

**AN EMPIRICAL STUDY OF AUSTRALIA'S CLASS
ACTION REGIMES**

FIRST REPORT

CLASS ACTION FACTS AND FIGURES

By

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EXECUTIVE SUMMARY

KEY FINDINGS

- A total of 241 Part IVA applications have been filed up to 3 March 2009 and 245 up to 30 June 2009, providing an average of 14 class action proceedings every 12 months since the Part IVA regime came into operation on 4 March 1992.
- Dividing the first 17 years of Part IVA into four equal periods of 4 years and 3 months, we find an extremely limited use of this regime in the first quarter - from 4 March 1992 to 3 June 1996 - (33 proceedings), more extensive use from 4 June 1996 to 3 September 2000 (92 proceedings) and a decreasing number of Part IVA proceedings ever since: 63 from 4 September 2000 to 3 December 2004 and 53 from 4 December 2004 to 3 March 2009.
- In no financial year, since Part IVA came into operation, have Part IVA proceedings constituted more than 0.74% of all Federal Court proceedings.
- Just over 81% of all the Part IVA proceedings filed in the first 17 years of Part IVA's operation were filed in the Victorian and NSW Registries with 35% in the former and 46% in NSW.
- New South Wales was the leading Part IVA jurisdiction overall and in the first eight and half years of Part IVA. But 48.2% of all the Part IVA applications filed since 4 September 2000 were filed in Victoria.
- The average number of respondents has been 3.65. In 51% of Part IVA proceedings, there were multiple respondents. In the pre-*Philip Morris* era, 51.6% of Part IVA proceedings were brought against more than one respondent. It is interesting to note that this percentage increased to 54.8% in the post-*Philip Morris* period. There were both multiple respondents and applicants in 14.5% of all class action proceedings.
- The average duration of all finalised Part IVA proceedings is 698 days (approximately 23 months) whilst the median duration is 446 days (approximately 14 months). Close to 42% of all finalised Part IVA proceedings were resolved within 12 months and close to 70% were concluded within two years.
- The average duration of Part IVA proceedings filed in NSW is 817 days (approximately 27 months). This average is 39% and 81% greater than the average duration of all non-NSW Part IVA proceedings and Victorian Part IVA proceedings, which stand at 587 (approximately 19 months) and 450 days (approximately 15 months), respectively.

- Using the Federal Court’s classification of causes of action, 40.2% of all Part IVA proceedings were consumer protection applications, 16.1% were corporations applications and 14.1% were “industrial” applications.
- Employing an unofficial classification of the types of Part IVA actions (prepared by Prof. Sweeney) that have been brought over the last 17 years, we find a total of 22.4% product liability class actions followed by 17.4% of Part IVA proceedings with respect to industrial/workplace claims whilst migration cases constitute 10.3% of all Part IVA applications. Contrary to popular beliefs only 9.9% of Part IVA proceedings were shareholder class actions whilst 8.2% concerned claims pertaining to investment and property schemes and in 4.5% of the cases the impugned conduct essentially concerned investment advice provided by professional advisers.
- In the post-insurance crisis reform era (from July 2004), we saw a sharp decrease in product liability class action proceedings and a significant increase in Part IVA proceedings concerning shareholders and investors. In this post-July 2004 rankings Part IVA applications with respect to claims by shareholders are ranked first as 25% of all Federal class action proceedings, filed in this period, fell in this category followed by proceedings with respect to impugned investment advice (17.8%) and consumer protection cases (9%).
- With respect to the legal representatives of Part IVA applicants, Slater & Gordon have been involved in more Part IVA proceedings than any other firm - 49 (20.3%) - followed by Maurice Blackburn with 33 proceeding (13.6%). No other law firm or entity, on the plaintiff side, has been involved in ten or more Part IVA proceedings. But since December 2007, when it filed its first Part IVA application, the Australian Securities and Investments Commission (“ASIC”) has filed more Part IVA proceedings than any other entity including Slater & Gordon and Maurice Blackburn. These Part IVA proceedings concerned various financial products issued by entities within the Westpoint Group.
- The most frequent way in which Part IVA proceedings have been resolved is through settlement. In fact 85 (38.9%) of the 218 resolved Part IVA proceedings were settled. The next most frequent outcome of Federal class actions has been the dismissal of the proceeding. This has occurred in 46 (21.1%) Part IVA proceedings. The next three ways in which Part IVA proceedings have been resolved are as follows: the proceedings were discontinued by the applicants (39 – 17.8%); proceedings were discontinued as Part IVA proceedings (26 – 11.9%) and judgments were delivered that were favourable to the applicant/class (16 – 7.3%).
- In the “second” eight and half years of Part IVA’s operation, 52.6% of Part IVA proceedings were resolved through settlements. This compares extremely favourably with the settlement rate in the first eight and half years, which was 28.8%.

- There are significant differences between the outcomes of those proceedings run by Slater & Gordon and Maurice Blackburn and those proceedings where neither of those firms was involved. In fact, 68% of the Part IVA proceedings conducted by these two firms were settled. On the other hand, 25.8% of the class action proceedings, which did not see the involvement of either of these firms, were settled. It should also be noted that 30.4% of the class actions, not brought by Slater & Gordon and Maurice Blackburn, were dismissed whilst none of the Part IVA proceedings in which these two firms were involved were dismissed.

- There are significant differences between the way in which Part IVA proceedings have been resolved in NSW, on the one hand, and Victoria and Queensland, on the other hand. A significant proportion of NSW proceedings, 32.3%, were dismissed. On the other hand, the dismissal rates in Victoria and Queensland were, respectively, 7% and 9.5%. A similar divergence exists with respect to settlement rates. In the Queensland Registry, 57% of Part IVA proceedings were finalised through a settlement, followed by Victoria with a 56% settlement rate. In NSW, on the other hand, only 23.8% of Part IVA proceedings were finalised through a settlement.

ACKNOWLEDGMENTS

This project stems from a call made by Chief Justice Black of the Federal Court of Australia, during his address in December 2005 at Australia's first ever conference on class actions (organised by Maurice Blackburn), for scholarly and extensive studies of the legislative regime that has been regulating class actions in the Federal Court of Australia since March 1992. This regime is found in Part IVA of the *Federal Court of Australia Act 1976* (Cth). Given that in 2000, the Victorian legislature introduced a class action regime that is very similar to Part IVA, through the addition to the *Supreme Court Act 1986* (Vic) of Part 4A, this project also encompasses an empirical study of Part 4A. The Federal Court and the Supreme Court of Victoria are of course this country's only superior courts where "US-style" class action proceedings may be filed.

This project would not have seen "the light of day" without (a) the research donations of Freehills (this project's major sponsor) and the entities listed below and (b) the research grants awarded by the Victoria Law Foundation and the Australian Institute of Judicial Administration. The sponsors include: the Australian Consumers' Association, Duncan Basheer Hannon, Maurice Blackburn, Slater & Gordon and IMF Australia. In October 2008 the award by the Australian Research Council of a large Discovery Project Grant to myself and Associate Professor Brendan Sweeney, who also works at Monash University's Department of Business Law and Taxation, has meant that it is now possible to conduct the type of study that Black CJ envisaged and called for. In fact, this project aims to review all major dimensions of the operation of the Federal and Victorian class action regimes.

I am delighted to say that, with respect to the Federal dimension of this study, Black CJ expressed his support for this project right from the outset. It is also important to draw attention to the wonderful assistance and support provided by (and the infinite patience exhibited by) numerous justices and Registry officers of the Federal Court. With respect to the former "group", a huge debt of gratitude is owed to Justice Lindgren who, among other things, spent countless hours going through numerous NSW Part IVA files to determine which documents our research assistants could have access to. It is also important to note that at various meetings of Justices of every Registry of the Federal Court, held at various times in the early part of 2009, my request for access to several categories of documents which are not normally available to members of the public (such as affidavits and the opt out notices lodged by class members) was approved.

But the biggest "victims" of this project have been the Court's Registry officers. In fact, their daily work was adversely affected and greatly inconvenienced as a result of needing to provide to the research assistants office facilities and numerous boxes of documents, as well as having to tolerate their extensive use of the Court's photocopying facilities. Therefore, I wish to thank, on my behalf and on behalf of Brendan and the research assistants who have reviewed Part IVA court files over the last twelve months or so, the following Registry officers:

- New South Wales: Paddy Hannigan, Stuart Young and Nicholas Vlachos.

- Victoria: David Priddle, Adrian De Luca and Bronwyn Davis.
- Queensland: Karen Baker and Colin Morrison.
- Western Australia: Nick Pannell and Robert Clements.
- South Australia: Patricia Christie and Michael Sarson.
- Australian Capital Territory: Natalie Cujes.
- Northern Territory: Patricia Christie.
- Tasmania: Alan Parrott.

Given that, as revealed in this report, most Part IVA proceedings have been filed in either NSW or Victoria, the biggest debt of gratitude is of course owed to Paddy and David and their respective teams.

With respect to the challenging task of identifying all Part IVA proceedings – or, more accurately, as many Part IVA proceedings as possible – the already-mentioned David Priddle and Natalie Cujes and the following class action protagonists were delightfully helpful:

- The Honourable Murray Wilcox QC.
- Rebecca Gilsean, Brooke Dellavedova, Bernard Murphy and Ben Slade (Maurice Blackburn).
- Ken Adams and Damian Grave (Freehills).
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- Peter Long (Slater & Gordon).
- Peter Humphries (Duncan Basheer Hannon).
- Prof Peter Cashman (Sydney University).

The Part IVA data set out in this report was extracted predominantly from court files.

Thus the hard work of the research assistants listed below - who enthusiastically

This report would not have been possible without the enthusiastic contribution of Christine Ernst, Elaine Lin, Tegan Rudolph, Josephine Battiste and, in particular, Jane Caruana who “extracted” from the Part IVA court files some of the data that is presented in this report. Jane Caruana also compiled the statistics presented in chapter 2 and Tegan Rudolph prepared Table 8. David Taft undertook research with respect to the insurance crisis reform.

I also wish to thank Maurice Blackburn for providing me with extensive and useful data, not publicly available, with respect to some of the Federal and Victorian class action proceedings that this firm was involved in. I am confident that in the next report I will be making a similar comment with respect to Slater & Gordon which have kindly agreed to, but have yet to, allow me access to their Part IVA and Part 4A client files.

Last, but not least, I would like to thank Ken Adams, Damian Grave, Nikki Maney and Melissa Filshie for organising the impressive seminar where the data contained in this report was first released publicly. I also wish to thank Ken and Damian for their strong support for this project right from the outset. The comments and suggestions that Justice Finkelstein, Jonathan Beach QC, Hugh McLernon, Ken and Damian made, with respect to an earlier draft of this report, were also greatly appreciated.

CHAPTER 1

INTRODUCTION

I. OVERVIEW

This report is the first of several papers that will be drafted and released, over the next two years, to record the findings of this empirical study of the Federal and Victorian regimes.

The central objective of this project is to determine, to the extent that it is possible, whether the beneficial effects which the drafters of Part IVA and Part 4A sought to attain, through the introduction of these class action regimes - commonly referred to as access to justice and judicial economy - have actually been secured. A comprehensive quantitative and qualitative analysis of all major dimensions of the operation of the Part IVA and Part 4A regimes is currently being undertaken. Thus, through a study of the client files of several class action protagonists and all court files, relating to class action litigation, this project will seek to provide findings and data with respect to a number of specific and crucial issues such as:

- the extent to which these class action devices have been employed;
- the average compensation received by class members;
- the average number of class members that have been the beneficiaries of successful class proceedings;
- the strength and nature of the substantive claims that have been litigated in class action proceedings;
- the average duration of these proceedings;
- the number of class action proceedings that have been brought against multiple defendants/respondents;
- the costs incurred by class action applicants and respondents;
- how class action proceedings have been funded;
- the extent to which parties to class action proceedings have engaged in what is often described as “interlocutory warfare”;
- how the benefits from successful class action proceedings have been divided between the class members, on the one hand, and the solicitors acting for the plaintiff class and the litigation funders that fund the litigation, on the other hand;
- the percentage of proceedings where some tangible benefit was secured for the plaintiff class;
- the impact on judicial workloads of the greater complexity of class action litigation as well as the need for trial judges presiding over this type of litigation to assume a managerial role;
- the number and characteristics of class members and class representatives;

- the frequency of, and nature of, communications between unrepresented class members, on the one hand, and class representatives and respondents and/or their lawyers, on the other hand, and the judicial responses to such communications;
- the responses of class members to notices that advise them of the more significant stages of the proceeding, including opt out notices;
- the formal and informal objections that are made by class members to proposed class action settlements;
- the number of eligible class members who take the prescribed steps that need to be taken before being able to receive a share of the settlement proceeds or of the damages awarded by the court;
- the frequency of, and the reasons behind, changes in class representatives;
- the various ways in which trials are conducted in class action proceedings;
- the number of class members who opt out of Federal or Victorian class action proceedings;
- the operation of Part IVA's and Part 4A's opt out regimes;
- how Part IVA proceedings were "distributed" across the various registries of the Federal Court;
- the various techniques that are employed by trial judges to protect the interests of class members;
- whether the legal representatives of the named parties and/or District Registrars have reported back to trial judges upon completion of two crucial processes that need to be undertaken in many class action proceedings: (a) the distribution/publication of opt out notices and other notices for class members; and (b) the distribution of the settlement proceeds or judicially awarded damages (as the case may be) to eligible class members;
- the different ways in which class action proceedings have been resolved; and
- the impact of the requirement that is frequently imposed by commercial litigation funders that Part IVA proceedings are not instituted for the benefit of all the victims of the impugned conduct but only for those who have executed funding agreements with such funders.

The aim of this report is to provide, in a simple and non-technical manner, general data and some preliminary findings regarding the first 17 years of the operation of the Part IVA regime. The intention here is not to provide firm or even tentative conclusions as to whether the Part IVA regime has operated in a satisfactory manner. With this first report, I am simply seeking to ensure that the current work of the Commonwealth Attorney-General's Department's Access to Justice Taskforce, as well as the current debate that is being conducted in both legal and non-legal circles – as to the desirability or otherwise of class action reform in the Federal Court, the Supreme Court of Victoria and/or other Australian superior courts – are undertaken on the basis of objective data and not pursuant to anecdotal evidence and/or speculation that is frequently influenced by one's ideological views.

In subsequent papers, the results of the review of court files, with respect to class action proceedings brought in the Supreme Court of Victoria, will also be included. This report is divided as follows:

- this chapter provides extensive data regarding the extent to which the Part IVA regime has been employed, since it came into operation on 4 March 1992, as well as the extent to which it has been utilised to resolve disputes involving multiple respondents;
- chapter 2 contains data concerning the duration of Part IVA litigation;
- the types of substantive claims that have been advanced on behalf of groups of claimants in Part IVA litigation are reviewed in chapter 3;
- chapter 4 contains a brief discussion of the law firms and other entities and persons that have represented applicants in Part IVA proceedings; and
- the way in which Part IVA proceedings have been resolved is explored in chapter 5.

II. DETERMINING THE PRECISE NUMBER OF PART IVA PROCEEDINGS – “MISSION IMPOSSIBLE”

As acknowledged by Chief Justice Black himself, at the already-mentioned 2005 conference, ascertaining the number of Part IVA proceedings is no easy task given that, unfortunately, the Court’s Part IVA database is far from perfect. This scenario has meant that debates in the media and in the legal literature, with respect to basic questions such as whether the Federal Court has been inundated with class action litigation, have frequently produced vastly different responses.

In light of this scenario, the Part IVA database that the Federal Court kindly provided to me merely provided the starting point in ascertaining the total number of Part IVA proceedings. A review of the legal literature, relevant web sites and electronic databases such as AUSLTII¹ was also undertaken, together with a review of every media report, with respect to Part IVA proceedings, that has been written since March 1992.² The final stage of this “investigative” work entailed seeking the assistance of several class action protagonists, listed in the Acknowledgments.

The outcome of this investigative work is presented in the tables set out below. But before considering this data attention needs to be drawn to the fact that the first ever Part IVA application was not filed until 17 June 1992, well over three months after Part IVA came into operation. This first Federal class action was NSD397/1992 *Metcalfe v NZI Securities (Australia) Ltd*. This matter went all the way to the High Court of Australia. In fact, on 13 December 1996, Australia’s highest court refused to grant special leave to appeal from a judgment handed down by the Full Federal Court in this matter. This hard-fought first class action was clearly a sign of things to come.

Table 1 divides data, as to the total number of Part IVA proceedings, into 17 years starting from 4 March 1992. That is, year 1 covers the period from 4 March 1992 to 3 March 1993, year 2 covers the period from 4 March 1993 to 3 March 1994 and so on until the last year, year 17, that encompasses the period from 4 March 2008 to 3 March

¹ This task was undertaken by Josephine Battiste and Ryan Dow.

² This task was undertaken by Jane Caruana and Christine Ernst.

2009. This is because the core dimension of this study entails the review of court files with respect to Part IVA proceedings filed on or before 3 March 2009. We were able to identify 241 Part IVA applications that were filed in this period. The average number of Part IVA proceedings in the first seventeen years of Part IVA is 14 per year while the median rate is 12 class actions per year.

The other way in which the data is presented in this chapter is by financial years. We were able to identify 245 Part IVA proceedings that were brought on or before 30 June 2009. The average number of Part IVA proceedings per financial year is 14.4. The median rate is 14 Part IVA proceedings per annum.

Table 1 – The First 17 Years of Part IVA

Year	Number of Part IVA Proceedings Filed
Year 1 (from 4/3/1992 to 3/3/1993)	6
Year 2 (from 4/3/1993 to 3/3/1994)	6
Year 3 (from 4/3/1994 to 3/3/1995)	14
Year 4 (from 4/3/1995 to 3/3/1996)	6
Year 5 (from 4/3/1996 to 3/3/1997)	12
Year 6 (from 4/3/1997 to 3/3/1998)	17
Year 7 (from 4/3/1998 to 3/3/1999)	31
Year 8 (from 4/3/1999 to 3/3/2000)	26
Year 9 (from 4/3/2000 to 3/3/2001)	16
Year 10 (from 4/3/2001 to 3/3/2002)	10
Year 11 (from 4/3/2002 to 3/3/2003)	29
Year 12 (from 4/3/2003 to 3/3/2004)	9
Year 13 (from 4/3/2004 to 3/3/2005)	7
Year 14 (from 4/3/2005 to 3/3/2006)	3
Year 15 (from 4/3/2006 to 3/3/2007)	7
Year 16 (from 4/3/2007 to 3/3/2008)	26
Year 17 (from 4/3/2008 to 3/3/2009)	16

Table 2 – Part IVA Proceedings Divided by Financial Years

Financial Year³	Number of Part IVA Proceedings Filed
1992-1993	9
1993-1994	4
1994-1995	13
1995-1996	6

³ Data with respect to the 1991-1992 financial is not included given that Part IVA came into operation only on 4 March 1992. Only one proceeding, the Metcalfe matter mentioned above, was brought in this financial year.

1996-1997	19
1997-1998	20
1998-1999	29
1999-2000	21
2000-2001	17
2001-2002	14
2002-2003	21
2003-2004	11
2004-2005	4
2005-2006	5
2006-2007	19
2007-2008	21
2008-2009	11

Dividing the first seventeen years of the operation of Part IVA into four equal periods of 4 years and 3 months each is rather helpful in seeking to ascertain trends in the employment, by classes of claimants, of the Part IVA regime. Such a breakdown is provided below:

First Quarter (from 4 March 1992 to 3 June 1996) – total of 33 Part IVA actions.

Second Quarter (from 4 June 1996 to 3 September 2000) – total of 92 Part IVA actions.

Third Quarter (from 4 September 2000 to 3 December 2004) – total of 63 Part IVA actions.

Fourth Quarter (from 4 December 2004 to 3 March 2009) – total of 53 Part IVA actions.

We thus see a 31.5% decrease, in the number of Part IVA proceedings, in the September 2000 – December 2004 period, and a further 15.8% decrease in the subsequent quarter. It should also be noted that the figure of 63 class actions for that period (the third quarter) has been distorted somewhat by the fact that on 22 November 2002 18 Part IVA proceedings were filed, with respect to an industrial dispute between certain hospital employees and numerous Victorian hospitals. The same firm of solicitors acted for the applicants in the 18 class actions in question and the applications and statements of claim in each of these proceedings were identical except for the names of the applicants and the respondents. Thus it was essentially one legal dispute that was litigated through 18 separate class action proceedings.

Similarly, the total of 53 Part IVA actions, with respect to the final quarter, has been “inflated” to some extent by the filing on the same day, in March 2007, of nine Part IVA applications by the same firm of solicitors against the same respondent with respect to the same legal grievance. Finally, reference should be made to four Part IVA applications that were filed in May 2002 as a result of a judicial order that was made, with respect to

an existing Part IVA proceeding, in order to ensure compliance with the *Philip Morris* principle, described below. Thus, in the last two quarters we have witnessed a significant decrease in the number of Part IVA applications filed, vis-à-vis the late 1990s, despite the fact that 31 Part IVA applications were lodged with respect to essentially three legal disputes. Reference should also be made to 9 Part IVA proceedings filed by ASIC, since December 2007, with respect to various financial products issued by entities within the group of companies known as the Westpoint Group.

The extremely limited employment of the Part IVA regime also becomes apparent from Table 3 below which presents data, with respect to the total number of Part IVA proceedings filed each financial year, as percentages of the total number of proceedings filed in the Federal Court in the relevant financial years.

Table 3 – Part IVA Proceedings as a Percentage of all Federal Court Proceedings⁴

Financial Year	Part IVA Proceedings as a % of Federal Court proceedings
1991-1992	0.03%
1992-1993	0.29%
1993-1994	0.11%
1994-1995	0.31%
1995-1996	0.13%
1996-1997	0.53%
1997-1998	0.63%
1998-1999	0.70%
1999-2000	0.74%
2000-2001	0.45%
2001-2002	0.42%
2002-2003	0.57%
2003-2004	0.21%
2004-2005	0.14%
2005-2006	0.11%
2006-2007	0.57%
2007-2008	0.73%
2008-2009	0.38%

It will be seen from the data set out above that Part IVA proceedings have never constituted more than 0.74% of all Federal Court proceedings. The “average percentage” is 0.39%.

III. IMPORTANT LEGISLATIVE AND JUDICIAL DEVELOPMENTS

⁴ The data, concerning the total number of Federal Court proceedings, that was used in calculating these percentages was collected (by Tegan Rudolph and Ryan Dow) from the Federal Court’s annual reports and, generally speaking, excluded appeals and related actions and bankruptcy matters.

In seeking to ascertain some of the potential reasons for the substantial differences in the employment of the Part IVA regime, over the four “quarters” mentioned above, it is useful to consider some of the legislative and judicial developments that have taken place during the first 17 years of Part IVA and which have had an impact on the employment of this regime. An example of a relevant development, of a legislative nature, is provided by the enactment of s 486B(4) of the *Migration Act 1958* (Cth) which, since October 2001, prohibits the filing of Part IVA actions with respect to migration proceedings.⁵

At around the same time, there was another relevant development, this time of a judicial nature. This was a decision handed down by the Full Federal Court of Australia on 13 March 2000 in *Philip Morris (Australia) Ltd v Nixon*.⁶ The Court essentially held that where a Part IVA proceeding involves multiple respondents each class representative and class member must have an individual claim against each respondent.

Another relevant development was the so-called “insurance crisis” legislative reform. At the Federal level, some of these measures came into effect in July 2004 whilst others commenced in April 2006. Some of the former changes entailed the introduction of statutory caps/limits on the quantum of personal injury damages that may be awarded with respect to non-economic loss as well as loss of earning capacity. Furthermore, the *Trade Practices Amendment Act (Personal Injuries and Death) Act (No 2) 1994* (Cth) prevents the recovery of damages for non-economic loss for less than 15% impairment. The more relevant changes that came into effect at a later stage (in April 2006) as a result of the enactment of the *Trade Practices Amendment (Personal Injuries and Death) Act 2006* (Cth), included the prohibition of an action for damages for personal injury or death under Part 5, Division 1 of the *Trade Practices Act 1974* (Cth) (“TPA”) as well as forbidding the Australian Competition and Consumer Commission from bringing a representative action for personal injury or death resulting from contraventions of Part 5, Division 1 of the TPA.

In seeking to understand the further decrease in the number of class actions filed in the fourth quarter, reference should also be made to the decision handed down in *Dorajay Pty Ltd v Aristocrat Leisure Limited*⁷ by Justice Stone, on 20 October 2005, to the effect that the group of claimants, represented in a Part IVA proceeding, may not be restricted to those who sign, at any stage during the course of the proceeding, a fee and retainer agreement with the applicant’s solicitors. This judicial approach to class-closing devices largely prevailed until 21 December 2007 when the Full Federal Court agreed with Finkelstein J, in the *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited*⁸ litigation, in holding that the class-closing device that was implemented by

⁵ Migration proceedings are essentially defined as all proceedings in the High Court, the Federal Court or the Federal Magistrates Court that raise an issue in connection with visas, deportation or removal of an unlawful non-citizen.

⁶ (2000) 170 ALR 487.

⁷ (2005) 147 FCR 394.

⁸ (2006) 229 CLR 386.

Maurice Blackburn in that case did not contravene any provisions of Part IVA, including those provisions regulating the opt out device.

On 30 August 2006 the High Court of Australia held, in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*,⁹ that the fact that the proceeding before the Court was funded by a commercial litigation funder, which exercised a significant level of control over the way the litigation was conducted, did not justify the conclusion that the litigation in question was an abuse of process. On 31 January 2007 the High Court handed down a judgment, in *Sons of Gwalia v Margateric*,¹⁰ which again was potentially beneficial to those who desire to file Part IVA proceedings and, in particular, shareholder class actions. In this case, the High Court held, essentially, that shareholders can now be viewed as equal to ordinary creditors in insolvencies where losses result from companies' misleading or deceptive conduct.

Concerns were expressed, at the time, by several entities and persons that these three judicial developments would result in a significant increase in the number of Part IVA proceedings. But, as already noted above, class action proceedings decreased by 15.8% in the December 2004 – March 2009 quarter. A somewhat different picture emerges, however, when one compares the total number of Part IVA proceedings filed in the three years after *Fostif* with the total number of class action proceedings filed in the three years immediately preceding *Fostif*:

- Part IVA proceedings from 31 August 2006 to 30 August 2009 – 54.
- Part IVA proceedings from 31 August 2003 to 30 August 2006 – 18.

But in order to have a complete picture of the effect which the three pro-applicants judicial pronouncements mentioned above have had, it is important to go back to Table 2 above. It will be recalled that there were 11 Part IVA actions filed in 2003-04, 4 in 2004-2005 and 5 in the 2005-2006 period. Thus, at around the time the High Court handed down its judgment in *Fostif*, if one viewed the Part IVA regime as a patient, then one would be calling (rather promptly) the patient's loved ones and a priest in light of the obvious fact that the patient was moribund. But, of course, this is merely my (colourful) interpretation of the data.

In light of the further positive judicial developments for litigation funders and applicants - in January 2007 (*Sons of Gwalia*) and in December 2007 (*Multiplex*) - one would have expected an extremely busy time for Part IVA lawyers in 2008 and 2009. Instead, as Table 2 clearly shows, there was only a slight increase in the number of Part IVA proceedings filed in the 2007-2008 financial year (21 compared with 19 in the preceding year) followed by a 47% decrease in 2008-2009 (as only 11 Part IVA proceedings were filed in that financial year).

⁹ (2007) 244 ALR 600.

¹⁰ (2007) 231 CLR 160.

Thus, it is more prudent to compare the 3 years, immediately following *Fostif*, with not just the three year period that immediately preceded *Fostif*, but also with other three-year periods (during the operation of Part IVA) going back to August 1994:

- Part IVA proceedings from 31 August 2006 to 30 August 2009 – 54.
- Part IVA proceedings from 31 August 2003 to 30 August 2006 – 18.
- Part IVA proceedings from 31 August 2000 to 30 August 2003 – 51.
- Part IVA proceedings from 31 August 1997 to 30 August 2000 – 72.
- Part IVA proceedings from 31 August 1994 to 30 August 1997 – 37.

Thus, it seems clear that *Fostif*, *Sons of Gwalia* and *Multiplex* were not sufficient to bring the number of Part IVA cases back to the levels that we witnessed in the late 1990s. In seeking to ascertain the reasons for the declining use of the Part IVA regime, one must also look beyond the class action landscape and consider factors such as:

- a general decline in the “volume” of commercial litigation;
- the existence of a virtually identical class action regime in the Supreme Court of Victoria; and
- the strict requirements which must be complied with before commercial litigation funders, such as IMF (Australia), consider funding a Part IVA proceeding.

The list above is not intended to be an exhaustive list of potentially relevant factors.

IV. PART IVA PROCEEDINGS ACROSS THE VARIOUS REGISTRIES OF THE FEDERAL COURT

As shown below, 81% of all the Part IVA proceedings filed, during the first 17 years of the operation of Part IVA, were brought in either NSW (46%) or Victoria (35%).

Table 4 – Part IVA Proceedings Filed in each Registry of the Federal Court

Registry of the Federal Court	Number of Part IVA Proceedings Filed
New South Wales	111 (46%)
Victoria	86 (35%)
Queensland	21 (8.7%)
Western Australia	8 (3.3%)
South Australia	8 (3.3%)
Australian Capital Territory	4 (1.6%)
Northern Territory	2 (0.8%)
Tasmania	1 (0.4%)

Dividing this data into two equal periods - the first period being the first eight and half years of Part IVA (from 4 March 1992 to 3 September 2000) and the second being the next eight and half years of Part IVA (from 4 September 2000 to 3 March 2009) - provides some fascinating results. As shown below, whilst the NSW Registry was clearly

the leading Part IVA Registry, in the first eight and half years, receiving 57% of all the Part IVA proceedings filed in that period, a fundamentally different picture emerges in the next eight and half years.

In fact, the total number of Part IVA proceedings filed in the NSW Registry decreased to 39, which represents a remarkable 45% decrease. Overall, the NSW Registry received only 33.6% of all the Part IVA proceedings filed in this period. And this is despite the fact that the 9 related proceedings filed in March 2007, mentioned above, were commenced in NSW. The data presented in chapter 5, concerning the outcomes of Part IVA proceedings, may perhaps shed some light with respect to this issue.

At the same time, it should be pointed out that the 86.6% increase in Victorian Part IVA proceedings is largely attributable to the 18 related industrial proceedings filed in November 2002 that were described above.

Table 5 – Part IVA Proceedings Filed in each Registry of the Federal Court from 4 March 1992 to 3 September 2000

Registry of the Federal Court	Number of Part IVA Proceedings Filed
New South Wales	72 (57%)
Victoria	30 (24%)
Queensland	13 (10%)
South Australia	3 (2.4%)
Australian Capital Territory	3 (2.4%)
Northern Territory	2 (1.6%)
Western Australia	1 (0.8%)
Tasmania	1 (0.8%)

Table 6 – Part IVA Proceedings Filed in each Registry of the Federal Court from 4 September 2000 to 3 March 2009

Registry of the Federal Court	Number of Part IVA Proceedings Filed
Victoria	56 (48.2%)
New South Wales	39 (33.6%)
Queensland	8 (6.8%)
Western Australia	7 (6%)
South Australia	5 (4.3%)
Australian Capital Territory	1 (0.8%)

V. PART IVA PROCEEDINGS INVOLVING MULTIPLE RESPONDENTS

One of the major aims of this study is to examine the extent to which named parties have “fought”, regarding the suitability of the Part IVA regime, as the vehicle for the resolution of the legal disputes that have resulted in the filing of Part IVA applications.

Where Part IVA proceedings have been brought against multiple respondents, respondents have frequently relied on the already-mentioned *Philip Morris* principle to bring Part IVA proceedings to an end. The intention here is simply to provide some background data as to the practical importance of this deceptively simple issue of how standing rules are to apply to class action proceedings that involve multiple respondents and, indeed, multiple applicants.

In 51% of the 241 Part IVA proceedings that we identified and which were filed on or before 3 March 2009, there were multiple respondents.¹¹ It is also useful to compare the number of Part IVA proceedings, brought against multiple respondents, before and after the *Philip Morris* principle that was enunciated on 13 March 2000. In the pre-*Philip Morris* era, 51.6% of Part IVA proceedings were brought against more than one respondent. It is interesting to note that this percentage increased to 54.8% in the post-*Philip Morris* period.

The average number of Part IVA respondents has been 3.65. The average number of respondents was 4.43 before *Philip Morris*. This average went down to 3.17 with respect to class action proceedings filed after 13 March 2000. Finally, it should also be noted that a total of 35 (14.5%) Part IVA proceedings have involved both multiple respondents and multiple applicants.

¹¹ The data was collected from the pleadings at the time that the Part IVA proceedings were commenced.

CHAPTER 2

DURATION OF PART IVA PROCEEDINGS

I. OVERVIEW

This chapter provides data for the purpose of ascertaining how long it has generally taken to resolve/finalise Part IVA proceedings. Before doing so, it is important to explain the approach that has been adopted, for the purposes of this report, to determine precisely when a Part IVA proceeding can be said to have been resolved.

Where a Part IVA proceeding loses that status, that is, it ceases to be a Part IVA proceeding before the litigation comes to an end, the “finalisation” date is, for the purposes of this chapter, the date when the proceeding ceases to be a Part IVA proceeding. Where such a change occurs, not through a formal order, but through the filing of an amended statement of claim and an amended application which no longer refer to the applicant acting as a Part IVA applicant, then the filing date of such amended pleadings is used as the termination date.

More subjective judgments are required where the litigation remained as a Part IVA proceeding until its conclusion. Justice Gillard of the Supreme Court of Victoria has explained that:

[A] group proceeding is not concerned with the complete cause of action of a claimant, in the sense that all elements of the cause of action and issues raised are determined in the proceeding. The Court considers and determines the common questions of law and fact.¹²

A similar approach has been adopted here to determine the termination dates of Part IVA proceedings. The practical result of this approach is that where the court has approved a settlement, as required by Part IVA’s s 33V, the day on which the s 33V order is issued is regarded as the termination date for the purposes of this report. Similarly, where a judicial pronouncement is handed down with respect to the common issues, and no appeals are lodged or heard, the day the judgment is delivered represents the termination date of the relevant Part IVA proceeding, for the purposes of the data presented in this report. The fact that following such settlements or judgments, as the case may be, a dispute exists between the named parties such as the payment of the other party’s costs, pursuant to a court order, or that class members need to take action, such as proving their claims, were not regarded as relevant for the purposes of ascertaining the finalisation date.

II. GENERAL DATA

Of the 241 Part IVA actions that we identified, which were filed in the first 17 years of Part IVA (that is, filed on or before 3 March 2009), 218 were finalised

¹² *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27, para 42 (per Gillard J).

(as defined above) as at the end of October 2009. The time span of these 218 closed cases ranged from 1 day to close to 11 years. As the table below indicates, close to 70% of Part IVA were concluded within 2 years, approximately 80% within three years and approximately 90% within four years.

Table 7 - The Time Span of all Resolved Part IVA Proceedings which were filed on or before 3 March 2009

0-12 months	12-24 months	24-36 months	36-48 months	48-60 months	60-72 months
41.74%	26.61%	10.09%	9.17%	5.05%	2.29%

72-84 months	84-96 months	96-108 months	108-120 months	120-132 months
1.83%	1.38%	0.46%	0.46%	0.92%

* All Figures have been rounded to the nearest hundredth of a percent

The average duration of all resolved Part IVA proceedings is 698 days, that is, almost two years. It is also instructive to compare the data with respect to the first eight and half years of Part IVA with the subsequent period of equal duration. The average duration of closed cases, which were filed between 4 March 1992 and 3 September 2000, is 807 days, almost 27 months. This should be contrasted with those terminated cases that were filed from 4 September 2000 to 3 March 2009. The average duration of these cases is 552 days, just over 18 months. It is thus apparent that resolved Part IVA proceedings, which were initiated in the first half of Part IVA’s “life”, went significantly longer than those proceedings which were filed in the second half.

The median duration of all finalised class actions is 446 days. The median data confirms the trend that was evinced by the mean data described above, namely, that Part IVA proceedings filed in the second half were finalised more promptly than those filed before 3 September 2000. In fact, the median duration of the latter group of proceedings was 561 days whilst the median duration of the more recent class actions was 437 days.

The table below is identical to Table 7 above except that it does not encompass data with respect to the 29 Part IVA proceedings that did not remain as Part IVA proceedings until the conclusion of the litigation. As is explained in Chapter 5 below, 26 Part IVA proceedings were discontinued, as Part IVA proceedings, either voluntarily by the applicant or by the Court, despite the applicant’s objections. The Federal Court also ordered the transfer of three Part IVA proceedings to another jurisdiction.

Table 8 - The Time Span of all Resolved Part IVA Proceedings which were filed on or before 3 March 2009 and which remained as Part IVA proceedings until they were finalised

0-12 months	12-24 months	24-36 months	36-48 months	48-60 months	60-72 months
38.10%	27.51%	10.05%	10.58%	5.29%	2.65%

72-84 months	84-96 months	96-108 months	108-120 months	120-132 months
2.12%	1.59%	0%	0.53%	1.59%

* All Figures have been rounded to the nearest hundredth of a percent

The data that is presented in the remainder of this chapter relates to the 218 finalised proceedings. That is, it encompasses the 29 proceedings that commenced as, but did not finish as, Part IVA proceedings.

III. DATA WITH RESPECT TO REGISTRIES

Table 9 below highlights the significant difference (81%) between the duration of NSW proceedings when compared with Victorian Part IVA proceedings. Furthermore, the average duration of NSW class actions, 817 days, exceeds by 39% the average duration of all non-NSW Part IVA proceedings, which stands at 587 days.

Table 9 – Duration of Resolved Part IVA Proceedings Filed in each Registry of the Federal Court from 4 March 1992 to 3 March 2009

Registry of the Federal Court	Average Duration of Resolved Part IVA Proceedings
Australian Capital Territory	1342 days
Queensland	870 days
New South Wales	817 days
Western Australia	744 days
Northern Territory	645 days
South Australia	615 days
Victoria	450 days
Tasmania	98 days

Table 10 below presents information, again divided by each Registry of the Federal Court, with respect to the median duration of Part IVA proceedings. This median data is far more favourable to the NSW Registry although the median duration of NSW Part IVA proceedings exceeds by 131% the median duration of Victorian Part IVA proceedings.

Table 10 – Median Duration of Resolved Part IVA Proceedings Filed in each Registry of the Federal Court from 4 March 1992 to 3 March 2009

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Registry of the Federal Court	Median Duration of Resolved Part IVA Proceedings
Australian Capital Territory	889 days
Queensland	672 days
Northern Territory	645 days
South Australia	595 days
Western Australia	564 days
New South Wales	490 days
Victoria	212 days
Tasmania	98 days

IV. SUBSTANTIVE CLAIMS

The table below presents duration data with respect to the substantive claims, advanced on behalf of classes of claimants by Part IVA applicants, as classified by the Federal Court itself.

Table 11 – Average Duration of Resolved Part IVA Proceedings Filed from 4 March 1992 to 3 March 2009 with respect to Different Types of Substantive Claims (as Classified by the Court)

Substantive Claims	Average Duration of Resolved Part IVA Proceedings
Consumer Protection	976 days
Intellectual Property	919 days
Corporations	690 days
Competition Law	639 days
Miscellaneous	464 days
Migration	457 days
Human Rights	400 days
Admiralty	335 days
Industrial	333 days
Administrative Law	321 days
Taxation	295 days
Native Title	189 days

V. THE REPRESENTATIVES OF PART IVA APPLICANTS

It is also interesting to focus on those cases run by the two “big players”, on the plaintiff side, in Australia’s class action landscape: Slater & Gordon and Maurice Blackburn. Looking at the finalised cases where one of these two firms was involved, the average duration is 695 days whilst the median duration is 374. The average duration of the other Part IVA proceedings, that have been resolved, and which did not see the involvement of either of these firms, is 699 days whilst the median duration is 465.5 days.

VI. OUTCOMES OF PART IVA PROCEEDINGS

The outcomes of Part IVA proceedings are considered in chapter 5. Table 12 below provides data on the duration of Part IVA proceedings divided by the various ways in which Federal class action proceedings have been finalised over the last 17 years.

Table 12 – Average Duration of Resolved Part IVA Proceedings Filed from 4 March 1992 to 3 March 2009 with respect to Different Types of Outcomes

Outcomes of Part IVA Proceedings	Average Duration of Resolved Part IVA Proceedings
Proceeding transferred to another jurisdiction	1,688 days
Settled	795 days
Proceeding Discontinued by the Applicant	728 days
Ruling Favourable to the Applicant/Class	709.5 days
Application Dismissed	683 days
Proceeding Discontinued as a Part IVA Proceeding	311 days
Proceeding consolidated with another Part IVA proceeding	24.6 days

Table 13 – Median Duration of Resolved Part IVA Proceedings Filed from 4 March 1992 to 3 March 2009 with respect to Different Types of Outcomes

Outcomes of Part IVA Proceedings	Median Duration of Resolved Part IVA Proceedings
Proceeding transferred to another jurisdiction	961 days
Ruling Favourable to the Applicant/Class	656.5 days
Settled	649 days
Application Dismissed	437 days
Proceeding Discontinued by the Applicant	357 days
Proceeding Discontinued as a Part IVA Proceeding	215 days
Proceeding consolidated with another Part IVA proceeding	11 days

CHAPTER 3

SUBSTANTIVE LAW AND FEDERAL CLASS ACTIONS

I. INTRODUCTION

One of the most important aims of this project is to provide a critical evaluation of the types of substantive claims that have been litigated in Part IVA proceedings over the last 17 years. This important and challenging task will be undertaken by Associate Professor Brendan Sweeney. The aim of this chapter is to provide general data with respect to the types of disputes that have been the subject of class action proceedings.

II. THE COURT'S CLASSIFICATION OF PART IVA APPLICATIONS

The first way in which this data is presented is by using the Federal Court's classification of the applications that have been filed in the Federal Court.

Table 14 – Part IVA Applications (as Classified by the Court) Filed from 4 March 1992 to 3 March 2009

Substantive Claims	Part IVA Proceedings
Consumer Protection	97 (40.2%)
Corporations	39 (16.1%)
Industrial	34 (14.1%)
Competition Law	23 (9.5%)
Migration	20 (8.2%)
Administrative Law	9 (3.7%)
Miscellaneous	8 (3.3%)
Human Rights	6 (2.5%)
Taxation	2 (0.8%)
Admiralty	1 (0.4%)
Intellectual Property	1 (0.4%)
Native Title	1 (0.4%)

As in previous chapters it is useful to divide this data into two periods, the first eight and half years of Part IVA with the subsequent eight and half years. The results of this line of inquiry are set out in the two tables below.

Table 15 – Part IVA Applications (as Classified by the Court) Filed from 4 March 1992 to 3 September 2000

Substantive Claims	Part IVA Proceedings
Consumer Protection	71 (56.8%)

Migration	20 (16%)
Industrial	8 (6.4%)

Subject Matter of Part IVA Disputes	Part IVA Proceedings
Product Liability (defective goods and services; mass torts)	54 (22.4%)
Industrial/workplace	42 (17.4%)
Migration	25 (10.3%)
Shareholder actions	24 (9.9%)
Investment and property schemes	20 (8.2%)
Consumer protection	20 (8.2%)
Miscellaneous	20 (8.2%)
Investment advice (professional advisers)	11 (4.5%)
Loans/Guarantees	8 (3.3%)
Franchising	5 (2%)
Competition Law	5 (2%)
Taxation	4 (1.6%)
Leases	3 (1.2%)

It is again useful to present this data into two periods so as to detect any interesting trends. The results of this line of inquiry are set out in the next two tables.

Table 18 – Types of Part IVA Actions (as Classified by Prof. Sweeney) Filed from 4 March 1992 to 3 September 2000

Subject Matter of Part IVA Disputes	Part IVA Proceedings
Product Liability (defective goods and services; mass torts)	46 (36.8%)
Migration	25 (20%)
Industrial/workplace	13 (10.4%)
Miscellaneous	10 (8%)
Consumer protection	9 (7.2%)
Investment and property schemes	6 (4.8%)
Loans/Guarantees	6 (4.8%)
Shareholder actions	3 (2.4%)
Competition Law	2 (1/6%)
Franchising	2 (1.6%)
Investment advice (professional advisers)	1 (0.8%)
Taxation	1 (0.8%)
Leases	1 (0.8%)

Table 19 – Types of Part IVA Actions (as Classified by Prof. Sweeney) Filed from 4 September 2000 to 3 March 2009

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Subject Matter of Part IVA Disputes	Part IVA Proceedings
Industrial/workplace	29 (25%)
Shareholder actions	21 (18%)
Investment and property schemes	14 (12%)
Consumer protection	11 (9.4%)
Miscellaneous	10 (8.6%)
Investment advice (professional advisers)	10 (8.6%)
Product Liability (defective goods and services; mass torts)	8 (6.8%)
Taxation	3 (2.5%)
Franchising	3 (2.5%)
Competition Law	3 (2.5%)
Loans/Guarantees	2 (1.7%)
Leases	2 (1.7%)
Migration	0 (0%)

A very significant decrease in the number of product liability proceedings is evident together with an increase in the Part IVA proceedings that concerned industrial/workplace disputes and the legal grievances of shareholders and investors.

It is also instructive to consider whether the so-called insurance crisis reform has had any impact on the types of actions that are litigated through the vehicle of the Part IVA device.

Table 20 – Types of Part IVA Actions Filed from July 2004 as Classified by Prof. Sweeney

Subject Matter of Part IVA Disputes	Part IVA Proceedings
Shareholder actions	14 (25%)
Investment advice (professional advisers)	10 (17.8%)
Consumer protection	9 (16%)
Miscellaneous	7 (12.5%)
Industrial/workplace	5 (8.9%)
Investment and property schemes	4 (7.1%)

CHAPTER 4

THE REPRESENTANTIVES OF PART IVA APPLICANTS

The aim of this chapter is to provide general data with respect to class action protagonists on the plaintiff/applicant side. This is certainly one area where Australia's class action landscape, as perceived by the media and several commentators, differs somewhat from the real scenario.

For instance, one would have expected Slater & Gordon, Cashman & Partners and Maurice Blackburn to have been actively involved in class actions right from the outset. But that has not been the case. The first ever Part IVA proceeding was brought by Blessington Judd Freeman Lazarus. Cashman & Partners did not file its first Part IVA proceeding until April 1993 whilst the first Part IVA proceeding filed by Slater & Gordon, that we were able to identify, was not until July 1996, well over four years after the Part IVA regime came into operation.

Equally unexpected was the finding that firms like Allen Allen & Hemsley, Freehills, Blake Dawson Waldron, Corrs Chambers Westgarth and Arnold Bloch Leibler have all acted for Part IVA applicants. Indeed the latter firm filed in May 1994 the first Victorian Part IVA proceeding that we were able to identify. And Allen Allen & Hemsley and Blake Dawson Waldron filed, respectively, the third and fourth ever Part IVA proceedings in November and December 1992.

A less surprising finding is that 33.9% of all Part IVA proceedings filed on or before 3 March 2009 saw the involvement of Slater & Gordon (with 49 proceedings) and Maurice Blackburn (with 33 proceedings). In considering this data, it must be remembered that in November 2002 Slater & Gordon filed 18 Part IVA proceedings with respect to the one legal dispute.

It is also interesting to note that a total of 16 Part IVA applications were filed by the ACCC (6) and by ASIC (9). Five Part IVA proceedings were brought by the ACCC in the late 1990s followed by a sole class action proceeding in the remaining 10 years (in 2003). ASIC's involvement in Part IVA litigation has followed a completely different path. ASIC filed its first Part IVA proceeding in December 2007. Over the next 15 months it filed eight more Part IVA applications. Indeed, if one considered the representatives of Part IVA applicants solely from December 2007, the conclusion would be inescapable that ASIC is now the leading protagonist in Australia's class action landscape. It will be recalled, however, that each of the nine proceedings concerned claims, against various entities, with respect to financial products issued by entities within the Westpoint Group.

Slater & Gordon and Maurice Blackburn are the only firms that have been involved in at least 10 Part IVA proceedings. ASIC, Parish Patience, Gerard Malouf & Partners and Peter Long's various firms have each been involved in 9 Part IVA proceedings. A total of 95 other entities, mostly law firms, have also represented Part IVA applicants. These

representatives have included sole practitioners, the Public Interest Advocacy Centre and various unions.

CHAPTER 5

OUTCOMES OF PART IVA PROCEEDINGS

I. GENERAL DATA

As indicated in chapter 1 above, the central philosophy that underpins this project is the need to ascertain, to the extent that it is possible, whether the Part IVA regime has attained the major objectives that it was designed to secure, such as access to justice and judicial economy. An important dimension of this analysis entails a determination of how Part IVA proceedings come to an end. The general data that is presented in this chapter constitutes the starting point of this important phase of this project.

But before revealing the data that we have collected, a brief explanation of the general approach that is employed in the remainder of this chapter is required. Because this chapter is intended to provide only a very broad overview of the outcomes of Part IVA proceedings, only one “label/description” is employed to describe the outcome of each proceeding. In some cases the outcome of the Part IVA litigation was attributable to a series of events. For example, in a handful of cases the delivery of a judgment, with respect to some or all of the common issues, whether or not it was favourable to the applicants, prompted the named parties to seriously pursue settlement negotiations. These negotiations were successful and a s 33V order was subsequently issued by the trial judge with respect to the settlement agreement that was entered into by the named parties. In this type of scenario, a judgment call was required as to which general description of the outcome of the litigation was the most appropriate.

Table 21 – Outcomes of Part IVA Proceedings Filed from 4 March 1992 to 3 March 2009

Outcomes of Part IVA Proceedings	Finalised Part IVA Proceedings
Settled	85 (38.9%)
Application Dismissed	46 (21.1%)
Proceeding Discontinued by the Applicant	39 (17.8%)
Proceeding Discontinued as a Part IVA Proceeding	26 (11.9%)
Ruling Favourable to the Applicant/Class	16 (7.3%)
Proceeding consolidated with another Part IVA proceeding	3 (1.3%)
Proceeding transferred to another jurisdiction	3 (1.3%)

A number of general observations, regarding the general descriptions used above, may assist the reader in drawing his/her own conclusions with respect to the data presented above.

II. SETTLED PART IVA PROCEEDINGS

For the outcome of a Part IVA proceeding to be described as “settled”, some benefit must have been received by the group that went beyond each named party bearing their own costs. This means that where a notice of discontinuance was lodged by the applicant or leave was granted by the Court, to discontinue the proceeding, with “no order as to costs”, then the outcome of this proceeding was recorded in Table 21 above as “proceeding discontinued by the applicant”.

III. APPLICATIONS DISMISSED

Not all of the Part IVA proceedings which were classified in this report as “Applications Dismissed”, saw a judicial pronouncement handed down, with respect to the merits of the applicant’s/group’s claims, that was unfavourable to the applicant and/or the group. The other reasons for the dismissal of Part IVA applications included the following:

- Two proceedings were dismissed as a result of the Court’s conclusion that the Court lacked the jurisdiction to hear the matter.
- In one case, the Court accepted the application by the respondents, pursuant to O 30 r 5 of the Federal Court Rules, to have the proceedings against them dismissed or stayed on the ground that the applicants had not prosecuted the proceedings with due diligence.
- In three class action proceedings the dismissal was attributable to the applicant’s failure to comply with: (a) a costs order issued in a previous class action by the same applicant against the same respondent (one Part IVA proceeding); and (b) the Court’s order that the applicant provide security for costs (on two occasions).
- In one Part IVA proceeding, the dismissal was attributable to the applicant’s failure to comply with the following order: “the application as a whole is to stand dismissed unless on or before 3 September 2003 the applicants file a Minute of Proposed Directions for the future conduct of the matter and the applicants to pay the costs of the first and second respondents [for today’s hearing]”.
- Another Part IVA proceeding was dismissed, pursuant to Order 10 Rule 3, following the non-appearance by the applicant’s solicitors at a directions hearing.

IV. PROCEEDINGS DISCONTINUED BY THE APPLICANTS

A general explanation also needs to be provided with respect to the way in which the concept of “proceeding discontinued by the applicant” has been applied in this chapter. In a number of Part IVA proceedings, upon reading the relevant court files, the conclusion/inference that the applicant’s request for judicial leave to discontinue the proceeding was made only after the applicant had secured most, or some, of the relief that it was seeking appeared extremely reasonable. This was particularly so where injunctive relief was sought. However, no such information could be found on the court file.

In 13 Part IVA proceedings, the reasons, which accompanied the discontinuance of, or the request for leave to discontinue, the proceeding reveal that this step was undertaken by the applicant for reasons unrelated to the merits of the applicant's case. These 13 class action proceedings may be summarised under the four categories set out below. In a handful of other cases, it was also reasonable to conclude that the decision to discontinue the litigation was unrelated to a conclusion, by the applicant's lawyers, that the applicant was unlikely to win the case but was instead attributable to other factors such as, for instance, the existence of other proceedings against the same respondents with respect to the same dispute. In the next phase of this project, we will hopefully have sufficient information with respect to these cases that further "categories", in addition to the four set out below, will be created to describe these proceedings.

First Category

This category, which encompasses the termination of 8 Part IVA proceedings, saw the withdrawal of the class representative from the litigation and the unwillingness of other class members to assume the challenging role of class representative.

With respect to four of these proceedings, the relevant class representatives had apparently settled their individual claims directly with the respondent. In two other proceedings, the applicant was bankrupt and in liquidation, respectively. In the 7th class action proceeding the applicant died whilst in the remaining Part IVA proceeding, the reasons for the applicant's decision to withdraw as applicant were not apparent from a review of the court file.

Second Category

In two related proceedings, the discontinuance of the litigation was attributable to the conclusion by the applicants' solicitors that a decision handed down by the Federal Court in an unrelated proceeding meant that the Federal Court now lacked the jurisdiction to hear the matters in question.

Third Category

In two Part IVA proceedings, there were essentially no more claimants left in the litigation as the class members has settled their individual claims.

Fourth Category

In one case, the applicant explained to the court that they were seeking to discontinue the litigation for essentially two reasons. The first was that the respondents were bankrupt. The second was that the applicant had secured some of the relief that it was seeking, namely, the respondent discontinuing the proceedings that it had commenced against most of the claimants in another court before the Part IVA application was filed.

But the order that was sought by the applicant was simply an order that the applicant have leave to discontinue the proceeding (with no order as to costs) rather than an order that the court approve the settlement agreement executed by the parties and tendered to the court. Thus it was classified as an application dismissed rather than as a settled proceeding. As the project moves to the next phase - which will entail, among other things, making contact with the representatives of Part IVA applicants - new categories and sub-categories of “outcomes” will be added which are most likely to encompass the type of scenario described above.

V. RULING FAVOURABLE TO THE APPLICANT/CLASS

This label is employed to describe those Part IVA proceedings where there is a judicial pronouncement which results in a total or partial “victory” for the applicant and/or the class.

VI. PROCEEDINGS DISCONTINUED AS PART IVA PROCEEDINGS

Some more details also need to be provided with respect to the 26 proceedings which were described above as “proceedings discontinued as Part IVA proceedings”. In thirteen of these proceedings this decision was made by the Court. On seven occasions this decision was made by the applicant, although on one such occasion this decision was clearly prompted by adverse judicial comments with respect to the way in which the represented group was defined. With respect to the remaining six proceedings which commenced, but did not finish, as Part IVA proceedings it was not clear whether this decision was made voluntarily by the applicant. Again, the relevant solicitors will be asked to provide an explanation.

The general data concerning outcomes of Part IVA proceedings is now presented with respect to different periods, various registries and different class action protagonists. Before doing so, the outcomes of Part IVA proceedings are presented in Table 22 below, after removing the 29 proceedings that did not retain their status as Part IVA proceedings until the conclusion of the litigation.

Table 22 – Outcomes of Part IVA Proceedings, Filed from 4 March 1992 to 3 March 2009, that remained as Part IVA Proceedings until they were finalised

Outcomes of Part IVA Proceedings	Finalised Part IVA Proceedings
Settled	85 (44.9%)
Application Dismissed	46 (24.3%)
Proceeding Discontinued by the Applicant	39 (20.6%)
Ruling Favourable to the Applicant/Class	16 (8.4%)
Proceeding consolidated with another Part IVA proceeding	3 (1.5%)

VII. OUTCOMES DIVIDED INTO TWO PERIODS

Table 23 – Outcomes of Part IVA Proceedings Filed from 4 March 1992 to 3 September 2000

Outcomes of Part IVA Proceedings	Finalised Part IVA Proceedings
Settled	36 (28.8%)
Proceeding Discontinued by the Applicant	27 (21.6%)
Application Dismissed	24 (19.2%)
Proceeding Discontinued as a Part IVA Proceeding	20 (16%)
Ruling Favourable to the Applicant/Class	13 (10.4%)
Proceeding transferred to another jurisdiction	3 (2.4%)
Proceeding consolidated with another Part IVA proceeding	2 (1.6%)

Table 24 – Outcomes of Part IVA Proceedings Filed from 4 September 2000 to 3 March 2009

Outcomes of Part IVA Proceedings	Finalised Part IVA Proceedings
Settled	49 (52.6%)
Application Dismissed	22 (23.6%)
Proceeding Discontinued by the Applicant	12 (12.9%)
Proceeding Discontinued as a Part IVA Proceeding	6 (6.4%)
Ruling Favourable to the Applicant/Class	3 (3.2%)
Proceeding consolidated with another Part IVA proceeding	1 (1%)

What is immediately apparent is the significant increase, in the last eight and half years, in the proportion of Part IVA proceedings that were finalised, through a settlement: from 28.8% to 52.6%. Another significant change is the fact that in the latter period only over 6.4% of the Part IVA proceedings were discontinued as Part IVA proceedings whilst the proportion for the first eight and half years stood at 16%.

VIII. OUTCOMES IN NSW, VICTORIA and QUEENSLAND

Table 25 – Outcomes of Part IVA Proceedings in the Three Most Important Registries

Type of Outcome	NSW Registry	Victorian Registry	Queensland Registry

Settled	23.8%	56%	57.1%
Application Dismissed	32.3%	7%	9.5%
Proceeding Discontinued by the Applicant	20.9%	14%	9.5%
Proceeding Discontinued as a Part IVA Proceeding	11.4%	9.8%	14.2%
Ruling Favourable to the Applicant/Class	9.5%	7%	9.5%
Proceeding consolidated with another Part IVA proceeding	0.9%	2.8%	0%
Proceeding transferred to another jurisdiction	0.9%	2.8%	0%
	100	100	100

The significant differences between Victoria and Queensland, on the one hand, and NSW, on the other hand, with respect to the proportions of Part IVA proceedings which were dismissed and, in particular, those that were settled are immediately apparent. The reasons for such differences are not, however, immediately apparent.

IX. OUTCOMES WITH RESPECT TO THE LEADING LEGAL REPRESENTATIVES OF PART IVA APPLICANTS

Comparing the combined outcomes of the class action proceedings that saw the involvement of Slater & Gordon and Maurice Blackburn with the combined outcomes of all other Part IVA proceedings, also provides some interesting results.

Table 26 – Outcomes of Part IVA Proceedings Run by Slater & Gordon and Maurice Blackburn

Type of Outcome	Slater & Gordon & Maurice Blackburn	Part IVA Proceedings without S&G or MB	All Finalised Part IVA Proceedings
Settled	68%	25.8%	38.9%
Application Dismissed	0%	30.4%	21.1%

Proceeding Discontinued by the Applicant	13%	19.8%	17.8%
Proceeding Discontinued as a Part IVA Proceeding	9%	13.2%	11.9%
Ruling Favourable to the Applicant/Class	0%		

CHAPTER 6

CONCLUDING REMARKS

As indicated above, this report constitutes the starting point of an ambitious empirical study of Australia's class action landscape. A much closer review (than what has been possible to this point) of all court files, with respect to all Federal and Victorian class action proceedings that were filed on or before 3 March 2009, and of the client files of a number of law firms that include Maurice Blackburn, Slater & Gordon and Duncan Basheer Hannon, will take place next year. This will enable the collection of data with respect to the numerous and important issues, with respect to the operation of the Part IVA and Part 4A regimes, that were listed in Chapter 1 above.