

Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors

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Abstract

The restriction of the groups of claimants represented in three recent shareholder class actions — to those aggrieved shareholders who were also the clients of the law firm acting for the class representatives — and the judicial termination of these class proceedings as long as this restriction continued to be employed, both highlight the existence of a number of fundamental problems with the class action regimes that currently operate in the Federal Court of Australia and in the Supreme Court of Victoria. This article provides a critical analysis of this controversial phenomenon.

1. Introduction

I find that the requirement that group members opt in to the proceeding to be inconsistent with the terms and policy of Pt IVA [of the *Federal Court of Australia Act 1976* (Cth)]. It is inappropriate that the proceeding continue under Pt IVA while the MBC criterion is part of the description of the representative group. I also find that, in the way in which the MBC criterion subverts the opt out process, it is an abuse of the Court's processes as established by Pt IVA.

The second, perhaps even more fundamental, objection to the MBC criterion is that it dictates who should represent group members. I find it an extraordinary proposition that the definition of the representative group should be used to confine a representative group to the clients of one solicitor, however narrowly the group is otherwise defined. In my view there is no support in principle or authority for this proposition and it is repugnant to the policy of the Act.¹

The comments were made by Stone J of the Federal Court in October 2005 to justify the judicial discontinuance of the *Dorajay Pty Ltd v Aristocrat Leisure Ltd*² shareholder class action. What prompted this vigorous judicial response was the so-called 'MBC criterion', a mechanism employed by Maurice Blackburn Cashman Pty Ltd ('MBC'), the law firm acting for the class representative, pursuant to which the group represented in (and thus bound by the outcome of) the class proceeding was limited to those shareholders who were also clients of MBC.

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1 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 ('*Dorajay*') at 431 (Stone J).

2 *Ibid.*

Upon reading Stone J's comments, one may be forgiven for concluding that the MBC criterion constituted a strategy devised primarily to maximise the remuneration received by the solicitors acting for class representatives. It will be shown, however, that the MBC criterion constitutes an almost natural or logical outcome/product of a number of features of Australia's class action landscape. These features include the increasing employment by the Federal Court and the Supreme Court of Victoria of opt in/closing the class devices, and the unwillingness of the drafters of the Federal and Victorian class action regimes to implement the measures, recommended by the Australian Law Reform Commission ('ALRC')³ in 1988, to address the formidable cost barriers to the institution and effective conduct of class proceedings.

In Part 2, a brief discussion of the general features of the Federal and Victorian regimes is provided, together with a more detailed consideration of the MBC criterion and the judicial opposition to it. The Federal and Victorian provisions governing the description of class members are canvassed in Part 3, together with an analysis of (a) the way in which represented groups have been described by class representatives; and (b) the opt in devices that trial judges have frequently employed to ascertain the identity of class members. Part 4 canvasses the essential features and requirements of the opt out devices employed by the Federal and Victorian regimes. It then considers the compatibility of these opt out devices with the MBC criterion and mechanisms pursuant to which potential claimants must express their interest in participating in the class proceeding in order to be included in the represented group.

Part 5 explores (a) the cost barriers adverted to above; (b) the measures that have been adopted by plaintiff lawyers to address these barriers; and (c) the direct nexus between these measures, on the one hand, and the MBC criterion and other techniques for describing the represented class that require some positive conduct on the part of potential claimants, on the other.

2. Overview

A. Australia's Class Action Regimes

Class action regimes have been operating in the Federal Court since March 1992, pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('FCAA'), and in the Supreme Court of Victoria since January 2000,⁴ pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) ('SCA').⁵ A proceeding may be brought under

3 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) at 106–130 ('ALRC 1988 Report').

4 Part 4A of the *Supreme Court Act 1986* (Vic) was actually enacted in November 2000 but was deemed to have come into operation in January 2000: see *Cook v Pasmenco Ltd* [2000] VSC 534 at [10] (Hedigan J).

5 While the FCAA and the SCA 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. Unless noted, section numbers are the same in each Act.

these regimes as long as the proceeding in question satisfies three ‘threshold’⁶ requirements. The first requirement is that seven or more persons have claims against the same person. The second requirement is that the claims are in respect of, or arise out of, the same, similar or related circumstances. The final prerequisite is that the claims of the group give rise to a substantial common issue of law or fact.⁷

The person or entity that commences the proceeding (the class representative/representative plaintiff) is the only formal party on the record. As already indicated, both regimes employ an opt out device. Pursuant to this device, claimants that fall within the description of the group represented by the class representative (‘the represented group’) will be bound by the outcome of the litigation unless they take the positive step of excluding themselves from the litigation: that is, they opt out. Section 33H of both statutes accommodates the opt out device. This section provides that an application commencing a representative proceeding, in describing or otherwise identifying group members to whom the suit relates, need not ‘name, or specify the number of, the group members.’⁸

The conclusion that one intuitively arrives at — that a class member is immune from adverse cost awards as a result of his or her non-party status — is expressly confirmed by s 43(1A) of the FCAA and s 33ZD of the SCA.⁹ These provisions essentially provide that trial judges may not award costs against class members except as authorised by ss 33Q or 33R.¹⁰ Section 33Q provides that if it appears to the court that determination of issues common to all group members will not finally determine the claims of all, the court may give directions in relation to the determination of the remaining issues, including directions establishing a sub-group consisting of those group members, and appointing a person to be the sub-group representative party on their behalf.¹¹ Section 33Q(3) provides that where the court appoints a person other than the representative party to be a sub-group

6 See *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 267 (Gleeson CJ, McHugh, Gummow, Kirby & Callinan JJ); *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at 514 (Sackville J).

7 *Federal Court of Australia Act 1976* (Cth) s 33C(1); *Supreme Court Act 1986* (Vic) s 33C(1).

8 As was stated by Lehane J of the Federal Court in *Bright v Femcare* [2000] FCA 1179 at [19], ‘[i]t is an inevitable aspect of proceedings under Pt IVA, I should think, that in many cases a substantial number of members of the represented group will be unknown.’ See also *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424 at 428 (O’Loughlin J); Peter Cashman, ‘Class Actions on Behalf of Clients: Is This Permissible?’ (2006) 80 *Australian Law Journal* 738 at 738: ‘It will often be the case that there will be a lack of clarity about the number of people affected and the nature and extent of the losses allegedly suffered. The identity of all of the affected individuals will also be difficult, if not impossible, to ascertain, at least at the outset of the litigation’.

9 See *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 FCR 480 at 495–6 (Moore J); *Courtney v Medtel Pty Limited* (2002) 122 FCR 168 at 180 (Sackville J). It has been noted that s 43(1A) of the *Federal Court of Australia Act 1976* (Cth) ‘is not limited to an order that the group members pay all of a respondent’s costs; it also prohibits, for example, an order that each group member pay severally an equal share’: *Ryan v Great Lakes Council* (1998) 155 ALR 447 at 454 (Lindgren J).

10 *Federal Court of Australia Act 1976* (Cth) s 43(1A); *Supreme Court Act 1986* (Vic) s 33ZD.

11 *Federal Court of Australia Act 1976* (Cth) s 33Q; *Supreme Court Act 1986* (Vic) s 33Q.

representative party, that person, and not the representative party, is liable for costs associated with the sub-group. Section 33R(1) authorises the court to permit an individual group member to appear/take part in the proceeding for the purpose of determining an issue that relates only to the claims of that member. In such a case, s 33R(2) provides that the individual group member, and not the representative plaintiff, is liable for costs associated with the determination of the issue.

Compliance with the three threshold requirements mentioned above does not guarantee to class representatives that they will be able to employ the class action procedure. In fact, trial judges are empowered to discontinue the proceedings as class proceedings, despite the fact that they adhere to each of these three requirements. The most significant of these termination powers is found in s 33N. This power may be exercised where it is in the interests of justice to discontinue the proceeding because of the existence of one or more of the following four scenarios: (a) the costs that would be incurred if the proceeding were to continue as a class proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; (b) all the relief sought can be obtained by means of a proceeding other than a class proceeding; (c) the class proceeding will not provide an efficient and effective means of dealing with the claims of group members; or (d) it is otherwise inappropriate that the claims be pursued by means of a class proceeding.¹² Reliance was placed on this s 33N power by Stone J in *Dorajay*.¹³

Attention may now be turned to the major features of the MBC criterion and to the philosophy underpinning the judicial rejection of it.

B. The MBC Criterion

(i) The Dorajay Proceeding

The respondent in this FCAA proceeding, Aristocrat Leisure Ltd ('Aristocrat'), was a company that provided gaming software, systems and hardware. The class representative claimed that, between 20 September 2002 and 27 May 2003, Aristocrat, by positive statements and by silence, made a series of representations about certain aspects of its operations and about its profits for the calendar years 2002 and 2003. According to the class representative, each of these representations was misleading or deceptive.¹⁴ The represented group was defined in the further amended statement of claim as follows:

12 See also *Federal Court of Australia Act 1976* (Cth) ss 33L, 33M; *Supreme Court Act 1986* (Vic) ss 33L, 33M. Section 33L provides that where, at any stage of the class proceeding, it appears likely that there are fewer than seven class members, the court is empowered to order (a) that the proceeding continue as a class proceeding or (b) that the proceeding no longer continue as a class proceeding. Section 33M empowers the court to order the termination of a class proceeding where the cost to the defendant of identifying the class members and distributing to them the damages won by the representative plaintiff would be excessive, having regard to the likely total of those amounts. This power may only be exercised upon an application by the respondent/defendant.

13 *Dorajay* (2005) 147 FCR 394 at 432–3 (Stone J).

14 *Id* at 397 (Stone J).

This proceeding is commenced by the Applicant on its own behalf and on behalf of the other persons for whom the solicitors for the Applicant have instructions to act at any particular time, who at some time during the period between 20 September 2002 and 26 May 2003 inclusive ... acquired an interest in shares in Aristocrat and who suffered loss and damage by or resulting from the conduct of Aristocrat referred to below.¹⁵

Justice Stone of the Federal Court explained that, pursuant to the mechanism governing the MBC criterion, MBC only accepted instructions to act for the aggrieved shareholders of Aristocrat upon such shareholders entering into a retainer agreement with MBC. A term of this retainer agreement, in turn, imposed the requirement that the class members also enter into a funding agreement with Insolvency Litigation Fund Pty Ltd ('ILF').¹⁶ As a result of this funding agreement, ILF was responsible for 'all legal costs and disbursements ... incurred by the Solicitors ... for the sole purpose of the commencement, and prosecution, of the Proceedings,'¹⁷ as well as for any adverse costs orders (including orders that the class representative provide security for costs).¹⁸ ILF would be entitled to receive, in the event of a victory by the plaintiff class, reimbursement of its expenditures as well as the payment of between 20 per cent and 40 per cent of the compensation that the class members received from the litigation.¹⁹

Justice Stone was of the view that there existed two valid grounds of objection to the MBC criterion. Her Honour described the first objection as follows:

rather than being able to be a member of the group without taking any positive step (as envisaged in the Attorney-General's comments ...) a person is required to opt in to the group by retaining MBC. The fact that an opt out procedure would still be required is not to the point. The legislature made a clear choice that was consistent with the recommendation of the ALRC on this issue ... Whatever advantages, real or apparent, may flow from the ability to identify each member of the class at the outset, a decision to apply an opt in procedure can only be made by the legislature.²⁰

15 Id at 396–7 (Stone J).

16 Id at 417 (Stone J).

17 Id at 399 (Stone J).

18 Id at 417 (Stone J); Ben Slade, 'Australian Shareholders and Extraterritorial Class Actions', (Paper presented at the International Class Actions Conference, Maurice Blackburn Cashman Lawyers, Melbourne, December 2005) at [9.3]. See also Law Council of Australia, *Litigation Funding* (Submission to the Standing Committee of Attorneys-General, 14 September 2006) at 7: '[litigation funding companies ('LFCs')] take on the burden of the costs risk for the claimants. LFCs will also do what is required to comply with an order for security for costs if it is made. They do so out of necessity, as claimants will, properly advised, want a costs indemnity and the court will, in all likelihood, order costs against the LFC where it has provided the funding for profit'.

19 *Dorajay* (2005) 147 FCR 394 at 417 (Stone J). The percentage would increase to 45 per cent in the event of an appeal: at 416–7. According to the Law Council, 'while there are examples of funders contracting for up to 75 per cent of the award in litigation, LFCs usually charge between 15% and 40% of the award': above n18 at 6.

20 *Dorajay* (2005) 147 FCR 394 at 417 (Stone J).

The second aspect of the MBC criterion that provoked judicial opposition in *Dorajay* was the fact that the definition of the represented group was used to confine the group to the clients of one firm of solicitors. Justice Stone had no objection to solicitors requiring entry into the funding agreement as a condition of accepting the retainer. What was objectionable to the court was that a claimant was required to become a client of MBC in order to be regarded as a member of the represented group.²¹ Consequently, her Honour held that the proceeding could not proceed as a class proceeding, as long as the MBC criterion continued to be employed as a means of describing the class. As a result of this ruling, the MBC criterion was removed by the representative plaintiff. In the latest version of the pleadings, the represented group was described in the following manner:

all persons who at some time between 20 September 2002 and 26 May 2003 inclusive, acquired an interest in shares in Aristocrat and suffered loss and damage by or resulting from the conduct of Aristocrat ...

Justice Stone did, however, reject one of the other submissions of the respondents: namely, that the court should hold that, because class members were required to enter into the retainer and funding agreements, the class proceeding constituted an abuse of process. This aspect/dimension of her Honour's judgment, which was indirectly endorsed in August 2006 by the High Court in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*,²² is beyond the scope of this article.

As noted in Part 1 above, the MBC criterion was contemporaneously used in two other shareholder class actions, one in the Supreme Court of Victoria and one in the Federal Court. Attention will now be turned to these two proceedings.

(ii) *Rod Investments (Vic) Pty Ltd v Clark*²³

In a judgment handed down approximately four weeks after Stone J's judgment in *Dorajay*, Hansen J of the Supreme Court of Victoria revealed that in this SCA proceeding, the statement of claim stated that this proceeding 'is commenced by

21 Id at 429 (Stone J). On the other hand, Cashman has expressed the view that '[t]his requirement in itself is hardly problematic. On the respondents [*sic*] side it is usually the case that insurers (and presumably the insurers of the respondents to the proceedings in question) require the insured party to be legally represented by the lawyers nominated by the insurer': above n8 at 743. See also Law Council above n18 at 15, where attention is drawn to 'the absolute power that insurers are given over litigation that they are concerned with In fact, a plaintiff cannot even find out if a defendant is insured let alone demand to know the identity of the responsible insurer or demand to inspect the relevant policy'.

22 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 80 ALJR 1441 ('*Fostif*'). In *Fostif* the High Court held (by a 5:2 majority) that the involvement of litigation funders in proceedings brought under the New South Wales traditional representative action procedure was not contrary to public policy and did not render the proceedings an abuse of process. For excellent reviews of this area, see Peter Cashman, 'Litigation Funding for Representative Actions: *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*' (2005) 68 *Precedent* 27; Lee Aitken, 'Before the High Court: "Litigation Lending" After *Fostif*: An Advance in Consumer Protection, or a Licence to "Bottomfeeders"?' (2006) 28 *Sydney Law Review* 171; Michael Legg & Greg Williams, 'The High Court Gives Litigation Funding Legitimacy, Yet Questions Remain' (2006) 44(9) *Law Society Journal* 53.

23 *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449 ('*Rod*').

the plaintiff on its own behalf and on behalf of the other persons identified in Schedule 1 hereto (“the Group Members”).²⁴ Justice Hansen indicated that, in an affidavit sworn by Bernard Murphy, the head of MBC’s Major Projects Department (Australia’s largest class action practice), it was disclosed that the common link between the 127 class members listed in Schedule 1 was that ‘as at 1 August 2005 each of those persons had retained his firm to act for them as their solicitor in the proceeding. That continued retainer is a condition of their being in the group. Hence, the group is confined to that limited group of MBC clients.’²⁵

After reviewing in some detail Stone J’s analysis of the MBC criterion in *Dorajay*, Hansen J expressed his entire agreement with the reasons and decision of Stone J. In so doing, he regarded as of no relevance the fact that in this case the representative group was described through a list of identified class members rather than through a description of the MBC criterion. This was because ‘the list of 127 persons in this case makes no or little sense without the knowledge of the link constituted by the MBC retainer.’²⁶

Another difference between *Rod* and *Dorajay*, which again was regarded as of no significance by Hansen J, was that in the former proceeding no commercial litigation funder was involved and ‘the attempt to close the class from the outset was done so with the instructions of all group members and because the group members were themselves collectively funding the claim.’²⁷ As a result of this ruling, the definition of the group of shareholders represented in these proceedings was altered to ensure that it ‘would not be confined to persons being clients of the plaintiff’s solicitor, but rather would include all persons who suffered loss from the relevant conduct in the relevant period.’²⁸ The most recent definition of the group read as follows:

[2. This proceeding is commenced by the Plaintiff] on its own behalf and on behalf of all persons who: (a) by themselves, their agents or trustees, at some time during the period between 26 October 2000 and 1 September 2004 acquired an interest in shares in Media World Communications Limited (ACN 061 727 642) (formerly Werrie Gold Limited) (“MWC”); and (b) suffered, or are trustees for persons who suffered, loss and damage by or resulting from the conduct of the Defendants referred to below (“Group Members”).²⁹

When approving this definition of the group in September 2006, Hansen J indicated that an affidavit of the plaintiff’s solicitor, Ben Slade, revealed that the original class members

had been notified of the proposed amendment to the group definition and informed that they will continue to be group members and that there was no requirement that they continue to instruct the plaintiff’s solicitors in order to

24 Id at [8] (Hansen J).

25 Id at [23] (Hansen J).

26 Id at [39] (Hansen J).

27 Law Council, above n18 at 17.

28 *Rod* [2006] VSC 342 at [6] (Hansen J).

29 Id at [6] (Hansen J).

continue to be group members. At the time of affirming the affidavit, none of the clients had advised that they wished to terminate the retainer agreement.³⁰

(iii) *Cadence Asset Management Pty Ltd v Concept Sports Limited*³¹

In this shareholder class action, brought under the FCAA, Finkelstein J of the Federal Court also considered the consistency of the MBC criterion with the FCAA. Unfortunately, no judgment was handed down recording his Honour's views on this issue. A review of the relevant transcripts of proceedings, however, reveals two broad reasons for Finkelstein J's opposition to the MBC criterion. The first objection was explained as follows by his Honour:

I'll be perfectly frank about what I don't like about this [the MBC criterion]. In Trade Practices legislation it's called third line forcing ... I do not like the idea ... the idea that you could use [the FCAA] to force people to retain lawyers, I regard as an anathema ... I regard the practical long-term consequences of the sort of thing you're asking me to do as almost outrageous. It forces people to retain lawyers, and [the FCAA] assumes they don't have to retain lawyers. They just go along for the ride, unless they write a letter saying, "I don't want to go along for the ride". But you're going to force people to retain lawyers ... This legislation is designed to achieve the exact opposite of what you're seeking to produce.³²

Justice Finkelstein's second objection to the MBC criterion had nothing to do with the perceived incompatibility of this mechanism with the opt out regime. His Honour instead drew attention to the inconsistency of the MBC criterion with his understanding of what was impliedly required by those provisions of the FCAA that govern description of the representative group. The requirement in question was that the way in which the class is described must relate to the cause of action. According to Finkelstein J, the only way in which the description of the represented group might legitimately be narrowed, and thus result in the exclusion of some potential claimants, would be through the application of restrictions of a 'geographical' nature.³³

In light of this objection to the MBC criterion, the class representative's solicitors decided not to proceed under the FCAA and instead joined each of the 137 class members as named plaintiffs.³⁴

30 Id at [7] (Hansen J).

31 *Cadence Asset Management Pty Ltd v Concept Sports Limited* (Unreported, Federal Court of Australia, Finkelstein J, 23 December 2005) ('*Cadence*').

32 *Cadence Asset Management Pty Ltd v Concept Sports Limited*, Transcript of Proceedings (Federal Court of Australia, Finkelstein J, 4 April 2004) at 18–19.

33 'Whether you can have a criteria that's ... got nothing to do with the articulated cause of action, which is how I always understood these criteria are meant to be for — although ... in the United States a common criteria ... which had nothing to do with cause of action was geography': id at 7.

34 *Cadence* (Unreported, Federal Court of Australia, Finkelstein J, 23 December 2005) at [1]. In October 2006 it was reported in the media that these proceedings were settled: see Marcus Priest, 'Concept Sports Pays Out Shareholders' *Australian Financial Review* (4 October 2006) at 51; Rebecca Urban, 'Concept Bosses Take Class Action Hit' *Age* (4 October 2006) at 2.

3. *Class Proceedings that Benefit only Some of the Victims of the Respondent/Defendant's Relevant Conduct*

A. *Overview*

Section 33C of both the Federal and Victorian regimes provides that where there has been compliance with the three commencement criteria, a proceeding may be brought on behalf of 'all or some' of the claimants. This aspect of s 33C is significant for a number of reasons. The first is that it demonstrates, quite clearly, that there is no requirement to the effect that a class proceeding needs to be brought on behalf of each and every person whose claim satisfies the three commencement prerequisites. On the contrary, we have an express legislative conferral, upon class representatives, of the discretion to exclude from the ambit of class proceedings some of the potential claimants.

The second, and more general, principle that emerges from s 33C is that the FCAA and the SCA do not seek to dictate the manner in which the representative group is defined/described and which of the potential claimants are included in the group. This is an issue that is left entirely to the discretion of the representative plaintiff. The only significant requirement imposed on them, as a result of the judicial interpretation and application of s 33C, is that the description chosen by the representative plaintiff must be sufficiently clear to enable claimants to determine whether or not they fall within the group.³⁵ Reference should also be made to s 33K, which authorises the court, at any stage of a class proceeding, on application made by the class representative, to give leave to amend the application commencing the class proceeding so as to alter the description of the group. But, ironically, this judicial power has usually been exercised to narrow, rather than expand, the description of the group.³⁶ As a result of s 33H, the representative plaintiff is required to describe or otherwise identify the class members to whom the proceeding relates. But, as already noted, this section also provides that it is not necessary to name, or specify the number of, the class members.

In light of the scenario depicted above, it is not surprising that shortly after the commencement of Part IVA of the FCAA a class proceeding was brought on behalf of most, but not all, of the persons who were harmed by the relevant conduct of the defendant. In *Lek v The Minister for Immigration, Local Government and Ethnic Affairs*,³⁷ an FCAA proceeding was brought with respect to the illegal arrival in Australia of Dr Lek, the class representative, and 118 other people, on a boat called the 'Beagle'. Justice Wilcox revealed that in late 1991 all the persons on whose behalf the proceeding was brought 'and perhaps others as well' were moved to the Villawood Detention Centre.³⁸ Most of the applications for refugee status that were lodged by all of the persons on the 'Beagle' were refused. The class representative sought judicial review of these decisions to refuse refugee

35 See, for example, *Petrusevski v Bulldogs Rugby League Club Limited* [2003] FCA 61.

36 See, for example, *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505, discussed below.

37 *Lek v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 ('Lek').

38 *Id* at 102 (Wilcox J).

status. The represented group was defined ‘by listing their [the class members’] names (51 in all) in a schedule to the Application.’³⁹ Justice Wilcox revealed that ‘Dr Lek preferred to represent only “Beagle” passengers who were at Villawood and readily available for consultation.’⁴⁰ It was convenient to list the names of the class members because ‘[t]he number of these people was small, and their names were known.’⁴¹

The practice of excluding some of the potential claimants from the description of the represented group, and thus from the ambit of the class action litigation, has been employed frequently. There are a number of reasons why class representatives and their legal advisers may decide to implement this strategy:

In some circumstances, a specific group of affected individuals may join together for the purpose of pursuing a class action to recover the losses suffered by them without wishing to assume the burdens, costs and risks associated with representing a much larger group of similarly affected individuals. This may particularly be the case in circumstances where for the purpose of recovery each member of the group is required to prove their individual entitlement and where proof of individual reliance (eg in a case involving misleading and deceptive conduct) or individual causation (eg in a case involving product liability or other personal injury) is required. An action limited to a small group of defined individuals with readily provable and quantifiable losses is easier to conduct, less expensive and easier to settle than a large case involving substantially larger numbers of group members.⁴²

One form of this practice of narrowing the class is to describe the class as either (a) all potential claimants less certain categories of claimants; or (b) as consisting only of specified categories of claimants that form part of a much broader pool of persons who have been adversely affected by the relevant conduct of the class action respondents/defendants. An illustration of technique (a) is provided by *The Council for the City of The Gold Coast v Pioneer Concrete (Qld) Pty Ltd*.⁴³ In this FCAA proceeding the class members were described as:

all persons (natural or corporate) who directly or indirectly acquired for value pre-mix concrete (‘product’) originally manufactured and/or supplied by one or more of the respondents in the geographical area encompassed by the present territorial unit of the local government of the Council for the City of The Gold Coast (the ‘market’) between the period from June 1989 to July 1994 inclusive (the ‘cartel period’) but excluding:

- (a) persons who have acquired concrete from an end consumer solely by reason of the acquisition of land on which a concrete structure had, prior to such acquisition, been erected; and
- (b) persons who acquired quantities of product totalling in aggregate less than

39 Id 103 (Wilcox J).

40 Id at 103 (Wilcox J).

41 Id at 103 (Wilcox J).

42 Cashman, above n8 at 738.

43 *The Council for the City of The Gold Coast v Pioneer Concrete (Qld) Pty Ltd* [1997] ATPR 44,076 (‘Gold Coast’).

1,000 cubic meters during the period from June 1989 to July 1994 inclusive;
and

- (c) persons who were able to pass on to other customers in the chain of commerce all product costs incurred.⁴⁴

An illustration of technique (b) mentioned above is furnished by the so-called vitamins class action in *Bray v F Hoffman-La Roche Ltd*.⁴⁵ The representative plaintiff sought, on behalf of the represented group, damages and other relief in respect of an international price fixing and market sharing arrangement by a number of companies. The impugned behaviour related to vitamin products manufactured and sold by the respondents or their subsidiaries for human and animal consumption.⁴⁶ The group represented by Bray encompassed:

persons who between 5 March 1992 and 5 July 1999 purchased in Australia all or some of vitamins A, B1, B2, B5 (Pantothenic Acid), B6, B9 (folic acid), B12, C, E, Beta Carotene, Canthaxanthin, Astaxanthin ... either directly or indirectly by way of the purchase of foods, beverages, vitamin pills or capsules or other products which contained one or more class vitamins supplied by one or more of the respondents.⁴⁷

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

the amendments will confine the claims to certain animal nutrition and health vitamins and will narrow the definition of group members to manufacturers, distributors and suppliers of those vitamins or pre-mix or other health or nutrition products or food which contain the vitamins, and producers of livestock who purchased stock feed containing vitamins, provided those group members expended at least \$2,000 in respect of the relevant products.⁴⁸

The practical effect of this amendment was to exclude most of the original class members from the proceeding.⁴⁹ In neither of these two FCAA cases did the court object to, or express concerns about, the narrowing of the class. Indeed, in the vitamins class action, the subsequent narrow description of the represented group was prompted by Merkel J's criticisms of the extremely broad manner in which the class was originally described:

44 Id at 44,079 (Drummond J).

45 *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505 ('Bray').

46 Id at [1] (Merkel J).

47 Id at [2] (Merkel J).

48 Id at [9] (Merkel J).

49 According to Lachlan Armstrong, one of the barristers who appeared on behalf of the representative plaintiff in *Bray*, the effect of the change in the description of the class 'is likely to have been vastly greater than cutting half of the original group. The confinement to manufacturers and distributors probably reduced the group to, at most, [a] few thousand group members, and quite possibly fewer than that': Email from Lachlan Armstrong to Vince Morabito, 7 February 2006.

Every man, woman and child who has been in this country between 1992 and 1999; every person who is engaged in the food chain, the supply of every food and animal product; is a plaintiff, a group member. I can't conceive of how that could ever be tried there are some areas where there will be losses that are seriously claimed. By all means, they should be singled out, but not everyone in the food chain in this country Is there any authority anywhere in the world that says that the class should be drawn so widely that [any person] who may have some kind of claim, no matter how small, no matter how nebulous and no matter how difficult to prove, ought to be included in the class?⁵⁰

Similarly, in *Gold Coast* one of the reasons for the judicial discontinuance of this proceeding as a class proceeding was the court's conclusion that the class representative had not been able to establish the existence of at least seven class members who were interested in recovering losses, suffered as a result of the defendant's conduct, by means of a class action.⁵¹

B. Listed Class Members

Another fairly popular technique, an example of which is provided by the *Lek FCAA* proceeding described above, has been to confine the representative group to those claimants whose names appear in a list attached to the originating process. Where the number of all potential claimants is limited and the identity of each claimant is known to the class representative,⁵² compiling a list of the class members constitutes a sensible strategy, as it enables the class representative to unambiguously demonstrate adherence to the requirement that there be at least seven class members.⁵³

This 'description by list' technique has also been employed in order to exclude (or has had the practical effect of excluding) from the litigation some of the

50 *Bray v F Hoffman-La Roche Ltd*, Transcript of Proceedings (Federal Court of Australia, Merkel J, 23 October 2003) at 187, 189, 196. This proceeding was settled in favour of the applicant and the class members for \$30.5 million, plus costs (of over \$10 million): see *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* [2006] FCA 1388.

51 See also Vince Morabito, 'The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions' (2004) 42 *Osgoode Hall Law Journal* 473 at 489.

52 See, for example, *Gui Sen Huang v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 134; *Patrick v Capital Finance Corporation (Australasia) Pty Ltd* [2004] FCA 120 at [9] (Tamberlin J); *Poignand v NZI Securities Australia Ltd* (1992) 37 FCR 363 at 364 (Gummow J); *Lean v Tumut River Orchard Management Ltd (in liquidation)* [2003] FCA 1004; *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723 at 724 (Drummond J); *Crawford v Bank of Western Australia Ltd* [2005] FCA 949 at [10] (Lee J).

53 This requirement is imposed by *Federal Court of Australia Act 1976* (Cth) s 33C(1)(a) and *Supreme Court Act 1986* (Vic) s 33C(1)(a). Compliance with this requirement does not necessarily mean that the small size of a given class may not be used by the respondent/defendant facing such a class to argue that the litigation should not be conducted as a class proceeding. See, for example, *Dinning v Commissioner of Taxation (Cth)* (1999) 99 ATC 4621 at 4628, where Ryan J of the Federal Court terminated an FCAA proceeding and one of the reasons for this decision was the fact that there were only seven class members. For a critique of this judicial approach, see Vince Morabito, 'Dinning v Federal Commissioner of Taxation: The Dawn of a New Era in Tax Litigation in Australia?' (2000) 7 *Canterbury Law Review* 487 at 498.

persons who were harmed by the relevant conduct of the class action respondents/defendants.⁵⁴ To the author's knowledge, this technique has not prompted any adverse judicial comments and, indeed, in 1996 Branson J of the Federal Court expressed a preference for a class defined by a list of the names of the claimants.⁵⁵

This judicial approach has been implemented despite the fact that it was reasonable to conclude that, in order to be named on this all-important list, some positive conduct on the part of the claimants, such as contacting the class representative's solicitors, would usually be required. In the SCA proceeding in *McLean v Nicholson*,⁵⁶ for instance, the representative group was defined as 'persons who have contacted Slater & Gordon regarding ciguatera poisoning.'⁵⁷ Their names were set out in a schedule to the endorsement on the writ.

If the trial judges had inquired as to how the list of class members had been compiled in two recently concluded shareholder class actions, where MBC acted for the representative plaintiff, they would have discovered that the MBC criterion was the controlling mechanism.⁵⁸ In *Bates v Dow Corning (Australia) Pty Ltd*,⁵⁹ the breast implant class proceeding, the employment of a mechanism similar to the MBC criterion was expressly revealed in the application and writ:

[the proceeding is brought by the applicant] on her own behalf and in a representative capacity on behalf of all persons domiciled and/or resident in Australia who have as at the date of filing herein retained any one of the Solicitors/firms of Solicitors specified in the Second Schedule annexed hereto and who have ever had a mammary prosthesis containing silicone, silicone gel, or saline, (but excluding silicone injections) ("Breast Implants") manufactured, supplied or promoted (or comprising a component part manufactured supplied or promoted) by one or more of the Respondents herein ...⁶⁰

54 See, for example, *Nguyen Thanh Trong v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 66 FCR 239 at 240 (Merkel J); *Cameron v Qantas Airways Limited* (1995) 55 FCR 147; *Magnus v South Pacific Air Motive Pty Ltd* (1997) 78 FCR 456 at 457 (Wilcox J); *Magnus v South Pacific Air Motive Pty Ltd* [2001] FCA 465 at [3] (Wilcox J); *McIntyre v Eastern Prosperity Investments Pty Ltd (No 3)* [2002] FCA 406; *Marks v GIO Australia Holdings Ltd (No 2)* (1996) 66 FCR 128 at 133 (Einfeld J); *Marks v GIO Australia Holdings Ltd* [1999] FCA 1010 at [66] (Einfeld J); *Ryan v Great Lakes Council* (1999) 102 LGRA 123 at 126, 128–9 (Wilcox J); *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179 at 181 (Wilcox, Ryan & Madgwick JJ); *Revian v Dasford Holdings Pty Ltd* [2002] FCA 676 at [2]–[5] (French J); *Ding v Minister for Immigration, Local Government and Ethnic Affairs* (1997) 147 ALR 673.

55 *Australian Competition and Consumer Commission v Chats House Investment Pty Ltd* (1996) 71 FCR 250 at 253.

56 *McLean v Nicholson* [2002] VSC 446.

57 *Id* at [2] (Bongiorno J). Justice Bongiorno did indicate that '[i]t was not suggested by the counsel for the plaintiff ... that any other person or persons may have been injured by the acts of negligence or breach of statutory duty alleged against the defendant who supplied the [fish] which the plaintiff and the other group members consumed': at [7]. But, with all due respect, it is difficult to see how the plaintiff could be certain of this fact.

58 *Spangaro v Corporate Investment Australia Funds Management Pty Ltd* V3019 of 2001 ('*Spangaro*'); *Lukey v Corporate Investment Australia Funds Management Pty Ltd* N1348 of 2000. Ironically, in *Spangaro* the trial judge was Finkelstein J, the same judge who, it will be recalled, rejected the MBC criterion in *Cadence*.

59 *Bates v Dow Corning (Australia) Pty Ltd* [2005] FCA 927.

Peter Cashman has revealed that during the course of this FCAA proceeding, ‘the ambit of the group was constantly amended, by orders of the Federal Court, to exclude women who were no longer clients of the firm(s) and to add as group members women who had become clients since the date of the last orders amending the description of the group.’⁶¹ Cashman was also involved in *Cameron v Qantas Airways Limited*,⁶² *Marks v GIO Australia Holdings Ltd (No 2)*⁶³ and *Thomson v Key Pharmaceuticals Pty Ltd*.⁶⁴ In these three proceedings the represented group was originally described to encompass all of the victims of the conduct in question but was subsequently altered (with the authorisation of the court) to include only a list of identified claimants. According to Cashman, all of the listed class members expressly consented to being class members and were clients of the solicitors acting for the class representatives.⁶⁵

The discussion above has revealed that, before Stone J’s ruling in *Dorajay*, Federal Court and Supreme Court of Victoria judges exhibited no interest in ensuring (a) that represented groups were not defined in a manner that resulted in the exclusion of potential claimants; or (b) that any such exclusion was not based on a failure, on the part of such claimants, to take some form of positive step such as contacting the representative plaintiff’s solicitors to express their interest in participating in the proceedings and/or entering into ‘no win no fee’ agreements with them.

The judicial approach summarised in the preceding paragraph has been accompanied by the frequent implementation of opt in devices, sometimes referred to as ‘closing the class’ devices.⁶⁶ Two directly relevant examples of the use of this device are provided by the FCAA proceedings in *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)*⁶⁷ and in *Williams v FAI Home Security Pty Ltd (No 4)*.⁶⁸ In the *GIO* shareholder class action, Moore J of the Federal Court ordered that a form, called Form C, be sent to the 25 806 class members who had

60 Application filed in *Bates v Dow Corning (Australia) Pty Ltd* [2005] FCA 927.

61 Cashman, above n8 at 739.

62 *Cameron v Qantas Airways Limited* (1995) 55 FCR 147. In this FCAA proceeding, the class originally encompassed those persons who suffered loss or damage arising from the relevant conduct of Qantas.

63 *Marks v GIO Australia Holdings Ltd (No 2)* (1996) 66 FCR 128. The class members to whom this FCAA proceeding related were originally described as ‘a class of borrowers (the group) who all received from one of the respondents monies under a facility known as the Asset Accumulator Account’: at 133.

64 *Thomson v Key Pharmaceuticals Pty Ltd* N5621 of 2003. This SCA proceeding was originally brought on behalf of ‘all persons who consumed a product known as Travacalm and suffered personal injury, loss or damage as a result of such consumption’: at [2] of the Writ.

65 Cashman, above n8 at 746.

66 See Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) at 362–6; *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 3 (Wilcox J); *Johnson Tiles Pty Ltd v Ezzo Australia Pty Ltd (No 2)* [2003] VSC 212 at [65]–[72] (Gillard J); *Johnson Tiles Pty Ltd v Ezzo Australia Pty Ltd (No 4)* [2004] VSC 466 at [7]–[11] (Gillard J); Damian Grave & Ken Adams, *Class Actions in Australia* (2005) at 375–82.

67 *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980 (‘*GIO*’).

68 *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 (‘*Williams*’).

not specifically instructed the class representative's solicitors to act on their behalf ('unrepresented class members') and had not opted out of the proceeding.⁶⁹ The legal effect of this form was, as his Honour himself later acknowledged, to create an opt in process.⁷⁰ This was because the class members who received this form were advised that they needed to fill out and return the form by a certain date in order to continue as class members.⁷¹

Only 1 957 unrepresented class members returned the form within the specified time. The class representative's solicitors completed the form on behalf of each of the 21 142 class members who had entered into conditional fee agreements with them ('represented class members').⁷² The practical effect of this order was thus to drastically reduce the number of unrepresented class members who would benefit from a successful outcome of the class proceeding, whilst leaving unaltered the number of represented class members. And several months later a successful result was indeed achieved for the class as a result of a settlement agreement that was approved by the court. Justice Moore explained that from what he had:

been told by the parties, the rationale for the settlement achieved in this way appears to be that the people who would enjoy the benefit of the settlement were those who had been prepared to look after their own interests either by retaining MBC [the representative plaintiff's solicitors] (who would attend to "Form C" on their own behalf) or, if they had not retained MBC, by completing a "Form C" themselves.⁷³

In *Williams* the parties to the class proceeding, which concerned misleading representations made with respect to certain alarm systems, sought judicial approval, as required by s 33V,⁷⁴ of a settlement agreement that they had agreed upon and executed.⁷⁵ It was proposed that only represented class members would be both bound by the settlement agreement and entitled to receive the compensation made available under it. This exclusion of unrepresented class members was justified essentially on the ground that 'it was very difficult to take their interests into account because one does not know what their instructions would be on the individual elements of their claim' and that, in any event, as the claims of these class members were not extinguished by the settlement, they could simply institute fresh proceedings against the class action defendants.⁷⁶

69 *GIO* [2003] FCA 980 at [7]–[9] (Moore J).

70 *GIO* [2003] FCA 1420 at [24] (Moore J).

71 *Id* at [9] (Moore J).

72 *Id* at [9] (Moore J).

73 *Id* at [16] (Moore J).

74 *Federal Court of Australia Act 1976* (Cth) s 33V; *Supreme Court Act 1986* (Vic) s 33V, which both 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. Similar provisions may be found in the class action regimes that currently operate in the United States and in Canada. See generally Vince Morabito, 'An Australian Perspective on Class Action Settlements' (2006) 69 *Modern Law Review* 347; Mulheron, above n66 at 390–407; Grave & Adams, above n66 at 349–434.

75 *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459.

76 *Id* at 468 (Goldberg J).

Justice Goldberg ordered that a settlement notice be published in a number of regional and metropolitan newspapers. This notice 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.⁷⁷ Eighty-eight class members contacted the solicitors for the plaintiff to advise them that they objected to the proposal to amend and settle the proceeding. The basis of this objection was that no settlement offer had been made to them.⁷⁸ Once these 88 class members were added as recipients of the settlement proceeds, Goldberg J approved the settlement.⁷⁹

The crucial question of whether the FCAA and the SCA authorise mechanisms for describing the represented class that require claimants to take some form of positive action in order to be included in the class will now be considered.

4. *The Validity of the MBC Criterion*

As the passage from Stone J's judgment in *Dorajay*, quoted in Part 2 above, shows, her Honour was of the view that the essence of an opt out mechanism is that the victim of the class action respondent/defendant's relevant conduct should be 'able to be a member of the [represented] group without taking any positive step.'⁸⁰ To assess whether that conclusion is correct, it is necessary to consider both the general understanding of what an opt out regime entails as well as the features and requirements of the specific opt out mechanisms that were chosen by the drafters of the Federal and Victorian class action regimes.

A. *General Notion of an Opt Out Mechanism*

With respect to the former issue, the following comments recently made in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*⁸¹ by Mason P of the New South Wales Court of Appeal (with whose reasons Sheller and Hodgson JJA agreed) are pertinent:

References to opting-in and opting-out should not mislead the reader into thinking that those who opt-in only become formally involved in the proceedings from the time when they opt-in. In truth, those represented are represented from the outset so long as the Rule's "jurisdictional" requirement is met. The court and the lead plaintiff are obliged to have regard to the interests of all represented persons from the outset and for as long as they continue within the class as described by the lead plaintiff in the originating process.⁸²

⁷⁷ *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399 at [8] (Goldberg J).

⁷⁸ *Id* at [9] (Goldberg J). There was no precise information as to the total number of unrepresented class members. The class solicitors estimated that the number of sale contracts for the alarm system in question during the relevant period 'could be as high as 100,000. However, the solicitors do not know whether all these sales contracts relate to alarm systems the subject of the proceeding or whether the relevant representation was made to the purchasers and was relied upon by them': *Williams* (2000) 180 ALR 459 at 463 (Goldberg J).

⁷⁹ *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399 at [27] (Goldberg J).

⁸⁰ *Dorajay* (2005) 147 FCR 394 at 429 (Stone J).

⁸¹ *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203.

⁸² *Id* at 259 (Mason P).

This comment was made in the context of the New South Wales traditional representative action rule. However, it is of great importance for present purposes, as it evinces a clear judicial indication that opt out and opt in devices provide different answers to the following question: in order to be bound by the class proceeding, is it enough for a claimant to fall within the description of the represented group, or is there an additional requirement, such as providing to the court a written consent to being a class member? Mason P was of the view that '[t]he obvious intent behind opt-in procedures is that a time will be reached when it will be too late for further persons to opt-in. At that stage, the court will order that the class of represented persons will be [closed].'⁸³

In relation to this issue, the crucial difference between Mason P's views and those of Stone J in *Dorajay* appears to be that the latter justice employs, as the starting point of the analysis, each member of the group of persons who have been harmed by the conduct of the defendant in question. Once you adopt this approach in determining whether a given device is consistent with the opt out mechanism, it is clear that the MBC criterion is in contravention of the opt out mechanism. This is because being an Aristocrat shareholder who has suffered harm as a result of the conduct challenged in the class proceeding would not be enough to be bound by the outcome of the litigation. Only those shareholders who take the step of entering into a retainer agreement and a funding agreement are able to acquire the status of class members.

If the starting point of the analysis is, instead, the class as described by the representative plaintiff in the originating process, then no inconsistency emerges between the MBC criterion and the requirements of the opt out mechanism. This is because an Aristocrat shareholder who falls within the description of the claimants represented in the proceeding — namely, a client of MBC who suffered the relevant loss — would need to take no positive step in order to be regarded, or continue to be regarded, as a class member.⁸⁴

Attention may now be turned to the crucial question of which of these two alternative visions of the opt out regime was embraced by the FCAA and the SCA.

B. The Intentions of the ALRC and the Drafters of the FCAA and the SCA

In *Dorajay*, Stone J placed great reliance on the analysis appearing in the ALRC's 1988 report as well as on comments made by then Federal Attorney-General, with respect to the reasons that prompted the ALRC to recommend, and the Australian Government to implement, an opt out mechanism.⁸⁵ The ALRC explained that:

⁸³ Id at 260 (Mason P).

⁸⁴ Because the description of the represented group was drafted in such a way that Aristocrat shareholders could become class members by executing retainer agreements with MBC at any time before the termination of the litigation, the involvement of the court was not required each time a shareholder became a client of MBC after the institution of the proceeding. It will be recalled that in *Bates v Dow Corning (Australia) Pty Ltd* [2005] FCA 927, several s 33K orders were required during the course of the proceeding, as a result of the represented group being limited to only those claimants who were clients of the relevant solicitors at the time the litigation was commenced.

⁸⁵ *Dorajay* (2005) 147 FCR 394 at 422–6 (Stone J).

[an] underlying purpose of the Commission's proposals is to enhance access to legal remedies for those who are disadvantaged either socially, intellectually or psychologically, and who would be unable for one reason or another to take the positive step of including themselves in the proceedings. If proceedings can be commenced only on behalf of those who elect to participate, many individuals who may be entitled to a legal remedy on account of some wrongdoing by the respondent will be excluded. The procedure will be of little use in many cases where damages are individually non-recoverable.⁸⁶

Similarly, the then Federal Attorney-General noted that:

The Government believes that an opt out procedure is preferable on grounds both of equity and efficiency. It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately.⁸⁷

If the legality and appropriateness of the MBC criterion were to be assessed solely through the application of the philosophy contained in the two quotes above, the conclusion arrived at by Stone J would appear to be *prima facie* correct. Empirical studies undertaken in the United States have confirmed the accuracy of the ALRC and Attorney-General's concerns that mechanisms rendering membership of the representative group dependent on expressing interest in being bound by the litigation have an adverse impact on the size of the represented group.⁸⁸ Regardless of whether this device is implemented — through the description of the represented group — at the time when the pleadings are drafted (as was the case in *Dorajay, Cadence and Rod*) or during the course of litigation (as was done in *Johnstone v HIH Limited*,⁸⁹ a case discussed below), the use of such devices is irreconcilable with the policy goals of enhancing access to justice and judicial economy that class action regimes are intended to secure.⁹⁰

This conclusion would appear to be particularly appropriate with respect to a client criterion.⁹¹ In fact, restricting the ambit of a class proceeding to those claimants who have not just expressed their interest in participating in the proceeding, but have in fact taken the significant step of expressly instructing the class representative's solicitors to act on their behalf in the class action, may be said to constitute a far cry from the class action landscape (depicted in the comments quoted above) that was envisaged by the ALRC and by the Federal Parliament when they selected the opt out mechanism. This becomes even more apparent when one considers the fact that class members are not parties to the proceedings and, as such, are immune from adverse cost awards. *Dorajay and Rod*

86 ALRC 1988 Report, above n3 at 49–50.

87 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991 (Michael Duffy MP) at 3175.

88 See Vince Morabito, 'Class Actions: The Right to Opt Out under Part IVA of the *Federal Court of Australia Act 1976* (Cth)' (1994) 19 *Melbourne University Law Review* 615 at 629–35.

89 *Johnstone v HIH Limited* [2004] FCA 190.

suggest that the aggrieved shareholders who were also MBC clients constituted a small category of the total number of shareholders who were harmed by the relevant conduct of the respondents. In fact, there were 682 MBC clients in *Dorajay* whilst there appears to be several thousand adversely affected shareholders in that case.⁹² In *Rod*, Hansen J noted that ‘if the group included all persons who met the criteria in s 33C, putting aside the MBC client criterion for this purpose, the group could comprise all registered shareholders in MWC which appeared to be over 2 000 persons. Further, the share register records only the legal title to shares and not the beneficial interest in shares.’⁹³

But a closer review of the ALRC’s 1988 report reveals that the aspirations of the ALRC (and thus of the Federal and Victorian legislatures), when they selected the opt out regime, do not provide a sound basis for Stone J’s rejection of a client criterion mechanism. The ALRC explained that the class action device’s goals of access to justice and judicial economy could:

only be served by enabling *proceedings to be commenced in respect of all persons who have related claims arising from the same wrong* without requiring their consent, while protecting their rights and preserving their freedom of choice.⁹⁴
[Emphasis added.]

The ALRC also indicated that

[i]f it were an essential requirement that the consent of all persons affected be obtained before grouped proceedings could be commenced, all or some of those

90 The then Federal Attorney-General revealed that the two principal purposes of Part IVA were as follows: ‘The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person’s loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action. The second purpose of the Bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions’ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991 (Michael Duffy MP) at 3174–5. Similar reasoning was embraced by the Victorian Attorney-General, Mr Robert Hulls, with respect to Part 4A: Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2000 (Robert Hulls MP) at 1252. These two objectives of the class action device, commonly referred to as access to justice and judicial economy, have also been recognised internationally.

91 In Cashman, above n8 at 750, attention is drawn to the fact that, ironically, in *Dorajay* the MBC criterion ‘was, in a sense, superfluous. What was of paramount concern to the funder of the litigation was a requirement that all those who were to be the beneficiaries of the financial assistance should contractually agree to pay part of the proceeds to the funder in the event that they succeeded in recovering damages.’

92 The respondent’s solicitors were of the view that approximately 18 275 shareholders acquired shares or additional shares in Aristocrat during the relevant period: Affidavit of Michael Rose, 30 March 2005 at [18], as sworn in *Dorajay* (2005) 147 FCR 394.

93 *Rod* [2005] VSC 449 at [20] (Hansen J). It will be recalled that, under the MBC criterion mechanism, only 127 of these aggrieved shareholders were bound by this proceeding.

94 ALRC 1988 Report, above n3 at 50.

involved could experience hardship *A multiple wrong by a respondent may affect a considerable number of people. In the example given earlier there were 500 people, each of whom had suffered loss ...* If an intending applicant could identify and obtain the consent of 50 people before commencing proceedings, any finding as to the respondent's liability would be binding only in respect of those 50 people. *The other 450 people, would not be able to benefit from that finding.* [Emphasis added.]⁹⁵

The passages quoted above clearly demonstrate the ALRC's expectation that proceedings instituted pursuant to its recommended grouped proceeding regime would be brought on behalf of *all* members of the groups of persons harmed by the challenged conduct of the respondents. This expectation was not unrealistic, in light of the fact that the ALRC's proposed regime provided aspiring class representatives with the financial tools required to act on behalf of potentially thousands of unidentified class members. As explained in Part 5 below, this aspect of the ALRC's regime was, unfortunately, not implemented by the Federal and Victorian legislatures.

But, more importantly, the FCAA and the SCA are directly inconsistent with the ALRC's expectation. In fact, as indicated in Part 3 above, s 33C expressly empowers the class representative to institute a class proceeding on behalf of less than the entirety of the group of claimants who satisfy the commencement prerequisites.⁹⁶ In light of this provision, it is inappropriate to determine whether the requirements of the opt out regime have been satisfied by reference to each of the persons who have been adversely affected by the act/omission which is being challenged in the class action. Consistency with this discretion to exclude some of the claimants requires that this exercise be undertaken only with respect to the class, as described in the pleadings by the class representative.

It is also submitted that the rejection of the opt in regime by the ALRC and the Federal and Victorian legislatures entailed a rejection of a formal regime pursuant to which, in every group proceeding, every member of the represented group would need to lodge with the court a written consent to being a class member. This interpretation of what an opt in device entails is consistent with (a) the general understanding of this device (discussed in Part 4(A) above);⁹⁷ and (b) the main features of the only Australian opt in device that was in place when the ALRC released its report in 1988 and when the relevant parts of the FCAA and the SCA were enacted. In fact, before a class suit could be brought pursuant to the class action regime regulated by (the now repealed) ss 34 and 35 of the SCA, the court needed to be satisfied that all persons being represented in the proceeding had, before the commencement of the proceeding, consented in writing to being

⁹⁵ *Id* at 53.

⁹⁶ *Federal Court of Australia Act 1976* (Cth) s 33C; *Supreme Court Act 1986* (Vic) s 33C.

⁹⁷ As noted by Cashman, 'the traditional notion of opting in usually envisages persons applying to the court to become members of the group represented in the class action rather than merely taking non-forensic steps to join a group already purportedly represented in the litigation': above n8 at 748.

represented⁹⁸ and had been named in the originating process, and that the written consents had been filed in the court at the same time that the originating process was commenced.⁹⁹

C. *Relevant Provisions of the FCAA and the SCA*

But the strongest evidence of the fact that the ALRC and the drafters of Australia's class action regimes viewed opt in devices in the very narrow manner outlined above is provided by the actual provisions of the FCAA and the SCA. Section 33A provides that 'group member' 'means a member of a group of persons on whose behalf a [class] proceeding has been commenced.' Section 33E(1) provides that the consent of a person to be a group member is not required unless s 33E(2) applies to the person. Section 33E(2), in turn, provides that none of the following persons is a class member 'unless the person gives written consent to being so': (a) the Commonwealth, a State or Territory; (b) a Minister of the Commonwealth, a State or a Territory; (c) a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an incorporated company or association; and (d) an officer of the Commonwealth, a State or a Territory, in his or her capacity as an officer, including any judge, magistrate or other judicial officer.

Section 33E(2) represents the imposition by the drafters of Australia's class action regimes of an opt in device (albeit with respect to a limited category of persons and entities). Consequently, it allows us to draw inferences as to the notion of an opt in mechanism that the ALRC and the drafters of the FCAA and the SCA envisaged.¹⁰⁰ It will be recalled that Stone J in *Dorajay* ruled that the FCAA embraced an opt out mechanism pursuant to which the victim of the class action respondent's relevant conduct should be 'able to be a member of [the represented] group without taking any positive step,'¹⁰¹ the positive step in that case being the execution of retainer and funding agreements. But, according to s 33E(2), the opt in mechanism that the FCAA rejected for the vast majority of claimants (but embraced for certain public entities and persons) is one pursuant to which the claimants need to 'provide written consent to being [class members]' to the court.¹⁰²

In light of the analysis above, it is clear that the opt out model chosen by the Federal and Victorian legislatures was not intended to restrict the class representative's discretion to represent only some victims of the allegedly illegal

98 *Supreme Court Act 1986* (Vic) s 35(2)(a). See generally Vince Morabito & Judd Epstein, *Class Actions in Victoria: Time for a New Approach* (Report commissioned by the Victorian Attorney-General's Law Reform Advisory Council) (1997) at [3.9]–[3.16].

99 *Supreme Court Act 1986* (Vic) s 35(3).

100 In the Explanatory Memorandum, Federal Court of Australia (Amendment) Bill 1991 (Cth) at 5, it is explained that '[t]he activities of Governments, government agencies, Ministers and officials may be subject to legislative and other restraints which make inappropriate the inclusion of such persons in a representative proceeding without consent.' See also ALRC 1988 Report, above n3 at 56; *CPSU, Community & Public Sector Union v Commonwealth of Australia* (1999) 94 FCR 146 at 155–6 (Marshall J).

101 *Dorajay* (2005) 147 FCR 394 at 417 (Stone J).

102 *Federal Court of Australia Act 1976* (Cth) s 33E(2); *Supreme Court Act 1986* (Vic) s 33E(2).

conduct by prohibiting class representatives from confining the represented class to those potential claimants who expressed interest in the litigation.¹⁰³

D. The Approach of United States Federal Courts

At first glance, the judicial interpretation and application of the opt out regime governed by Rule 23(c) of the *United States Federal Rules of Civil Procedure* may be viewed as providing support for Stone J's stance in *Dorajay*. In fact, in December 2004, the United States Court of Appeals for the Second Circuit held, in *Kern v Siemens Corporation*,¹⁰⁴ that:

[n]ot only is an “opt in” provision not required, but substantial legal authority supports the view that by adding the “opt out” requirement to Rule 23 ... Congress *prohibited* “opt in” provisions by implication.¹⁰⁵

But a review of the devices that were judicially rejected in *Kern* and other United States cases reveals that the United States case law on this issue does not necessarily support *Dorajay*.¹⁰⁶ In *Kern* the trial judge had certified a scheme pursuant to which those claimants who fell within the description of the represented group were required to lodge a written consent to ‘being included as members of the class’.¹⁰⁷ Such a device appears to bear a greater similarity to the regime governed by s 33E(2) of the FCAA and the SCA than to the MBC criterion. Broadly similar conclusions may reasonably be drawn with respect to the two general categories of devices that have been labelled as opt in devices, and thus rejected by United States Federal Courts. These court administered schemes essentially required those claimants who fell within the description of the represented group to complete and lodge, by a particular date, questionnaires or proofs of claim, in order to retain their status as class members.¹⁰⁸ The reasons for the judicial rejection of these devices were recently and succinctly explained as follows by the United States District Court for the Western District Court of Kentucky: ‘[such devices are] the functional equivalent of a court ordered mandatory “opt in” requirement, that is “speak” (or act) now or forever be silenced. This the Court cannot do.’¹⁰⁹ It is submitted that this rejection of mandatory questionnaires and proofs of claim on the part of United States courts

103 This discretion is conferred by *Federal Court of Australia Act 1976* (Cth) s 33C and *Supreme Court Act 1986* (Vic) s 33C.

104 *Kern v Siemens Corporation*, 393 F 3d 120 (2nd Cir, 2004) (*‘Kern’*).

105 *Id* at 124 (Cabranes J),

106 It also provides evidence of the validity of Cashman’s comment that ‘there is scope for terminological or conceptual confusion when referring to opt-in and opt-out class action models’: above n8 at 743.

107 *Kern v Siemens Corporation*, 393 F 3d 120 (2nd Cir, 2004) at 122 (Cabranes J).

108 *Kern v Siemens Corporation*, 393 F 3d 120 (2nd Cir, 2004) at 125–6 (Cabranes J). The following summary of the United States judicial principles governing this issue that is found in *Moore’s Federal Practice*, s 23.1042[3][a] (3rd ed, 2004) appears to confirm the validity of this conclusion: ‘nothing in Rule 23(c) authorises courts to impose a requirement that individual class members file a notice affirmatively opting *in* to the class or affirmatively requesting *inclusion* as a condition of participation or any recovery that the class may obtain.’

109 *Sutton v Hopkins County*, 2006 US Dist (WD of Kent, 16 March 2006) at 11243 (McKinley J).

is inconsistent with the class closing device adopted in *GIO*¹¹⁰ but not with client criterion mechanisms.

E. Two Restrictions Imposed by Australia's Opt Out Regimes

The provisions governing Australia's opt out regimes appear to achieve the same result that is achieved, with respect to Alberta's class action regime, by s 17(1)(a) of the *Class Proceedings Act*, SA 2003, c C-16.5, which reads as follows:

For determining, with respect to a class proceeding, whether a person is a class member or remains a class member, the following applies: ... a person ... who meets the criteria to be a class member in respect of the class proceeding is a class member in the class proceeding unless that person, in the manner and within the time provided for in the [judicial] order made in respect of the class proceeding, opts out of the class proceeding.¹¹¹

Once the opt out mechanism is seen as operating only with respect to the represented group as identified and described in the pleadings, it becomes apparent that it imposes two major restrictions on both representative plaintiffs and trial judges presiding over the class proceeding. The first restriction imposed by the opt out regime is that once a properly instituted class action is in progress, those claimants who fall within the description of the represented group contained in the pleadings are class members who may not be deprived of this status merely because they have failed to provide written consents to being class members.

The recent ruling by Tamberlin J in the *Johnstone v HIH Limited*¹¹² FCAA proceeding confirms the existence of this restriction. The *HIH* class proceeding was brought on behalf of the shareholders and noteholders in HIH Limited (the first respondent) who suffered loss and damage as a result of the misleading and deceptive conduct of any of the respondents. The respondents included the accounting firm and the insurers of HIH Limited. The lawyers hired by the representative plaintiff sent the class members a letter which contained the following paragraph:

You are ... still able to join by completing the accompanying *HIH CLASS ACTION FORM*, and forwarding it together with payment by means of a cheque, money order or credit card of a nominal amount of \$350 plus GST of 10% (total \$385), made payable to Dennis & Company. Our fee to join this Class Action includes all work necessary to quantify and prosecute your claim and is your only expense.¹¹³

The court accepted the submissions put forward by some of the respondents to the effect that this paragraph was misleading for two reasons. The first was that it incorrectly suggested that, in order to be bound by the proceedings, those shareholders and noteholders in HIH Limited who suffered the relevant loss, and were thus part of the representative group as described in the pleadings, were

110 *GIO* [2003] FCA 980.

111 *Class Proceedings Act*, SA 2003, c C-16.5, s 17(1)(a).

112 *Johnstone v HIH Limited* [2004] FCA 190 ('*HIH*').

113 *HIH* [2004] FCA 190 at [99] (Tamberlin J).

required to complete and send an ‘HIH Class Action Form’. The passage was also misleading to the extent that it suggested that it was also necessary to pay money in order to be considered as class members in the proceeding.¹¹⁴ The remedy granted by the court was to require the solicitors to draft a letter of correction that was to be sent to the recipients of the misleading letter.¹¹⁵

Further examples of devices that are difficult to reconcile with opt out mechanisms are the class closing devices implemented in *GIO*¹¹⁶ and *Williams*.¹¹⁷ It will be recalled that in the former case class members were excluded from the class proceeding if they failed to formally express their consent to being class members by filling in and sending a form. In *Williams* unrepresented class members were excluded from both the proceeding and the proposed settlement unless they contacted the court and voiced their objections to this proposed strategy. Ironically, Stone J in *Dorajay* held that these devices were fully authorised by the broad managerial powers conferred upon trial judges by the FCAA and the SCA.¹¹⁸

Section 33ZB of the FCAA, which has been described by the Full Federal Court as the ‘pivotal provision of Part IVA,’¹¹⁹ is consistent with this interpretation as it provides that a judgment given in an FCAA proceeding ‘binds all such persons [described or otherwise identified in the judgment] other than any person who has opted out of the proceeding under section 33J.’¹²⁰ This provision and its Victorian counterpart¹²¹ lead us to the other condition imposed by the opt out regime that may be discerned from the terms of the FCAA and the SCA: namely, that class members must be given an opportunity to exclude themselves from the class proceeding if they so desire. In fact, s 33J of both regimes provides that 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.

F. Conclusion

The analysis developed in this Part has demonstrated that the MBC criterion does not contravene the provisions of the FCAA and the SCA that govern the opt out device. Consequently, the adoption of the philosophy — concerning the most appropriate approach to statutory interpretation, embraced by Stone J herself (and captured in the following passage) — leads to the conclusion that it was inappropriate for Stone J to use the s 33N power to order the discontinuance of the

114 *Id* at [102] (Tamberlin J).

115 *Id* at [106] (Tamberlin J).

116 *GIO* [2003] FCA 980.

117 *Williams* (2000) 180 ALR 459.

118 *Dorajay* (2005) 147 FCR 394.

119 *Femcare Ltd v Bright* (2000) 100 FCR 331 at 338 (Black CJ, Sackville & Emmett JJ).

120 *Federal Court of Australia Act 1976* (Cth) s 33ZB.

121 *Supreme Court Act 1986* (Vic) s 33ZB, which provides that a judgment given in an SCA proceeding ‘binds all persons [described or otherwise identified in the judgment] who are such group members at the time the judgment is given.’

Dorajay proceeding as a class proceeding, if the MBC criterion was not abandoned: '[t]he goals that Pt IVA was intended to achieve must be considered, not in the abstract but in the context of the procedures that Parliament expressly adopted.'¹²² *Dorajay* also highlights the need to drastically curtail the power of trial judges to terminate properly instituted class proceedings. This issue is, of course, beyond the scope of this article.¹²³

At the same time, it has been shown that the reduction in the number of potential class members that ordinarily results from the implementation of client criterion mechanisms is prima facie inconsistent with the desirable goal of employing the class action device to provide access to justice to groups of similarly situated victims of illegal conduct. This latter conclusion is based on the premise that assessing the compatibility of the MBC criterion with the policy goals of class actions entails comparing the size of the class in a class proceeding where the MBC criterion is employed with the size of the class where a more traditional description of the represented group is used, such as the one envisaged by the ALRC, by Stone J in *Dorajay*¹²⁴ and by Finkelstein J in *Cadence*.¹²⁵ But what if the effect of the judicial rejection of a client criterion is that it will substantially decrease the employment of the class action device and thus render more difficult the attainment of the desirable goals of access to justice and judicial economy that Australia's class action regimes were created to attain? In such a scenario, the employment of the client criterion mechanism may be said to represent the lesser of two evils, as a class proceeding that benefits a limited number of victims represents a superior option to having no class proceeding at all.

The likely impact of the non-availability of a client criterion mechanism on the approach of solicitors acting for class representatives and the commercial litigation funders that fund class proceedings will now be considered.

5. *The Financial Dimensions of Class Proceedings*

A. *Overview*

If one were to rely solely on the analyses of Stone J in *Dorajay* and Finkelstein J in *Cadence* in ascertaining the circumstances that prompted the implementation of the MBC criterion, one would be entitled to conclude that the MBC criterion represents an attempt on the part of entrepreneurial solicitors¹²⁶ to secure a

122 *Dorajay* (2005) 147 FCR 394 at 433 (Stone J).

123 See Morabito & Epstein, above n98 at [6.16]–[6.19]; Morabito, above n51; Bernard Murphy & Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30 *Melbourne University Law Review* 399 at 416–8.

124 *Dorajay* (2005) 147 FCR 394.

125 *Cadence* (Unreported, Federal Court of Australia, Finkelstein J, 23 December 2005).

126 Whenever the term 'entrepreneurial' is employed to refer to solicitors acting for class representatives, it is intended as a criticism of such solicitors. But, as noted by an American commentator, 'entrepreneurial litigation is what class actions are all about': see Note, 'Investor Empowerment Strategies in the Congressional Reform of Securities Class Actions' (1996) 109 *Harvard Law Review* 2056 at 2060.

monopoly with respect to all of the legal claims that fall within the ambit of the class action litigation. But, with all due respect, this approach displays a judicial inability to recognise or appreciate a number of practical considerations of some significance.

In the first place, lawyers acting for the representative plaintiffs enjoy, in effect, a monopoly over each of the claims being litigated in the class proceeding. In fact, whilst it is true that in the absence of a client criterion, individual class members are free to hire their own lawyers, there exist a number of reasons why in the vast majority of cases this will not occur. Where the individual claims of class members are individually non-recoverable, seeking the services of a solicitor other than the solicitor in charge of the proceeding would not constitute a financially rational strategy. Even where the individual claims are significant, in most circumstances hiring another solicitor would not represent a fruitful exercise. This is because this solicitor would not have all the information concerning the class action litigation that would be required in order to provide effective advice to the class member in question. Attention should also be drawn to the fact that an established feature of Australia's class action landscape, which has been judicially opposed on only one occasion,¹²⁷ is that the solicitors of class representatives seek to enter into conditional fee agreements with not just the class representatives, but also the class members.¹²⁸ It is therefore not surprising that, in a number of recent class proceedings, all of the class members were clients of the class solicitors, despite the non-employment of mechanisms similar to a client criterion.¹²⁹

But a far more significant flaw in the judicial approach to the MBC criterion is the simple fact that the significant decrease in the number of class members, that results from the adoption of mechanisms that require claimants to take a positive step, drastically reduces the ultimate compensation secured by such solicitors on behalf of the class. It is thus not surprising that whenever the enactment of a class action regime is debated, the opt out regime is invariably advocated by those who support the introduction of class actions whilst those who oppose them favour an opt in device.¹³⁰ Equally unsurprising is the fact that none of the respondents in *Dorajay* and *Cadence* objected, at first, to the employment of the MBC criterion. It was only after the trial judges expressed their objections to the MBC criterion that the respondents made various and vigorous submissions against it. In *Rod*, the attack on the MBC criterion was only launched by the defendants after Stone J handed down her judgment in *Dorajay*.¹³¹ This change in attitude was, of course,

127 See *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167.

128 See, for example, Grave & Adams, above n66 at 467; Ben Slade, 'Class Actions: Watch Out for the Details' (2002) 16(3) *Commercial Law Quarterly* at 3, 5; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) at 490; *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317; *Courtney v Medtel Pty Limited (No 5)* (2004) 212 ALR 311 at 322 (Sackville J).

129 See *Neil v P & O Cruises Australia Limited* [2002] FCA 1325 at [7] (Weinberg J); *Mardini v Arthurs Seat Scenic Chairlift Pty Ltd* (No 5648 of 2003; proceeding); *Reiffel v ACN 075 839 226 Pty Ltd (No 2)* [2004] FCA 1128 at [10] (Gyles J); *Petrusevski v Bulldogs Rugby League Club Ltd* [2004] FCA 1712 at [4] (Gyles J); *Crawford v Bank of Western Australia Ltd* [2005] FCA 949 at [22] (Lee J).

prompted by a realisation that this judicial opposition could be employed to seek a termination of the proceedings as class proceedings. The question still remains: why the implementation of a mechanism by plaintiff solicitors that weakens significantly the position of the plaintiff class? The answer to this question will reveal the sorry state of Australia's class action regimes.

B. Costs and Funding of Class Actions

As noted above, class members are bound by the outcome of a class proceeding without being formal parties to the litigation. This confers upon them an immunity from adverse cost awards. In the absence of retainer agreements entered into between individual class members and the lawyers hired by the class representatives, class members are not liable for the costs and fees incurred in running the proceeding on the plaintiff's side. The term 'free riders' has thus been used on a regular basis to describe the position of class members.¹³² In many circumstances, it would not be financially rational for aspiring class representatives to institute class actions, unless they were able to shift to others the liability for (a) the fees and disbursements of the class representative's lawyers; (b) any costs awarded to the defendants in the event of a loss for the class;¹³³ and (c) any security for costs orders granted to the defendants.¹³⁴ This state of affairs was aptly described as follows by Wilcox J of the Federal Court:

130 Compare, for example, 'Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules' (1978) 5 *Class Action Reports* 3 at 22 ('the real reason for the opt in procedure is quite clear. It is to permit defendants to escape large proportions of deserved liabilities for actual harms inflicted. This is to be accomplished by exploiting the predictable nonresponses to legalese opt in notices often incomprehensible to the average layman, who is offered no immediate and tangible benefit for undertaking the burden of responding affirmatively') with Senator Peter Durack as quoted in Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991 at 3022 ('Our court system is based on the fact that individuals make their own decisions to initiate proceedings; it is done by the conscious decisions of individuals. That is what ought to happen; people ought to take responsibility for whether they want to start proceedings. But under this Bill they become part of a system without knowing, or perhaps even caring. It really goes against the philosophical basis of our legal system and affects the individual rights of people to make those decisions').

131 *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 499.

132 See Vince Morabito, 'Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs' (1995) 21 *Monash University Law Review* 231 at 235-9 and the references cited therein.

133 See, for example, Australian Law Reform Commission, *Costs Shifting: Who Pays For Litigation*, Report No 75 (1995) at 17: 'Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation. For people caught up in the legal system it can become an intolerable burden.' See also Law Council, above n18 at 10: 'The cost of litigation is clearly a prohibitive factor for many people seeking to right a civil wrong'.

134 Since the Full Federal Court's decision in *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, the chances of such orders being issued in class proceedings have increased significantly: see Mulheron, above n66 at 370-3; Vince Morabito, 'Class Actions in the Federal Court of Australia: The Story So Far' (2004) 10 *Canterbury Law Review* 229 at 253-7; Grave & Adams, above n66 at 253-78; Murphy & Cameron, above n123 at 420-2.

the problem is that a representative party is exposed to the risk of an order to pay the costs of a respondent or respondents (the amount of which will usually be increased by the very fact that the proceeding *is* a representative one), without gaining any personal benefit from the representative role. So there is little or no incentive for a person to act as a representative party. Unless the person's potential costs are covered by someone else, there is a positive disincentive to taking that course.¹³⁵

Where the class representative's individual claims would not warrant individual litigation, it would make little sense for such claimants to bear the financial burden of a far more costly and complex type of litigation: namely, a class proceeding. The following comments made by Kirby J in *Fostif*, with respect to the difficulties faced by those who institute proceedings pursuant to the traditional representative action procedure, are equally applicable to FCAA and SCA proceedings:

it is necessary to keep in mind the particular demands inherent in representative proceedings: the need to marshal effectively substantial resources; to gather voluminous evidence; to retain and pay competent counsel over a significant period; often to provide substantial security for costs; to attend both to the general issues and to those particular to identified subcategories and individual cases; and to prove consequential losses usually with the evidence of several experts.¹³⁶

Attention should also be drawn to the costs entailed in furnishing class members with opt out notices: that is, notices that advise class members of the commencement of the class proceeding, the claims being pursued on behalf of the class, the description of the represented group and the right of the members of such group to exclude themselves from the litigation. Such notices are usually published in newspapers. If this advertising were limited to one state it would cost at least \$20 000, whilst if it were undertaken nationally, as is frequently the case, it would cost at least \$100 000.¹³⁷ In light of these and other significant costs entailed in running a class suit, the commencement of a traditional proceeding, where the individual claim of the claimant in question is individually recoverable, would again constitute a more appealing option than acting on behalf of a group of similarly situated claimants.

In its 1988 study of the class action procedure, the ALRC recognised that the general rules governing litigation costs, if applied unaltered to class actions, could constitute 'a disincentive to bringing grouped proceedings, and might in fact create

135 *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139 at 145. See also Michael Abdelkerim, 'Class Counsel's Ethical Obligations' (2004) 18 *Windsor Review of Legal and Social Issues* 105 at 110; Garry D Watson, 'Class Actions: The Canadian Experience' (2001) 11 *Duke Journal of Comparative and International Law* 269 at 275. Murphy & Cameron, above n123 at 434, have revealed that 'in the GIO class action, approximately 70–80 of the people who telephoned the eventual class lawyers regarding their losses were asked whether they would agree to be the lead plaintiff in the contemplated litigation before one agreed to assume that role.'

136 *Fostif* (2006) 80 ALJR 1441 at 1472 (Kirby J).

137 Affidavit of Bernard Michael Murphy, dated 31 March 2005, filed in the *Dorajay Pty Ltd v Aristocrat Leisure Limited* No N362 of 2004 proceeding at 12–13 ('Murphy Affidavit').

yet another barrier to access to legal remedies of the kind which the recommended procedure itself aims to overcome.¹³⁸ To address these problems, the ALRC recommended that the financial burdens be shifted from the class representatives to a class action fund and to their solicitors.

With respect to the former strategy, the ALRC proposed the creation of a special fund to provide for the costs of parties involved in class proceedings.¹³⁹ This fund would apply a merit test to any application for financial assistance. The ALRC was of the view that '[w]hile there may be special cases where means should be taken into account, the focus of any special fund should be to provide funding based on merit.'¹⁴⁰ This fund would be used to 'provide support for the applicants' proceedings and to meet the costs of the respondent if the action is unsuccessful.'¹⁴¹

The other strategy proposed by the ALRC was that class representatives should be allowed to execute conditional fee agreements pursuant to which the class solicitor charges nothing if the case is lost and a higher than scale fee if the case is successful. This strategy would provide a means of financing group litigation and of overcoming the costs disincentives to the institution of class actions.¹⁴² Under the ALRC's proposed regime, such arrangements could not come into effect until approved by the court. Before giving this approval, the court would need to be satisfied that the method of calculating the fees was fair and reasonable.¹⁴³ Before the court commenced its assessment of fee agreements, notice would be given of the fee agreement to the class members in order to provide them with the opportunity to appear before the court and to argue against approval.¹⁴⁴

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

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

138 ALRC 1988 Report, above n3 at 106. See also Ontario Law Reform Commission, *Report on Class Actions*, Report No 48 (1982) at 647; Law Reform Committee of South Australia, *Report Relating to Class Actions*, Report No 36 (1977) at 6; Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) at 239.

139 ALRC 1988 Report, above n3 at 127.

140 Ibid.

141 Id at 126.

142 Id at 118–9.

143 Id at 121.

144 Ibid.

recently, to drive the American legal system rather than the merits of the issues themselves.¹⁴⁵

It is important to remember that, contrary to what Senator Tate indicated in the passage quoted above, the ALRC *did not recommend* the employment of contingency fees pursuant to which solicitors acting for the class representatives would be entitled to receive a percentage of the proceeds won on behalf of the class.¹⁴⁶ The rejection of the conditional fee recommendation has been superseded by the enactment, in several states, of legislation that authorises such arrangements in most proceedings, including class proceedings. However, as aptly noted by Damian Grave and Ken Adams, ‘the legislative pendulum in respect of conditional uplift costs agreements appears to have swung in the opposite direction with the New South Wales Parliament’s decision [which came into effect in 2005] to prohibit uplift [fees] for damage claims.’¹⁴⁷

The employment of conditional fee arrangements by the class representative’s solicitors had been, until recently, the principal mechanism for financing class proceedings in Australia. However, in the last few years commercial litigation funders¹⁴⁸ have entered the class action arena.¹⁴⁹ The implementation of the MBC criterion and similar mechanisms has been an integral part of their involvement in class proceedings. The reasons for this strategy have been described as follows by the Law Council of Australia:

145 Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991 (Senator Michael Tate) at 3025. Similarly, a number of American commentators have advocated the termination of the employment of contingency fee agreements in class actions: see Lester Brickman, ‘ABA Regulation of Contingency Fees: Money Talks, Ethics Walks’ (1996) 65 *Fordham Law Review* 247 at 299–315. On the other hand, the United States Supreme Court has recognised that such agreements may enable the vindication of the rights of classes of similarly situated claimants: *Deposit Guaranty National Bank v Roper* 445 US 326 (1980) at 338. See also FG Hawke, ‘Class Actions: The Negative View’ (1998) 6 *Torts Law Journal* 68 at 74, where it is noted that ‘if society wants a class action facility it must also accept some form of contingent fee or other lawyer-finance arrangement to make it work.’

146 In fact, cl 33(2) of the Bill drafted by the ALRC expressly provided that ‘the Court shall not approve an agreement that provides for the amount of the remuneration to be ascertained by reference to the amount recovered, or ordered to be paid, in the proceedings’: ALRC 1988 Report, above n3 at 165.

147 Above n66 at 482. The practical effect of this legislative amendment in NSW has been accurately described as follows by the Law Council, above n18 at 12: ‘it must be noted that access to justice in NSW has been significantly curtailed by the ... ban on uplift fees in damages claims. This has effectively removed the capacity of law firms to incorporate the risk of accepting cases on a [“no win, no fee”] basis into their fee structure, making speculative damages claims virtually untenable in that jurisdiction, to the significant detriment of impecunious plaintiffs.’ Consequently, the Law Council has recommended that this ban be repealed: *id* at 26.

148 According to the Law Council, above n18 at 6, ‘[t]here are five LFCs currently operating in Australia — IMF (Australia) Limited, Hillcrest Litigation Services Limited, Litigation Lending Services Pty Ltd, Australian Litigation Funding Pty Ltd and Firmstone & Feil. These private LFCs account for approximately 95 per cent of litigation funding in Australia.’

149 See Murphy & Cameron, above n123 at 435.

A [litigation funder ('LFC')] will not agree to fund proceedings where potential plaintiffs can choose whether or not to agree to the LFC's terms because parties who commenced proceedings guaranteed by the funder will be at a disadvantage compared to parties that do not sign the agreement, effectively creating a 'free-rider' problem. There will be no incentive for parties to sign an agreement with the LFC if they believe they can join the class and obtain the benefit from the proceedings without paying a percentage to the funder.¹⁵⁰

The involvement of commercial litigation funders may also be viewed from another perspective. It signals an increasing unwillingness on the part of plaintiff lawyers to bear the costs and risks inherent in a no win no fee arrangement.¹⁵¹ This is not surprising when one considers that, pursuant to such conditional fee arrangements, the class representative's lawyers are the ones that underwrite the high costs of the class proceedings in the hope that a successful outcome for the class will ensue. In the *GIO* proceedings mentioned above, for instance, approximately 13 months before a settlement agreement was executed by the parties and approved by the court, Moore J of the Federal Court revealed that the

[class representative's law firm] is not a party to the proceeding though it has not sought to disguise the fact that it is underwriting the costs of the litigation brought by Mr King [the class representative] which, to date, amount to almost five million dollars.¹⁵²

Furthermore, as noted by Murphy, 'there is massive expenditure on barristers, experts and solicitor time involved and these expenses have to be carried for five to six years before payment. If the case is unsuccessful, that expenditure is lost.'¹⁵³ In meeting these costs, no reliance may be placed on public funding.¹⁵⁴ The practical consequence of this scenario is that:

it is generally not viable for most law firms to fund representative proceedings on a conditional basis The price of failure is high, too high for many to risk it again. Only major firms with significant capital reserves have the financial capacity to fund large-scale commercial litigation — and generally not more than one at a time, due to the high risk and cost involved. While law firms are able to facilitate access to justice for some, this work is but a fraction of the overall assistance required for plaintiffs in this area.¹⁵⁵

150 Law Council, above n18 at 17–18. See also Ben Slade, 'Litigation Funding: A Social Service' (Paper presented at AILA 2006 Insurance Law Intensive, Gold Coast, 25–26 May 2006) at [5.7].

151 This problem has been exacerbated by the possibility that such solicitors may be found personally liable for the costs of the respondents/defendants: see Mulheron, above n66 at 479; Murphy & Cameron, above n123 at 424.

152 *GIO* (2002) 121 FCR 480 at 485 (Moore J).

153 Bernard Murphy, 'Current Trends and Issues in Australian Class Actions' (Paper presented at the International Class Actions Conference, Maurice Blackburn Cashman Lawyers, Melbourne, December 2005) at [3.5.2].

154 This is, of course, attributable to the lack of a class action fund and to the fact that legal aid 'is generally available only for criminal and family law disputes': Law Council, above n18 at 11.

In *Rod* the MBC criterion was employed despite the non-involvement of commercial litigation funders.¹⁵⁶ Thus *Rod* (and previous proceedings where a client criterion was employed) highlight the fact that where such solicitors are willing to act on behalf of class representatives without the financial backing of entities such as ILF, such involvement may, on occasions, be made conditional on the solicitors' ability to restrict the ambit of the represented group to their clients. The reasons for this approach are conveniently contained in an affidavit sworn by Murphy in *Dorajay*.¹⁵⁷ In the Murphy Affidavit, emphasis was placed on the problems that had been experienced in the *GIO* proceeding. It will be recalled that in this FCAA action the judicial implementation of a closing the class device resulted in the exclusion of over 23 000 shareholders/class members from the proceeding.¹⁵⁸ In the Murphy Affidavit, it is explained that

[t]he GIO class action did not include in the class description any requirement that group members have instructed MBC ... [T]he absence of an MBC criterion had the direct consequence that very substantial time and resources of the parties and the Court had to be expended in determining first which shareholders were in the class, and then which of those were interested in participating in settlement.¹⁵⁹

This line of reasoning, in support of the MBC criterion, exhibits an appealing logic. The MBC criterion was intended to attain the same outcome that was achieved by the process that was initiated by the Form C mechanism in *GIO*.¹⁶⁰ But it would be achieved without the delay experienced and the costs incurred in *GIO*, in ascertaining which class members were interested in participating in the proceedings or in any settlement. The interpretation of the FCAA that has been judicially embraced and outlined above leads to the conclusion that the Federal legislature introduced an extremely odd class action regime, pursuant to which devices that render the inclusion of claimants in the representative group dependent on such claimants taking a positive step are, generally speaking, legal and permissible if the court implements them during the course of the class proceeding, but not if the plaintiffs implement them at the outset of the litigation. Conversely, in the United States, a distinction has been drawn between,

155 *Id* at 12. See also Murphy & Cameron, above n123 at 405 ('there are only two firms in Australia that frequently act for applicants in this area — even though the procedure has been available for over 14 years. Given the ability of lawyers to locate and practise in profitable areas, this is a good indicator of how difficult it is to run class action litigation'). The two firms in question are MBC and Slater & Gordon.

156 *Rod* [2005] VSC 449.

157 Murphy Affidavit, above n137. See also Cashman, above n8 at 739; Murphy & Cameron, above n123 at 419: 'In our experience, victims of a mass wrong who are interested in pursuing a case often take the view that the litigation should be for the benefit of those who agree upon common arrangements for its efficient conduct. These arrangements might include, for example, contributing to a fighting fund, agreeing to particular funding arrangements, or agreeing to use and follow reasonable advice of shared solicitors'.

158 *GIO* (2002) 121 FCR 480.

159 Murphy Affidavit, above n137 at 14.

160 *GIO* (2002) 121 FCR 480.

on the one hand, requiring an individual to take affirmative action to join a class for liability determination purposes and, on the other hand, requiring a class member to take action (such as filling out a claim form) in order to obtain the ultimate relief. The former is an “opt in” provision and the latter is not, since a class member who fails to obtain ultimate relief because he did not fill out a claim form is nonetheless still a class member.¹⁶¹

It will be recalled that in *GIO* the class closing device was implemented before liability was determined.¹⁶²

When contacted by the author (before the High Court’s decision in *Fostif*), John Walker, the Managing Director of ILF, and its parent company, IMF (Australia) Ltd, indicated that as long as the MBC criterion continued to be judicially disallowed, the funding provided by these entities would be diverted to group litigation brought under the traditional representative action procedure that is available in every Australian state.¹⁶³ Murphy expressed to the author a similar intention to move away from the class action regimes and towards the state regimes mentioned above, when instituting multi-party litigation.¹⁶⁴ The tragic irony is that the FCAA and the SCA were introduced to overcome the numerous and significant shortcomings of the traditional representative action procedure which had prevented this procedure from providing an effective and efficient means of dealing with multi-party litigation.¹⁶⁵ More importantly, the High Court’s decision in *Fostif*:

has the effect of requiring the class of plaintiffs to be identified at the commencement of proceedings or otherwise defined as an open class for which relief is sought [This] frustrates any attempt to capture the class so as to limit the group to those who agree to a funder’s terms. To this degree the decision is as frustrating for LFCs as were [the rulings in *Dorajay* and *Rod*].¹⁶⁶

A more general problem in using the traditional representative action procedure was adverted to by Gleeson CJ in *Fostif*:

The main problem is that the rule of court ... in the present case ... was based on a model taken from the 19th century, and was ill-adapted to the exigencies of modern commercial litigation funding. The rule is required to bear a weight for which it was not designed.¹⁶⁷

161 *Kern v Siemens Corporation*, 393 F 3d 120 (2nd Cir, 2004) at 127 (Cabranes J).

162 *GIO* (2002) 121 FCR 480.

163 See also Law Council, above n18 at 18.

164 Personal communication from Bernard Murphy to Vince Morabito. See also Murphy & Cameron, above n123 at 419–20, where it is revealed that ‘there are at least two large claims in excess of \$97 million that will not run as a class actions as a direct result of the [*Dorajay* and *Rod*] decisions.’

165 See generally Morabito & Epstein, above n98 at [22]–[34]; Mulheron, above n66 at 77–94.

166 Law Council, above n18 at 17. It is therefore not surprising that when contacted after *Fostif*, Walker and Murphy revealed a far more cautious approach, on the part of IMF and MBC respectively, towards the employment of the traditional representative action procedure.

167 *Fostif* (2006) 80 ALJR 1441 at 1446 (Gleeson CJ).

6. Conclusion

The picture that emerges from the review of Australia's class action regimes developed in this article is a grossly unsatisfactory one. The comments of the ALRC and the Federal Attorney-General (upon which great reliance was placed by Stone J in *Dorajay*) display an intention to introduce a class action device that would provide access to justice to as many members of groups of similarly situated victims as possible through, among other things, the employment of an opt out regime. However, the Federal and Victorian class action regimes that were enacted departed significantly from this desirable scenario. No obligation to bring a class action on behalf of all potential claimants was imposed on aspiring class representatives. On the contrary, class representatives are expressly authorised to institute a class proceeding on behalf of only 'some' of the relevant victims. Class representatives have also been provided with an unfettered discretion in determining which of the claimants are included in the description of the represented group: that is, in determining the lucky 'some' mentioned above.

Equally troubling has been the failure of the drafters of the FCAA and the SCA to provide aspiring class representatives with the financial tools required to meet the significant costs entailed in instituting and running a class proceeding that is governed by an opt out device. In fact, opt out notices, as well as other notices that advise class members of the main developments in the class action, need to be published, usually in more than one newspaper. And, of course, in the event of a successful outcome for the class, lengthy and costly steps need to be implemented in order to identify class members and distribute to them the 'fruits' of the litigation.

In this scenario, the recent involvement in class action litigation by commercial litigation funders has been a positive development.¹⁶⁸ But the financial support to class representatives provided by these third parties comes at a cost. A significant percentage of the proceeds procured on behalf of the class must be paid to such funders.¹⁶⁹ It is important to bear in mind that receiving a percentage of the proceeds is a privilege that is not extended to solicitors that enter into conditional fee agreements. But, of course, the most negative dimension of litigation funding is represented by the employment of mechanisms such as the MBC criterion, which restrict the pool of claimants who benefit from a class proceeding to the clients of the class representative's solicitors. This less-than-ideal scenario does not, however, furnish evidence in support of the extremely hostile characterisation

168 See *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292 at [54] (Lord Phillips MR): 'Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation.'

169 It is interesting to note that in its 1988 report, the ALRC expressed a preference for 'private financing of grouped proceedings by, for example, consumer organisations or environmental groups in every case, as long as the agreement to maintain the action was not made in consideration of a share in the proceeds or subject matter of the action': ALRC 1988 Report, above n3 at 129.

of litigation funders provided by Callinan and Heydon JJ of the High Court in *Fostif*:

The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes, by assuming near total control of their conduct, and by manipulating the procedures and orders of the court with the motive, not of resolving the disputes justly, but of making very large profits.¹⁷⁰

A more persuasive and balanced assessment of the impact and utility of litigation funders has been provided by the Law Council:

the arguments in favour of litigation funders being entitled to fund litigation greatly outweigh the arguments against, provided relatively simple criteria are met and the courts accept a supervisory role. This is especially the case with respect to large and complex commercial litigation, including class actions, where all parties involved remain insolvent.¹⁷¹

The fact that MBC is increasingly implementing this class-narrowing mechanism, even where no third party funding is involved, is also symptomatic of the increasing difficulties faced by those desiring to act on behalf of groups of similarly situated victims. It must be noted, in fact, that MBC has acted for class representatives, pursuant to conditional fee agreements, in the majority of class proceedings that have been brought in Australia since 1999.

Equally contradictory and unsatisfactory has been the approach of trial judges to the question of what an opt out mechanism entails. They have exhibited no interest in ascertaining whether the criteria, pursuant to which potential claimants have been excluded from the description of the class, were consistent with the requirements of an opt out mechanism. They have also had no hesitation in employing their broad managerial powers to exclude class members from class proceedings upon their failure to fill in forms that recorded their interest in participating in the litigation.

In light of the scenario depicted above, the intervention of the Federal and Victorian legislatures is highly desirable: indeed, essential. Hopefully, such legislative intervention will not encompass the prohibition of client criterion mechanisms. In fact, such prohibition would constitute a myopic approach as it

170 *Fostif* (2006) 80 ALJR 1441 at 1496 (Callinan & Heydon JJ).

171 Law Council, above n18 at 8. See also *Fostif* (2006) 80 ALJR 1441 at 1467–8 (Kirby J): ‘To lawyers raised in the era before such multiple claims, representative actions and litigation funding, such fees and conditions may seem unconventional or horrible. However, when compared with the conditions approved by experienced judges in knowledgeable courts in comparable circumstances, they are not at all unusual. Furthermore, the alternative is that very many persons, with distinctly arguable legal claims, repeatedly vindicated in other like cases, are unable to recover upon those claims in accordance with their legal rights.’

would entail dealing with the symptom rather than the cause of the problem. As aptly noted by Cashman:

From a public policy perspective, there are clearly arguments in favour of classes being defined as broadly as possible so as to maximise the beneficiaries of the litigation in the event that it is successful, or to maximise the number of persons bound by a determination, even if unfavourable to the group. However, the legislation imposes the financial burden on the applicant to conduct the case and places the applicant at personal risk of an adverse costs order. The failure to implement the recommendations of the ALRC in favour of contingency fees, and a class actions fund coupled with the inability of lawyers to charge a fee calculated as a percentage of the total recovery on behalf of the class as a whole (unlike in the United States and Canada), has resulted in a situation where the financial burdens of such litigation are usually met by either the law firms conducting the case or commercial litigation funders. Providing that the requirements of Pt IVA are otherwise satisfied, it ought not be a matter of concern to the court or the respondent if certain group members, law firms or funders decide to limit the class to persons or entities who wish to have claims pursued on their behalf.¹⁷²

The rejection of a mechanism, on the basis that it prevents a significant proportion of claimants from gaining access to justice, represents a self-defeating exercise if it results in access to justice becoming an unattainable goal for *all claimants*. Measures must instead be introduced by the Federal and Victorian legislatures to help class representatives overcome the formidable financial barriers to the employment of the class action device.¹⁷³ It is again appropriate to refer to the judgment of Kirby J in *Fostif*:

we would now recognise ... the fundamental human right to have equal access to independent courts and tribunals. These institutions should be enabled to uphold legal rights without undue impediment and without rejecting those who make such access a reality where otherwise it would be a mere pipe dream or purely theoretical.¹⁷⁴

A way must also be found of enabling class actions to benefit as many claimants as possible whilst, at the same time, ensuring that commercial litigation funders continue to provide financial support to class representatives. It is submitted that an appropriate starting point for an inquiry as to how this desirable goal may be secured is to consider whether a modified version of Rule 23(g)(2)(C) of the *United States Federal Rules of Civil Procedure*, which came into operation in December 2003, should be introduced in Australia.¹⁷⁵ As explained by the United States Civil Rules Advisory Committee, ‘attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may

172 Cashman, above n8 at 751–2.

173 See generally Mulheron, above n66 at 435–479; Morabito, above n132; Grave & Adams, above n66 at 435–84.

174 *Fostif* (2006) 80 ALJR 1441 at 1473 (Kirby J).

175 See also Cashman, above n8 at 752; Law Council, above n18 at 17.

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.¹⁷⁶

The reform advocated by IMF and MBC is for the FCAA and the SCA to expressly allow class representatives (and the court) the choice between an opt out device and an opt in device. This ‘hybrid’ model,¹⁷⁷ if implemented, would bear a broad similarity to the regimes proposed in England and Wales by Lord Woolf in 1996,¹⁷⁸ by the South African Law Commission in 1998,¹⁷⁹ by the US Civil Rules Advisory Committee in 1993¹⁸⁰ and by the US Justice Department in 1979.¹⁸¹

176 *Report of the Civil Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure* (2002) United States Courts at 111–2 <<http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf>> accessed 24 January 2007. The Civil Rules Advisory Committee added that, pursuant to this provision, “Courts 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”: *id* at 115.

177 See generally Morabito, above n88 at 635; Mulheron, above n66 at 33–4.

178 Lord Woolf, above n138 at 236.

179 South African Law Commission, *The Recognition of A Class Action in South African Law*, Project 88, Working Paper 57 (1995) at [5.11.4].

180 See Thomas Willging, Loral 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) at 97.

181 Deborah Hensler, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross, Erik Moller and Nicholas Pace, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Report; RAND Institute for Civil Justice, Santa Monica; 2000) at 21.

