whereas opt in classes encourage them to attempt to increase the risks of the litigation for all concerned. In cases attracting large scale media attention, the opt-out class also has advantages to defendants as it enables them to settle all their liabilities in the one proceeding. This avoids costs as it is far easier to negotiate with one party instead of many, and it is far cheaper to deal with one court case than numerous individual cases.

The uncertain nature of the court's discretion under a *Carnie* type class adds greatly expense, delay and risk in commencing an action on a class basis. Few prospective class representatives will be willing to expose themselves to these costs, delays and risks by trying to promote a class. In consequence, the *Carnie* procedure is presently to uncertain to be of anything but limited value. In time the procedure may evolve into something useful as the courts devise workable class action rules, or as cases define the principles to be applicable to such actions, but for the present the benefit of the *Carnie* procedure is largely illusory.

3 Thresholds to commencing class access

Part IVA of the *Federal Court Act* provides that a class action can be commenced where seven or more people have claims against the same person if the claims arise out of the 'same, similar or related circumstances and give rise to a 'substantial' common issue of law or fact. In *Connell v Nevada Financial Group*[10] Drummond J of the Brisbane Federal Court considered that the expression 'substantial' in s.33C(1)(c) imposed a gateway test on whether or not an action could be commenced on a class basis.

He felt that an action should not continue as a class action, even if the common issues were not insubstantial, if they were outweighed by the non-common issues. In other words, according to Drummond J, a determination of substance was a matter of weighing the common with the uncommon.

This view has since been criticised by Wilcox J who observes that the gatekeeper function under Part IVA is provided by the discretion in s.33N.11 The issue is still open, and will continue to be raised by defendants until it is clarified by the Full Court. Until then an unhealthy degree of uncertainty will permeate the issue and this assists defendants. Plaintiffs, in turn, will be forced to consider registry shopping ▶

to minimise the risk that they may strike a judge with a narrow view of the class rules.

4. Using judicial discretion to turn an opt-out class into an opt-in class

The *Federal Court Act* makes it clear that the class action procedure is of the 'opt-out' model. But in one case Drummond J has interpreted the discretion under s.33N(1) of the Act as conferring power to impose threshold requirements in addition to those contained in s.33C(1). In the process his Honour converted, in this case, the opt-out regime under the Act into an opt-in regime.[12]

This case involved an action by the Gold Coast City Council, (on behalf of defined but unidentified concrete consumers), for the recovery of damages against a pre-mix concrete price fixing cartel.[13]

Drummond J found that there were more than seven persons with a potential claim; the claims arose out of similar or related circumstances; and the claims gave rise to substantial common issues of law or fact.[14] Nonetheless, and notwithstanding the express provisions of Part IVA which made it clear that it was not necessary for a class representative to name or specify the number of class members[15] or elect whether they wish to participate[16] (until the opt-out date is published), he found that there were not seven or more members 'interested' in prosecuting their claims. In consequence he directed, under s.33N(1), that the matter no longer continue on a class basis.

In other words, Drummond J imposed on the plaintiff an obligation to produce evidence not only identifying claimants with potential claims, but demonstrating that they were also 'interested' in prosecuting those claims. Under the express provisions of Part IVA such a decision is not required to be made by class members until an opt-out date set by the court. The effect of the Concrete Cartel Case decision was to require the applicant to prove that seven or more members had decided to opt-in before they were actually required to do so under the express provisions of the Act. This decision, like the *Connell* Case referred to in 3 above, continues of persuasive value and will continue to be cited by respondents in strike out applications unless and until it is finally put to rest by higher authority.[17]

5. Class actions against common and uncommon defendants

A requirement of Part IVA is that the action involve claims of seven or more persons 'against the same person'.[18] This raises the question whether actions which include common claims against one set of defendants can be joined with idiosyncratic (eg: non 'common') claims against others. For example, persons injured by defectively manufactured food products have claims against both the manufacturer and also, in many instances, the sellers of the goods, distributors, and others in the chain of commerce. But the further away you get from the original 'common' source (often a product manufacturer), the more 'uncommon' respondents exist (such as sellers, suppliers, etc). This accumulation of common and uncommon respondents can have serious implications for the choice of a person with suitable *standing* to act as a 'class representative'.

In *Ryan v Great Lakes Council & Ors*[19] (the 'Wallis Lakes Oyster Case') the applicant sued several respondents on behalf of himself and others who allegedly had contracted Hepatitis A virus after consuming Wallis Lakes oysters. The applicant had personal claims only against 2 of the 12 respondents joined in the action. Wilcox J, in dismissing the applicant's action against the remaining 10 respondents said: . A similar point was made by Wilcox J in *Symington v Hoechst Schering Agrevo Pty Ltd & Ors*[20] (the ICI Cotton Contamination Case) where he said:

> ...*The present applicants claim the product supplied to their neighbours, which contaminated their cattle, was that of the first respondent, Hoechst Schering Agrevo Pty Limited. They concede they personally have no claim against the second, third, fourth, fifth, or sixth respondents. Accordingly, the action must be dismissed as against those respondents.*

This interpretation of s.33C(1)(a) of the *Federal Court Act*, whilst likely to be correct in law, is a serious limit on the utility of the class action procedure in Part IVA. Wilcox J suggests that these limitations can be mitigated, in some cases, by issuing separate class actions against different sub groups of common respondents, or by issuing individual actions, and later seeking to consolidate all actions for determination of common issues.[21] While these procedures may be available in theory, they will often be difficult to use in practice. This will be particularly so if different actions have been issued by different lawyers without careful regard for pleading each case in similar manner.

A further problem created by the 'standing' requirement of Part IVA is that it can fragment an otherwise coherent and generally common group of claims, (which can be more effectively administered on a class basis), into a number of smaller groups which may individually fail the numeracy requirements of s.33C(1)(a) of the Act. This frustrates each of the objects of the class action provisions previously referred to in this paper.

6. Same respondent but a mixture of common and uncommon claims

The position referred to in point 5 above should not be confused with the situation where all group members have claims against the same respondent, but where not all of their claims are identical.

In that situation it is fairly clear that a class action is competent (provided the class representative has standing to sue each respondent). The court can entertain claims that are based on different theories.[22] The court can also decide common issues by class proceedings and then deal with more idiosyncratic issues on a case by case basis.[23]

But in each case the court has an overriding discretion under s33N(1) as to whether it will allow a matter to continue on a class basis at all. In consequence, the applicant always faces the risk that a judge will not even bother to divide the case into common and non common issues, but will simply decertify the class action.

The outcome of this discretion is always difficult to predict in advance. In most instances the result will depend more on the attitude of the judge towards class actions than anything else. The judge will either view class actions as an opportunity to resolve the case by creative means, or a quagmire into which he or she may become irretrievably lost. This uncertainty can dissuades plaintiffs from attempting to class proceedings in anything but the clearest cases.

7. Same parties, similar claims, but different facts relied upon

Where the claims of each member rely on proof of factual situations that are idiosyncratic to each claimant then the fact that each claim involves a common issue of law and arises out of similar or related circumstances will, often, not be sufficient.

This is particularly the case where each claimant relies on representations made only to them. In such cases the terms of the representation and the fact of reliance are unique to each claimant. For example, in the *Tsang v Uvanna*[24] each claimant sought relief arising out of their reliance on oral misrepresentations made by a migration agent. While there were many similarities between the claims of each class member the individual facts were sufficiently diverse to deny class coverage.

8. Costs of notification

As a rule the class representative (or, where the action is conducted on a speculative basis, his or her lawyer) will bear the cost of notification of the class proceedings to class members. This, and all other costs and delays that can be associated with class proceedings, often operates as a disincentive to taking class proceedings.

9. Cost exposure of the class representative

The class representative, like any other litigant, is exposed to liability for the opponents costs. But under Part IVA of the *Federal Court Act* costs cannot be ordered against a class member other than the representative.[25]

While it is often claimed that courts should not award costs against a class representative in public interest proceedings the cases do not support the concept.[26]

The risk of an adverse cost order, and the procedural complexities and added costs that a class representative can incur in class proceedings, all combine to dissuade individuals from acting as class representatives. Naturally, without a class representative there is no class action.

In conclusion

Contrary to the dire consequences predicted (and sometimes already asserted) by some groups, class actions have not really altered legal landscape to any significant degree. While it is possible the situation may change over time by the gradual clarification of the procedure, at present the future of class actions is not that clear.

The lesson, if one can be gleaned from the cases decided so far, is that some of the judiciary have been slow to embrace the class action procedure. As with all paradigm shifts in the law, the future of the procedure will depend on the degree to which the more adventurous judges will be able to encourage acceptance of class actions from others on the bench. But even then, changes in judicial attitude may still prove inadequate for the task without some further legislative reform of Part IVA. In the present political climate, such reform is unlikely to occur. ■

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Rob presented the above paper at the Australian Legal Convention in September 1997.

References:

1 Introduced by the *Federal Court of Australia Act* 1976 and operational from 5 March 1992.

2 In the USA you could also add jury trials and punitive damages to this list.

3 See, for example, Cornwall, *Representative Proceedings Supplement*, August 1997, PIAC, NSW. Ms. Cornwall's research was only able to identify 30 class actions over the last 5 years. Many of these have been stayed on discretionary grounds.

4 J. Basteen QC., *Representative Proceedings in New South Wales: Some Practical Problems*, Law Society Journal (NSW), Vol 34 Issue 2 (1996) 45.

5 See, for example, R.J. Davis, *Negotiating Personal Injury Cases: A survey of The Attitudes and Beliefs of Personal Injury Lawyers*, (1994) 68 ALJ 734.

6 Section 33G of the *Federal Court Act*.

7 See: *Victorian Supreme Court Act* 1986; Rule 34 of the Supreme Court Rules (SA).

8 (1995) 127 ALR 76.

9 Cornwall, *Representative Proceedings Supplement*, August 1997, PIAC, NSW, p.4.

10 Federal Court of Australia, QG 135/1995, 5 September 1996, (unreported).

11 Wilcox J, *Representative Proceedings in the Federal Court of Australia: A Progress Report*, 15 ABR 91, 93; APLR Vol.8 No.5 p.76 @ 79.

12 *Gold Coast City Council v Pioneer & Ors*, Federal Court of Australia, QG190/1996, 11 July 1997, (unreported).

13 Under s.45 of the *Trade Practices Act 1974*.

14 In other words he found that all of the threshold requirements of s.33C(1) were met in this case.

15 Section 33H(2).

16 Section 33J.

17 The Gold Coast City Council, which is still proceeding with it's individual action, did not appeal the decision terminating class status.

18 Section 33C(1)(a) of the *Federal Court Act*.

19 Federal Court of Australia, NG183/97, 18/9/97, (unreported).

20 Federal Court of Australia, NG581/96, 4/9/97, (unreported).

21 Federal Court of Australia, NG183/97, 18/9/97, (unreported).

22 *Tropical Shine Holdings v Lake Gesture & Ors*, (1993) 118 ALR 510.

23 *Zhang De Yong v Minister for Immigration*, (1993) 118 ALR 165. But contrast *Tsang v Uvanna*, Federal Court Australia, NG505/94, December 1995, (unreported).

24 *Tsang v Uvanna*, Federal Court Australia, NG505/94, December 1995, (unreported).

25 Section 43(1A).

26 See *Council of the Municipality of Botany & Ors v Secretary, Department of the Arts, Sport, The Environment, Tourism and Territories & Ors* (1992) 34 FCR 412. Contrast comments by Wilcox J in *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139.