

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

SECOND REPORT

*Litigation Funders, Competing Class Actions, Opt Out
Rates, Victorian Class Actions and Class Representatives*

By

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September 2010



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EXECUTIVE SUMMARY

KEY FINDINGS

- A total of 249 applications have been filed, pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth), up to 3 March 2009 and 253 up to 30 June 2009. There has been an average of 14.64 class action proceedings every 12 months (and a median rate of 11 class actions) since the Part IVA regime came into operation on 4 March 1992.
- A total of only 28 class actions have been brought in the Supreme Court of Victoria, pursuant to Part 4A of the *Supreme Court of Victoria Act 1986* (Vic), as at the end of 2009. We have thus seen an average of 2.8 Part 4A proceedings every year (and a median rate of 3 Part 4A proceedings per year) since the Part 4A regime was deemed to come into operation on 1 January 2000.
- Dividing the first 17 years of Part IVA into four equal periods of four years and three months, we find an extremely limited use of this regime in the first quarter - from 4 March 1992 to 3 June 1996 - (37 proceedings), more extensive use from 4 June 1996 to 3 September 2000 (93 proceedings) and a decreasing number of Part IVA proceedings ever since: 65 from 4 September 2000 to 3 December 2004 and 54 from 4 December 2004 to 3 March 2009.
- Dividing the first 10 years of Part 4A into four equal periods of two years and six months reveals the following trends in the filing of class action proceedings in the Supreme Court of Victoria: nine Part 4A proceedings were commenced in the first quarter (from 1 January 2000 to 30 June 2002) and the same number of class action proceedings was witnessed in the second quarter (from 1 July 2002 to 31 December 2004). The third quarter (from 1 July 2005 to 30 June 2007) saw a decrease to four Part 4A proceedings followed by six Part 4A proceedings in the fourth quarter (from 1 July 2007 to 31 December 2009).
- The phenomenon of “related” class action proceedings, that is, proceedings with respect to the same disputes, was widespread. Close to half (119 - 47.80%) of all Part IVA proceedings filed in the first 17 years of the operation of Part IVA satisfied this description. These 119 class actions were brought with respect to a total of 39 disputes. Six (22.22%) of all Part 4A proceedings, filed in the first 10 years of the operation of Part 4A, were related proceedings. They concerned three disputes. Eleven Federal class actions and eight Victorian class actions were also brought with respect to the same disputes.
- Some of these related class action proceedings were competing class action proceedings, that is, proceedings filed by different legal representatives with respect to the same legal disputes. A total of 31 competing Part IVA proceedings were filed with respect to 11 disputes. Twenty-eight of these competing Federal class actions were filed before the High Court of Australia’s August 2006

decision in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* and the Full Federal Court of Australia's December 2007 decision in *Multiplex Funds Management Limited v P Dawson Nominees Pty Ltd*. Thirteen of these 28 Part IVA proceedings concerned four disputes and essentially entailed one set of lawyers acting for one sub-set of claimants and another set of lawyers acting for another sub-set of claimants.

- Thus, contrary to popular belief, *Fostif* and *Multiplex* have not resulted in the Federal Court of Australia being inundated with numerous competing Part IVA proceedings. Nor have they increased the frequency of competing Part IVA proceedings.
- Before *Fostif* and *Multiplex*, there had also been six competing Federal and Victorian class action proceedings with respect to two disputes and four competing Part 4A proceedings with respect to two disputes.
- The 249 Part IVA proceedings that were filed on or before 3 March 2009 were brought with respect to a total of 169 legal disputes. Thus, the average number of legal disputes that have been litigated as class action proceedings before the Federal Court (every 12 months since March 1992) is 9.94. This data provides strong evidence of the fact that there has been a very limited (and probably inadequate) employment of the Federal class action regime.
- The Federal Government responsible for the introduction and enactment of Part IVA expected that, on average, approximately one per cent of class members would opt out of Part IVA proceedings. This estimate was grossly inaccurate. The average opt out rate has in fact been 13.78% whilst the median opt out rate has been 5.28%. Furthermore, at least one class member has opted out in 78.76% of the Part IVA proceedings where an opportunity to opt out was extended to class members. These opt out statistics are also significantly higher than corresponding empirical data for the US Federal class action regime.
- Even higher are the opt out rates for Victorian class action proceedings. The average opt out rate has been 20.63% whilst the median opt out rate has been 11.19%. Furthermore, at least one class member has opted out in all of the Part 4A proceedings where an opportunity to opt out was extended to class members.
- Extremely high opt out rates were found in those Federal and Victorian class actions where there were direct communications between respondents and/or their lawyers and the individual class members. In fact, in these cases the mean opt out rate was 84.5% in Victorian class actions and 51.28% in Federal class actions. The median rate was 84.5% in Part 4A actions and 43.25% in Part IVA actions.
- A review of the comments written by class members on opt out forms revealed that some class members opted out because of a total misunderstanding, on their

part, regarding the essential features of class action litigation and/or the opt out device.

- A total of 18 Federal class actions have been funded by five commercial litigation funders and one Victorian class action has been funded by one of these five funders. These litigation funders have provided class members with an indemnity with respect to adverse costs awards, including security for costs orders.
- The 18 funded Part IVA proceedings “covered” a total of approximately 70,500 claimants. A total of approximately 5,500 class members were eligible to receive a share of the settlement proceeds in those funded class action proceedings that were settled.
- Ten funded Part IVA proceedings were resolved whilst the remaining eight are still in progress. All of the resolved cases were settled. One of the ten settled actions was no longer a Part IVA action when it was settled. This settlement rate, for funded Part IVA cases, is far higher than the overall settlement rate for Part IVA actions. In fact, as at 31 August 2010, approximately 40.94% of all resolved Part IVA proceedings had been settled.
- The ten settled funded Part IVA proceedings generated a total of approximately \$311 million. The median settlement fund in these proceedings was equal to \$8 million while the average settlement fund was \$31.1 million. Approximately, 29.61% of these settlement funds went to the relevant litigation funders. There were no major differences between the duration of settled funded Part IVA proceedings and the duration of all settled Part IVA proceedings.
- Class representatives in both Federal and Victorian class action proceedings have come from “all walks of life”. The age of class representatives has ranged from 7 years to 88 years. Their average age is 46.66 years while their median age is 45 years. Married couples have assumed the role of class representatives on a fairly regular basis.

ACKNOWLEDGMENTS

This is the second report with respect to an extensive empirical study of the legislative regimes that have been regulating class actions in the Federal Court of Australia, since March 1992 (pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth)) and in the Supreme Court of Victoria, since January 2000 (pursuant to Part 4A of the *Supreme Court Act 1986* (Vic)). The Federal Court and the Supreme Court of Victoria are of course Australia's only superior courts where "US-style" class action proceedings may be filed. This may soon change as the New South Wales Attorney-General announced, in August 2010, that by the end of 2010 he will unveil a legislative class action regime for NSW that will be based predominantly on the Federal and Victorian regimes.¹

The first report, which was released in December 2009,² contained a long list of entities and persons that have supported in numerous ways this rather ambitious project. Since then the list of the entities and persons that we are delighted to formally thank has become significantly longer. They are set out below, divided under the following three broad categories: (a) justices and Registry staff of the Federal Court of Australia and the Supreme Court of Victoria; (b) sponsors, class action protagonists and entities and persons with a special interest in civil justice; and (c) the members of the team that is undertaking this project.

FEDERAL COURT OF AUSTRALIA AND SUPREME COURT OF VICTORIA

- Current Federal Court Justices: Finkelstein J and Moore J.
- Former Federal Court Justices: Lindgren J, Black CJ and Wilcox J.
- Former Supreme Court Justice: Gillard J.
- Associates and former Associates to Federal and Victorian justices: Robin Delahunty, Claire Downey and Amanda Molesworth.
- Prothonotary of the Supreme Court of Victoria: Joe Saltalamacchia.
- Federal Court's Manager of eServices and Casetrack: David Beling.
- Federal Court's New South Wales District Registry: Paddy Hannigan, Stuart Young, Nicholas Vlachos, Stephen Williams, Bree McAullay and Dimitra Faloutsos.
- Federal Court's Victorian District Registry: David Priddle, Don Beale, Bronwyn Barbetti, Adrian De Luca, Angela Clarke and Bronwyn Davis.
- Federal Court's Queensland District Registry: Karen Baker, Colin Morrison and Kay Van Brederode.
- Federal Court's Western Australian District Registry: Nick Pannell and Robert Clements.
- Federal Court's South Australian District Registry: Patricia Christie and Michael Sarson.

¹ See <http://www.lawlink.nsw.gov.au> ("Latest News" Section – *NSW Set to Reform Class Action Laws*).

² V Morabito, *Class Action Facts and Figures* (First Report; An Empirical Study of Australia's Class Action Regimes; December 2009).

- Federal Court’s Australian Capital Territory District Registry: Natalie Cujes and Elizabeth Coombe.
- Federal Court’s Northern Territory District Registry: Patricia Christie.
- Federal Court’s Tasmanian District Registry: Alan Parrott.

**SPONSORS, CLASS ACTION PROTAGONISTS AND ENTITIES AND
PERSONS WITH A SPECIAL INTEREST IN CIVIL JUSTICE**

Australian Research Council (Discovery Project Grant)

Freehills (Major Sponsor)

- Ken Adams, Damian Grave, Jason Betts, Nikki Maney and Melissa Filshie.

Victoria Law Foundation

- Joh Kirby and Melanie Rygl.
- This project has been supported by a general grant from the Victoria Law Foundation – www.victorialawfoundation.org.au

Maurice Blackburn

- Brooke Dellavedova, Bernard Murphy, Rebecca Gilsean, Ben Slade, Tina Vecchio, Jade Casey, Kim Parker, Andrew Watson, Barry Lipp, Martin Hyde, Josh Bornstein, Jacob Varghese, Jason Geisker, Richard Ryan, Julian Schimmel, Ronald Koo and Kamal Farouque.

Slater & Gordon

- Vicky Antzoulatos, Andrew Grech, Peter Long, Ken Fowlie, Steven Lewis, James Higgins, Veronica Walsh, Van Moulis, Ben Phi, Barry Woollacott, Tracy Tran, Beverley Oakes, David Andrews, Angela Wong, Andy Munro, Andrew Barker, Damian Scattini and Carita Kazakoff.

Australian Institute of Judicial Administration

- Prof Greg Reinhardt.
- This project has been supported by a research grant from the Australian Institute of Judicial Administration.

IMF (Australia) Ltd

- John Walker, Hugh McLernon, Susanna Khouri and Wayne Attrill.

Duncan Basheer Hannon

- Peter Humphries and Katie Herzberg.

Choice

- Gordon Renouf and Lizzie Ball.

Clayton Utz

- Christina Harris, Stuart Clark, Andrew Morrison and Ross McInnes.

Maddens Lawyers

- John Madden.

Macpherson + Kelley Lawyers

- Ron Willemsen.

Shine Lawyers

- Simon Morrison.

Stringer Clark Solicitors

- Ann Cunningham.

Fitzpatrick Teale Solicitors

- David John Fitzpatrick.

Oldham Naidoo Lawyers

- Daniel Oldham.

Barristers

- Lachlan Armstrong, Neil Francey, Lisa Nichols and Jonathan Beach QC.

Academics

- Prof. Peter Cashman (Sydney University), Prof. Rachael Mulheron (Queen Mary University of London), Prof. Vicki Waye (University of South Australia), Prof. Russell Smyth (Monash University) and Michael Duffy (Monash University).

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- South Australian Research Assistants: Josephine Battiste and Ryan Dow.
- Queensland Research Assistants: Jaclyn Rolfe and Fleur Irvine.
- ACT Research Assistant: Aparna Nanayakkara.

MOVING FORWARD

This report contains references to some of the papers, with respect to various dimensions of this project, that we are currently working on. In July and August 2010 Josephine Battiste, mentioned above, conducted a review of the Part IVA files of Duncan Basheer Hannon. We wish to formally record our gratitude to Peter Humphries and, in particular, Katie Herzberg who spent numerous hours in the “dusty” and frequently frustrating world of archived files.

In October 2010 we are scheduled to commence a review of the class action files of Maurice Blackburn. This will be followed by a review of Slater & Gordon's files. The major purpose of this review is to collect data, concerning crucial dimensions of the operation of Australia's class action regimes, such as the distribution of settlement funds and damages and the costs of running class action proceedings, which is not normally available from public sources such as court files.

CHAPTER 1

GENERAL DATA

I. STRUCTURE OF THIS REPORT

This report is the second of several papers that will be drafted and released or published, over the next two years, to record the findings of this empirical study of the Federal and Victorian regimes. It is based on the data available to us as at the end of August 2010. This report is divided as set out below.

- This chapter provides the latest data with respect the extent to which the Part IVA and Part 4A regimes have been employed in the first 17 years and 10 years, respectively, of the operation of these regimes.
- Chapter 2 provides complete data with respect to a phenomenon that has been encountered frequently in Australia’s class action landscape, namely, that of multiple class actions being filed with respect to essentially the same dispute, including where different law firms or entities have acted for the class representatives in each of these related proceedings.
- The opt out rates, that is, the percentages of class members who have excluded themselves from Federal and Victorian class actions, are revealed in chapter 3.
- In chapter 4 data is provided with respect to the most controversial and talked about protagonists in Australia’s class action landscape over the last few years, namely, commercial litigation funders.
- In chapter 5, the spotlight is turned on those individuals and entities, who are vital to the operation of class action regimes, but who are frequently ignored by commentators: the class representatives.

II. TOTAL NUMBER OF PART IVA PROCEEDINGS IN THE FIRST 17 YEARS

A. Identification of Additional Class Actions

As revealed in the first report, the core dimension of this project entails the review of court files with respect to proceedings filed under Part IVA between 4 March 1992 (when Part IVA came into operation)³ and 3 March 2009. Information and data concerning Part IVA proceedings filed after this latter date are included only where we were able to procure totally reliable data from sources other than court files.

³ It should be pointed out that there is no unanimous view, among both judges and commentators, as to precisely when Part IVA came into operation. Some believe it commenced on 5 March 1992 whilst others regard the date mentioned above as the correct date. This debate has no practical relevance to the data contained in this report as no Part IVA applications were filed on 4 March 2009. Thus, even if, contrary to the view adhered to in this report, 4 March 2009 and not 3 March 2009 were to be regarded as the correct cut-off point for the first 17 years of Part IVA, it would not alter the data with respect to the total number of Part IVA proceedings that were filed in these 17 years.

The first report was based on data available to us as at the end of October 2009. At that time we were able to identify a total of 241 Part IVA proceedings which were filed up to 3 March 2009 and a total of 245 Part IVA proceedings filed up to 30 June 2009. The continued search for all class action proceedings and the on-going review of files, which have taken place since then, have enabled us to identify an additional eight Part IVA proceedings that were filed in the first 17 years of the operation of Part IVA. Thus, as at the end of August 2010, we have identified a total of 249 Part IVA proceedings that were filed on or before 3 March 2009 and a total of 253 Part IVA proceedings that were filed on or before 30 June 2009.

In light of this discovery of eight additional Part IVA proceedings, since the release of the first report, we update, in this chapter, the data that was provided in chapter one of the last report. We also provide Part IVA data that was not included in the first report as well as corresponding data regarding the Victorian regime.

B. Methodology Employed

We have identified as Part IVA proceedings those proceedings where: (a) the application and/or the statement of claim expressly referred to Part IVA and/or to the Rules that regulate Part IVA applications;⁴ or (b) in the absence of an express reference to Part IVA (or to the Rules that regulate Part IVA applications), the named applicants were identified as acting in a representative capacity and subsequent documents indicated that the applicants, seeking to act on behalf of similarly situated claimants, did so pursuant to Part IVA and not pursuant to provisions such as Order 6 Rule 13. This rule provides that “where numerous persons have the same interest in any proceeding the proceeding may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them”.

Also regarded as Part IVA proceedings, for the purposes of this study, are proceedings which commenced as “orthodox” proceedings but the relevant applicants sought and secured leave from the Court to convert them into Part IVA proceedings.⁵

It is important to draw attention to the fact that frequently media reports on class actions have regarded as Part IVA proceedings the threats to file Part IVA proceedings, especially where the negotiations that followed those threats resulted in compensation being provided by the potential respondent. Frequently, the term class action has also been used by reporters to describe proceedings which were, at no stage, either Part IVA proceedings or intended to be Part IVA proceedings. They were simply brought as “orthodox” proceedings where all the aggrieved persons were applicants, that is, formal

⁴ Order 73 Rule 3 of the Federal Court Rules provides that “representative proceedings must be commenced by filing an application in accordance with Form 129”.

⁵ With respect to these types of proceedings the filing date was the date when they became Part IVA proceedings. Where leave to convert the proceedings into Part IVA proceedings was not granted, the proceedings in question were not classified as Part IVA proceedings.

parties to the proceedings.⁶ And yet in the reports in question they were described as class actions and frequently lawyers acting for the applicants were quoted referring to the proceedings in question as class actions. This type of inaccurate reporting has contributed, to some extent, to the erroneous perception that the use of the Part IVA regime has been excessive.

In order to be regarded as a Part IVA proceeding, for the purposes of this study, it was not necessary for the application and statement of claim, pursuant to which the proceedings were commenced, to have been served on the respondents. Three Part IVA proceedings satisfied this description.

Recognition of a proceeding, as a Part IVA proceeding, did not depend on at least one directions hearing having been held. Two Part IVA proceedings satisfied this description, in addition to the three proceedings mentioned in the preceding paragraph.

An identical approach has been adopted with respect to the identification of Part 4A proceedings in the Supreme Court of Victoria.

Before leaving this section, attention should be drawn to several “unique” Federal proceedings that were regarded as Part IVA proceedings, for the purposes of this study, as a result of the application of the approach outlined above. In one case, the relevant application was headed “Application under Part IVA of the *Federal Court of Australia Act 1976* (Cth)”. But there was no reference to persons other than the named applicants in the remainder of the pleadings.⁷

In another proceeding, which again was classified as a Part IVA proceeding, ten persons were listed as applicants. The application made it clear that the proceeding was brought pursuant to Part IVA. It also described the represented group in the following unique manner: “the members of the group to whom the proceedings relate are the Applicants”. And the remainder of the court file suggested that the relevant members of the Part IVA group conducted themselves/were treated in the same way that one would normally expect named applicants to conduct themselves/be treated by, for instance, being required to provide discovery.

The odd nature of this type of scenario, which seeks to merge two otherwise separate and distinct scenarios, namely, a class action proceeding, on the one hand, and an orthodox proceeding with more than one named applicant, on the other hand, was masterfully captured by Justice Moore. His Honour was speaking, as a member of the Full Federal Court, in another Part IVA proceeding where a broadly similar approach was adopted in the pleadings:

⁶ In Part IVA and Part 4A proceedings, and indeed in all modern class action regimes, only the applicants/plaintiffs are formal parties to the proceedings and the other claimants (the class/group members) are bound by the outcome of the litigation (unless they opt out) despite their formal status as non-parties.

⁷ The proceeding in question lasted less than two weeks.

If you look at the provisions of [Part IVA], one of the things you have to do is identify the group firstly, and secondly identify an applicant or applicants who bring the proceedings on behalf of the group. We have a quite different creature, or proceeding, where all the applicants are named as applicants, that's not a representative proceeding at all. And I must say the pleading has the appearance of being the latter type of case, that is one where all the applicants are named applicants, not one or two, bringing a proceeding on behalf of a group which in turn is identified in the pleading.⁸

C. General Data

As was the case with chapter one of the last report, Table 1 divides data, as to the total number of Part IVA proceedings, into 17 years starting from 4 March 1992. That is, year one covers the period from 4 March 1992 to 3 March 1993, year 2 covers the period from 4 March 1993 to 3 March 1994 and so on until the last year, year 17, that encompasses the period from 4 March 2008 to 3 March 2009. The average number of Part IVA proceedings in the first seventeen years of Part IVA is 14.64 per year while the median rate is 11 class actions per year. Year seven saw the highest number of Part IVA proceedings: 31.

In Table 2 this data is presented by financial years. As already noted, we were able to identify 253 Part IVA proceedings that were brought on or before 30 June 2009. The average number of Part IVA proceedings per financial year is 14.82. The median rate is 14. The 1998-1999 year saw the highest number of class actions: 30.

Table 3 provides this data with respect to calendar years. The average number of Part IVA proceedings per calendar year is 14.67. The median rate is 11 class actions per year. In 1998 we saw the filing of 31 Part IVA proceedings, the highest number in a given financial year.

Table 1 – The First 17 Years of Part IVA

Year	Number of Part IVA Proceedings Filed
Year 1 (from 4/3/1992 to 3/3/1993)	8
Year 2 (from 4/3/1993 to 3/3/1994)	7
Year 3 (from 4/3/1994 to 3/3/1995)	14
Year 4 (from 4/3/1995 to 3/3/1996)	7
Year 5 (from 4/3/1996 to 3/3/1997)	11
Year 6 (from 4/3/1997 to 3/3/1998)	18
Year 7 (from 4/3/1998 to 3/3/1999)	31

⁸ *McIntyre v Eastern Prosperity Investments Pty Ltd* (Transcript of Proceedings; 13 August 2003), 6. In *McIntyre* the class members were listed on the “front cover” of the pleadings in the same way that named applicants are normally set out but, contrary to the proceeding described above, they were described as “Second Class Member, Third Class Member” and so on. We have found several more Part IVA proceedings where the same approach, to that followed in *McIntyre*, was adopted with respect to the description of the class members in the pleadings.

Year 8 (from 4/3/1999 to 3/3/2000)	27
Year 9 (from 4/3/2000 to 3/3/2001)	16
Year 10 (from 4/3/2001 to 3/3/2002)	10
Year 11 (from 4/3/2002 to 3/3/2003)	30
Year 12 (from 4/3/2003 to 3/3/2004)	9
Year 13 (from 4/3/2004 to 3/3/2005)	8
Year 14 (from 4/3/2005 to 3/3/2006)	4
Year 15 (from 4/3/2006 to 3/3/2007)	7
Year 16 (from 4/3/2007 to 3/3/2008)	26
Year 17 (from 4/3/2008 to 3/3/2009)	16

Table 2 – Part IVA Proceedings Divided by Financial Years

Financial Year⁹	Number of Part IVA Proceedings Filed
1992-1993	12
1993-1994	4
1994-1995	13
1995-1996	7
1996-1997	18
1997-1998	21
1998-1999	30
1999-2000	21
2000-2001	17
2001-2002	14
2002-2003	22
2003-2004	12
2004-2005	4
2005-2006	6
2006-2007	19
2007-2008	21
2008-2009	11

Table 3 – Part IVA Proceedings Divided by Calendar Years

Calendar Year¹⁰	Number of Part IVA Proceedings Filed
1992	6
1993	9

⁹ Data with respect to the 1991-1992 financial is not included given that Part IVA came into operation only on 4 March 1992. Only one proceeding, the *Metcalfe* matter mentioned in Table 4 below, was brought in this financial year.

¹⁰ The calendar year of 2009 is not included in Table 3 as we do not have entirely reliable data regarding the precise number of Part IVA proceedings that were filed in the second half of 2009.

1994	12
1995	7
1996	10
1997	19
1998	32
1999	25
2000	17
2001	11
2002	31
2003	6
2004	11
2005	2
2006	7
2007	26
2008	18

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

First Quarter (from 4 March 1992 to 3 June 1996) – a total of 37 Part IVA proceedings were filed.

Second Quarter (from 4 June 1996 to 3 September 2000) – a total of 93 Part IVA proceedings were filed.

Third Quarter (from 4 September 2000 to 3 December 2004) – a total of 65 Part IVA proceedings were filed.

Fourth Quarter (from 4 December 2004 to 3 March 2009) – a total of 54 Part IVA proceedings were filed.

We thus see a 30.1% decrease, in the number of Part IVA proceedings, in the September 2000 – December 2004 period, and a further 16.9% decrease in the subsequent quarter.

Table 4 below provides data with respect to the filing of the 1st Part IVA proceeding, the 50th Part IVA proceeding, the 100th proceeding and so on.

Table 4 – Part IVA’s “50th” Proceedings

Case Number	Name of Case	Date Filed	Period Between the Filing of this Case and the Previous 50th Case
1st	<i>Metcalf v NZI Securities (Australia) Ltd</i>	17 June 1992	-

50th	<i>Glavas v Lago Smallgoods</i>	24 March 1997	1,741 days
100th	<i>Finance Sector Union of Australia v Commonwealth Bank of Australia</i>	1 April 1999	738 days
150th	<i>Australian Liquor, Hospitality and Miscellaneous Workers Union v Metropolitan Ambulance Service</i>	5 April 2002	1,100 days
200th	<i>Smith v University of Ballarat</i>	15 February 2006	1,412 days
250th	<i>Wotton v State of Queensland</i>	11 March 2009	1,120 days

The extremely limited employment of the Part IVA regime also becomes apparent from Table 5 below which presents data with respect to the total number of Part IVA proceedings filed each financial year, as percentages of the total number of proceedings filed in the Federal Court in the relevant financial years.

Table 5 – Part IVA Proceedings as a Percentage of all Federal Court Proceedings¹¹

Financial Year	Part IVA Proceedings as a % of Federal Court proceedings
1991-1992	0.03%
1992-1993	0.38%
1993-1994	0.11%
1994-1995	0.31%
1995-1996	0.16%
1996-1997	0.50%
1997-1998	0.66%
1998-1999	0.73%
1999-2000	0.74%
2000-2001	0.45%
2001-2002	0.42%
2002-2003	0.60%
2003-2004	0.25%
2004-2005	0.14%
2005-2006	0.13%
2006-2007	0.57%
2007-2008	0.73%
2008-2009	0.38%

It will be seen from the data set out above that Part IVA proceedings have never constituted more than 0.74% of all Federal Court proceedings. The average percentage is 0.40%.

¹¹ The data, concerning the total number of Federal Court proceedings, that was used in calculating these percentages was collected from the Federal Court's annual reports and, generally speaking, excluded appeals and related actions and bankruptcy matters.

D. The Post-*Fostif* Period

On 30 August 2006 the High Court of Australia held, in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*,¹² that the fact that the proceeding before the Court was funded by a commercial litigation funder, which exercised a significant level of control over the way the litigation was conducted, did not justify the conclusion that the litigation in question was contrary to public policy or an abuse of process. In the first report we compared the three years, immediately following *Fostif*, with other three-year periods (during the operation of Part IVA) going back to August 1994. Below we set out the latest data pertaining to the periods in question:

- Part IVA proceedings from 31 August 2006 to 30 August 2009 – 54.
- Part IVA proceedings from 31 August 2003 to 30 August 2006 – 20.
- Part IVA proceedings from 31 August 2000 to 30 August 2003 – 52.
- Part IVA proceedings from 31 August 1997 to 30 August 2000 – 74.
- Part IVA proceedings from 31 August 1994 to 30 August 1997 – 37.

Thus, the discovery of eight additional Part IVA proceedings, since the first report, has not altered the conclusion that *Fostif* has not, contrary to what a significant number of media reports would lead one to believe, resulted in the Federal Court being confronted with more class action proceedings than ever before.

III. TOTAL NUMBER OF PART 4A PROCEEDINGS IN THE FIRST 10 YEARS

In January 2000, Order 18A of the Supreme Court (General Civil Procedure) Rules 1996 came into operation. This Order introduced a regime, in the Supreme Court of Victoria, for dealing with legal disputes involving multiple claimants. This regime was based on, and was thus very similar to, the Part IVA regime. In the first proceeding that was commenced pursuant to these rules, the defendants challenged the validity of this regime. This challenge was rejected by a narrow majority of the State's Court of Appeal.¹³

Before the High Court of Australia was able to consider an application for special leave to appeal, from the Court of Appeal's decision, the Victorian Parliament enacted Part 4A of the *Supreme Court Act 1986* (Vic). This regime also closely mirrors its Federal counterpart. Part 4A was enacted towards the end of 2000 but was deemed to come into operation on 1 January 2000. That is to say, proceedings brought pursuant to Order 18A were to be treated as if they had been filed under Part 4A.

We have reviewed court files with respect to proceedings that were filed (or were deemed to have been filed) under Part 4A, on or before 31 December 2009. Thus, this project encompasses a review of the first ten years of the operation of the Victorian regime. We were able to identify a total of 28 proceedings that were filed during this period. The yearly data is presented below in Table 6. This data reveals an average of 2.8 class

¹² (2006) 229 CLR 386.

¹³ *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545.

actions per year and a median rate of 3 class actions per year. We saw the highest number of Part 4A proceedings in 2003, with seven class actions.

Dividing the first ten years of the operation of Part 4A into four equal periods of two years and six months provides the data set out below. It shows that the first two quarters saw the filing of a greater number of Part 4A proceedings than in the last two quarters. Thus, the experience with respect to the Victorian regime is consistent with the experience with the Part IVA regime, to the extent that it reveals the filing of a lower number of class actions in the last two quarters.

First Quarter (from 1 January 2000 to 3 June 2002) – a total of nine Part 4A proceedings were filed.

Second Quarter (from 1 July 2002 to 31 December 2004) – a total of nine Part 4A proceedings were filed.

Third Quarter (from 1 January 2005 to 30 June 2007) – a total of four Part 4A proceedings were filed.

Fourth Quarter (from 1 July 2007 to 31 December 2009) – a total of six Part 4A proceedings were filed.

Table 6 – Part 4A Proceedings Divided by Calendar Years

Calendar Year	Number of Part 4A Proceedings Filed
2000	4
2001	4
2002	2
2003	7
2004	1
2005	4
2006	0
2007	0
2008	2
2009	4

The next table, showing Part 4A proceedings as a percentage of all Supreme Court proceedings, reveals a similar pattern to that revealed by Table 5 with respect to equivalent data concerning the Federal regime.

Table 7 – Part 4A Proceedings as a Percentage of all Supreme Court Proceedings¹⁴

¹⁴ The data that was used in calculating these percentages was data collected from the Supreme Court’s annual reports with respect to the total number of originating process proceedings.

The employment of calendar years for the earlier years and financial years in the later years is due to the fact that these were the periods that were employed in the relevant annual reports of the Supreme Court.

Financial Year or Calendar Year	Part 4A Proceedings as a % of Supreme Court proceedings
2000	0.09%
2001	0.07%
2002	0.04%
First half of 2003	0.19%
2003-2004	0.04%
2004-2005	0.01%
2005-2006	0.04%
2006-2007	0%
2007-2008	0%
2008-2009	0.05%

It will be seen from the data set out above that Part 4A proceedings have never constituted more than 0.09% of all Supreme Court proceedings in any given calendar year and not more than 0.05% in any given financial year.

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

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

Table 8 – Part IVA Proceedings Filed in each Registry of the Federal Court

Registry of the Federal Court	Number of Part IVA Proceedings Filed in Each Registry
New South Wales	115 (46%) [-2] ¹⁵
Victoria	89 (35%) [+1][-1]
Queensland	21 (8.4%) [-1][+1]
Western Australia	8 (3.2%)
South Australia	8 (3.2%) [+1]
Australian Capital Territory	4 (1.6%)

¹⁵ The numbers in the square brackets, when preceded by the plus sign, refer to the number of Part IVA proceedings that were filed in another Registry of the same court and were subsequently transferred to the Registry in question. The data that is preceded by the minus sign refers to the number of Part IVA proceedings that were filed in that particular Registry but which were subsequently transferred to another Registry. This “transfer to other registries” data only records those Part IVA proceedings which were transferred from one Registry to another whilst they were Part IVA proceedings. It does not encompass those proceedings which were transferred at a time when they ceased to be Part IVA proceedings.

Northern Territory	3 (0.8%) [+1]
Tasmania	1 (0.4%)

Dividing this data into two equal periods - the first period being the first eight and half years of the operation of Part IVA (from 4 March 1992 to 3 September 2000) and the second being the next eight and half years of Part IVA (from 4 September 2000 to 3 March 2009) - provides some fascinating results. As shown below, whilst the NSW Registry was clearly the leading Part IVA Registry, in the first eight and half years, receiving 57% of all the Part IVA proceedings filed in that period, a fundamentally different picture emerges in the next eight and half years.

In fact, the total number of Part IVA proceedings filed in the NSW Registry decreased to 40, which represents a remarkable 46% decrease. Overall, the NSW Registry received only 33.6% of all the Part IVA proceedings filed in this period.

Table 9 – Part IVA Proceedings Filed in each Registry of the Federal Court from 4 March 1992 to 3 September 2000

Registry of the Federal Court	Number of Part IVA Proceedings Filed
New South Wales	75 (57%)
Victoria	31 (23%)
Queensland	13 (10%)
South Australia	3 (2.3%)
Australian Capital Territory	3 (2.3%)
Northern Territory	3 (2.3%)
Western Australia	1 (0.7%)
Tasmania	1 (0.7%)

Table 10 – Part IVA Proceedings Filed in each Registry of the Federal Court from 4 September 2000 to 3 March 2009

Registry of the Federal Court	Number of Part IVA Proceedings Filed
Victoria	58 (48.7%)
New South Wales	40 (33.6%)
Queensland	8 (6.7%)
Western Australia	7 (5.8%)
South Australia	5 (4.2%)
Australian Capital Territory	1 (0.8%)

CHAPTER 2

MULTIPLE CLASS ACTION PROCEEDINGS WITH RESPECT TO THE SAME DISPUTES

I. OVERVIEW

It will be recalled that in the first report attention was drawn to several instances of multiple Part IVA proceedings having been filed with respect to essentially the same disputes. The highest number of Part IVA proceedings, with respect to the one dispute, that was referred to in the first report was 18 (concerning an employment dispute in Victoria). Whilst reviewing the notices that were published in newspapers to advise class members of the proposed settlement of these 18 proceedings, it was discovered that the proceedings in question were actually 19 and not 18.

Another important feature of the Federal and Victorian class action landscape that became apparent, as the close review of court files continued, was that this phenomenon of “related” class action proceedings was widespread. This finding led to the decision to collect complete data concerning related Part IVA and Part 4A proceedings. We saw this type of research as desirable for two major reasons. The first was to determine the precise number of legal disputes that led to Federal and Victorian class action proceedings. The frequency of related class action proceedings made it abundantly clear that the total number of Part IVA and Part 4A proceedings could not be regarded as an accurate (or even approximate) indicator of the total number of disputes that have resulted in class action proceedings before the Federal Court and the Supreme Court of Victoria, respectively.

The second rationale for pursuing this line of inquiry was to collect data that would shed some light with respect to one of the most discussed and controversial issues, regarding the operation of Australia’s two class action regimes over the last few years. The issue in question is whether the emergence of litigation funders – and their general preference for “closed classes” pursuant to which the class action proceedings only bind those claimants who have entered into funding agreements with such funders and fee and retainer agreements with the class representative’s lawyers – has resulted in “competing” class actions.¹⁶ That is to say, has the involvement of litigation funders resulted in the Federal Court and the Supreme Court of Victoria being faced with simultaneous class action proceedings “run by differently constituted groups, differing only in their legal representation”?¹⁷

II. RELATED PART IVA PROCEEDINGS

¹⁶ In December 2007, the Full Federal Court of Australia upheld the legality of these mechanisms: *Multiplex Funds Management Limited v P Dawson Nominees Pty Ltd* (2007) 244 ALR 600.

¹⁷ K Adams and O Wolahan, “Evolving Issues in Shareholder Class Actions – Funding and Causation” (Paper presented at AMPLA Limited’s 33rd Annual Conference; Sydney; 28-31 October 2009), 4.

Of the 249 Part IVA proceedings that we have identified, only 130 (52.20%) could be said to have been filed with respect to legal disputes which were not totally or substantially identical to legal disputes that led to the filing of other Part IVA proceedings. To put it differently, the 130 Federal class actions in question could reasonably be described as having been brought with respect to 130 different legal disputes or issues.

This means of course that 119 (47.80%) of the Federal class actions that were filed in the first 17 years of Part IVA's operation concerned legal disputes that were also litigated in other Part IVA proceedings. That is to say, close to half of the Federal class action proceedings that were filed during the relevant period can be correctly described as multiple class action proceedings with respect to the same legal disputes. The total number of legal disputes that prompted the 119 class action proceedings in question is 39.

Combining the data contained in the preceding two paragraphs leads to the important finding that the 249 Part IVA proceedings that were filed on or before 3 March 2009 were brought with respect to a total of 169 legal disputes. Thus, the average number of legal disputes that have been litigated as class action proceedings before the Federal Court (every 12 months since March 1992) is 9.94.

A breakdown of the 119 related Part IVA proceedings and the 39 legal disputes, with respect to which these class action proceedings were filed, is provided below:

- 1 instance of 19 Part IVA proceedings with respect to the same dispute.
- 1 instance of 9 Part IVA proceedings with respect to the same dispute.
- 2 instances of 5 Part IVA proceedings with respect to the same dispute.
- 3 instances of 4 Part IVA proceedings with respect to the same dispute.
- 5 instances of 3 Part IVA proceedings with respect to the same dispute.
- 27 instances of 2 Part IVA proceedings with respect to the same dispute.

We can now turn to a consideration of how many of these related Federal class action proceedings were brought by different legal representatives.

III. COMPETING PART IVA PROCEEDINGS

Of the 39 legal disputes that provoked 119 related Part IVA proceedings, eleven generated proceedings by different legal representatives. The total number of competing Part IVA proceedings with respect to these eleven disputes is 31:

- 1 instance of 5 Part IVA proceedings with respect to the same dispute.
- 2 instances of 4 Part IVA proceedings with respect to the same dispute.
- 2 instances of 3 Part IVA proceedings with respect to the same dispute.
- 6 instances of 2 Part IVA proceedings with respect to the same dispute.

Ten of the eleven disputes in question did not see the involvement of litigation funders nor did they occur after the High Court of Australia's decision in *Fostif*. These ten

disputes resulted in the filing of 28 competing class action proceedings. The eleventh legal dispute in question provoked three competing class action proceedings. These proceedings, which were funded by commercial litigation funders, were filed in the post-*Fostif* era and concerned the grievances of shareholders of the Centro group of companies. Two of these Part IVA proceedings were filed by Maurice Blackburn, supported by one litigation funder, whilst the third Part IVA proceeding was filed by Slater & Gordon, with the financial support of another litigation funder.¹⁸

Totally unexpected, and thus far more fascinating, are the findings with respect to the 28 pre-*Fostif* competing Part IVA proceedings that were brought in relation to ten legal disputes. In fact, we found that the filing of competing Part IVA proceedings (a total of 13), with respect to four of the ten legal disputes in question, was attributable to the fact that the first Part IVA proceedings that were filed sought to bind some but not all of the alleged victims. The Part IVA proceedings that were filed subsequently, by other lawyers, sought to represent some or all of the aggrieved persons who were left out of the existing Part IVA proceedings. What renders fascinating this finding is the major criticism that has been made of the December 2007 decision of the Full Federal Court of Australia, in *Multiplex Funds Management Limited v P Dawson Nominees Pty Ltd*,¹⁹ that closed class mechanisms do not contravene the provisions of Part IVA, including the opt out device.

The criticism in question is essentially that the Full Federal Court's decision will lead to numerous instances of competing Part IVA proceedings with one set of lawyers acting for one group of claimants and another set of lawyers acting for another group of claimants with respect to the same dispute. But, as the preceding paragraph indicated, this problem has already been faced by the Federal Court on four different occasions, well before *Fostif* and *Multiplex*. Whilst, as explained below, the competing class action proceedings in question did not arise as a result of the involvement of litigation funders, they created the general scenario that critics of *Multiplex* fear will result from this judicial pronouncement. This scenario entails, of course, additional Part IVA proceedings being filed by different lawyers in order to secure legal redress for those aggrieved persons who were excluded from the group/class represented by other lawyers in existing Part IVA proceedings.

Two of the four pre-*Fostif* instances of competing Federal class action proceedings, mentioned in the preceding paragraph, arose as a result of two proceedings that bound only those claimants who were members of the entities that were funding and/or running the litigation: a union in one case and an association of borrowers in the other. Two other Part IVA proceedings were filed by other law firms on behalf of those alleged victims of the impugned conduct, who were not covered by the other class actions, as they were not members of the relevant association or union.

The "listed class members" technique was employed in the other two pertinent instances of competing Part IVA proceedings. Proceedings were filed only on behalf of named and listed claimants with each set of lawyers acting for a different list/sub-set of claimants.

¹⁸ *Kirby v Centro Properties Limited* [2008] FCA 1505.

¹⁹ (2007) 244 ALR 600.

These findings also highlight another feature of Australia's class action landscape which is not well known, namely, the regular employment of closed class mechanisms well before the emergence of commercial litigation funders.

Five of the remaining six instances of competing Part IVA proceedings involved, broadly speaking, the scenarios that one more closely associates with traditional opt out regimes, namely, different law firms bringing class actions on behalf of essentially all or most of the aggrieved persons. The last instance of competing Part IVA proceedings arose as a result of one law firm filing opt out notices on behalf of its clients, in an existing Part IVA proceeding brought by other solicitors, and then filing a separate class action proceeding on behalf of the opt out class members in question.

We now consider the experience of the Victorian regime with respect to these issues.

IV. RELATED PART 4A PROCEEDINGS

As noted in chapter one, we identified a total of 28 class action proceedings that were filed in the Supreme Court of Victoria up to the end of 2009. These 28 proceedings were brought with respect to 25 disputes, as six proceedings concerned three disputes only. In one of the three instances of related Part 4A proceedings, the two class action proceedings in question were filed by the same lawyers.

There was one Part 4A proceeding filed with respect to all of the alleged victims by one law firm. But another law firm lodged opt out notices, on behalf of its clients in this Part 4A proceeding, and subsequently commenced a Part 4A proceeding on behalf of these opt out class members. In the final instance of related Part 4A proceedings, two law firms brought, at around the same time, two separate Part 4A proceedings seeking to represent essentially the same group of claimants. These four competing Victorian proceedings were filed before *Fostif* and did not involve litigation funders.

Far more interesting is the fact that several Part 4A proceedings have been brought with respect to disputes which also led to the filing of Part IVA proceedings. In fact, eight Part 4A proceedings concerned six disputes that also resulted in the filing of a total of eleven Part IVA proceedings. With respect to two of the six disputes in question, the Victorian class actions (three of them) were brought by different lawyers from those who were running the related Federal class actions (three of them). Again, these competing Part IVA and Part 4A proceedings were filed in the pre-*Fostif*/litigation funders era.

The eight Part 4A proceedings in question included two of the most well-know and significant class action proceedings that have been filed over the last 17 years in the Federal Court of Australia: *Dorajay Pty Ltd v Aristocrat Leisure Limited*²⁰ and *Peterson v Merck Sharp & Dome (Australia) Ltd.*²¹ In fact, these two proceedings were first filed in the Supreme Court of Victoria, as Part 4A proceedings, but shortly after the Court made an order, by consent, that they be transferred to the Federal Court.

²⁰ *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2008] FCA 1311.

²¹ See *Peterson v Merck Sharp & Dome (Australia) Pty Ltd* [2010] FCA 180.

When we combine these results the following finding is arrived at: the 277 class action proceedings that were brought in the Federal Court of Australia and in the Supreme Court of Victoria, during the periods evaluated by this study, concerned a total of 188 legal disputes.

V. EVALUATION OF THE DATA

A. No Opening of the Floodgates

The data set out in this chapter and the preceding chapter proves unambiguously that whatever problems Australia's two class action regimes may have created for society in general, the judiciary, the business community or anybody else for that matter, the bringing of an excessive number of class actions is not among them. Thus, any person or entity that continues to assert that Part 4A and Part IVA have generated an unacceptably high level of class action litigation in Australia is, to put it bluntly, not acting in good faith.

Indeed the data that we have collected suggests that these class action regimes have been employed with respect to a very small proportion only of the legal disputes that the drafters of Parts IVA and 4A had in mind when introducing these regimes into Australia's civil justice landscape. It is therefore appropriate here to consider the assessment of Australia's class action regimes that has been provided by several local and overseas commentators over the last few years.

They have expressed the view that Parts IVA and 4A are among the most liberal/plaintiff-friendly class action regimes in the world, perhaps even surpassing the US and Canadian class action regimes. This assessment is essentially grounded upon the following two differences between these regimes and the North American class actions regimes: the lack of a certification regime in the Australian regimes and the fact that the three requirements which must be satisfied, before a Part IVA/4A proceeding may be instituted,²² appear to be easier to satisfy than the corresponding requirements in Canada and the US.

²² A proceeding may be brought under the Australian regimes as long as the proceeding in question satisfies three "threshold" requirements. The first requirement is that seven or more persons have claims against the same person. The second requirement is that the claims are in respect of, or arise out of, the same, similar or related circumstances. The final prerequisite is that the claims of the group give rise to a substantial common issue of law or fact: Part IVA, s 33C and Part 4A, s 33C. But what is often overlooked is the fact that, contrary to their North American counterparts, Australian trial judges have extremely broad powers to discontinue, as class action proceedings, properly instituted class action proceedings, that is, Part IVA and Part 4A proceedings that adhere to each of the three prerequisites mentioned above. This judicial power includes the ability to order the discontinuance of class action proceedings, as Part IVA or Part 4A proceedings, where the trial judge "is satisfied that it is in the interests of justice to do so because ... it is ... inappropriate that the claims be pursued by means" of a class action proceeding: Part IVA, s 33N(1)(d) and Part 4A, s 33N(1)(d). See, generally, V Morabito, "The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions" (2004) 42 *Osgoode Hall Law Journal* 473.

But the data that we have collected, regarding the extent to which these regimes have been employed, demonstrates once again the major difference between the perceived operation of these class action regimes and how they actually operate in practice. Even a superficial review of media reports (concerning conduct that is alleged to have adversely affected multiple persons) would suggest that the filing of (on average) 14 class actions every 12 months, in the country’s “national court”, with respect to (on average) just less than ten disputes, represents an extremely “minimal” employment of the Federal regime.²³

The fact that, as demonstrated in the first report, no law firm has made a serious attempt to challenge the dominance of Maurice Blackburn and Slater & Gordon in this area,²⁴ over the last 17 years or so, clearly suggests that the vast majority of Australian plaintiff law firms do not share the view that Part IVA and Part 4A are extremely liberal/plaintiff-friendly. The existence of this scenario appears to be confirmed by our finding that in 19 Part IVA proceedings the class representative’s legal team relied on both Part IVA and the already-mentioned Order 6 Rule 13. Whilst these proceedings represent only 7.63% of the total number of Federal class actions that were filed during the relevant period, they are significant nevertheless for two principal reasons.

For one thing they reveal a certain level of uneasiness, or feeling of uncertainty, on the part of those who represent Part IVA applicants as to whether their clients would in fact be permitted to employ the Part IVA regime. This reliance on Order 6 Rule 13, as a “Plan B”, assumes even greater significance when one considers that a major rationale behind the introduction of the Part IVA regime was to ensure the availability of a group litigation device with respect to legal disputes involving numerous similarly situated persons.

This desirable goal could not be achieved through the representative action procedure, governed by Order 6 Rule 13. Essentially this was due to the major difficulties that were faced by aspiring representative applicants in complying with the prerequisites, contained in this rule, which needed to be satisfied in order to have access to this representative action procedure. Thus, it is sadly ironic that on 19 separate occasions the legal representatives of Part IVA applicants appear to have reached the following conclusion: “well, if we are not allowed to bring a class action under Part IVA, we may be able to bring a representative action under Order 6 Rule 13”.²⁵

The scenario that has been depicted here, with respect to the Federal regime, applies with even greater force to the Victorian regime, given that only 28 proceedings have been brought over ten years with respect to 25 disputes. The Victorian experience is of direct

²³ It will also be recalled from chapter one that: (a) five Part IVA proceedings did not consume any judicial resources as they were either not served on the respondents or were discontinued before the first directions hearing; and (b) two Part IVA proceedings, that were formally brought as Part IVA proceedings, were not prosecuted as class action proceedings, despite there being no formal orders that the proceedings cease to continue as Part IVA proceedings.

²⁴ But it should be noted that the firm of Macpherson + Kelley is set to become the third major player in Australia’s class action landscape, at least with respect to the Victorian regime.

²⁵ It should also be noted that the Part IVA proceedings against the Australian Wheat Board and Village Life Limited were originally brought pursuant to this Rule and its NSW counterpart, respectively.

relevance, of course, to the imminent introduction of a legislative class action regime in NSW and clearly indicates that the Supreme Court of NSW will not be faced with numerous class action proceedings.

Indeed, the experience with Part 4A clearly suggests that the approach which the NSW Government intends to adopt is a very enlightened one. In fact, the NSW Attorney-General's press release has revealed an intention to introduce for NSW an improved version of Part 4A (and thus Part IVA) by, for instance, empowering the Supreme Court of NSW to provide *cy pres* remedies in the class action proceedings brought under this new legislative regime.²⁶

In light of the discussion above, one cannot resist the temptation to make the observation that, if Australia's class action regimes are in fact amongst the most liberal in the world, then the world class action landscape must be in a fairly precarious state indeed (at least, for those who desire to act on behalf of similarly situated claimants).

B. Competing Class Actions

The data that has been presented in this chapter provides a clear illustration of some of the problems that have been created by the lack of empirical studies with respect to Australia's class action landscape. Various commentaries/reports, since *Multiplex*, have created the impression that this judicial pronouncement is likely to create in the future (and on a very regular basis) a problem which had, until now, been faced essentially only once (with respect to the Longford gas explosion)²⁷ by Australian courts. The problem in question entails different lawyers bringing simultaneous class action proceedings²⁸ with respect to the same dispute.

But our research has shown that, before *Multiplex*, the Federal Court had confronted this scenario (of competing Part IVA proceedings) on ten separate occasions. Given that the Full Federal Court's judgment in *Multiplex* was handed down in December 2007, this means that up to that point there had been competing Federal class action proceedings, on average, once every 19 months. According to the information that is available to us, in the 19 months after *Multiplex* (that is, up to July 2009), the Centro proceedings provided the only instance of competing Part IVA proceedings.²⁹

²⁶ For a succinct summary of some of the arguments in favour of the availability of *cy pres* remedies in class action proceedings, see V Morabito, "The Victorian Law Reform Commission's Class Action Reform Strategy" (2009) 32 *University of New South Wales Law Journal* 1055, 1064-1069 and the references cited therein.

²⁷ See *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56.

²⁸ It is important to bear in mind that, for the purposes of this study, the term class actions encompasses Part IVA and Part 4A proceedings only and not representative proceedings brought in the State Supreme Courts, such as the Supreme Court of NSW, pursuant to the State counterparts to the Federal Order 6 Rule 13.

²⁹ We are not aware (as at 31 August 2010) of any post-July 2009 competing Part IVA proceedings but this statement is based entirely on the information contained in judgments, media reports and the web sites of relevant law firms and entities.

Thus, so far, *Multiplex* has not increased the frequency with which this problem has been dealt with by the Federal Court. We have also revealed that, before *Multiplex* and *Fostif*, there had been six competing Federal and Victorian class action proceedings with respect to two disputes and four competing Part 4A proceedings with respect to two disputes.

The discussion contained in this chapter should not be interpreted as suggesting that no express guidance should be provided, to trial judges faced with competing class action proceedings, by the Federal, Victorian and New South Wales legislatures. Indeed, Justice Finkelstein of the Federal Court ought to be applauded for having tried, in the *Centro* matters, to devise a general strategy/approach which, if found to be both effective and fair, could have been applied by trial judges, whenever faced with this type of scenario, instead of being required to “reinvent the wheel” each time.³⁰

What is submitted here is simply that the debate with respect to the most appropriate general approach/mechanism, for dealing with this issue, should not be based on misplaced concerns that the Federal Court and Victoria’s Supreme Court are neither equipped nor have sufficient experience in dealing with this type of problem or that they will be inundated with competing class action proceedings. Such a debate should also be informed by an awareness of how Federal and Victorian trial judges have grappled with this problem in the past. We are currently working on a paper that will provide this analysis.

³⁰ Essentially, Finkelstein J ruled that a litigation committee should be formed to determine which law firm and litigation funder should conduct the litigation on behalf of all the potential claimants: *Kirby v Centro Properties Limited* [2008] FCA 1505.

CHAPTER 3

OPT OUT RATES

I. OVERVIEW

The United States experience, based on a paper provided to me, although written some decade ago, indicates that perhaps one per cent of group members might opt out and that of those only a very few actually mount their own actions. Our legal officer in the Washington Embassy ... has made extensive inquiries and has been able to find nothing that really refutes that experience reflected in that paper. But the right has to be acknowledged and that is what we are doing in this enhanced representative action.³¹

The comments above were made by the then Minister for Justice and Consumer Affairs, during the Senate's consideration of the Bill of Parliament that contained Part IVA, and reflected the Government's expectation as to the percentage of class members who would seek to exclude themselves from Part IVA proceedings. In this chapter, we reveal our findings with respect to the *actual opt out rates* for Part IVA and Part 4A proceedings.

Pursuant to the opt out device, claimants that fall within the description of the group represented by the class representative, the represented group, will be bound by the outcome of the litigation unless they take the positive step of excluding themselves from the litigation, that is, they opt out. To accommodate the opt out device, we find in both Part IVA and Part 4A s 33H. This section provides that an application (with respect to Part IVA proceedings) or writ (with respect to Part 4A proceedings) commencing a class action proceeding, in describing or otherwise identifying class members to whom the suit relates, need not name, or specify the number of, the class members.

The crucial provision of both regimes, with respect to the opt out device, is 33J. It provides that the Court must fix a date before which a class member may opt out of the class action proceeding and that a class member may opt out of the class action proceeding by written notice given under the Rules of Court before the date so fixed. Section 33J also provides that, except with the leave of the Court, the hearing of the action is not to commence earlier than the date before which a class member may opt out of the proceeding.

II. COLLECTION OF THE REQUIRED DATA

Before commencing this study our expectation was that, with respect to a significant number of the class actions that were filed during the relevant periods, we would not be able to find any data at all with respect to the total number of claimants who fell within the ambit of the represented group, as outlined in the pleadings. Fortunately, we were able to find that data with respect to all the class action proceedings where an opt out

³¹ *Hansard*, Senate (13 November 1991), 3027 (Senator Tate).

order was in fact made. This positive scenario was largely attributable to the data provided by most of the class action protagonists listed in the Acknowledgments.

Of course, the precision of the data in question varied somewhat ranging from an exact figure, where for instance the class members were listed in a schedule attached to the pleadings, to a very general estimate as to the potential number of claimants. This latter scenario would usually exist where the litigation never reached (or has not yet reached) the stage where a more precise assessment, as to the size of the class, would be possible.

A judgment call was still required with respect to the total number of claimants, to be used in working out the opt out rates, in for instance shareholder class actions which advanced sufficiently for the court to make an order closing the class. Pursuant to such orders, claimants are usually required to complete and lodge with the court a simple form in order to be eligible to receive a share of any compensation that might be made available to class members pursuant to a settlement agreement or damages awarded by the court.

With respect to these cases, generally speaking, two alternative ways of calculating the total number of claimants were potentially available to us. One was to simply add the number of persons who “opted in” to the total number of persons who opted out. The other was to employ instead the total number of shareholders for the relevant periods, found on the share registers. We implemented the latter strategy.

This was also the general approach that we adopted with respect to other class action proceedings that did not encompass shareholders. In food poisoning cases, for instance, we used in our opt out calculations the data made available to the parties by the relevant health departments (as the total number of persons who suffered the relevant harm from the relevant food or beverage) rather than simply adding together the total number of persons who opted out with the total number of persons who had opted in (whether formally through a court-approved class closing order or informally by registering with the class representative’s solicitors).

III. OPT OUT RATES IN PART IVA PROCEEDINGS

With respect to two of the 249 Part IVA proceedings that we studied, we were not able to obtain any opt out-related data at all, including the simple question of whether an opt out order was in fact made. With respect to three other Federal class actions, we were not able to obtain reliable data regarding the number of claimants who opted out. But we are quietly confident of receiving that data from the relevant solicitors by the end of the year.

With respect to 91 (37.29%) of the 244 class action proceedings in question, we were not able to find any s 33J orders, that is, any court orders, issued under that provision, providing that those class members who wished to opt out were required to file their opt out forms by a given date. Thus, the data that we employed to calculate the opt out rates came from the remaining 153 cases.

Before revealing our findings, it is useful to refer to corresponding empirical data regarding the US Federal class action regime:

Combining the opt outs at the certification and settlement stages yields percentages of certified (b)(3) class actions with one or more opt outs ranging from 42% to 50% in the four districts ...

How many class members opted out in these cases? In all four districts, the median percentage of members who opted out was either 0.1% or 0.2% of the total membership of the class and 75% of the opt out cases had 1.2% or fewer class members opt out.³²

The opt out findings, with respect to the 153 Part IVA proceedings in question, are as follows:

- The average opt out rate was 13.78%.
- The median opt out rate was 5.28%.
- At least one class member opted out in 78.76% of the class actions in question.
- The opt out rate was 1.2% or less in 30.82% of the class actions in question.
- The opt out rate was 10% or less in 62.32% of the class actions in question.
- The opt out rate was 30% or less in 84.93% of the class actions in question.

IV. OPT OUT RATES IN PART 4A PROCEEDINGS

Opt out orders were made in 14 of the 28 Part 4A proceedings that we identified in the first ten years of the operation of the Victorian regime. We were able to collect opt out data with respect to all of these cases. By the end of 2010, opt out orders are likely to be made in four of the Part 4A proceedings that are currently in progress.

The opt out findings, with respect to the 14 Part 4A proceedings in question, are as follows:

- The average opt out rate was 20.63%.
- The median opt out rate was 11.19%.
- At least one class member opted out in 100% of the class actions in question.
- The opt out rate was 1.2% or less in 7.14% of the class actions in question.
- The opt out rate was 10% or less in 42.85% of the class actions in question.
- The opt out rate was 30% or less in 85.71% of the class actions in question.

V. COMMUNICATIONS WITH CLASS MEMBERS

It was clear, right from the early stages of our collection of opt out data, that whenever a high percentage of class members excluded themselves from class action litigation, there was usually evidence of the respondents and/or their legal representatives conducting

³² TE Willging, LL Hooper and RJ Niemic, *Empirical Study of Class Actions in Four Federal Districts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center; 1996), 52. See also R Mulheron, "The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis" (2009) 15 *Columbia Journal of European Law* 409, 432.

settlement negotiations directly with individual class members. This preliminary finding prompted us to compile complete data, with respect to not only cases of settlement negotiations, but also those class action proceedings where there were direct communications between individual class members and respondents and/or their agents, regarding the litigation in question.

Such communications usually entailed either settlement negotiations, attempts to persuade class members to opt out or the respondent providing class members with its “side of the story” and/or its assessment as to the likely outcome and/or duration of the litigation. In the documents filed in the proceedings in question, or in relevant media reports, lawyers acting for the class representatives have frequently used stronger or more colourful language to describe the communications in question. But the purpose of the exercise here is not to determine whether those assessments were justified or to consider the appropriateness or desirability of these communications. The aim is simply to identify all those class action proceedings where these communications took place and to collect relevant opt out data with respect to these proceedings.

We identified 17 Part IVA proceedings where some of the communications outlined above took place. We were able to obtain opt out data with respect to all but one of these cases. The remaining Part IVA proceeding is one of the three cases with respect to which we are quietly confident of receiving the necessary opt out data from the applicant’s solicitors soon.

Our opt out findings with respect to these 16 cases are as follows:

- The mean opt out rate was 51.28%.
- The median rate was 43.25%.
- When these 16 cases are removed from the overall opt out data, the mean opt out rate for all Federal class actions (minus these 16 cases) goes down to 9.80% whilst the median rate goes down to 3.57%. Thus, these 16 cases, which represented 10.45% of the Federal class actions where an opt out order was made, accounted for 28.88% of the overall mean opt out rate and 32.38% of the overall median opt out rate.

We identified two Part 4A proceedings where there were communications between the respondents and/or their agents and individual class members regarding the class action litigation in question. Our opt out findings with respect to these two Victorian class actions are as follows:

- The mean and median opt out rate was 84.5%.
- When these two cases are removed from the overall opt out data, the mean opt out rate for all Victorian class actions (minus these two cases) goes down to 9.99% whilst the median rate goes down to 9.95%. Thus, these two cases, which represented 14.28% of the Victorian class actions where an opt out order was made, accounted for 51.57% of the overall mean opt out rate and 11.08% of the overall median opt out rate.

VI. OPT OUT FORMS

An important dimension of this project has entailed the review of the opt out forms that class members are required to complete, sign and file in order not to be bound by the class action proceeding. The purpose of this review was to ascertain, from any comments that class members chose to write on the forms themselves, or on documents attached to the forms, whether they fully understood the information, regarding the class action proceeding in question and their right to opt out, that is contained in the court-approved opt out notices. These notices are usually sent directly to class members, posted on the web or published in various newspapers, magazines or other publications.

This review provided the most depressing and, at the same time, amusing aspect of this study. It was amusing due to the extremely colourful descriptions/assessments of respondents/defendants, plaintiff lawyers, and lawyers and the legal system in general, that we found in some of the opt out forms. Particularly amusing was the fact that some class members viewed the opt out form as tantamount to personal correspondence between them and the relevant trial judge leading, in some instances, to a request that the judge call them on the mobile number that the class members provided on the opt out form!

The sad aspect of the review of opt out forms was the discovery that the opt out decision, made by a not insignificant number of those class members who wrote comments on their opt out forms, was most likely the product of a total misunderstanding, on their part, regarding the essential characteristics of class action litigation and/or the opt out device. In fact, some class members felt that the fact that the lawyers made them parties to the litigation, without seeking their prior permission, meant that they, and/or the legal system, could not be trusted.

The comments of some class members also exhibited a failure to understand that the filing of the opt out form deprived them of the opportunity to receive a share of any monetary benefits that the class action litigation might produce. Other comments revealed a belief on the part of the class members in question that they would be liable for the costs of the litigation because they were parties to the proceeding. Even more depressing was our conclusion that if someone, whether a member of the Court's Registry staff or the relevant solicitors, had contacted the class members in question to briefly discuss with them their concerns, most of them would have probably revoked their opt out forms.

Our findings, with respect to this review of opt out forms and court-approved opt out notices and other notices sent to class members, will be the subject of a separate paper. But we provided a summary of the more significant findings to the Court's National Practice Committee before it finalised the sample opt out notice that is attached to the Court's Practice Note on Part IVA. This Practice Note was released in July 2010. Given that we did not contact those class members who did not write any comments on their opt out forms, we are unable to say whether some or any of them were also confused as to some of the cardinal features of class action litigation. We are thus not in a position to

quantify the “contribution” that this confusion, on the part of some class members, has made to the higher-than-expected median and mean opt out rates. But we do suspect that this contribution is significant.

VII. EVALUATION OF THE DATA

The finding that the average opt out rates in Part IVA and Part 4A proceedings are substantially higher than what was envisaged by the drafters of the Part IVA regime is not a positive outcome, when one considers the philosophy that underpins the opt out device. Similarly troubling is the fact that the mean and the median opt out rates - as well as the percentages of cases where at least one class member opted out - for Australia’s two class action regimes are also significantly higher than the corresponding empirical data for the US Federal class action regime. The principal rationale for the creation of the opt out device in the US, back in 1966, was described as follows:

requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people - especially small claims held by small people - who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable.³³

Similarly, Michael Duffy, the then Commonwealth Attorney-General, revealed in Parliament, during the Second Reading of the Bill that contained Part IVA, that an opt out procedure is preferable because it “ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings”.³⁴

The comments written by some of the class members on the opt out forms that they have lodged, which were adverted to above, lead to an important and alarming conclusion. The class members that the opt out device seeks to protect (by including them within the ambit of a class action proceeding without requiring them to take an affirmative step) are probably the ones who lodge opt out notices, as a result of their confusion as to, among other things, the nature of a class action proceeding and/or the opt out device.³⁵

³³ B Kaplan, “Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)” (1967) 81 *Harvard Law Review* 356, 397-398. Justice Frankel described his conversation with Professor Kaplan: “I wrote down what he said - of the class action’s ‘historic mission of taking care of the smaller guy’. As he and the committee saw it, the likelihood is that this guy will routinely ignore, or at least fail to respond to, the notices contemplated under (c)(2). On that premise, the vote went the way we see, to the effect that a non-response means inclusion rather than inclusion” (M Frankel, “Amended Rule 23 from a Judge’s Point of View” (1966) 32 *Antitrust Law Journal* 295, 299).

³⁴ *Hansard*, House of Representatives (Cth), 14 November 1991, 3175. Similar reasoning had been adopted by the Australian Law Reform Commission: Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report no 46; 1988), para 107.

³⁵ See also The Hon Justice Kevin Lindgren, “Some Current Practical Issues in Class Action Litigation” (2009) 32 *University of New South Wales Law Journal* 900, 906 (“There is, however, a troubling question as to whether some group members who opt out do so as a result of ignorance”).

The extremely high mean and median opt out rates, in those class actions where there have been communications between the respondents and the class members regarding the litigation in question, also raise significant questions. One is entitled to wonder/ask, for instance, whether we would have witnessed this scenario had more trial judges implemented the sophisticated regime that was devised by Justice Moore in the Part IVA proceeding against GIO³⁶ or the approach that was adopted by Justice Wilcox in the concluding stages of the *Dingle v Ciba- Geiby Australia Ltd* Part IVA proceeding.

In the former case, Justice Moore required GIO and/or its lawyers to forward to the class representative's solicitors, Maurice Blackburn ("MB"), a draft of any correspondence to be sent to unrepresented class members ten days before the date it was to be sent. This regime was intended to provide MB with a meaningful opportunity to seek judicial intervention if there was any concern, on the part of MB, regarding the correspondence proposed to be sent to the class members. His Honour also felt that it was appropriate to limit GIO's capacity to communicate with class members to written communications. An order was also made that no offer of settlement should be sent to any group member without leave of the Court.

The approach to this issue, adopted by Wilcox J in the final stages of *Dingle*, is sufficiently captured by the following comments made by his Honour during a directions hearing:

However, I do have the view that it's really undesirable, when there are solicitors acting for the applicant who has fiduciary responsibilities towards group members, for there to be negotiations behind the solicitor's back. I think it's a similar sort of situation to what you get in ordinary litigation and if there are going to be discussions they ought to be between the representatives. I would prefer to take some sort of undertaking or assurances from the parties rather than make an order. ... I'm all in favour of negotiations and settlement ... but I think it's better for it to be done through the solicitors.³⁷

But there is reason to be optimistic with respect to the future, as a result of the Federal Court's Practice Note on Part IVA which, as noted above, was released in July 2010. In fact, the sample opt out notice attached to this Practice Note addresses directly those aspects of the opt out notices, that have been approved by trial judges in the past and which appear to have confused some class members. Thus, opting out of Part IVA proceedings, as a result of the lack of understanding adverted to in this chapter, is likely to decrease. Hopefully, Victorian and NSW trial judges will also rely on this sample opt out notice.

The Practice Note also deals with communications between class members and parties to Part IVA proceedings. It provides that:

Where group members are not clients of the applicant's solicitors (ie where no notice of acting has been given) then all other parties should use reasonable endeavours to ensure that any communications with group members are in writing.

³⁶ *King v GIO Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 191 ALR 697.

³⁷ *Dingle v Ciba- Geiby Australia Ltd* (Transcript of Proceedings; 3 March 1999), 11-12.

Where a party communicates with a non-client group member suggesting that the group members do or do not something, the communication should explain the consequences of following the suggestion and encourage the non-client group member to obtain legal advice.

The Court may make orders establishing a protocol for communications between parties and non-client group members.³⁸

Whilst the GIO regime would have provided more safeguards than those available under the regime recommended in the Practice Note,³⁹ adherence to the Practice Note should help to ensure that decisions to opt out of class action proceedings: (a) will be based on accurate and balanced information and (b) will not be “rushed”. Furthermore, the Practice Note does not preclude the implementation by Federal trial judges of the GIO regime given that it expressly recognises their ability to “make orders establishing a protocol for communications between parties and non-client group members”. Hopefully, a similar approach will be adopted by Victorian and NSW trial judges.

³⁸ Federal Court of Australia, *Practice Note CM 17 – Representative Proceedings Commenced Under Part IVA of the Federal Court of Australia Act 1976* (5 July 2010), clause 6.

³⁹ See V Morabito, “Judicial Supervision of Individual Settlements with Class Members in Australia, Canada and the United States” (2003) 38 *Texas International Law Journal* 663.

CHAPTER 4

COMMERCIAL LITIGATION FUNDERS

I. OVERVIEW

Few topics in recent years have excited as much controversy as litigation funding and, in particular, the rise of entrepreneurial litigation funding. Advocates for litigation funding argue that it is a means of enhancing “access to justice”, of enforcing market protections and allowing consumers to hold recalcitrant corporations accountable for the misconduct and the harm they inflict, which would not otherwise be redressed. For critics, entrepreneurial litigation is an example of heinous commodification – an anathema that corrupts the court process and the prosecution of claims (Justice McDougall, “Keynote Address to the NSW Young Lawyers Civil Litigation Seminar”; March 2010; p 16).⁴⁰

In this chapter, we provide our findings with respect to some of the issues that have provoked the diametrically opposed assessments of commercial litigation funders described above by Justice McDougall of the Supreme Court of New South Wales. The commonly held view is that the funding by IMF (Australia) Ltd’s wholly owned subsidiary, Insolvency Litigation Fund Pty Ltd (“ILF”), of the 2004 Federal class action against Aristocrat Leisure Limited heralded the arrival of commercial litigation funders in Australia’s class action landscape. But, as noted already, the *Aristocrat* proceeding was first filed as a Part 4A proceeding in the Supreme Court of Victoria on 27 November 2003.

But the first involvement of litigation funders in class action litigation goes further back, to December 2001, to be precise. The commercial litigation funder was again ILF. It agreed to fund two existing Part IVA proceedings that had been filed in 1998 and 2000 with respect to the so-called Waterfront industrial dispute.⁴¹ The involvement of ILF was “welcomed” with an application for security for costs, for just less than \$400,000. The security for costs order was made, against the litigation funder, in January 2002 but at a court-ordered mediation, which was held the following month, a settlement agreement was executed by the parties which was subsequently approved by the court. Thus, the security was never paid.

With respect to the first 17 years of the operation of Part IVA, we have identified a total of 18 Part IVA proceedings that have received some funding from a total of five commercial litigation funders. The five funders in question are: IMF (Australia) Ltd,

⁴⁰ See also R Mulheron and P Cashman, “Third-Party Funding of Litigation: A Changing Landscape” (2008) 27 *Civil Justice Quarterly* 312; and V Waye and V Morabito, “The Dawning of the Age of the Litigation Entrepreneur” (2009) 28 *Civil Justice Quarterly* 389, 432-433.

⁴¹ As explained by Justice Kiefel of the Federal Court, as she then was, the litigation arose “out of the recruiting and training of a non-union workforce for the Australian waterfront industry in late 1997 and early 1998 ... The persons recruited are alleged to have suffered loss as a result of entering into one or more contracts of employment and because the contracts were terminated”: *Batten v CTMS Ltd* [1999] FCA 1576, para 1.

International Litigation Funding Partners Pte Ltd,⁴² Comprehensive Legal Funding LLC (formerly Commonwealth Legal Funding),⁴³ Litigation Lending Services and 2117980 Ontario Inc.⁴⁴ We were able to find only one Part 4A action with respect to which some funding was received from a commercial litigation funder, the already mentioned *Aristocrat* litigation. Until December 2006, IMF had been the only litigation funder “involved” in class action proceedings.

Eleven of the funded cases were securities class actions. Two cases concerned disputes between employers and employees, as noted above. One proceeding was a cartel class action whilst another Part IVA proceeding involved a dispute concerning a facility agreement. Two other funded Part IVA proceedings were filed with respect to disputes regarding the commissions that agents were entitled to receive whilst the 18th funded case concerned essentially claims of misfeasance in public office.

II. THREE CATEGORIES OF FUNDING

It is possible to classify the support provided by litigation funders to class representatives under the following three general categories:

Category 1

The funder was required to pay all legal costs and disbursements incurred by the class representative’s solicitors (with respect to the commencement and prosecution of the proceedings), as well as any adverse costs orders, including orders that the class representative provide security for costs.⁴⁵

Category 2

The funder was required to pay all legal costs and disbursements incurred by the class representative’s solicitors (subject to one exception set out below), as well as any adverse costs orders, including orders that the class representative provide security for costs.

The exception in question is that the funder was required to pay a specified percentage only of the professional fees of the class representative’s solicitors upon receipt of each invoice, with the remainder of the fees to be paid only if there was a successful outcome in the proceedings.⁴⁶

Category 3

⁴² “A company incorporated in the Republic of Singapore”: *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2008] FCA 1769, para 1 (per Finkelstein J).

⁴³ This is a US-based company.

⁴⁴ As the name of the company suggests, it is a company incorporated in the Canadian province of Ontario.

⁴⁵ See, for instance, *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 145 FCR 394, para 77.

⁴⁶ See, for instance, *Brookfield Multiplex v International Litigation Funding Partners Pte Ltd (No 3)* (2009) 256 ALR 247, 430-431.

The funder was required to pay all legal disbursements incurred by the class representative's solicitors, as well as any adverse costs orders, including orders that the class representative provide security for costs order, but not the professional fees of the class representative's solicitors. In fact, the class representative's solicitors acted on a conditional fee payable only in the event of a successful outcome in the proceedings.⁴⁷

We have not identified any instances of the litigation funders failing to meet any of the commitments outlined above in the 18 funded Part IVA proceedings.

III. CLOSED CLASSES

Contrary to popular belief, closed class mechanisms were not employed in all of these proceedings. In four of the 18 cases in question the litigation was brought on behalf of all claimants. In a fifth case, the *Aristocrat* proceeding, this scenario was arrived as a result of Justice Stone's ruling that one form of these mechanisms contravened Part IVA's opt out regime.⁴⁸ We made the following interesting findings regarding claimants in funded Part IVA proceedings:

- The total number of class members who were covered by these 18 proceedings was approximately 70,500. This figure is based on the size of the relevant represented groups before opt out orders were made.
- A total of approximately 5,500 class members were eligible to receive a share of the settlement funds in those funded cases that were settled.

In the court files we also looked for any evidence of dissatisfaction on the part of those who executed funding agreements as well as those who did not, and were thus not included within the ambit of the class action proceedings, where a closed class mechanism was employed. We did not find any complaints by (or references to such complaints by) class members or potential class members.⁴⁹

This finding is broadly consistent with the events that followed the ruling by Stone J of the Federal Court in the *Aristocrat* Part IVA proceeding, regarding the closed class mechanism that had been employed in this case. The mechanism in question, called the MBC criterion, restricted the proceeding to those claimants who were clients of the class representative's solicitors, Maurice Blackburn Cashman (as the firm was then called), at any time during the progress of the litigation. A term of this firm's retainer agreement, in turn, imposed the requirement that the class members also enter into a funding agreement with ILF. Justice Stone held that this mechanism contravened the provisions governing, and/or the philosophy that underpinned, Part IVA's opt out regime.⁵⁰

⁴⁷ See, for instance, VID12/2007 *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd*.

⁴⁸ *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 145 FCR 394.

⁴⁹ See also Submission to the Standing Committee of Attorneys-General by John Walker (IMF (Australia) Ltd's Managing Director; 11 August 2006), 16 ("remarkably, IMF has not received any complaints from its 15,000 clients. There is a clear and unequivocal demand that is being serviced").

⁵⁰ *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 145 FCR 394.

The practical result of this adverse ruling was that the description of the represented group was altered to encompass all relevant shareholders of Aristocrat. Furthermore, Maurice Blackburn Cashman wrote to all those shareholders who had entered into fee and retainer agreements with the firm (682 of them) advising them that as a result of Stone J's ruling they could rescind the relevant agreements whilst still remaining as class members. Only three (0.43%) of these 682 class members availed themselves of this option.

Justice Hansen of the Supreme Court of Victoria adopted the reasoning of Stone J in also rejecting the MBC criterion in the so-called *Media World Part 4A* proceeding.⁵¹ In this proceeding, there was no funder but the class was again restricted to the clients of Maurice Blackburn Cashman.⁵² None of the members of the *Media World* group availed themselves of the opportunity, made available by Hansen J's judgment, to retain their status as class members whilst at the same time rescinding the fee and retainer agreements that they had executed with Maurice Blackburn Cashman.

IV. CONDUCT AND OUTCOMES OF FUNDED PART IVA PROCEEDINGS

Litigation funders have provided the financial support mentioned above in exchange for, in the event of a victory by the plaintiff class, reimbursement of its expenditures as well as specified percentages of the compensation that the class members would receive from the litigation. On some occasions they have also charged a "project management fee". A concern with respect to contingency fee agreements executed by the plaintiff's legal representatives is that they create the potential for conflict of interest in relation to such matters as settlement of the client's claim. As explained by leading US scholars:

Attorneys compensated on a percentage method have an incentive to settle early for an amount lower than what might be obtained by further efforts. The attorney who puts in relatively few hours to obtain an early settlement is likely to earn a much greater compensation per hour of effort than an attorney who expends greater efforts and litigates a case to the point where the plaintiff's recovery is maximised.⁵³

Does the fact that litigation funders are not the legal representatives of Part IVA applicants render the reasoning above inapplicable to them? The answer to this question turns on the answer to another crucial question, namely, whether litigation funders have any real control over the way the proceedings are conducted and ultimately resolved.

The formal agreements, governing the funding of Part IVA proceedings that we have reviewed, seek: (a) to minimise conflicts between the interests of the class and the

⁵¹ *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449.

⁵² As explained by the Law Council of Australia, "the attempt to close the class from the outset was done so with the instructions of all group members and because the group members were themselves collectively funding the claim": Law Council of Australia, *Litigation Funding* (submission to the Standing Committee of Attorney-Generals; 14 September 2006), para 58.

⁵³ JR Macey and GP Miller, "The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform" (1991) 58 *University of Chicago Law Review* 1, 25. Occasionally, it may be the claimants who wish to settle early whilst the litigation funders may desire for the proceeding to proceed further: see V Waye, "Conflicts of Interest Between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19 *Bond Law Review* 225, 237.

interests of the relevant funders; and (b) to address them when they do arise. The pertinent features of these agreements (and arrangements) are briefly set out below:

- Unlike the funding arrangements that were place in *Fostif*,⁵⁴ the lawyers who act for the class are retained by the claimants. That is to say, the class members execute with the solicitors a fee and retainer agreement.
- The funders are entitled to give regular instructions to the solicitors. But the applicants may override those instructions by providing their own instructions to the solicitors.
- The solicitors must rely only on the instructions they receive from the class representative where they form the view that there exists a conflict between the obligations they owe to the litigation funder and those owed to the class representative.
- Where there is disagreement regarding a proposed settlement between the class and the litigation funders, the advice of Senior Counsel must be sought. This advice, regarding the reasonableness of the proposed settlement in question, is binding.

Nevertheless, we looked for any differences in the way these 18 funded class actions were conducted, when compared with unfunded class actions, which might suggest that the litigation funder's interests took precedence over the interests of the relevant group of claimants. An important dimension of this line of inquiry was the way in which funded Part IVA proceedings had been resolved.

Ten of these class action proceedings were resolved whilst the remaining eight are still in progress. All of the resolved cases were settled. One of the ten settled actions was no longer a Part IVA action when it was settled.⁵⁵ This settlement rate, for funded Part IVA cases, is far higher than the overall settlement rate for Part IVA actions. In fact, as at 31 August 2010, approximately 40.94% of all resolved Part IVA proceedings had been settled.

Our preliminary data with respect to these 18 funded Part IVA proceedings is as follows:

- The ten settled proceedings generated a total of approximately \$311 million.
- The average compensation generated in these ten cases is \$31.1 million whilst the median compensation is equal to \$8 million.
- Approximately 29.61% (\$92.1 million) of these settlement funds went to the relevant litigation funders.
- The remaining \$219 million was shared between the solicitors for the Part IVA applicants and the class members.⁵⁶

⁵⁴ In *Fostif* the solicitors were retained by the litigation funders and the funders had the authority to instruct the solicitors and to settle the proceeding without consultation with the clients.

⁵⁵ It had been discontinued, as a Part IVA proceeding, by the applicant's solicitors following adverse comments, made by the trial judge during a directions hearing, concerning the closed class mechanism that had been employed in that case. The relevant class members (over 120 of them) all became named applicants.

⁵⁶ We are in the process of ascertaining what "slice of this pie" was received by class members.

Did the merits of the substantive claims in the ten cases in question warrant a far greater level of compensation, than what was made available to the class members under the relevant settlement funds? That is, of course, a very difficult question to answer for “outsiders” who do not have at their disposal all or even most of the relevant evidence that is in the possession of the respective legal teams. We reviewed closely all the relevant information and documents contained on the court files, including the submissions that were made by the lawyers in question, in support of the applications for s 33V orders.⁵⁷ The way the Court dealt with s 33V applications was also closely reviewed. This review has led to the conclusion that the decisions, made by the various trial judges, to approve the settlements proposed by the parties to the ten funded Part IVA proceedings were fully justified.

Another relevant quantitative measure that we applied was the duration of these cases, compared with all other Part IVA proceedings. We calculated the mean and average duration of all resolved Part IVA proceedings as well as those proceedings which were resolved through a settlement that was approved by the Court. Similar calculations were made with respect to eight of the ten funded class actions that were settled.⁵⁸ The results of our calculations are as follows:

- Average duration of resolved/settled funded Part IVA proceedings: 760 days.
- Average duration of all settled Part IVA proceedings: 771.35 days.
- Average duration of all resolved Part IVA proceedings: 710.84 days.
- Median duration of resolved/settled funded Part IVA proceedings: 611.50 days.
- Median duration of all settled Part IVA proceedings: 649 days.
- Median duration of all resolved Part IVA proceedings: 498 days.

Thus, no major differences emerge between how long it takes to settle funded actions and the duration of all settled Part IVA proceedings. This finding is confirmed by a more qualitative assessment of how funded class actions are conducted. In one funded proceeding, for instance, the settlement agreement was executed several months after a long trial was completed. In another proceeding, the settlement was arrived at during the first week of the trial whilst in another Part IVA case the settlement was arrived at only a few months before the trial was scheduled to begin. In several funded cases, there were appeals to the Full Federal Court of Australia, including one application for special leave to appeal to the High Court. Thus, there was no evidence of a less vigorous prosecution of Part IVA proceedings where funding was provided by commercial litigation funders.

V. EVALUATION OF THE DATA

Overall, the picture that emerges from the data set out in this chapter, with respect to funded class action proceedings, is a positive one.

⁵⁷ Section 33V provides that the settlements of Part IVA and Part 4A proceedings must be approved by the Court.

⁵⁸ The two settled Waterfront class actions were not included in these calculations given that the relevant litigation funder only became involved in the final stages of these proceedings.

In light of the preference for closed class mechanisms by litigation funders, the findings: (a) that over 70,500 persons were potentially able to receive the benefits of successful funded Part IVA proceedings; and (b) that over 5,500 of them were eligible to receive a share of the settlement funds were pleasant surprises. Equally positive were the findings: (a) that all the resolved funded class actions were settled pursuant to settlement agreements/schemes that were judicially found to be reasonable; and (b) that the involvement/presence of the litigation funders did not appear to have adversely affected the manner in which the lawyers for the Part IVA applicants conducted the litigation.

The fact that litigation funders received approximately 30% of the settlement funds that were generated by funded Federal class action proceedings was also a pleasant surprise given that it is commonly stated, by legal commentators, that the share of the proceeds of funders is typically between one third and two thirds of the proceeds.

The willingness and ability of litigation funders to provide an indemnity for adverse cost awards in funded Part IVA proceedings is another extremely positive finding. The recent decision of the High Court of Australia in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*⁵⁹ provides a salutary reminder that it cannot be assumed that the support provided by litigation funders will invariably encompass an indemnity for awards of costs against their clients.

Does the scenario depicted above demonstrate that there is no need to consider greater regulation of litigation funders? The fact that there is no guarantee that all, or even some, of the positive features of Australia's funded class actions landscape, outlined above, will continue to be present, even in the immediate future, strongly points towards a negative answer to the question posed above.

In 2000 the Australian Law Reform Commission recommended that a review of the operation of Part IVA should be undertaken.⁶⁰ A similar recommendation was made in September 2009 by the Federal Attorney-General's Access to Justice Taskforce.⁶¹ This review ought to encompass an evaluation of the various options that are available to regulate litigation funders.

It is submitted that the evaluation of possible regimes must also encompass an assessment of their likely impact on the degree of competition in Australia's litigation funding industry. In fact, it cannot be doubted that the generally positive scenario that has been

⁵⁹ (2009) 239 CLR 75. In this case, the High Court essentially held that there was no abuse of process, where a litigation funder did not provide the plaintiff with an indemnity with respect to any cost orders that may have been granted in favour of the defendant.

⁶⁰ Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System* (Report no 89; 2000), para 7.128.

⁶¹ Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report; September 2009), 117 (Recommendation 8.11). See also The Hon Justice Kevin Lindgren, "Some Current Practical Issues in Class Action Litigation" (2009) 32 *University of New South Wales Law Journal* 900, 901 ("A review of the operation of Part IVA is to be welcomed. That Part has been in force since 1992 without any substantial review of its operation").

revealed in this chapter is partly attributable to the greater competition that has resulted from the recent involvement of foreign litigation funders. But there is a real danger that complicated regulatory regimes, with stringent/difficult to comply with requirements, might be introduced, in the name of consumer protection, but which will, in practice, be detrimental to the very persons they are intended to protect. This undesirable scenario will eventuate if only a handful of litigation funders will be able to operate under whatever regime is introduced.

It is also submitted that the advocated review of class actions and litigation funders should also consider carefully the reasons/factors that have increasingly made plaintiff law firms reluctant to fund Part IVA proceedings and which have made litigation funders fundamental players in Australia's class action landscape in such a short period of time. A meaningful review of class actions and litigation funders should also carefully consider whether to introduce mechanisms designed "to allow a litigation funder to claim a share of the total amount recovered by litigation on behalf of an opt out class, without necessarily requiring each of the group members to enter into separate contractual arrangements with the funder on commencement of the proceeding".⁶² In fact, the ideal scenario would be to have litigation funders supporting class action proceedings where the represented groups always encompassed all potential claimants.

⁶² Victorian Law Reform Commission, *Civil Justice Review* (Report no 14; 2008), 616.

CHAPTER 5

CLASS REPRESENTATIVES

I. OVERVIEW

The unique nature of class action litigation becomes evident when one compares media reports on class action proceedings with the way in which other legal proceedings are discussed by Australian journalists. With respect to non-class action litigation, the media reports invariably describe the plaintiffs, the defendants and frequently the lawyers who represent the parties in question. Our review of media reports on Australian class actions, since March 1992, has revealed, among other things, that respondents/defendants and the lawyers acting for the class are invariably mentioned, together with a summary of the legal grievances of the class. But more often than not there is no reference to the named plaintiff/applicant, that is, the person or entity that will formally represent the interests of the relevant class. A broadly similar approach is apparent in the relevant commentaries that have been published in the legal literature.

The existence of this scenario led to the decision to write a paper that will be devoted entirely to a study of class representatives and the role that they have played in class action litigation, including the circumstances surrounding their appointment, removal or substitution. In this chapter, we reveal some of the more interesting data that we have collected up to this point.

II. GENERAL DATA WITH RESPECT TO CLASS REPRESENTATIVES

Australia's class representatives may be divided under the following broad categories:

- Individuals.
- Corporations.⁶³
- Unions.
- The Australian Competition and Consumer Commission.
- An Association incorporated under the *Associations Incorporation Act 1984* (NSW).
- A council.

Other interesting data concerning class representatives includes:

- At least 26 couples (all married) have assumed the role of class representatives.
- Parents and their children were class representatives in at least six class action proceedings.
- At least five class representatives passed away before the termination of the relevant class action proceedings.

⁶³ Sometimes the individuals and corporations in question brought the class actions on behalf of the businesses that they were operating and which were harmed by the impugned conduct.

- The replacement of existing class representatives and the addition of further representatives were events that occurred on a fairly regular basis.
- A not insignificant number of Part IVA applicants did not reside in the State or Territory where the relevant proceedings were filed. Some did not even reside in Australia.
- We found several instances of the same individuals being class members in one or more Part IVA proceedings and applicants in other Part IVA proceedings. So far, we have identified this phenomenon in migration and securities class actions only.
- A not insignificant number of persons and entities have acted as applicants in more than one Part IVA proceeding. Some Part IVA applicants have also assumed the role of Part 4A plaintiffs. This finding is not however indicative of the existence of “professional class representatives” in Australia.⁶⁴ It is instead entirely attributable to one of the aspects of the Australian class action landscape that was discussed in chapter two above, namely, the same law firms bringing multiple class actions with respect to essentially the same disputes.
- The age of class representatives has ranged from 7 years to 88 years. Their average age is 46.66 years and their median age is 45 years.

III. WHAT DO CLASS REPRESENTATIVES DO FOR A LIVING?

We are seeking to compile a complete list of the occupations of the individuals who have assumed the challenging role of Part IVA and Part 4A applicants/plaintiffs. Some of this data has been collected from court files and from media reports. But most of it was provided by the class action protagonists listed in the Acknowledgments. Particularly helpful were Bernard Murphy, Rebecca Gilson and Neil Francey.

Set out below are our preliminary findings. It is important to note that here we have included the occupations of class representatives only with respect to those Federal and Victorian class action proceedings where the nature of the substantive claims, that were advanced in the litigation, did not dictate that the class representatives had to be members of a given profession, field or sector. For instance, a Part IVA proceeding was filed on behalf of all the Deputy Registrars of the Family Court of Australia with respect to an industrial dispute with the Court.⁶⁵

This meant that the Part IVA applicants were all Deputy Registrars. As a result, the position of Deputy Registrar is not included in the list below. This is because we are seeking to determine if plaintiff lawyers have exhibited a preference for class representatives, from particular occupations or sectors or with particular characteristics, whenever the relevant groups of claimants encompassed persons from several sectors or

⁶⁴ With respect to the US Federal regime, see TE Willging, LL Hooper and RJ Niemic, *Empirical Study of Class Actions in Four Federal Districts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center; 1996), 25: “we found few multiple appearances of named plaintiffs in the four districts. Pooling all the names of class representatives into one file with 353 names of class representatives from 141 cases, we identified duplicate appearances by four individuals and one corporation”.

⁶⁵ *CPSU, The Community and Public Sector Union v Commonwealth of Australia* [1999] FCA 653.

fields, thus giving the lawyers a choice.⁶⁶ Finally, it is important to point out that the occupations listed below encompass most of the individuals who have acted as class representatives in all but a couple of Australia's most important class action proceedings.

- Academic (senior lecturer and course coordinator of the Bachelor of Arts (Humanities and Social Sciences)).
- Barristers (2).
- Bottle shop attendant.
- Camp counsellor.
- Casual worker (packing boxes).
- Chartered accountant.
- Chartered accountant (former merchant banker).
- Clerical/home duties.
- Company director.
- Dental surgeon.
- Dentist.
- Disability pensioner (former operator of a pinball and video machine supply and repair business).
- Disability pensioners (3).
- Doctors (3).
- Farmer.
- Farmer (former boilermaker/welder).
- Factory worker.
- Former building contractor.
- Former officer of a foreign Army and maritime worker.
- Former engineer in the design and construction industry and aquaculture developer.
- Former hotel cook and manager.
- Former hotel reception manager.
- Full-time mother.
- Hairdresser.
- High school students (3).
- Housewives (2).
- Human resources manager.
- Industrial engineer.
- Investment bankers (3).
- IT consultant.
- Labourer.
- Maintenance worker.
- Managing director.
- Media consultant.
- Member of the Australian Army.
- Member of the NSW Parliament (subsequently practised as a barrister and an accountant).
- Metal machinist.
- Nurses (3).

⁶⁶ An assumption has been made here that it is invariably the plaintiff lawyer that determines, from a pool of potential candidates, who the class representatives will be. But it should be pointed out that we have found instances of plaintiff solicitors taking a more passive role, not unlike the traditional scenario with respect to non-group litigation, where the claimant decides to issue a legal proceeding and contacts a lawyer of his/her choice for the purpose of seeking legal advice regarding their litigious plans.

- Operators of a Chinese food manufacturing business (2).
- Owners of an interstate haulage by semi-trailers business (2).
- Panel beater.
- Part-time TAFE teacher in community services and health industry.
- Part-time worker.
- Pensioners (3) (former factory/manufacturing workers).
- Pensioners (3).
- Pensioner (former beauty specialist).
- Pensioner (former global maritime safety manager).
- Proprietor of an Italian pizza and pasta bar.
- Plumber.
- Primary school students (2).
- Print production planner.
- Property developer.
- Proprietor and senior partner of an accounting, auditing and insolvency firm.
- Receptionist.
- Research Fellow (in medicine).
- Retired (3).
- Retired accountants (2).
- Retired hospital worker.
- Retired public servant.
- Retired senior industrial officer.
- Retired wheat farmers (2).
- Scheduling coordinator in the human resources and food and beverage department of a casino.
- Self-employed print broker.
- Semi-retiree.
- Stage manager at London's Royal Festival Hall.
- Surgeon.
- Teachers (2).
- Travel agent (former detective in the Police Force's criminal investigation branch).
- Unemployed.
- University student.
- War veteran.
- Widowed pensioner.
- Writer.

IV. COMMENTS

The list above indicates quite clearly that class representatives in Australia have come from all “walks of life”. They have included white collar workers and blue collar workers; employees and business people; former and current members of the workforce as well as full-time, part-time and casual workers; people with tertiary degrees as well as people with other levels of education or training; public sector employees and those operating in the private sector; primary, high school and university students; executives; recipients of pensions; and persons whose important work, at home, does not generate any income. They have also included a member of Australia's most loved category of “workers”, politicians!

This scenario represents a surprisingly positive finding. In fact, the frequent descriptions of plaintiff solicitors as the real class representatives and the firm belief by some class action respondents and their legal representatives, that persons of straw are regularly chosen to ensure that such respondents will not recoup their costs in the event of an unsuccessful outcome for the class, made us expect a different scenario. A scenario where class representatives came only from particular sectors of our society instead of reflecting, to some extent, the wide spectrum of backgrounds, occupations and expertise that can be found in our community.