

# **Australian Unions—the Unknown Class Action Protagonists**

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# Australian Unions—the Unknown Class Action Protagonists

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☞ Australia; Class actions; Funding arrangements; Trade unions

*[Class actions have been available in the Federal Court of Australia since March 1992. The scholarly reviews of the major players in the Australian class action landscape, that have appeared in the legal literature since 1992, have placed under scrutiny the conduct and role of major plaintiff law firms and, more recently, litigation funders and the Australian Securities and Investments Commission. But the first ever empirical study of this regime, which the authors are currently conducting, has revealed the significant role that unions have played in Federal class actions. The aim of this article is to explore how Australian unions have sought to enforce the legal rights of workers through the employment of the Federal class action regime.]*

## I. Introduction

Australia was one of the first countries outside of the United States to introduce comprehensive class action regimes. This was achieved through the enactment of Pt IVA of the *Federal Court of Australia Act 1976* (Cth), which came into operation on March 4, 1992. The authors are currently conducting, with the assistance of a team of research assistants, the first ever empirical study of the operation of the Pt IVA regime. In particular, this study entails the review of all Pt IVA proceedings that were filed in the first 17 years of the operation of Pt IVA; that is to say, all the Federal class actions that were filed on or before March 3, 2009 (“the study period”).

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Since 1992, local and international scholars and commentators have placed their attention on the role that the major plaintiff law firms, such as Slater & Gordon and Maurice Blackburn, and more recently, commercial litigation funders and the Australian Securities and Investments Commission (“ASIC”) (Australia’s corporate “watchdog”), have played in bringing and/or funding Federal class actions. The involvement of unions in Pt IVA proceedings has been largely ignored by legal scholars. But this study has revealed that Australian unions were involved in a total of 45 Pt IVA proceedings during the study period. This represents 18 per cent of all the Pt IVA proceedings that were filed in this period. Furthermore, Australian unions have been involved in more Pt IVA actions than the total number of Pt IVA actions that saw the involvement of litigation funders (18 of them), ASIC (9) and the Australian Competition and Consumer Commission (6) (“ACCC”) (the national consumer “watchdog”), combined.

The aim of this article is to explore, through an examination of these 45 Pt IVA proceedings, the significant role that unions have played in protecting and advancing the interests of workers through the use of the class action mechanism. It will also explore the crucial question of whether union class actions have attained the two major policy goals of the Pt IVA regime, access to justice and judicial economy. Finally, the article will also enable a determination to be made as to whether unions and class actions constitute a compatible and effective combination in securing justice for aggrieved workers.

## II. Aggrieved Employees, Class Actions and Unions

### A. Union Class Actions

The class actions that are the subject of this article are those Pt IVA proceedings—brought on behalf of workers only<sup>1</sup>—where one or more unions: (a) were the class representatives; (b) were plaintiffs<sup>2</sup> in Pt IVA proceedings but did not formally assume the role of class representatives; (c) were the class representative’s solicitors; or (d) funded or took an active role in the litigation by, for instance, being directly involved in the settlement negotiations with the defendants. These are not mutually exclusive scenarios as unions have assumed more than one of these four roles in several Pt IVA proceedings. In the remainder of this article, the term “union class actions” will be used to describe Pt IVA proceedings that fall within one or more of the four categories in question.

<sup>1</sup> The application of this restriction has meant that one of the four class actions that were brought with respect to the Longford gas explosion that occurred in Victoria in 1998—*Dean v Esso Australia Ltd*—was not regarded as a union class action, for the purposes of this article. This is because in *Dean* the represented group comprised not only those workers who were stood down - as a result of the interruption or cessation of gas supply in Victoria that was caused by this explosion for approximately two weeks - but also those business and domestic users of gas who suffered loss and damage as a result of this non-availability of gas: see *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56, at [3] (per Merkel J).

<sup>2</sup> In the Federal Court of Australia, plaintiffs are known as “applicants” and defendants are referred to as “respondents”. But in this article the more traditional terms of “plaintiffs” and “defendants” will be employed.

## B. Policy Goals of Pt IVA

In enacting Pt IVA, the Australian Parliament relied to a large extent on the report released by the Australian Law Reform Commission (“ALRC”) in 1988.<sup>3</sup> In the Second reading Speech for the *Federal Court of Australia (Amendment) Bill 1991* (Cth), the Bill that contained Pt IVA, the then Attorney-General identified the two goals that Pt IVA was expected to secure. The first goal, commonly referred to as the access to justice goal, was to provide a real remedy where, although many people were affected and the total amount at stake was significant, each person’s loss was small and thus it was not economically viable to recover it in individual proceedings. It was hoped that Pt IVA would provide access to the courts to those in the community who had been effectively denied legal redress because of the high cost of taking action.<sup>4</sup>

Whilst the Attorney-General referred only to financial barriers, in explaining the access to justice goal of Pt IVA, it is widely acknowledged that modern class action regimes seek to enable similarly situated claimants to overcome all the barriers that prevent them from securing legal redress, and not just economic barriers.<sup>5</sup> As explained by the ALRC in its 1988 report:

“[A class action device] could overcome the cost and other barriers which impede people from pursuing a legal remedy. People who may be ignorant of their rights or fearful of embarking on proceedings could be assisted to a remedy if one member of a group, all similarly affected could commence proceedings on behalf of all class members.”<sup>6</sup>

As noted below, these problems assume great importance, and are quite prevalent, in legal disputes involving employees.

The then Attorney-General explained that the second objective of Pt IVA was to deal efficiently with the situation where the damages sought by each claimant were large enough to justify individual litigation and a large number of persons desired to issue legal proceedings against the defendants. It was hoped that the class action procedure would allow similarly situated claimants to obtain legal redress and to do so more cheaply and efficiently than would be the case if each of these claimants filed individual proceedings.<sup>7</sup> The general philosophy underpinning this policy goal of modern class action regimes, commonly known as the judicial economy goal, is thus the efficient use of finite judicial resources.

<sup>3</sup> Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (1988) Report no 46 (“ALRC 1988 Report”).

<sup>4</sup> *Hansard*, HR (November 14, 1991) 3174. For a recent discussion of the major categories or components of litigation costs, see New South Wales Law Reform Commission, *Security for Costs and Associated Costs Orders* (May 2011), Consultation Paper 13 at, paras 1.17–1.22.

<sup>5</sup> See, generally, R. Mulheron, *The Class Action in Common Law Legal Systems: a Comparative Perspective* (Oxford: Hart Publishing; 2004), pp.235–236 and the references cited therein; South African Law Commission, *The Recognition of a Class Action in South African Law* (1995), Working Paper 57, at paras 1.3–1.4; Alberta Law Reform Institute, *Class Actions* (December 2000), Report no 85; , at para 96; Manitoba Law Reform Commission, *Class Proceedings* (1999), Report No.100, at p.2; and *1176560 Ontario Ltd v The Great Atlantic & Pacific Co of Canada Ltd* (2002) 62 OR (3d) 535, 538 (per Winkler J).

<sup>6</sup> *ALRC 1988 Report*, para 69.

<sup>7</sup> *Hansard*, HR (November 14, 1991) 3174.

### C. Enforcement of Legal Rights By Employees

It is widely acknowledged that fear of retaliation represents a formidable barrier to overcome for employees who seek to enforce their rights by taking legal action against their current employers.<sup>8</sup> The available empirical evidence confirms the existence of this undesirable state of affairs. For instance, in its seminal 1982 study of class actions, the Ontario Law Reform Commission drew attention to<sup>9</sup>: (a) a survey conducted by the American Bar Foundation which found that only 1 per cent of job discrimination problems and 8 per cent of wage collection difficulties were taken to lawyers and that only 29 per cent of persons faced with job discrimination in hiring or promotion took any action at all,<sup>10</sup> and (b) a British study which found that only 4 per cent of those with employment problems who were in need of advice saw a solicitor.<sup>11</sup> In 2010 an American scholar referred to the following data, in the context of overtime claims in the United States:

“To support their claim that few employees are willing to bring overtime claims individually, the employees in *Gentry* pointed out that there are only forty published decisions concerning individual overtime claims over a sixty-seven-year period and only six of the forty cases were initiated by current employees. Also, the [Division of Labor Standards Enforcement] received between 600 and 800 retaliation complaints annually from 2001 to 2004 from employees who filed wage claims against their employer.”<sup>12</sup>

In 2006, the Law and Justice Foundation of New South Wales conducted a survey of legal needs in three areas of New South Wales. It found that approximately 43 percent of the respondents that had experienced an employment problem in the previous year had not sought professional help.<sup>13</sup>

Many American courts have also readily accepted that fear of retaliation prevents, in many circumstances, the filing of individual proceedings against current employers.<sup>14</sup> This judicial recognition has taken place in the context of determining whether class proceedings, brought pursuant to r.23 of the *United States Federal Rules of Civil Procedure*, have complied with one of the conditions that must be satisfied before a District Court is able to certify the proceeding as a class action. This prerequisite, contained in r.23(a)(1), requires aspiring class

<sup>8</sup> See, for instance, A. Brunsten, “Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts” (2008) 29 Berkeley J. Emp. & Lab. L. 269 at 272; D. Weil and A. Pyles, “Why Complain? Complaints, Compliance, and the Problem of Enforcement in the US Workplace” (2005) 27 Comp. Lab. L. & Pol’y J. 59 at 65; C. Arup and C. Sutherland, “The Recovery of Wages: Legal Services and Access to Justice” (2009) 35 Monash U. L. Rev. 96 at 101; and G. Yaniv, “Complaining About Noncompliance with the Minimum Wage Law” (1994) 154 *International Review of Law and Economics* 351.

<sup>9</sup> Ontario Law Reform Commission, *Report on Class Actions* (1982), Report No.48, at p.128 fn.109 (“OLRC Report”).

<sup>10</sup> Citing B. Curran, *The Legal Needs of the Public: The Final Report of a National Survey* (Chicago: American Bar Foundation, 1977), at pp.137 and 260.

<sup>11</sup> Citing Abel-Smith, Zander and Brooke, *Legal Problems and the Citizen* (London: Heinemann, 1973), at p.158 (Table 35).

<sup>12</sup> Y. Li, “Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers” (2010) 31 Whittier L. Rev. 665 at 728.

<sup>13</sup> C. Coumarelos, Z. Wei and A. Zhou, *Justice Made to Measure—NSW Legal Needs Survey in Disadvantaged Areas* (Sydney: Law and Justice Foundation of NSW; March 2006), Access to Justice and Legal Needs, Vol.3, at p.99.

<sup>14</sup> See, for instance, *Gentry v Superior Court*, 165 P.3d 556 at 565 (Cal. 2007) (“retaining one’s employment while bringing formal legal action against one’s employer is not ‘a viable option for many employees’”); and *Mullen v Treasure Chest Casino LLC*, 186 F.3d 620, 625 (5th Cir. 1999).

representatives to satisfy the court that “the class is so numerous that joinder of all members is impracticable”. This acceptance of the inhibiting effect of the fear of retaliation has facilitated the judicial finding that joinder is impracticable and thus that class certification is generally justified in employment/workplace litigation.<sup>15</sup>

Various scholars and courts have also drawn attention to a financial barrier which, whilst not peculiar to the workplace arena, is faced quite frequently by aggrieved employees. This is the fact that the claims of workers are usually of modest size and thus would not justify the high costs entailed in bringing individual proceedings.<sup>16</sup> The existence of this scenario was alluded to by the US Supreme Court in 2001 when it remarked that “employment litigation often involves smaller sums of money than disputes concerning commercial contracts”.<sup>17</sup> In the United States, the term “negative-value claims” has increasingly been employed to describe these types of small claims.<sup>18</sup> Other factors that may prevent employees from securing legal remedies include language and educational barriers, limited financial resources, unawareness that their rights are being violated<sup>19</sup> and limited knowledge of the legal system.<sup>20</sup>

### *D. Class Actions as a Means of Overcoming Barriers to Redress*

How can a class action device, such as the one provided and regulated by Pt IVA, assist aggrieved workers in overcoming most or some of the obstacles explored above? In order to answer this question, it is necessary to draw attention to some of the fundamental features of contemporary opt-out class action regimes. As noted by the US Supreme Court in 1979, the class action device is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named

<sup>15</sup> See, for instance, *McLaughlin v Liberty Mutual Insurance Company*, 224 F.R.D. 304 at 309 (D. Mass. 2004) (“many courts have suggested that the employer-employee relationship is of such a nature that an employee ‘may feel inhibited to sue making joinder unlikely’”); *Scott v Aetna Services Inc.*, 210 F.R.D. 261 at 266–267 (D. Conn. 2002); *McBean v City of New York*, 228 F.R.D. 487 at 503 (S.D.N.Y. 2005); and Craig Becker and Paul Strauss, “Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards” (2008) 92 Minn. L. Rev. 1317 at 1329.

<sup>16</sup> See, for instance, Brunsten, “Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts” (2008) 29 Berkeley J. Emp. & Lab. L. 269 at 272; *Gentry v Superior Court* 165 P.3d 556 at 565 (Cal. 2007); Li, “Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers” (2010) 31 Whittier L. Rev. 665 at 706 and 726–727; and Richard Bales, “Normative Consideration of Employment Arbitration at Gilmer’s Quinceanera” (2006) 81 Tul. L. Rev. 331 at 355–356.

<sup>17</sup> *Circuit City Stores v Adams* 532 U.S. 105, at 123 (2001).

<sup>18</sup> See J. M. Glover, “Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements” (2006) 59 Vand. L. Rev. 1735 at 1737 fn.3: “a negative-value suit is one in which the total costs of pursuing the claim exceed the total expected recovery for that claim”.

<sup>19</sup> As pointed out in Weil and Pyles, “Why Complain? Complaints, Compliance, and the Problem of Enforcement in the US Workplace” (2005) 27 Comp. Lab. L. & Pol’y J. 59 at 82–83, “significant costs arising in the workplace context include: (a) obtaining information regarding the existence of basic worker rights as well as the standards to which employers are held accountable; (b) gathering information on the current state of workplace conditions ...; and (c) learning specific details of how the law is administered (eg, the procedures for initiating a complaint inspection)”. See also Arup and Sutherland, “The Recovery of Wages: Legal Services and Access to Justice” (2009) 35 Monash U. L. Rev. 96 at 105.

<sup>20</sup> See, for instance, W. Corbett, “Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again” (2002) 23 Berkeley J. Emp. & Lab. L. 259 at 261; Y.L. Zheng, “It’s Not What is On Paper, But What is In Practice: China’s New Labor Contract Law and the Enforcement Problem” (2009) 8 *Washington University Global Studies Law Review* 595 at 614; and J. Sternlight, “As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?” (2000) 42 Wm and M. L. Rev. 1 at 12.

parties only”.<sup>21</sup> Whilst only the class representatives are the named parties, on the plaintiff side, the outcome of the proceeding binds not only the named plaintiff but also the non-parties,<sup>22</sup> that is, the class members.<sup>23</sup>

As the named party, it is the representative party who appears in court, has the formal responsibility for running the case and for complying with any orders made by the court and is liable for any costs awarded in favour of the class action defendant.<sup>24</sup> Class representatives also “have responsibilities to prosecute the action on behalf of and in the interests of the class”.<sup>25</sup> In class action regimes that employ the opt-out device—such as Pt IVA and r.23—in order to be bound by a class action, a class member need not provide a formal consent. One simply needs to fall within the ambit of the represented group, as defined by the representative party’s lawyers in the pleadings. As noted by the US Supreme Court:

“Unlike a defendant in a normal civil suit, [a class member] is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection. In most class actions [a class member] is provided at least with an opportunity to “opt-out” of the class, and if he takes advantage of that opportunity he is removed from the litigation entirely.”<sup>26</sup>

This privileged status enjoyed by class members (who, as a result, are sometime referred to as free riders)<sup>27</sup> potentially provides employees with a realistic means of overcoming the already-mentioned obstacles, including fear of retaliation by the employer. This is because:

“Employees may feel that class actions allow them to assert their claims without having to assume a highly visible or noticeable role in the dispute, which deflects the employer’s attention from any one class member. Also,

<sup>21</sup> *Califano v Yamasaki* 442 U.S. 682 at 700–701 (1979).

<sup>22</sup> See *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 166 ALR 731 at 738 (per Merkel J.); *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 191 ALR 697 at [49]–[51] (per Moore J.); and *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161 at 175 (per Gaudron, Gummow and Hayne JJ).

<sup>23</sup> As recently noted by M. C. Cullity J. of the Ontario Supreme Court of Justice, class members “are not parties to the proceedings but they are not strangers. Their rights are as much at stake as those of the plaintiffs”: *Heron v Guidant Corp* [2007] O.J. No.3823 at [10]. See also *Boulanger v Johnson & Johnson Corp* (2003) 64 OR (3d) 208 at 217 (per Blair RSJ, Carnwath and Madonald JJ); *Devlin v Scardelletti* 536 U.S. 1 at 7 (2002); *Courtney v Medtel Pty Limited* [2002] FCA 957 at [36] (per Sackville J); and *McLean v Nicholson* [2002] VSC 446, at [4] (per Bongiorno J).

<sup>24</sup> As recently noted by Ontario’s Court of Appeal, “the prosecution of the action rests squarely with the representative plaintiff. The representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report”: *Fantl v Transamerica Life Canada* (2009) 95 OR (3d) 767 at 777–778 (per Winkler C.J.). See also *Deposit Guaranty National Bank v Roper* 445 U.S. 326 at 344 fn.4 (1980); *Phillips Petroleum Co v Shutts* 472 U.S. 797 at 810 (1985); *Scott v TD Waterhouse Investor Services (Canada) Inc.*, 2001 BCD Civ J LEXIS 1417, at 58 (per Martinson J); *Dabbs v Sunlife Assurance Co of Canada* (1998) 41 OR (3d) 97 at 99 (per Laskin, Charron and O’Connor JJ.A.); and *Mayo v Hartford Life Insurance Co.*, 2002 US Dist LEXIS 15990, at 14 (SD Tex., 2002).

<sup>25</sup> *Fantl v Transamerica Life Canada* [2008] O.J. No 1536, at [63] (per Perell J).

<sup>26</sup> *Phillips Petroleum Co v Shutts* 472 US 797 (1985) at 810–811.

<sup>27</sup> See *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061, at [48] (per Finkelstein J.); B. Murphy and C. Cameron, “Access to Justice and the Evolution of Class Action Litigation in Australia” (2006) 30 M.U.L.R. 399 at 419; and V. Morabito, “Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs” (1995) 21 Monash U. L. Rev. 231 at 235–239 and the references cited therein.

employees may think that employers are less likely to retaliate against members of a class since retaliatory conduct against a large number of people would be more recognisable.<sup>28</sup>

It is thus not surprising that it was recently remarked by an American commentator that employment discrimination cases have long “typified the sort of civil rights action that courts and commentators describe as uniquely suited to resolution by class action litigation”.<sup>29</sup> The utility of class actions in enforcing the rights of employees in the United States may perhaps be gauged by the increasing use by US employers of “class action waivers” which are essentially mandatory arbitration provisions that prohibit class actions.<sup>30</sup>

Can the involvement of unions in class actions have beneficial effects? Hamilton and Anderson have provided an affirmative answer by drawing attention to the fact that American courts have recognised that:

“unions possess more resources and information than any individual claimant and are uniquely situated to advance their members’ interests as class representatives ... [L]abor unions can be a powerful ally for plaintiffs seeking class relief ... Plaintiff’s counsel looking for a source of information, for funding, for a means of reaching out to the individual members of a given class, should consider the possibility that a labor union may be an excellent tool for accomplishing their clients’ goals of obtaining a better workplace.”<sup>31</sup>

This assessment appears to have been endorsed by the Civil Justice Council of England and Wales (“CJC”) in November 2008 when it recommended the introduction of a new collective action regime for England and Wales. In fact, the CJC recommended that trade unions be included among the “socially responsible collective bodies” that should be allowed to act as representative parties under this proposed collective action regime.<sup>32</sup>

<sup>28</sup> Li, “Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers” (2010) 31 Whittier L. Rev. 665 at 728. See also B. Van Schaack, “Unfulfilled Promise: The Human Rights Class Action” [2003] U. Chi. Legal F. 279 at 320.

<sup>29</sup> M. Hart, “Will Employment Discrimination Class Actions Survive?” (2004) 37 Akron L. Rev. 813 at 813–814. See also Glover, “Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements” (2006) 59 Vand. L. Rev. 1735 at 1744; and *E. Tex. Motor Freight Sys. Inc v Rodriguez* 431 U.S. 395 at 405 (1977). Similarly, in 2001, the Supreme Court of Canada indicated that “discriminatory policies [which] may affect entire categories of employees” are among the types of disputes that may be efficiently resolved through a class action, “in a manner that is fair to all parties”: *Dutton v Western Canada Shopping Centres Inc* [2001] 2 SCR 534, para 26 (per McLachlin CJ).

<sup>30</sup> See generally Glover, “Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements” (2006) 59 Vand. L. Rev. 1735; and Li, “Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers” (2010) 31 Whittier L. Rev. 665. This strategy will no doubt become even more popular as a result of the endorsement it received from a majority of the US Supreme Court in April 2001: see *AT&T Mobility LLC v Concepcion*, 2011 US LEXIS 3367 (April 27, 2011).

<sup>31</sup> M. Hamilton and L. Anderson, “Labor Unions and Class Actions: The Union Perspective on Collective Litigation” (Paper presented at the ABA Section of Labor and Employment Law Annual Meeting, Atlanta, August 10, 1999), at pp.2 and 13, available at [www.bna.com/bnabooks/ababna/annual/99/class.pdf](http://www.bna.com/bnabooks/ababna/annual/99/class.pdf) [Accessed August 10, 2011]. See also *International Woodworkers v Chesapeake Bay Plywood Corp* 659 F.2d 1259 at 1268 (4th Cir. 1981): “in fact, it has been argued by some commentators that a union may be better suited to represent a class consisting of its members in employment discrimination litigation than the members themselves”.

<sup>32</sup> Civil Justice Council of England and Wales, “*Improving Access to Justice through Collective Actions*” — *Developing a More Efficient and Effective Procedure for Collective Actions* (November 2008) at p.142 (“CJC Report”).

The reference to unions possessing greater resources in the passage quoted above is particularly relevant to the Australian Federal regime given that, as discussed later, the Australian Government refused to implement the measures recommended by the ALRC in order to overcome the cost barriers to the employment of the Pt IVA device.

Attention can now be turned to the crucial question of whether the involvement of unions in Pt IVA actions has enabled Australian workers with legal grievances to seek legal redress, thus facilitating the attainment of Pt IVA's access to justice objective. The consistency of union class actions with the other major objective of the Pt IVA regime, judicial economy, will also be considered.

### III. Access to Justice and Union Class Actions

#### *A. The employment of the Pt IVA regime*

The authors have identified a total of 250 proceedings that were brought pursuant to Pt IVA, during the study period. In 50 (20 per cent) of these class actions, the classes/groups represented by the representative parties consisted entirely of aggrieved employees.<sup>33</sup> Forty-five (90 per cent) of these employee Pt IVA proceedings were union class actions.<sup>34</sup>

The “distribution” of all Pt IVA proceedings and the 45 union class actions, over the study period, is captured by Tables 1 and 2. It will be seen that the greatest number of union class actions in a calendar year was witnessed in 2002, when there were 20 Pt IVA proceedings filed. However, 19 of these union cases were brought with respect to the same industrial dispute.<sup>35</sup> The greatest number of separate workplace disputes, that resulted in union class actions, was seen in 1998. In that year, 10 union Pt IVA proceedings were filed with respect to 8 separate and distinct workplace disputes.

It took unions almost four years, after Pt IVA came into operation, to utilise the class action mechanism to protect and assert the legal rights of workers. Indeed, only two union class actions were filed in the period between March 4, 1992 and February, 10 1998. This sluggish start by unions corresponds with the data regarding the overall employment of Pt IVA; a fact which is also highlighted by Table 2 which divides the study period into four equal periods of four years and three months.

It is not possible to state with absolute certainty the reasons for the initial reluctance of claimants (including, of course, unions and aggrieved workers and their legal representatives) to initiate Pt IVA proceedings.<sup>36</sup> It is, however, reasonable to conclude that unfamiliarity with the new legislation is likely to have been a reason. Another likely reason is that the Pt IVA regime could only be

<sup>33</sup> In its 1988 Report, the ALRC included, among the multiple wrong situations where its proposed grouping procedures could be used, “injuries to employees”: *ALRC 1988 Report*, para. 65.

<sup>34</sup> A total of 16 unions were involved in these 45 Pt IVA proceedings.

<sup>35</sup> This industrial dispute was caused by the Victorian Government's decision to contract out psychiatric services from stand-alone psychiatric hospitals into general hospitals and other community services. It led to the filing of 19 Pt IVA proceedings, in 2002, against Victorian hospitals on behalf of the relevant psychiatric nurses, seeking lost pay and conditions: see D. Serghis, “Health War on a Third Front”, *Herald-Sun*, October 23, 1997, at p.9; and “Nurses' Pay Win”, *Herald-Sun*, February 10, 2003, at p.1.

<sup>36</sup> See also S. Clark and C. Harris, “Class Actions in Australia: (Still) A Work in Progress” (2008) 31 *Australian Bar Review* 63 at 69.

employed with respect to causes of action that arose after Pt IVA came into operation.<sup>37</sup> What can be stated with certainty is that the increasing number of union class actions in the late 1990s coincided with the introduction of new workplace legislation by the Coalition government led by John Howard, in the form of the *Workplace Relations Act 1996* (Cth) (“WRA”). As part of the overall objective of reducing the role and influence of third parties like unions—in favour of direct relationships between employers and employees at the enterprise level—this legislation contained an array of measures aimed at destabilising established union structures.<sup>38</sup>

One such measure was the introduction of Australian Workplace Agreements (“AWAs”), which were, essentially, formalised agreements primarily negotiated directly between employees and employers. It has been suggested that employers used AWAs to further weaken the power of unions.<sup>39</sup> It is thus not surprising that AWAs were the subject of four union class actions, as unions employed the Pt IVA regime to defend the legal rights of workers. These Pt IVA proceedings encompassed claims that the class members were unlawfully persuaded to enter into an AWA under duress, were provided with false or misleading information regarding an AWA or were discriminated against as a result of a failure to enter into an AWA.<sup>40</sup>

One of these AWA-related Pt IVA proceedings was the first of its kind. In fact, the Pt IVA proceeding in *Smith v University of Ballarat* filed in 2006—on behalf of over 700 academic and general staff at Ballarat University—was described by the representative party’s solicitor, Josh Bornstein, as

“a test case because the Courts have not dealt with the obligations of employers to deal honestly with their employees in the context of persuading them to sign AWAs.”<sup>41</sup>

Beyond the introduction of AWAs, the WRA also represented a challenge to the ability of Australian unions to defend and enforce the legal rights of workers.<sup>42</sup> Rubinstein believes that the WRA was designed to break the power of unions in traditionally strong areas, such as the wharves, the coal industry, the building industry and the meat processing industry.<sup>43</sup> The WRA reduced union rights in a number of ways, including limiting the powers of the Australian Industrial Relations Commission to arbitrate, requiring the stripping back of awards to 20 core matters and increasing sanctions for industrial misbehaviour by unions.<sup>44</sup> Employers were

<sup>37</sup> Pt IVA s.33B. See also Australian Law Reform Commission, *Managing Justice — A Review of the Federal Civil Justice System* (2000), Report No.89, at para 7.91.

<sup>38</sup> A. Forsyth and C. Sutherland, “From ‘Uncharted Seas’ to the ‘Stormy Waters’: How Will Trade Unions Fare under the Work Choices Legislation?” (2006) 16 *Economics and Labour Relations Review* 215 at 217. See also R. Naughton, “Sailing into Uncharted Seas: the Role of Unions under the Workplace Relations Act 1996 (Cth)” (1997) 10 *Australian Journal of Labour Law* 112; and W. J. Ford, “Being There: Changing Union Rights of Entry under Federal Industrial Law” (2000) 13 *Australian Journal of Labour Law* 1.

<sup>39</sup> G. Patmore, “A Voice for Whom? Employee Representation and Labour Legislation in Australia” (2006) 29 *UNSW Law J.* 8 at 19.

<sup>40</sup> See, for instance, *Schanka v Employment National (Administration) Pty Ltd* [1998] FCA 1123.

<sup>41</sup> L. MacNamara, “Academics Put Workplace Laws to the Test”, *The Australian*, February 15, 2006, at p.6. See also Adam Morton, “Third Degree”, *The Age*, February 20, 2006, at p. 12; and *Smith v University of Ballarat* [2006] FCA 148.

<sup>42</sup> J. Shaw, “Observations on Trade Union Recognition in Britain and Australia” (2001) 24 *University of New South Wales Law Journal* 214 at 226.

<sup>43</sup> Rubinstein, “Not Down and Not Out” (1998) 23 *Alternative Law Journal* 53 at 53.

<sup>44</sup> M. Lee, “On the Waterfront” (1998) 23 *Alternative Law Journal* 107 at 108.

supplied with an array of legal avenues to deal with industrial action.<sup>45</sup> Thus, the power of unions to take industrial action was severely diminished. As a consequence of these developments, workers and unions began to rely more on the courts than on traditional tribunals.<sup>46</sup> These new hurdles faced by unions after the enactment of the WRA appear to have contributed to the increased employment of the Pt IVA regime by unions. Although the power of unions to take industrial action was weakened, they still had the class action mechanism at their disposal to enforce and protect the legal rights of their workers.

Indeed it is fascinating to note that employers in three of the four sectors targeted by the Howard Government, highlighted by Rubinstein above—the wharves and the mining and meat industries—were on the receiving end of several union class actions.<sup>47</sup> Two of these proceedings were brought with respect to the Waterfront dispute, one of the country's most bitterly-fought and publicised industrial disputes. In early 1998, two Pt IVA proceedings were filed, on behalf of approximately 1,400 employees of the Patrick Stevedoring group (all members of the Maritime Union of Australia), seeking, among other things, interim orders designed to protect these employees against imminent termination of their employment. The union learnt that the Patrick group intended to dismiss its workforce and replace it with non-union labour. At first instance, North J. of the Federal Court granted the relief sought.<sup>48</sup> Justice North's ruling was affirmed on appeal by the Full Federal Court of Australia<sup>49</sup> and again, to a large extent, by the High Court of Australia, Australia's highest court.<sup>50</sup>

A surprising fact that emerges from the data contained in Table 2 is the decrease in the number of union class actions that were filed in the “fourth quarter”, that is, the period from December 4, 2004 to March 3, 2009. In fact, in this period the so-called Work Choices regime came into operation (in March 2006), which further eroded the legal rights of workers and unions.<sup>51</sup> Perhaps, this reduced reliance on the Pt IVA regime was, to some extent, attributable to the “establishment”, in 2007, of the Workplace Ombudsman, now called the Fair Work Ombudsman.<sup>52</sup> During 2008–2009, for instance, this Ombudsman recovered A \$32,489,904 for 28,648 employees.<sup>53</sup>

<sup>45</sup> Rubinstein, “Not Down and Not Out” (1998) 23 *Alternative Law Journal* 53 at 53. See G. McCarty, “Industrial Action under the Workplace Relations Act 1996 (Cth)” (1997) 10 *Australian Journal of Labour Law* 133; and M. Lee and D. Peetz, “Trade Unions and the Workplace Relations Act” (1998) 9 *Lab. & Ind.* 5.

<sup>46</sup> Justice Ludeke, “The Evolving Industrial Relations Regime: The Federal System 1992–1998” (1998) 72 *Australian Law Journal* 863 at 869.

<sup>47</sup> See, for instance, *Thickbroom v Newcastle Wallsend Coal Co Pty Ltd* [1998] FCA 867; and *Australasian Meat Industry Employees' Union v Azir* [1998] FCA 925.

<sup>48</sup> *Maritime Union of Australia v Patrick Stevedores No.1 Pty Ltd* (1998) 77 FCR 456.

<sup>49</sup> *Patrick Stevedores No.2 Pty Ltd v Maritime Union of Australia* (1998) 77 FCR 478.

<sup>50</sup> *Patrick Stevedores No.2 Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 643.

<sup>51</sup> Some of the more important changes introduced by the Work Choices legislation (the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)) and various sets of regulations included reducing the exposure of employers to unfair dismissal claims and restricting significantly the ability of unions to organise strikes and enter workplaces. Special issues of several journals were entirely devoted to Work Choices: see, for instance, Vol.29, issue 1 of the *University of New South Wales Law Journal*.

<sup>52</sup> The Ombudsman's primary function is to protect and enforce the rights of workers and employees under Commonwealth workplace relations laws: Workplace Ombudsman, *Annual Report 2008–09*, at p.6.

<sup>53</sup> Workplace Ombudsman, *Annual Report 2008–09*, at p.viii.

### B. *Standing to sue*

In the United States it has been held that unions have standing to represent groups of similarly situated workers in class actions, even if the union alleges no specific injuries to itself as an entity but instead raises only the claims of its members.<sup>54</sup> The fact that the union also seeks to represent non-union employees does not result in the union losing standing to sue.<sup>55</sup>

Pt IVA's s 33D(1) addresses standing to bring a Pt IVA proceeding by requiring Pt IVA plaintiffs: (a) to have "a sufficient interest to commence a proceeding on his or her own behalf" against the relevant defendant; and (b) to be "a person referred to" in in s.33C(1)(a). This latter provision sets out the first of three prerequisites, which must be satisfied in order to avail oneself of the Pt IVA device: the existence of "seven or more persons [who] have claims against the same person".<sup>56</sup>

The Federal Court has held that in order to comply with ss.33C and 33D, and thus be able to bring a Pt IVA proceeding, it is not necessary to have suffered personally from the relevant conduct of the defendants. It is only necessary that the representative plaintiff has standing to sue.<sup>57</sup> As a result, the ACCC has been allowed to be a Pt IVA plaintiff, despite the fact that it had no interest of its own to protect in the cases in question and that its individual standing to sue was only statutory.<sup>58</sup>

Similarly, in one of the union class actions, *Finance Sector Union of Australia v Commonwealth Bank of Australia*,<sup>59</sup> the Full Federal Court of Australia held that the Finance Sector Union of Australia was entitled to assume the role of class representative despite the fact that, unlike the relevant workers, it was not claiming damages; it was seeking instead the imposition of a penalty on the defendant, pursuant to s.178(1) of the WRA, for breach of an award. This was because it was held that the members of the Pt IVA class do not need to be all suing in the same capacity.

Despite this judicial approach, the instances of a union assuming the role of class representative in Pt IVA proceedings have been rare. In fact, only four (8.89 per cent) of the 45 union class actions saw the union maintaining the role of representative plaintiff. In 11 (24.44 per cent) other union cases, the union was a plaintiff to a Pt IVA proceeding whilst one or more of the aggrieved workers

<sup>54</sup> *International Woodworkers v Chesapeake Bay Plywood Corp*, 659 F.2d 1259 (4th Cir. 1981).

<sup>55</sup> *Clark Equipment Co v International Union*, 803 F.2d 878 at 880 (6th Cir. 1986).

<sup>56</sup> The other two requirements, contained in subsections (b) and (c), are that the claims of all of the seven or more claimants are in respect of, or arise out of, the same, similar or related circumstances and give rise to a substantial common issue of law or fact.

<sup>57</sup> In the industrial arena, "various pieces of industrial legislation ... grant standing to unions to commence proceedings in their own right in relation to various causes of action, including underpayment matters": Peter Cashman, *Class Action Law and Practice* (Sydney: Federation Press, 2007), at p.590.

<sup>58</sup> See *Australian Competition and Consumer Commission v Chats House Investment Pty Ltd* (1996) 142 ALR 177; *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424; and *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* (1998) 156 ALR 273.

<sup>59</sup> *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 166 ALR 141.

assumed the role of Pt IVA representatives. This meant that whilst the union was a party to the same proceeding, it only pursued its individual claims and did not formally represent the class.<sup>60</sup>

In seven (15.56 per cent) of the 45 union class actions, the union undertook the role of the representative party's legal representative. The various roles occupied by unions in these cases were not mutually exclusive, as it was not uncommon for the union to hold multiple roles within the same proceeding, such as, for instance, being both the class representative and the class representative's legal representative. In the remaining proceedings that did not see the union as a plaintiff, class representative or legal representative, the union was "behind" the litigation, initiating, funding the proceedings and/or playing an active role in the conduct of the Pt IVA litigation.

### C. Funding of Union Class Actions

In August 2006, the High Court of Australia held (by a 5:2 majority) that the funding of a representative proceeding by a commercial litigation funder, in exchange for a specified percentage of the proceeds generated by a successful outcome, did not constitute an abuse of process nor was it against public policy.<sup>61</sup> But third party funding of litigation, by unions, was judicially accepted many years before this important ruling. In fact, despite the ancient tort and crime of maintenance,<sup>62</sup> English and Australian courts have upheld the right of unions to fund proceedings brought by some of their members for defamation,<sup>63</sup> unpaid wages<sup>64</sup> or in respect of accidents.<sup>65</sup> As explained by Lord Denning MR in the 1968 case of *Hill v Archibold*:

"Most of the actions in our courts are supported by some association or other, or by the state itself. Comparatively few litigants bring suits, or defend them, at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side."<sup>66</sup>

The authors have discovered that the practice of unions funding litigation, involving workers, has continued into the realm of class actions. Documents contained in court files and information provided to the authors by the relevant

<sup>60</sup> Rule 9.02 of the Federal Court Rules permits two or more persons to be joined as applicants where: (a) they might have issued separate proceedings against the same defendant; (b) the same question of law or fact might arise in those separate proceedings; and (c) all rights to relief claimed in those separate proceedings would be in respect of or arise out of the same transaction or series of transactions.

<sup>61</sup> *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

<sup>62</sup> As noted by the Full Federal Court of Australia in *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261 at 267 (per Lockhart, Cooper and Kiefel JJ.): "maintenance, which consisted of the assistance or encouragement of a party to an action in which the maintainor had no interest, was regarded by the English law, from an early time, as a crime punishable by fine or imprisonment. It later became recognised as a civil wrong."

<sup>63</sup> See *Stevens v Keogh* (1946) 72 CLR 1; and *Hill v Archibold* [1968] 1 QB 686 CA.

<sup>64</sup> See *Greig v National Amalgamated Union of Shop Assistants* (1906) 22 T.L.R. 274.

<sup>65</sup> See *Allen v Francis* [1914] 3 K.B. 1065 CA at 1067 (per Lord Cozens-Hardy M.R.).

<sup>66</sup> [1968] 1 Q.B. 686 at 694–695. See also Law Commission of England and Wales, *Proposals for Reform of the Law Relating to Maintenance and Champerty* (HMSO, 1966), Law Com. No.7, at para 15; Rules Committee, *Class Actions for New Zealand* (2008), Second Consultation Paper, at para.20; and Australian Law Reform Commission, *Standing in Public Interest Litigation* (1985), Report No.27, at para.339.

lawyers revealed that at least 67 per cent of the union class actions were completely funded by the relevant unions. Indeed, in only 6.7 per cent of the union cases was there evidence that the class members were required to contribute to the costs of running the proceedings.

The crucial role that third party funding, such as that provided by unions, plays in Pt IVA proceedings becomes apparent when one considers the following features of the class action landscape. As already noted, the only persons on the plaintiff side that are liable for costs, including the costs that are awarded to the adversary (in the event of a loss), are the class representatives. Class action proceedings are generally more expensive and complex than orthodox litigation. The vast majority of class representatives do not possess the necessary funds and seeking contributions from class members represents, in most circumstances, an unreliable strategy for funding class actions; a scenario that, as we will see in the next sub-section, is prevalent in employment class actions. Legal aid is generally not available in non-criminal proceedings and, contrary to one of the ALRC's 1988 recommendations,<sup>67</sup> a class action fund was not established by the Federal Government. Thus, in most circumstances, class action litigation will not "see the light of day" unless funding is secured from litigation funders, plaintiff solicitors or entities such as unions.

Finally, the last sentence in Lord Denning M.R.'s comments quoted above—that third party funders must be prepared to meet adverse costs awards—highlights a benefit flowing to Pt IVA defendants from the funding of class actions by unions. In fact, Pt IVA defendants and their lawyers have frequently expressed the concern that plaintiff lawyers tend to appoint, as Pt IVA plaintiffs, persons of straw, thus rendering any costs orders made in favour of Pt IVA defendants of no practical utility.<sup>68</sup> The involvement of unions thus provides Pt IVA defendants with an alternative source of compensation<sup>69</sup> with respect to some of the legal costs that they incurred in successfully defending the class action.<sup>70</sup>

#### *D. The claims and socioeconomic status of Pt IVA employees*

In addition to the already-mentioned AWA-related disputes, claims in union Pt IVA cases stemmed from alleged unlawful workplace practices such as: (a) a failure to pay severance payments, entitlements, allowances, leave loadings and wages; (b) terminations for prohibited reasons; (c) breaches of employment contracts; (d) a failure to advise employees of entitlements to retirement benefits; and (e) unqualified representations made by employers regarding their employment

<sup>67</sup> ALRC 1988 Report, at paras 308–310.

<sup>68</sup> See, for instance, S. Clark and C. Harris, "Multi-Plaintiff Litigation in Australia—A Comparative Perspective" (2001) 11 Duke J. of Comp. & Int'l Law 289 at 303; and D. Grave and K. Adams, *Class Actions in Australia* (Sydney: Lawbook Co, 2005), at p.482.

<sup>69</sup> See, however, Arup and Sutherland, "The Recovery of Wages: Legal Services and Access to Justice" (2009) 35 Monash U. L. Rev. 96 at 109 where attention is drawn to the fact that in claims for underpayments costs do not generally follow the event.

<sup>70</sup> The recent ruling by the High Court of Australia, in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75, that the Supreme Court of New South Wales was correct in holding that it did not have the power to order a third party funder, a litigation funder, to pay the costs of the relevant defendant, was attributable to the unique nature of the relevant NSW rule. In fact, r.42.3(2) of the *Uniform Civil Procedure Rules 2005* (NSW) (now repealed) limited the capacity to award third party costs to cases which comprised an abuse of process. In other jurisdictions, such as the Federal jurisdiction, where the capacity to award third party costs is less restricted, litigation funders have been ordered to contribute towards the winning defendant's costs: see, for instance, *Gore v Justice Corp* (2002) 119 FCR 429.

security. None of the individual claims of the employees in question would appear to justify the costs entailed in bringing individual legal proceedings.<sup>71</sup> The existence of this scenario appears to be confirmed by the fact that the authors have not identified any instances of workers—who were among the alleged victims of the conduct challenged in union class actions—bringing individual proceedings either after opting out of the relevant union class action or where they never fell within the ambit of the group represented in the union Pt IVA proceeding in question.<sup>72</sup>

Table 3 provides information regarding the categories of workers that have been represented in union class actions. With the exception of Victorian police officers and the Deputy Registrars of the Family Court of Australia, the employees represented in union class actions cannot be said to be legally sophisticated. Similarly, none of them would appear to be highly-paid workers.

In eight union class actions, the represented groups comprised only current employees whilst in 27 cases, the representative parties acted on behalf of both current and former employees. It should also be noted that in all of the cases where former employees only were represented in the litigation, the circumstances that led to these persons becoming former employees were the subject of the proceedings.

The scenario depicted above confirms that without union class actions probably most, if not all, of the relevant employees would not have been able to seek legal redress from a court. It should be noted, however, that unions have extensively employed so-called “closed class” mechanisms, pursuant to which the Pt IVA proceeding was brought, not on behalf of all aggrieved workers, but only on behalf of those workers who were members of the relevant union. This practice is now considered.

### *E. Closed classes*

In December 2007 the Full Federal Court of Australia upheld the validity of a closed class mechanism that is preferred by commercial litigation funders.<sup>73</sup> Pursuant to this device, the litigation supported by the funder only covers those claimants who, at the time the proceeding is filed, had executed funding agreements with the funders and/or fee and retainer agreements with the representative party’s solicitors.<sup>74</sup>

The authors have found that in 29 (64 per cent) of the union class actions—whilst the aggrieved workers encompassed both members and non-members of the relevant union—the class representatives brought the Pt IVA litigation on behalf of union workers only. In three other cases the represented

<sup>71</sup> In one union class action, for instance, the individual claim of the class representative did not exceed A \$416. In October 2008, New Zealand’s Rules Committee concluded that legal claims worth NZ \$150,000 or \$200,000, whilst substantial, “under today’s conditions, having regard to legal fees and the probably extensive costs of investigating the facts, each claim is quite possibly uneconomic”: Rules Committee, *Class Actions for New Zealand*, at para 12. In 1978, the US Department of Justice expressed the view that a claim worth US \$10,000 would warrant individual proceedings: see *OLRC Report*, at p.484.

<sup>72</sup> The authors have discovered that when individual proceedings are brought in the two scenarios articulated above the defendants invariably advise the trial judge presiding over the class action of these developments and, as a result, the relevant Pt IVA court file would contain references to the additional proceedings in question.

<sup>73</sup> *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

<sup>74</sup> See generally P. Cashman, “Class Actions on Behalf of Clients: Is This Permissible?” (2006) 80 *Australian Law Journal* 738; and V. Morabito, “Class Actions Instituted only for the Benefit of the Clients of the Class Representative’s Solicitors” (2007) 29 *Sydney Law Review* 5.

group encompassed only union members due to the simple fact that in the relevant workplace there were no non-union workers. Limiting the group represented in a Pt IVA proceeding in such a way would appear to be irreconcilable with the goal of enhancing access to justice, as workers who have identical or similar claims to class members are effectively excluded from taking part in the proceeding merely because they are not members of the relevant union. This is directly inconsistent with the intention of the drafters of Pt IVA to provide as many claimants as possible with the opportunity to obtain access to the legal system.

But, as already noted, the Full Federal Court has upheld the validity of closed class devices. This judicial conclusion was arrived at despite the court expressing concerns regarding closed class mechanisms,<sup>75</sup> broadly similar to those outlined in the preceding paragraph. This ruling was not entirely surprising given that Pt IVA's s 33C expressly provides that a Pt IVA proceeding may be brought on behalf of "some or all" of the relevant claimants. Attention should also be drawn to the fact that the exclusion of some of the claimants, from the ambit of Pt IVA litigation, is a strategy that has been implemented frequently (for various reasons) since as early as 1993.<sup>76</sup>

The non-union members are, of course, not precluded from initiating their own separate class action on the same subject matter if they so desire and if they are able to secure funding for it. This has, in fact, happened once. Interestingly, in this instance of competing employment class actions, the first Pt IVA proceeding was actually brought on behalf of the non-union workers only, as the solicitors in question were aware that the relevant union was planning to have another firm of solicitors file a Pt IVA proceeding with respect to the same dispute but only on behalf of its members.<sup>77</sup> It is actually not uncommon for competing class actions to be filed with respect to the same dispute: the authors have identified 11 instances of competing Pt IVA proceedings being filed with respect to the same disputes in the study period.

The fact that unions have no obligation to expend their resources to assist individually non-union workers in securing legal remedies should also be remembered. When considering the relevant empirical data from this perspective, it shows that in 13 union class actions, as a result of class action litigation which included all aggrieved workers regardless of their union membership, non-union class members were able to obtain access to the Federal Court through the assistance and resources of the relevant union. Furthermore, in 8 of these 13 "open class" union class actions, a positive outcome was secured for the class. Thus, non-union workers were able to benefit residually from litigation initiated by unions for the primary purpose of assisting their members. As already noted, this goes beyond what a union is obligated to do. Attention should also be drawn to the fact that in 72 per cent of the union class actions—where only union members were

<sup>75</sup> *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 at [1] (per French J.); and [117] and [198] (per Jacobson J.).

<sup>76</sup> See Morabito, "Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors" (2007) 29 Sydney Law Review 5 at 13–20.

<sup>77</sup> For more details on the first case see *Robert Woodhouse v John McPhee* [1997] FCA 1509. When faced with two class actions filed, with respect to the same dispute, by different solicitors on behalf of different groups of claimants, the defendants sought an order that the second Pt IVA proceeding be dismissed as an abuse of process. Goldberg J., instead, ordered that the two plaintiff law firms co-operate with each other to ensure that, as far as possible, the two proceedings were run as one proceeding.

represented—the relief sought was substantially or partly non-monetary. This meant that in the event of a successful outcome for the class, all relevant employees, whether or not formally covered by the proceeding, would benefit from the injunctive and/or declaratory relief secured.<sup>78</sup>

It is interesting to note that in the United States there have been allegations that in some union-driven class actions—where there were conflicts between the interests of union workers and the interests of non-union workers—the union allowed the interests of its members to prevail over the interests of the latter group when a settlement agreement was executed with the defendants.<sup>79</sup> No discrimination against non-union workers was identified by the authors in the way union Pt IVA actions have been settled.

Despite the frequent exclusion of non-union workers, a total of over 27,108 workers were represented in the 45 union class actions. We now consider what percentage of these class members have, on average, opted out; that is, removed themselves from the class action litigation.

### *F. Opt out rates*

As explained by the Ontario Law Reform Commission, “the operation of the same social and psychological factors that discourage persons from bringing their own civil actions will prevent them from taking other forms of affirmative action”, such as opting in.<sup>80</sup> This was the principal reason why the ALRC recommended, and the Australian Government and Parliament implemented, the opt-out device for Pt IVA proceedings.<sup>81</sup>

As a result, Pt IVA’s s.33E(1) provides that the consent of a person to be a class member in a Pt IVA proceeding is not required. An exception is provided, under s.33E(2), with respect to the Commonwealth, a State or Territory, or a Minister, officer or certain agencies of the Commonwealth, a State or a Territory.<sup>82</sup> These persons and entities will be bound by a Pt IVA proceeding only if they expressly

<sup>78</sup> In Glover, “Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements” (2006) 59 Vand. L. Rev. 1735 at 1744 attention is drawn to the fact that a major reason why many employment discrimination claims are most effectively brought as class actions in the United States is the fact that in such claims the relief sought is primarily injunctive.

<sup>79</sup> See, for instance, *Clark Equipment Co v AIW International Union* 803 F.2d 878 (6th Cir. 1986) where the settlement was approved despite the dissent of the non-union class members.

<sup>80</sup> *OLRC Report*, at p.480. See also Mulheron, *The Class Action in Common Law Legal Systems*, 2004, at p.37; D. Hensler and T. Rowe Jr, “Beyond ‘It Just Ain’t Worth It’: Alternative Strategies for Damage Class Action Reform” (2001) 64 Law & Contemp. Probs 137 at 146; Brunsden, “Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts” (2008) 29 Berkeley J. Emp. & Lab. L. 269 at 286 and 296–297; Deborah Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand Publishing, 2000), at p.476; Becker and Strauss, “Representing Low-Wage Workers in the Absence of a Class” (2008) 92 Minn. L. Rev. 1317 at 1325–1328; J. Bowermaster, “Two (Federal) Wrongs Make A (State) Right: State Class-Action Procedures as an Alternative to the Opt-In Class-Action Provision of the ADEA” (1991) 25 U. Mich. J.L. Reform 7 at 29; Zheng, “It’s Not What is On Paper, But What is In Practice” (2009) 8 *Washington University Global Studies Law Review* 595 at 615–616; and Steven Zieff, “Advanced Issues in Collective Actions” (2006) 10 Empl. Rts & Employ. Pol’y J. 435 at 437.

<sup>81</sup> See, generally, Morabito, “Class Actions Instituted only for the Benefit of the Clients of the Class Representative’s Solicitors” (2007) 29 *Sydney Law Review* 5 at 21–24; and *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 at 422–426 (per Stone J.). In November 2008, the Civil Justice Council of England and Wales concluded that “the use of opt-out might ... be properly and fairly utilised in actions that seek to vindicate civil or other general rights ie, equal pay claims; anti-discrimination claims; employment claims ...”: *CJC Report*, at p.146.

<sup>82</sup> This exception, contained in s.33E(2), is justified in the Explanatory Memorandum on the ground that “the 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”: Explanatory Memorandum to the Federal Court of Australia (Amendment) Bill 1991 (Cth) at para 14. A similar rationale was put forward by the ALRC: ALRC 1988 Report, at para 128.

consent to such a scenario. To accommodate the opt-out device, s 33H provides that an application commencing a Pt IVA proceeding, in describing or otherwise identifying group members to whom the suit relates, need not “name, or specify the number of, the group members”.<sup>83</sup>

Another crucial provision of Pt IVA is s 33J, as it governs the manner in which the right to opt-out may be exercised. It provides that the court must fix a date before which a group member may opt-out of a Pt IVA proceeding. A class member may opt out of the Pt IVA proceeding by written notice given under the rules of court before the date so fixed. Section 33X(1) provides that notice must be given to class members of the commencement of the proceeding and of their right to opt out of the proceeding before the date specified by the court under s 33J. Section 33Y dictates that the form, content and method of distribution of notices, such as the opt-out notice, must be approved by the court.

The authors discovered that the average opt-out rate for the 250 Pt IVA proceedings that were filed in the study period was 13.81 per cent whilst the median rate was 5.30 per cent. It was also found that class members were more likely to elect to remain in union class actions than in other Pt IVA actions. In fact, the average opt-out rate in union class actions was 5.43 per cent whilst the median rate was 2.59 per cent.

A review, by the authors, of the comments that class members have written on their opt-out forms revealed that one of the principal reasons for the higher-than-expected opt-out rate of 13.81 per cent<sup>84</sup> was attributable to confusion, on the part of some opt-out class members, as to the essential characteristics of class action proceedings and/or the opt-out device.<sup>85</sup> Some opt-out class members, for instance, were under the mistaken belief that they were liable for costs and/or that it was improper for plaintiff lawyers to initiate (and for the court to allow the bringing of) class action proceedings without the prior consent of the affected claimants.<sup>86</sup>

The lower opt-out rates in union class actions would suggest that this problem is less prevalent in these proceedings. This state of affairs appears to be confirmed by a review of the opt-out forms that have been filed in union class actions. The comments found on these forms exhibited minimal instances of a failure, on the part of the relevant class members, to fully comprehend the opt-out process and their rights in the proceedings. There are other aspects of the way union class actions have been conducted which are consistent with the conclusion that class

<sup>83</sup> As indicated by Lehane J. of the Federal Court in *Bright v Femcare Ltd* [2000] FCA 1179, at [19]: “it 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 (per O’Loughlin J.); and Cashman, “Class Actions on Behalf of Clients: Is This Permissible?” (2006) 80 *Australian Law Journal* 738 at 738.

<sup>84</sup> The Government responsible for Pt IVA expected an average opt-out rate of approximately 1 per cent: see *Hansard*, HR (November 13, 1991) 3174.

<sup>85</sup> The authors of the most cited empirical study of r.23 reached the conclusion that “many, perhaps most, of the [class] notices present technical information in legal jargon. Our impression is that most notices are not comprehensible to the lay reader”: T. Willging, L. Hooper and R. Niemic, “An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges” (1996) 71 N.Y.U. L. Rev. 74 at 134. A sample opt-out notice was attached to the Federal Court’s Pt IVA Practice Note, which is discussed later in the article. This sample notice has removed many of the features of the opt-out notices that have been approved by the Federal Court and which, according to the authors’ findings mentioned above, confused some class members.

<sup>86</sup> See also K. Lindgren, “Some Current Practical Issues in Class Action Litigation” (2009) 32 U.N.S.W. L.J. 900 at 906 (“there is, however, a troubling question as to whether some group members who opt-out do so as a result of ignorance”).

members in union class actions are likely to have had a better understanding of the major aspects of the litigation and/or how opt-out class actions operate than their counterparts in non-union class actions. They are canvassed below.

The court files revealed that in a handful of union class actions class members were able to have discussions with various parties to the proceedings and to receive additional information about the litigation in a number of ways. In two cases, for instance, the opt-out notice was delivered to class members at interviews/meetings set up for that purpose. This face-to-face contact allowed class members to ask the union's legal representative any questions they may have had regarding the proceeding. In three cases opt-out notices were delivered in person to the class members by a union official or their employer or via notice boards at the relevant workplaces.<sup>87</sup> In another three cases, the class representative's lawyers sent a newsletter to class members—separate from the formal opt-out and settlement notices approved by the court—thus providing class members with additional information about the case as well as updating them as to its progress. Additionally, in four cases the relevant union held at least one meeting with class members to discuss a proposed settlement or certain aspects of the case. These methods would have all contributed to clearing up any misconceptions class members may have had about the proceedings.

In Pt IVA proceedings where a union was a plaintiff, class representative, legal representative or otherwise provided support, the knowledge of this fact may have led some class members to conclude that it was unlikely that their employers would “punish” them for not having excluded themselves from the class action proceeding. The knowledge of the involvement of a union in the Pt IVA litigation may have also led some of the relevant employees to regard the litigation as having a higher likelihood of success. Unions are known to be experienced in the field of workplace disputes and often would have had prior experience in dealing with the defendant employers. Indeed, it has been asserted by Browne that due to their prior relationship, unions often have an insider's advantage in terms of “having the goods” on the defendant.<sup>88</sup>

In many cases the support of the union would have placed the class representative in an advantageous position right from the outset of the litigation; something which many class members would have been aware of. The fact that in 25 (55.56 per cent) of the union class actions, the class representative's solicitors were either Slater & Gordon or Maurice Blackburn would have also inspired confidence as to the likely outcome of the proceeding. These two firms are the only law firms that have specialised in class action litigation during the study period and a majority of the class actions that they have filed have resulted in a settlement.<sup>89</sup>

<sup>87</sup> For a judicial discussion of a similar order, in the context of r.23 actions, see *Frank v Capital Cities Communications*, 88 F.R.D. 674 at 679 (S.D.N.Y., 1981).

<sup>88</sup> Audrey Browne, “Class Actions in Employment Law Breakout II: How to Settle a Class Action” (Paper presented at the American Bar Association's 1999 Annual Meeting, Atlanta, Georgia: August 10, 1999), at p.6, available at [www.bna.com/bnabooks/ababna/annual/99/annual01.pdf](http://www.bna.com/bnabooks/ababna/annual/99/annual01.pdf) [Accessed August 12, 2011].

<sup>89</sup> See V. Morabito, *An Empirical Study of Australia's Class Action Regimes: First Report: Class Action Facts and Figures* (2009), at pp.28 and 35–36, available at <http://globalclassactions.stanford.edu/empirical> [Accessed August 12, 2011]. Slater & Gordon were the class representatives' solicitors in the 19 proceedings against Victorian hospitals, whilst Maurice Blackburn was involved in six union class actions, including the Waterfront cases, the case against Ballarat University and *Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong*

At least some of the Pt IVA employees are likely to have been familiar with the union and its functions prior to the initiation of the proceedings, especially if they were members of the union. This prior relationship with the union may have led at least some of the class members to place a greater level of trust in the people running and/or supporting the case than would have otherwise been the case. Thus, they were less likely to opt-out as a result of a feeling of anger or mistrust that may have been generated by their inclusion in the litigation without their consent.

### *G. Pt IVA's opt-in device*

The operation of Pt IVA's extremely limited opt in regime—which it will be recalled relates to governments and government officials and entities and is regulated by s.33E(2)—also warrants a brief discussion. The authors identified only one Pt IVA proceeding, filed during the study period, where all members of the represented group were required to opt in, pursuant to s.33E(2), in order to be bound by the proceeding. This proceeding was a union case.<sup>90</sup>

The relevant (potential) claimants were the Deputy Registrars of the Family Court of Australia, who were involved in an industrial dispute with the court itself. Despite comments made by the class representatives' solicitors—to the effect that at least 35 Deputy Registrars had expressed their support for the proceeding—only one person filed the required opt-in form. But subsequently the class member in question sought to revoke this opt-in form.

This very limited experience with the s.33E(2) opt-in device is consistent with the findings of US empirical studies of r.23<sup>91</sup> and with the operation of several US legislative regimes in the employment arena,<sup>92</sup> such as the *Fair Labor Standards*

*City Council* [2000] FCA 1231, which was described by Josh Bornstein as setting “a precedent for council workers around the country in winning the first successful class action against outsourcing deals”: M. Bachelard, “Victims of Council's Outsourcing Win Reinstatement”, *The Australian*, September 6, 2000, at p.3.

<sup>90</sup> See *CPSU, Community and Public Sector Union v Commonwealth of Australia* [1999] FCA 653. There were approximately 48 Deputy Registrars at the time of the litigation.

<sup>91</sup> These findings are summarised in V. Morabito, “Class Actions and the Right to Opt Out under Pt IVA of the Federal Court of Australia Act 1976 (Cth)” (1994) 19 *Melb. U.L.R.* 615 at 629–633.

<sup>92</sup> The *Age Discrimination in Employment Act* and the *Equal Pay Act*, both enacted in the 1960s, provide for collective actions governed by an opt-in device. The former legislation prohibits employment discrimination against persons between the ages of 40 and 70 years. The latter Act requires equal pay for equal work regardless of the sex of the employee.

*Act of 1938* (“FLSA”),<sup>93</sup> which employ opt-in devices.<sup>94</sup> One of the undesirable effects of the opt-in device is that most of the class actions that have been filed pursuant to the FLSA have been brought on behalf of former employees only.<sup>95</sup>

### *H. Outcomes of union class actions*

The significantly lower opt-out rates for union class actions signify that far greater percentages of class members covered by the Pt IVA litigation were able to receive the benefits of a successful Pt IVA proceeding; an event which happened frequently in union class actions. In fact, the outcomes of union class actions were overwhelmingly favourable to representative parties and class members. In 73.33 per cent of the union class actions, the class representatives and the class members received a tangible benefit from the proceeding, the most common being monetary relief for each of the class members. At least 14,075 employees were eligible to receive a tangible benefit from union class actions. The information available to the authors showed that the monetary relief received by individual workers ranged from A \$100 to A \$26,556.

Union class actions were most commonly resolved through a settlement. Indeed, 67 per cent of the union class actions were settled. This contrasts with the settlement rate of 42.68 per cent for all Pt IVA proceedings filed during the study period, although it does not match the settlement rates achieved in class actions funded by litigation funders (100 per cent) or those brought by ASIC (88 per cent). The remaining union class actions were: (a) brought to an end by a favourable (6.67 per cent), partly favourable (2.22 per cent) or unfavourable (2.22 per cent) post-trial ruling; (b) summarily dismissed (4.44 per cent); (c) discontinued by the representative plaintiffs (13.33 per cent); (d) discontinued as Pt IVA litigation (2.22 per cent); or (e) stayed for want of prosecution (2.22 per cent).

Settlement was a common way in which union class actions were resolved because in most circumstances it was in the interests of both sides not to proceed to trial. Most of the union class actions were preceded by an ongoing industrial dispute, and thus extensive negotiations, albeit mostly failed negotiations, had frequently taken place between the unions and the defendants prior to the class action litigation.<sup>96</sup> Negotiation is one of the key roles performed by unions. It is

<sup>93</sup> This legislation establishes a minimum hourly wage and overtime provisions and restricts child labour. FLSA provides that employees may bring an action on behalf of themselves and “similarly situated” employees. It also requires an employee/potential class member to give consent in writing to participate in such a case. This consent must be filed with the court. As noted in S.E. Cole and M. Bainer, “To Certify or Not To Certify: A Circuit-By-Circuit Primer on the Varying Standards for Class Certification in Actions under the Federal Labor Standards Act” (2004) 13 B.U. Pub. Int. L.J. 167 at 168, “the successful claimant in such actions may recover unpaid regular and overtime wages, an additional amount of liquidated damages equaling the amount of the wages recovered, legal or equitable relief, costs and mandatory attorneys’ fees”.

<sup>94</sup> See, for instance, Brunsten, “Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts” (2008) 29 Berkeley J. Emp. & Lab. L. 269 at 294 (“the average opt-in rate for ... [the] twenty-one cases analysed [brought pursuant to the FLSA] is 15.71 per cent. This data shows that an opt-in regime results in far lower participation rates than an opt-out regime”); *De Asencio v Tyson Foods Inc*, 342 F.3d 301 at 310 (3rd Cir, 2003) (“under most circumstances, the opt-out class will be greater in number, perhaps even exponentially greater” than the FLSA’s opt-in class); and D. Borgen and L. Ho, “Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act” (2003) 7 Empl. Rts & Employ. Pol’y J. 129 at 151–153.

<sup>95</sup> See, for instance, G. W. Foster Jr, “Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions” [1975] Wis. L. Rev. 295 at 310; and Weil and Pyles, “Why Complain? Complaints, Compliance, and the Problem of Enforcement in the US Workplace” (2005) 27 Comp. Lab. L. & Pol’y J. 59 at 83–84.

<sup>96</sup> The class actions brought against numerous Victorian hospitals provide examples of this scenario given that the dispute which resulted, in 2002, in the filing of these proceedings commenced back in 1997.

for this reason that in several cases in which in the union was not a formal party to the proceeding, the union nevertheless undertook the role of negotiator on behalf of the representative parties in settlement discussions that were held with the defendants.<sup>97</sup>

Pt IVA's s.33V dictates that a Pt IVA proceeding cannot be settled without the approval of the court. The Federal Court will not approve a class action settlement unless it is satisfied that the proposed settlement is fair and reasonable and adequate having regard to the claims made on behalf of the class members who will be bound by the settlement.<sup>98</sup> Similarly, the court

“must be satisfied that any settlement or discontinuance of [Pt IVA] proceedings has been undertaken in the interests of the group members as a whole, and not just in the interests of the applicant and the respondent.”<sup>99</sup>

As recently acknowledged by Justice Gordon of the Federal Court of Australia, “in assessing a compromise under s 33V ..., the Court’s task is an onerous one particularly in circumstances ... where the application is unopposed”.<sup>100</sup>

In union class actions, this judicial task is potentially rendered more onerous by the need to ensure that any conflicts of interest which may arise, as a result of a union’s involvement in the proceedings, do not adversely affect all or some of the class members. A union may have multiple objectives in getting involved in a proceeding. Rutherglen has asserted that union representation most frequently complicates class action litigation when the union seeks to represent the class.<sup>101</sup> He believes that conflicts of interest could arise as a result of the incompatibility between a union’s role in collective bargaining and a union’s role as a representative party.<sup>102</sup> Thus, he warned that

“[t]he danger of union representation is not that it will be unsophisticated or underfinanced, but that it will serve the interests of the majority of employees rather than the interests of each segment of the class.”<sup>103</sup>

In its 1988 report the ALRC revealed that concerns had been raised that the ALRC’s proposal may encourage zealots or crusaders to seek out groups of people who may have suffered as result of multiple wrongs and bring proceedings on their behalf to pursue political or other objectives. The ALRC’s response to this criticism, set out below, suggests that unions may have been included among the zealots and crusaders feared by the relevant critics:

<sup>97</sup> Again, the class action litigation against Victorian hospitals provides an illustration of this practice.

<sup>98</sup> See *Williams v FAI Home Security Pty Ltd (No.4)* (2000) 180 ALR 459 at [19] (per Goldberg J.); *Neil v P&O Cruises Australia Pty Ltd* [2002] FCA 1325 at [6]–[7] (per Weinberg J.); *Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd* [2004] FCA 1114 at [10] (per Crennan J.); *Courtney v Medtel Pty Ltd (No.5)* [2004] FCA 1406 at [37]–[42] (per Sackville J.); Federal Court of Australia, *Practice Note CM 17—Representative Proceedings Commenced under Pt IVA of the Federal Court of Australia Act 1976* (July 5, 2010), at para 11 (“Practice Note”); and *Georgiou v Old England Hotel Pty Ltd* [2006] FCA 705, at [18] (per Young J.).

<sup>99</sup> *Australian Competition & Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 at 258 (per Branson J.). See also *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 at [15] (per Finkelstein J.); and *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No.2)* [2006] FCA 1388 at [30]–[31] (per Jessup J.).

<sup>100</sup> *Haslam v Money for Living (Aust) Pty Ltd (Administrators Appointed) (ACN 107 611 218)* [2007] FCA 897 at [17].

<sup>101</sup> G. Rutherglen, “Notice, Scope, and Preclusion in Title VII Class Actions” (1983) 69 Va L. Rev. 11 at 66.

<sup>102</sup> G. Rutherglen, “Notice, Scope, and Preclusion in Title VII Class Actions” (1983) 69 Va L. Rev. 11 at 67.

<sup>103</sup> G. Rutherglen, “Notice, Scope, and Preclusion in Title VII Class Actions” (1983) 69 Va L. Rev. 11 at 68.

“This objection seems to be based on the dubious proposition that the motives of the principal applicant are somehow relevant to the question whether people who have been injured should be accorded the compensation the law decrees. It suggests that it is somewhat wrong for a person to tell others about legal remedies to which they are entitled or to help them to take action. Many union and business groups ... do just this as a normal part of their service to their members and others.”<sup>104</sup>

It is thus important that unions do not seek to force a settlement on the class to advance their own organising, bargaining or political ends.<sup>105</sup> The relevant court files reviewed by the authors did not reveal the existence of any of the undesirable scenarios depicted above. All the settlements executed by the parties to union class actions were approved by the court without any judicial requests for modifications or additions to the settlement agreements/schemes in question.

There were also minimal instances of class members objecting<sup>106</sup> to the terms of the settlement agreements.<sup>107</sup> Whilst leading US scholars have expressed the view that lack of, or minimal, objections by class members to proposed settlements cannot be regarded as reliable evidence that class members supported the settlements,<sup>108</sup> objections from class members have usually been instrumental in the few instances of Australian courts refusing to approve proposed class action settlements.<sup>109</sup>

A form of relief commonly claimed by class representatives in union class actions, but which has rarely been claimed in other Pt IVA actions, was the imposition of a penalty on the defendant. This strategy was made possible by the Full Federal Court’s ruling, in the already-mentioned *Finance Sector Union* case, that it is permissible to employ the Pt IVA regime as a vehicle for a claim involving the imposition of a penalty. The court perceptively drew attention to the fact that a contrary conclusion would

“impose a significant limitation on the utility of Pt IVA [as] there are many statutory provisions that empower the court to impose penalties, either by way of primary relief or in conjunction with other orders.”<sup>110</sup>

<sup>104</sup> *ALRC 1988 Report*, at para.124.

<sup>105</sup> Hamilton and Anderson, “Labor Unions and Class Actions: The Union Perspective on Collective Litigation” (Paper presented at the ABA Section of Labor and Employment Law Annual Meeting, Atlanta, August 10, 1999), at p.3.

<sup>106</sup> Part IVA’s s.33X(4) requires that an application for approval of a settlement under s.33V must not be determined unless notice has been given to class members, unless the court is satisfied that it is just to do so.

<sup>107</sup> In one case, two class members expressed a strong opposition to the proposed settlement because it did not include a further component relating to their sub-group but they nevertheless signed a document confirming that they would accept the proposed settlement although “under protest”. In another case, a meeting of class members voted not to approve the settlement deed as it stood, but to approve the deed if it were amended to provide for distribution of the settlement fund within two months of the settlement being approved by the court. The deed was subsequently amended and approved by the court.

<sup>108</sup> See, for instance, T. Eisenberg and G. Miller, “The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues” (2004) 57 *Vand. L. Rev.* 1529.

<sup>109</sup> See V. Morabito, “An Australian Perspective on Class Action Settlements” (2006) 69 *M.L.R.* 347 at 367–371.

<sup>110</sup> *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 166 *ALR* 141 at 145 (per Wilcox, Ryan and Madgwick JJ.).

These penalties were often claimed pursuant to the WRA. Relief in the form of a penalty imposed on the employers can be seen as fulfilling a regulatory function<sup>111</sup> given that it goes beyond providing a remedy to the class members and encompasses as well a punitive and thus deterrent effect.<sup>112</sup> As relief in the form of a penalty was usually claimed in addition to monetary relief for class members, it demonstrates that in many Pt IVA proceedings unions have attempted to reconcile one of their principal goals, of improving workplace conditions, with the immediate goal of obtaining legal redress for the workers represented in the litigation. It should be noted, however, that whilst the imposition of a penalty on the defendants was a form of relief commonly claimed in union class actions, it was rarely ordered. This is because, as already noted, only a small percentage of union class actions were resolved through a trial.

#### IV. Judicial Economy and Union Class Actions

The fact that, as already noted, there has been only one instance of competing class actions in this area together with the total lack of any evidence that any of the aggrieved workers brought their own proceedings, provides a picture of union class actions which is totally consistent with the judicial economy goal of Pt IVA. We now consider whether union class actions have attained Pt IVA's objective of promoting "efficiency in the use of court resources".<sup>113</sup>

##### A. Duration

The authors found that, at the time of writing, the average duration of all resolved Pt IVA actions (that were filed in the study period) was 727 days, with a median duration of 572 days. Union class actions have had a noticeably shorter duration: an average duration of 424 days and a median duration of 171 days. Shorter class actions mean, of course, that less judicial time and thus fewer judicial (as well as non-judicial) resources were consumed by the litigation.

The way in which union class actions were resolved has undoubtedly played a significant role in the shorter duration of these proceeding. As already noted, a majority of union class actions were settled, and a trial was held in only 11 per cent of union class actions. In many cases, it would have been in the interests of the defendant not to unnecessarily prolong the litigation given that the class action had already caused severe disruptions to the workplaces in question. It has been suggested that, as unions only have time to become involved in meritorious class actions, most employer defendants should seriously weigh the time and expense of protracted litigation against the possibility of an early cost-effective settlement.<sup>114</sup>

<sup>111</sup> See Arup and Sutherland, "The Recovery of Wages" (2009) 35 Monash U. L. Rev. 96 at 110 and the references cited therein.

<sup>112</sup> Deterrence of illegal conduct or behaviour modification is recognised in Canada and the United States as the third policy goal of modern class action devices but, unfortunately, it was not embraced by the ALRC and by the drafters of Pt IVA: see generally V. Morabito, "The Victorian Law Reform Commission's Class Action Reform Strategy" (2009) 32 U.N.S.W. L.J. 1055 at 1065–1066.

<sup>113</sup> *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 at [15] (per Merkel J.).

<sup>114</sup> Browne, "Class Actions in Employment Law Breakout II: How to Settle a Class Action" (Paper presented at the American Bar Association's 1999 Annual Meeting, Atlanta, Georgia: August 10, 1999), at p.3, available at [www.bna.com/bnabooks/ababna/annual/99/annual01.pdf](http://www.bna.com/bnabooks/ababna/annual/99/annual01.pdf) [Accessed August 12, 2011].

As cases which involve unions and numerous employees often receive media coverage, employers may have also sought to limit any negative publicity stemming from the litigation by agreeing to an early settlement.<sup>115</sup> The early settlements meant, of course, that class members were able to receive any benefits flowing from the favourable outcome and “get on with their lives”<sup>116</sup> sooner rather than later.

### *B. Interlocutory disputes*

In 2002, Finkelstein J., sitting as a member of the Full Federal Court, drew attention to a problem that has been encountered in a number of Pt IVA proceedings:

“There is a disturbing trend that is emerging in [Pt IVA] proceedings which is best brought to an end. I refer to the numerous interlocutory applications [lodged by defendants], including interlocutory appeals, that occur in such proceedings. This case is a particularly good example. The respondents have not yet delivered their defences yet there have been approximately seven or eight contested interlocutory hearings before a single judge, one application to a Full Court and one appeal to the High Court. I would not be surprised if the applicants’ legal costs are by now well in excess of \$500,000. I say nothing about the respondents’ costs. This is an intolerable situation, and one which the court is under a duty to prevent, if at all possible.”<sup>117</sup>

One obvious repercussion of the excessive number of interlocutory hearings is that vast resources are required to defend these challenges. This adds significantly to the already high costs of running a class action proceeding and may well lead to the abandonment of the proceeding. Numerous interlocutory hearings also result in the consumption of finite judicial resources. It is therefore not surprising that the Federal Court released in July 2010 a detailed Practice Note on Pt IVA, one of the main purposes of which was to address this problem.<sup>118</sup> Similarly, in September 2009 the Access to Justice Taskforce of the Australian Attorney-General’s Department recommended a review of the operation of Pt IVA. According to this taskforce, this review should consider, among other things, measures designed to limit the number of interlocutory hearings and whether the

<sup>115</sup> See, for instance, Li, “Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers” (2010) 31 *Whittier L. Rev.* 665 at 699 (“negative publicity can adversely affect employers’ ability to attract and retain customers and employees”); and Zheng, “It’s Not What is On Paper, But What is In Practice” (2009) 8 *Washington University Global Studies Law Review* 595 at 614.

<sup>116</sup> *Harrison v Kerrili Pty Ltd* [2007] VSC 277 at [47] (per Gillard J.).

<sup>117</sup> *Bright v Femcare Ltd* (2002) 195 ALR 574 at 607. See also *Bray v F Hoffmann-La Roche Ltd* (2003) 200 ALR 607 at 660 (per Finkelstein J.); *Milfull v Terranora Lakes Country Club Ltd (In Liquidation)* [2004] FCA 1637, at [1] and [17] (per Kiefel J.); and Lindgren J. “Class Actions and Access to Justice” (Keynote Address given at the International Class Actions Conference 2007 organised by Maurice Blackburn Lawyers in Sydney, October 25–26, 2007), at p.2.

<sup>118</sup> The aim of this Practice Note includes facilitating “the efficient and expeditious conduct of representative proceedings, in particular by ensuring that the issues that are in contest are exposed at an early date and that representative proceedings are not unnecessarily delayed by interlocutory disputes”: Practice Note at para 1.2(b).

ability of the Federal Court to order the discontinuance of a Pt IVA proceeding, as a Pt IVA proceeding, pursuant to s 33N should be limited or removed, and whether this provision should be replaced with any specific criteria.<sup>119</sup>

A minimal amount of time was spent resolving interlocutory disputes in union class actions. No doubt, this is a major reason why union class actions have been resolved more promptly than other Pt IVA proceedings. In only 11 per cent of union class actions was at least one of the hearings devoted to the defendant's challenge to the employment of the Pt IVA regime. In 80 per cent of these cases, only one hearing was held to consider these challenges. There was only one instance of a union proceeding ceasing as a Pt IVA proceeding and continuing as orthodox litigation and this outcome appears to have been attributable to a decision made by the class representative rather than as a result of a successful challenge by the defendant.

The existence of this scenario suggests that in employment class actions run, funded or supported by unions it was fairly obvious that the litigation satisfied the criteria set out in s.33C. In most union cases, as the group consisted of employees and ex-employees of the defendant, it was not difficult to accept that the group consisted of seven or more class members who had claims against the same defendant. To ascertain the identity and number of class members, which were bound by the litigation, frequently records were available from either the employers or in lists in the possession of the relevant union. There were generally minimal assertions by employers that the class representatives had failed to establish the criteria contained in ss.33C(1)(b) and (c). This is not surprising given that the claims usually revolved around the same conduct allegedly perpetrated by the defendant, thus demonstrating that the claims of the members of the relevant class arose from the same, similar or related circumstances and encompassed a substantial common issue of law or fact.

The minimal success of s.33N applications in union class actions also suggests that Australian employment class actions are not, contrary to US employment class actions, "increasingly brought on behalf of a class of individuals with fundamentally distinct and individualised claims".<sup>120</sup> The knowledge that an entity such as a union—which possesses more resources than any individual worker or indeed all workers collectively—was behind the class may have also contributed to the limited instances of interlocutory challenges in union class actions.

### *C. Opt-out process*

Another factor which appears to have contributed to the shorter average duration of union class actions is the fact that the opt-out process was usually completed promptly in these proceedings. In union class actions, class members had, on average, approximately 36 days to opt-out of the proceedings, from the time they received the opt-out notice to the deadline determined by the court. Opt out orders

<sup>119</sup> Australian Attorney-General's Department's Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) at p.117. Section 33N(1)(d) allows the Federal Court to discontinue a Pt IVA proceeding, as a Pt IVA proceeding, where it is of the view that it is "inappropriate" that the proceeding progress as a Pt IVA proceeding: see generally V. Morabito, "The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions" (2004) 42 Osgoode Hall L. J. 473.

<sup>120</sup> M. Perry and R. Brass, "Rule 23(B)(2) Certification of Employment Class Actions: A Return to First Principles" (2010) 65 N.Y.U. Ann. Surv. Am. L. 681 at 700.

were also made in the early stages of union class actions. In fact, in more than 24 per cent of the union cases in which an opt-out order was made, the first opt-out order was made within 10 days of the first directions hearing. In 21 per cent of the union cases where an opt-out order was made, the first opt-out order was made before a defence was filed by the defendant.<sup>121</sup>

The opt-out process has taken a minimal amount of time to complete in union cases probably because, as already noted, the identity of those falling within the represented group was on most occasions not difficult to ascertain. It is thus evident that trial judges have recognised that there is no need to spend an excessive amount of time, in implementing this required procedure of the Pt IVA regime, in union cases.

## V. Conclusion

Weil and Pyles have drawn attention to the fact that:

“A large number of empirical studies demonstrate that workers are more likely to exercise rights where they have an agent that assists them in use of those rights. In most cases, that has meant a union. The contrary case also follows: workers that feel vulnerable to exploitation are less likely to use their rights — those include immigrant workers, those with less education or fewer skills, and those in smaller workplaces or in sectors prone to a high degree of informal work arrangements.”<sup>122</sup>

The empirical study of Australia’s Federal class actions, which the authors are currently conducting, reveals the existence of a similar scenario with respect to employment class actions. In fact, it has been shown that class actions which have involved a union as a representative party, plaintiff, legal representative, funder or supporter possess many characteristics which make them an important part of, not only the Australian class action landscape, but also the country’s labour law arena. As noted by American scholars, “the policy of worker protection embodied in our employment laws cannot have its intended effect unless those laws are rigorously enforced”<sup>123</sup> and class action litigation “offers a tool for aggrieved workers to ... pool their resources and force employees to address employee grievances”<sup>124</sup>.

<sup>121</sup> The significance of this finding is that, as noted in the Pt IVA Practice Note, “the usual practice is to send opt-out notices to group members shortly after the close of pleadings”: Practice Note, at para.7.3.

<sup>122</sup> Weil and Pyles, “Why Complain? Complaints, Compliance, and the Problem of Enforcement in the US Workplace” (2005) 27 *Comp. Lab. L. & Pol’y J.* 59 at 91. See also A. Hodges, “Strategies for Combating Sexual Harassment: The Role of Labor Unions” (2006) 15 *Tex. J. Women & L.* 183 at 207–208; and Brunsten, “Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts” (2008) 29 *Berkeley J. Emp. & Lab. L.* 269 at 296, fn.142, (“union decline and underenforcement may go hand in hand. Workers are more likely to enforce rights when they have the support of the knowledge, resources and organising capacity of a third-party intermediary”).

<sup>123</sup> Brunsten, “Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts” (2008) 29 *Berkeley J. Emp. & Lab. L.* 269 at 309.

<sup>124</sup> B. Fanibanda, “Dukes v Wal-Mart: The Expansion of Class Certification as a Mechanism for Reconciling Employee Conflicts” (2007) 28 *Berkeley J. Emp. & Lab. L.* 591 at 591. Similarly, it has been noted that in Canada “class actions have been instrumental in achieving fair and efficient resolution of large and complicated disputes arising in a wide variety of subject areas, including ... employment law”: Uniform Law Conference of Canada’s Committee on the National Class and Related Interjurisdictional Issues, *Background, Analysis and Recommendations* (March 2005) at para 5. See also *CJC Report*, at p.146.

Indeed, in many ways union class actions can be seen as fulfilling the goals of the drafters of Pt IVA in a more obvious fashion than class actions which have not involved unions. Over 27,108 aggrieved employees were able to gain access to the Federal Court with respect to claims that would not have justified individual litigation. Even if the claims in question had been individually recoverable, the socioeconomic status of most of the relevant workers would have prevented them from taking legal action. Furthermore, with respect to those employees whose legal grievances were against their existing employers, “one does not have to be a scholar to know that suing the boss is not a safe career move”.<sup>125</sup>

The lower opt-out rates found by the authors in union class actions vis-à-vis the rates in all Pt IVA actions have also demonstrated that greater proportions of claimants were able to benefit from these proceedings. It has also been revealed that over 14,075 aggrieved employees were entitled to receive a tangible benefit from union class actions. This positive scenario was largely attributable to a settlement rate in these proceedings that is significantly higher than the settlement rate for all Pt IVA actions. It was also shown that union class actions have run for a shorter period of time than non-union class actions and that a minimal amount of time was usually spent debating whether it was appropriate for the litigation to be conducted as a class action.

Thus, it can be confidently concluded that the class action mechanism has given unions an alternative forum to advance and protect workers’ rights and has provided workers with legal grievances with an effective and efficient method for securing legal remedies. The underlying goals justifying the existence of unions and class actions are not dissimilar. Both involve the collectivisation of people who have common grievances against the same perpetrator. They both give an ordinary person, who may not possess an extensive knowledge of the law and the legal system or significant financial resources, an avenue to seek redress for wrongs perpetrated by often large and powerful entities. In some ways, they can be seen as giving a voice to the voiceless. Thus, it should not be completely surprising that the employment of the class action regime by unions has generated many positive outcomes for both unions in workplace disputes and the workers that they have represented.

## Appendix

Table 1: Total number of Pt IVA proceedings and union class actions

Calendar Year	Number of Pt IVA Proceedings Filed	Number of Union Class Actions Filed
1992	6 <sup>126</sup>	0
1993	9	0
1994	12	0
1995	7	0
1996	10	1

<sup>125</sup> Becker and Strauss, “Representing Low-Wage Workers in the Absence of a Class” (2008) 92 Minn. L. Rev. 1317 at 1327.

<sup>126</sup> The ALRC had indicated in 1988 that “a reasonable estimate is that there are unlikely to be more than five or six cases in the first 12 months”: *ALRC 1988 Report*, at para 338.

Calendar Year	Number of Pt IVA Proceedings Filed	Number of Union Class Actions Filed
1997	20	1
1998	32	10
1999	25	4
2000	17	2
2001	11	1
2002	31	20
2003	6	1
2004	11	2
2005	2	0
2006	7	1
2007	26	1
2008	18	1

Table 2: The four “quarters” of the study period

Quarter	Number of Pt IVA Proceedings	Number of Union Class Actions
First Quarter (from March 4, 1992 to June 3, 1996)	37	1
Second Quarter (from June 4, 1996 to September 3, 2000)	94	16
Third Quarter (from September 4, 2000 to December 3, 2004)	65	25
Fourth Quarter (from December 4, 2004 to March 3, 2009)	54	3

Table 3: Categories of Employees Involved in Union Class Actions

Categories of Employees Involved in Union Class Actions
Academic and general university employees
Administrative and non-teaching employees of Victoria’s Department of Education
Airline pilots
Ambulance workers
Blinds factory employees
Bus drivers
Construction workers
Deputy Registrars of the Family Court of Australia
Employment consultants
Factory workers
Home care workers
Information technology workers
Maritime/dock workers

**Categories of Employees Involved in Union Class Actions**

Meatworkers

Mineworkers

Nurses

Printing and maintenance employees, working for the publisher of a newspaper

Process workers

Truck drivers

Victorian police officers

Victorian public servants