WESTERN AUSTRALIA

REPRESENTATIVE PROCEEDINGS

PROJECT 103 — FINAL REPORT

JUNE 2015

THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

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FOREWORD

In July 2011, the then Attorney General asked the Law Reform Commission of Western Australia ('the Commission') to examine and report upon whether, and if so in what manner, the principles, practices and procedures pertaining to representative proceedings being commenced in the courts of Western Australia require reform, in particular giving close consideration to:

i. the need for a detailed guiding framework for the manner in which representative proceedings are to be conducted or concluded;

ii. the need to reduce the uncertainty and lack of clarity in the area;

iii. the adoption of an appropriate and effective model, either through amendment to the Supreme Court Rules or statutory reform, taking into account recent developments regarding representative proceedings in other jurisdictions both nationally and internationally;

iv. the need to ensure that representative proceedings are conducted in a fair manner which gives those who will be bound by orders made in the proceedings a reasonable opportunity to decide whether or not to participate in the proceedings and to be heard in relation to issues affecting their rights; and

v. any related matter.

The Commission released a Discussion Paper in February 2013. In its Discussion Paper, the Commission made the following proposals:

(a) that Western Australia should adopt legislation to create a scheme allowing representative actions in substantially similar terms to Part IVA of the *Federal Court of Australia Act 1976* (Cth); and

(b) Order 18 Rule 12 of the Rules of the *Supreme Court 1971* (WA) should be retained in its current form as a surviving alternative.

The Commission sought submissions on the above proposals, as well as on all and any aspects of the Terms of Reference. Specifically it sought comment on three key issues:

1. If a new regime is appropriate, should such amendment be effected by amendment of the rules of the Supreme and/or District Courts only, or by the passage of legislation?

2. Should Western Australia adopt a legislative representative proceedings regime substantively similar to that existing in Part IVA of the *Federal Court of Australia Act 1976* (Cth)?

   In respect of this second issue, the Commission recognised that there were two fundamental points of difference between Part IVA of the *Federal Court of Australia Act 1976* (Cth) and Part 10 of the *Civil Procedure Act 2005* (NSW). The first is the extent to which the legislation should allow representative actions to automatically proceed on a 'closed class' basis, as prescribed by s 166(2) of Part 10 of the *Civil Procedure Act 2005* (NSW). While such a provision does not exist in either the federal or the Victorian legislation, the Commission is aware that closed class representative actions are relatively common in both federal and New South Wales proceedings.

   The Commission therefore invited submissions on whether any legislative amendment in Western Australia should include an equivalent provision to s 166(2) of Part 10 of the *Civil Procedure Act 2005* (NSW).

3. The other key difference in the *Civil Procedure Act 2005* (NSW) is the extent to which there is an express permission to issue a representative action against multiple defendants, irrespective of whether or not the persons affected have a claim against every defendant in the action ('the *Philip Morris* issue').

   In respect of this third issue, the Commission understands that in circumstances where the Philip Morris issue presents in the federal and Victorian jurisdictions, the practice routinely adopted is that multiple actions are issued and thereafter consolidated. The Commission specifically invited comment on whether a provision equivalent to s 158(2) of Part 10 of the *Civil Procedure Act 2005* (NSW) should be included in any final recommendation for legislative reform in Western Australia.

In addition, the Commission invited interested parties to comment on the following questions:

- the possible need for codification of the role of the representative plaintiff and requirements for removal of a representative plaintiff;
- the suspension of limitation periods and the status of class members' claims in the event a class is disbanded by order of the court;
- whether there should be a more prescriptive legislative framework in relation to security for costs in representative proceedings;
- whether the impact of proportionate liability legislation as enshrined in the *Civil Liability Act 2002* (WA) could produce anomalous results in relation to the issue of whether every group member must have a claim against each named respondent;
- whether more prescriptive notification provisions are required in order to ensure that class members are aware of their right to opt out of a representative proceeding; and
- In its current form, s 33V of the *Federal Court of Australia Act 1976* (Cth) contains no statutory guidance or criteria that a court should take into account when considering whether to approve the settlement or discontinuance of an action. The Commission invited submissions on the question of whether formal criteria are required.

The Commission also noted that interested parties were encouraged to make submissions on any other issues relating to the current composition of Part IVA proceedings.

The Commission received seven submissions from stakeholders including the Law Society of Western Australia, the Law Council of Australia, the Western Australian Bar Association and the Justices of the Supreme Court of Western Australia. The submissions were of great assistance in completing the reference, and the Commission appreciates the time and effort that went into their preparation.

Following analysis of the submissions and its own research, the Commission has formed the view that Order 18 Rule 12 of the *Rules of the Supreme Court 1971* (WA) is inadequate to facilitate large representative actions with sufficient connection to Western Australia being litigated on their merits in our state courts. The Commission considers that the introduction of a legislative scheme allowing representative actions would assist in reducing interlocutory disputes, lowering costs and alleviating procedural barriers. Accordingly, the Commission makes the following recommendations in this Report:

1. that Western Australia enact legislation to create a scheme in relation to the conduct of representative actions.
2. that the legislative scheme be based on Part IVA of the *Federal Court of Australia Act 1976* (Cth).
3. that Order 18 Rule 12 of the Rules of the *Supreme Court 1971* (WA) be retained.

4. that the legislative scheme include a provision based on s 33T of Part IVA of the *Federal Court of Australia Act 1976* (Cth) but that it be expanded so that a court may remove and substitute a representative party where it is in the interests of justice to do so.

5. that a provision equivalent to s 158(2) of the *Civil Procedure Act 2005* (NSW) be included in the legislative scheme.

6. that a provision equivalent to s 166(2) of the *Civil Procedure Act 2005* (NSW) not be included in the legislative scheme.

7. that, in conjunction with any implementation of the above recommendations, consideration be given by government to whether the torts of maintenance and champerty should be abolished or whether the law in relation to their operation should be otherwise modified in Western Australia.

These recommendations are made in the hope that they will facilitate the conduct of representative actions in Western Australia and provide certainty to plaintiffs.

The Commission is grateful to its project writer, Tim Hammond, for his diligence and hard work in researching and writing the Discussion Paper and this Final Report.

This reference was concluded following a transition to new administrative arrangements and reformulation of the Commission due to the retirement of its former Chair, Richard Douglas. The Commission is now administered directly by the Department of the Attorney General. The Commission thanks its former Executive Officer, Heather Kay, and former Executive Assistant, Sharne Cranston, for their invaluable assistance with this reference prior to this transition, and also gratefully acknowledges the assistance of officers from within the Department of the Attorney General. Finally, the Commission thanks the Attorney General for providing this assistance and for his continued support of its work.

Dr David Cox
Chair

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CHAPTER 1
INTRODUCTION

BACKGROUND

1.1 In July 2011, the then Attorney General, Christian Porter MLA, directed the Law Reform Commission of Western Australia ('the Commission') to 'examine and report upon whether, and if so in what manner, the principles, practices and procedures pertaining to representative proceedings require reform'.

1.2 In particular, the Attorney General requested that close consideration be given to the following factors in relation to such an examination ('Terms of Reference'):

the need for a detailed guiding framework for the manner in which representative proceedings are to be conducted or concluded;

i. the need to reduce the uncertainty and lack of clarity in the area;

ii. the adoption of an appropriate and effective model, either through amendment to the Supreme Court Rules or statutory reform, taking into account recent developments regarding representative proceedings in other jurisdictions both nationally and internationally;

iii. the need to ensure that representative proceedings are conducted in a fair manner which give those who will be bound by orders made in the proceedings a reasonable opportunity to decide whether or not to participate in the proceedings and to be heard in relation to issues affecting their rights; and

iv. any related matter.

1.3 The Terms of Reference relate specifically to the existing framework within which representative proceedings operate in Western Australia. The framework is contained in Order 18 Rule 12 of the *Rules of the Supreme Court 1971* (WA) (RSC).

1.4 Order 18 Rule 12 of the RSC provides as follows:

12. Representative proceedings

(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, 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.

(2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued, to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this subrule, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.

(3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

(4) An application for the grant of leave under subrule (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.

(5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

(6) The Court hearing an application for the grant of leave under subrule (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.

1.5 In February 2013, the Commission published a Discussion Paper in relation to the Terms of Reference.[1]

1 Law Reform Commission of Western Australia, *Representative Proceedings*, Discussion Paper, Project No. 103 (2013) ('Discussion Paper').

1.6 The Discussion Paper set out the Commission's preliminary view, which was that Western Australia should adopt a legislative scheme for representative actions that is substantially similar to Part IVA of the Federal Court of Australia Act 1976 (Cth) ('Primary Proposal').[2]

1.7 In addition to the Primary Proposal, the Commission also asked for submissions on a number of related issues. In summary, these issues were as follows:

1. whether Order 18 Rule 12 of the RSC should be retained in its current form;
2. whether the proposed reform should be brought about by the passage of legislation, or whether amendment to the RSC would be sufficient;
3. whether there should be statutory provisions that:
   a. allow for the creation of closed classes (this concept is described in further detail in Chapters 3 and 5); and
   b. allow claims to proceed against multiple defendants, irrespective of whether or not the persons affected have a claim against every defendant in the action (known as the *'Philip Morris* issue');[3] and
4. whether there are opportunities to improve the existing representative actions legislative framework, with a particular focus upon whether:
   a. there should be codification of the role of the representative plaintiff, including requirements for removal of a representative plaintiff;
   b. limitation periods should be suspended in the event that a proceeding is disbanded;
   c. there should be a more prescriptive legislative framework regarding security for costs in representative actions;
   d. the proportionate liability provisions in the *Civil Liability Act 2002* (WA) could produce anomalous results by requiring every group member to have a claim against each named respondent;
   e. more prescriptive provisions are required to ensure class members are aware of their right to opt out of a representative action; and
   f. formal criteria surrounding the resolution of representative actions (either by way of settlement or discontinuance) are required.[4]

SUBMISSIONS RECEIVED

1.8 The Commission received a number of submissions from the broader legal community, including from the Chief Justice of Western Australia, the Western Australian Bar Association, the Law Council of Australia, the Law Society of Western Australia, the Mental Health Law Centre and a number of private law firms. The complete list of submissions is contained in Appendix A.

1.9 It is noteworthy that all of the submissions received supported the adoption of a legislative framework for representative actions in Western Australia.

1.10 Rather than set out the substance of the submissions in this chapter, the Commission will reference the submissions throughout this Final Report.

1.11 The Commission is also grateful for the benefit of Professor Morabito's assistance in informing the Commission on key features of the recommended legislative scheme.[5]

2 Ibid [6.29].
3 Ibid [6.30]
4 Ibid [6.31]
5 Professor Vince Morabito is a professor in the Department of Business Law and Taxation at Monash University. Professor Morabito has practised as a solicitor, taught in the law schools of Monash, Melbourne and Deakin universities and has worked as a consultant for organisations including the United Kingdom Government Equalities Office, the Hong Kong Law Reform Commission, the Federal Court of Australia and the Victorian Law Reform Commission. He is a member of the Federal Court of Australia's Victorian and New South Wales Class Action Users Groups. Professor Morabito co-authored a report on class actions in 1995, at the request of the Victorian Attorney-General's Law Reform Advisory Council. This report resulted in the introduction of a new and comprehensive legal regime governing Victorian class actions. He has authored and co-authored extensively in the area of representative actions and many of his publications are referred to in this Final Report.

IS REFORM NEEDED?

1.12 Do the principles, practices and procedures relating to representative proceedings require reform in Western Australia? In the Commission's view, the answer is yes.

1.13 There are legislative regimes at both the federal level and in Victoria. As discussed in detail in the Discussion Paper,6 the statistics of the Federal Court of Australia ('Federal Court') and the Supreme Court of Victoria confirm that representative actions are regularly issued in those jurisdictions. The same cannot be said of jurisdictions that only have representative proceedings provisions.

1.14 The Commission observed in the Discussion Paper that, whilst representative actions are being consistently commenced in the Federal Court and in states with the relevant legislative framework, they are not being litigated in Western Australia pursuant to Order 18 Rule 12 of the RSC. The submissions received by the Commission did not contradict this view.

1.15 It appears to the Commission that there are two possible explanations as to why representative actions are not being issued in Western Australian courts. First, representative actions based upon a cause of action attracting federal jurisdiction, which might otherwise be litigated in Western Australia, are being issued in the Federal Court. Second, for reasons discussed below, it is difficult to bring representative actions under Order 18 Rule 12 of the RSC.

1.16 Those cases falling outside the scope of Order 18 Rule 12 of the RSC are likely to be run as 'group proceedings'. This means individual writs lodged on behalf of plaintiffs are either case-managed together as a large group, or sit behind a 'test case'. This has the potential to create a large administrative burden and thus to put pressure on the Western Australian court system, which must manage limited resources to deal with the flow of cases in an efficient manner. This in turn can have consequences for ensuring access to justice.

KEY ISSUES IMPACTING ON REFORM AND METHODOLOGY

1.17 Key issues impacting on reforming representative proceedings essentially relate to access to the court system and to justice generally.

1.18 Order 18 Rule 12 of the RSC is a barrier to multi-party claims being pursued in the courts, because it is inherently uncertain.

1.19 There can be no doubt that large-scale court proceedings are becoming an increasingly viable method of litigating claims. This is illustrated by the advent of the types of representative actions currently being seen in other jurisdictions, such as shareholder actions and cartel actions, as well as large product liability class actions.

1.20 If the Western Australian court system is to be seen as keeping pace with community expectations regarding access to justice, the ability to bring representative action proceedings is clearly an area that requires review.

1.21 It is opportune that the Commission undertakes a review of whether the current representative proceedings provision in Order 18 Rule 12 of the RSC offers a remedy for affected persons, particularly where damages sought are not economically viable to recover.

1.22 The referral giving rise to this Report sought the Commission's view on the operation of Order 18 Rule 12 of the RSC and its view as to where, if appropriate, amendments should be made to remove impediments to its application.

6 Discussion Paper, [1.18]–[1.20].

TERMINOLOGY

1.23 To the layperson, the term 'class action' is often associated with the American-style class action. However, those American cases are very different from their Australian counterparts.

1.24 As the High Court of Australia ('High Court') noted in *Carnie v Esanda Finance Corporation Ltd*:[7]

> The term "class action" is used in various senses. Sometimes it is employed as a generic term to comprehend any procedure which allows the claims of many individuals against the same defendant to be brought or conducted by a single representative. At other times, when the "same interest" stipulation was thought to preclude the application of the representative action procedure to actions for damages on the ground that each individual's entitlement to damages would have to be independently assessed, the term "class action" was employed to refer to an extension of the representative action to cover such actions.
>
> The remaining sense in which the term "class action" is used is by way of reference to the class action procedures prescribed and applied in the United States, such as the procedures prescribed by the Federal Rules of Civil Procedure, r. 23.[8]

1.25 Within Australia, two primary models of 'group proceeding' exist:

(a) traditional representative proceedings under provisions similar to Order 18 Rule 12 of the RSC.[9]

(b) schemes created by legislation such as exist within the federal jurisdiction and in Victoria and New South Wales.

1.26 The nomenclature used to describe the above types of proceedings varies between jurisdictions within Australia. To the public at large, schemes created by legislation are often colloquially described as 'class actions'.[10] The term 'group proceedings' was used in 1988 by the Australian Law Reform Commission (ALRC) in its report recommending a statutory framework.[11] In Victoria, these proceedings are known as 'group proceedings' and in the federal and the New South Wales legislation they are referred to as 'representative proceedings'.

1.27 For the sake of uniformity, and in order to keep the language in this Final Report consistent with the Terms of Reference, the Commission will adopt the following terminology:

(c) when reference is made to the traditional rules-based representative proceedings provisions that have their origins relating back to the Courts of Chancery, the term 'representative proceedings' will be used; and

(d) when reference is made to the statutory schemes contained in Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('Part IVA'), Part 4A of the *Supreme Court Act 1986* (Vic) ('Part 4A') and Part 10 of the *Civil Procedure Act 2005* (NSW) ('Part 10'), for ease of reference, the term 'representative action' will be used.

7 (1995) 182 CLR 398.

8 Ibid 403–4 (Mason CJ, Deane & Dawson JJ) (footnotes omitted).

9 *High Court Rules 2004* (Cth) r 21.09; *Federal Court Rules 2011* (Cth) r 9.21; *Court Procedure Rules 2006* (ACT) Pt 2.4 Div 2.4.7; *Supreme Court Rules* (NT) Order 18; *Uniform Civil Procedure Rules 1999* (Qld) rr 75–76; *Supreme Court Civil Rules 2006* (SA) rr 80–82; *Supreme Court Rules 2000* (Tas) rr 335–336; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Order 18.

10 Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012).

11 *Grouped Proceedings in the Federal Court* [1988] ALRC 46.

FINAL RECOMMENDATIONS

1.28 As indicated in Chapter 6, having regard to the issues raised in the Discussion Paper, and having considered the various submissions received from interested parties, the Commission makes the following recommendations in its Final Report:

1. that Western Australia enact legislation to create a scheme in relation to the conduct of representative actions.
2. that the legislative scheme be based on Part IVA of the *Federal Court of Australia Act 1976* (Cth).
3. that Order 18 Rule 12 of the RSC be retained.
4. that the legislative scheme include a provision based on s 33T of Part IVA of the *Federal Court of Australia Act 1976* (Cth) but that it be expanded so that a court may remove and substitute a representative party where it is in the interests of justice to do so.
5. that a provision equivalent to s 158(2) of the *Civil Procedure Act 2005* (NSW) be included in the legislative scheme.
6. that a provision equivalent to s 166(2) of the *Civil Procedure Act 2005* (NSW) not be included in the legislative scheme.
7. that, in conjunction with any implementation of the above recommendations, consideration be given by government to whether the torts of maintenance and champerty should be abolished or whether the law in relation to their operation should be otherwise modified in Western Australia.

STRUCTURE OF THE FINAL REPORT

1.29 The Final Report is set out in a way that is intended to reflect the evolution of the debate in relation to representative actions. The origin and development of the existing rule is discussed in Chapter 2, while Chapter 3 examines the key features of the representative action regime. Chapter 4 of the Final Report discusses the merits of rules-based reform compared to legislative reform. Chapter 5 discusses the key features of the proposed model relating to representative actions, concluding with a set of final recommendations (as summarised above) in Chapter 6 of the Report.

CHAPTER 2

REPRESENTATIVE PROCEEDINGS

HISTORICAL CONTEXT

2.1 The rule reflected in Order 18 Rule 12 of the RSC ('the Rule') originated in the 16th and 17th centuries in the English Courts of Chancery.[12]

2.2 In *Duke of Bedford v Ellis,*[13] Lord MacNaghten explained the rationale for the Rule as it stood in 1901:

> The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice, the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you could never "come at justice," to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.[14]

2.3 Representative proceedings first arose in English pre-industrial agrarian society in cases such as *Brown v Howard ('Brown')*, a land tenure case from 1701.[15]

2.4 From *Brown* to the present, representative proceedings have each been founded on the notion of common interest. Because of this, the courts have been claiming for hundreds of years that the element justifying group litigation among cohesive social groups is not the groups' cohesion but the existence of a shared interest.[16]

2.5 In *Brown* a group of tenants had to pay an additional fee to the owner of the land, the Lord of Greystock Manor.[17] The tenants alleged that the fee imposed by the Lord had become fixed or at least limited and should not have been increased.[18]

2.6 In his analysis of the origins of group proceedings, Professor Yeazell observed that 'for the court in *Brown*, therefore, the only real question was whether the contributing tenants must be formal parties to the action to avoid the crime of Maintenance. The answer was no: "it is no Maintenance for all the Tenants to contribute, for it is the Case of all"'.[19]

2.7 Since *Brown*, group proceedings in the Courts of Chancery have evolved from being a measure employed by individuals united by a social grievance to constituting a litigation procedure used by aggrieved plaintiffs pursuing purely economic interests.[20]

2.8 In England, common law and equity were fused in 1873.[21] It was then only a matter of time before representative proceedings, which had been available in the Courts of Chancery, were being prosecuted in English common law courts.[22]

12 See Yeazell SC, 'From Group Litigation to Class Action Part 1: The Industrialisation of Group Litigation' (1980) 27 *University of California Los Angeles Law Review* 514, especially 514–16.
13 [1901] AC 1.
14 Ibid 8.
15 21 Eng Rep 960, 960 (ch 1701).
16 Yeazell SC, 'From Group Litigation to Class Action Part 1: The Industrialisation of Group Litigation', (1980) 27 *University of California, Los Angeles Law Review* 514, 515.
17 *Brown v Howard* (1701) 21 ER 960.
18 Ibid.
19 Ibid. While the common law crime of maintenance was abolished throughout Australia, it remains a tort in this jurisdiction, in contrast to other jurisdictions such as the Australian Capital Territory, New South Wales, South Australia and Victoria.
20 Yeazell, ibid 521.
21 Supreme Court of Judicature Act 1873 (Eng), the principles of which are reflected in the *Rules of the Supreme Court 1971* (WA).
22 Morabito V, 'Statutory Limitation Periods and the Traditional Representative Action Procedure' (2005) 5(1) *Oxford University Commonwealth Law Journal* 113, 113–114.

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2.9 Within the current RSC, as adopted in 1971, the Rule is reflected in Order 18 Rule 12. This provision has remained unchanged since the RSC were introduced.

2.10 Order 18 Rule 12 of the RSC has had little application. There are few reported cases where the courts have given consideration to its proper interpretation.[23]

2.11 In the matter of Minara Resources Ltd v Ashwin,[24] the Court of Appeal of the Supreme Court of Western Australia ('Court of Appeal') considered an application for leave to appeal together with an appeal relating to a decision dismissing an application for a stay of a representative proceeding. The proceedings related to an application on behalf of representative plaintiffs, who sought to register an interest over land pursuant to the *Native Title Act 1993* (Cth).

2.12 Master Sanderson, in the decision at first instance,[25] observed that:

> The rule is not often relied upon – either in this jurisdiction or in other States which all have a broadly similar provision. However, the New South Wales equivalent of this rule did receive detailed consideration by the High Court in *Carnie v Esanda Finance Corp Ltd* ... From this decision, two rules emerge which are of importance for present purposes. First, once the existence of numerous parties and the requisite commonality of interest are ascertained, the rule is brought into operation subject only to the exercise of the Court's power to order otherwise … It is important to note that it is for the party commencing proceedings to determine whether or not it satisfies the requirements of O 18 r 12(1). No application has been made to the Court to authorise representative proceedings. Those proceedings can be commenced by the party and "unless the Court otherwise orders" continued…
>
> The second point that emerges from the decision is that when considering whether representative proceedings should be allowed to continue, matters to be taken into account include whether representative proceedings would involve greater expense and prejudice than other modes of trial, whether consent is required from the group members, the right of members to opt out, the position of persons under a disability, alterations to the description of the group, settlement and discontinuance of the proceedings and notices to the various group members.[26]

2.13 Master Sanderson held that it was appropriate to allow the action to proceed as a representative proceeding.[27] The Court of Appeal (comprising of Justices of Appeal Wheeler and McLure) was of the view that Master Sanderson was correct in his reliance upon the principles as set out in *Carnie v Esanda Finance Corporation*.[28] However, the Court of Appeal subsequently held that the order of the Master should be set aside on the basis that 'it was not an order sought by either party'.[29]

2.14 The Court of Appeal held, having regard to the manner in which Order 18 Rule 12 of the RSC was constructed, that:

> [T]he Court has no power to order that a proceeding be a representative proceeding, as the Master has purported to do. That rule suggests that the only role for the Court is to determine either: whether the proceeding satisfies the description in r 12(1), if it is purportedly brought as a representative proceeding; or whether, assuming it satisfies the description, it should be continued as such a proceeding.[30]

23 See *Minara Resources Ltd v Ashwin & Others* [2007] WASCA 107. See also *Boase v Brook* [2015] WASC 23. Even in *Minara's* case, the discussion in relation to representative proceedings as they apply in Western Australia is brief, despite being the primary point upon which the appeal was argued. The discussion of the Court in relation to Order 18 Rule 12 in *Minara's* case simply sets out and endorses the principles in *Duke of Bedford v Ellis* 1901 AC1 as well as *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, [35]–[38]. See also the discussion of the Court at [42]–[43].

24 [2007] WASCA 107.

25 *Ashwin v Minara Resources Ltd* [2006] WASC 75.

26 Ibid [19]–[20] (citations excluded).

27 Ibid [21]–[22].

28 *Minara Resources Ltd* [2007] WASCA 107, [35]–[37].

29 *Minara Resources Ltd* [2007] WASCA 107, [42].

30 Ibid.

2.15 While there remains no other appellate authority dealing with Order 18 Rule 12 of the RSC, given its pedigree and the pedigree of comparable rules in other Australian jurisdictions, this rule is likely to be applied consistently.[31] However, with the elapse of time, amendments have been made in other jurisdictions resulting in divergence of the rules across Australia and leading the High Court in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* to caution:[32]

> [T]he rules governing representative or group proceedings vary greatly from court to court. Two things of present significance follow from this. The first is that close attention must be given to the particular Rules of the Supreme Court upon which this litigation turns. The second is that the outcome of the present proceedings with respect to those Rules is not to be taken necessarily as indicating that there would have been the same outcome in proceedings under the rules of other courts.[33]

INADEQUACY OF THE CURRENT RULE

2.16 The absence of detailed procedural provisions in the RSC has created considerable uncertainty as to whether representative actions can proceed using the various incarnations of the rules-based representative proceedings order.

2.17 The traditional rule relating to representative proceedings has been the subject of considerable criticism.

2.18 One critic has expressed the view that 'the uncertainty that has been created by the excessive brevity of the rules governing representative actions greatly hinders the ability of such proceedings to secure the social benefits described above',[34] namely, access to justice, reduced costs and increased efficiency.

2.19 In the New South Wales Supreme Court of Appeal case of *Esanda Finance Corporation Ltd v Carnie,*[35] ('*Esanda*') Gleeson CJ (as he then was) observed:

> The subject of class actions is controversial. One thing, however, seems generally to be agreed. If they are to become part of our litigious procedures, then they need to be governed by rules that make them manageable and effective. An example is to be found in the recently enacted Pt IVA of the *Federal Court of Australia Act 1976* (Cth). That legislation permits representative proceedings in circumstances that extend well beyond what was traditionally regarded as the scope of a rule such as that with which we are presently concerned. However, the legislation which permits such proceedings deals with, and regulates, such important matters as whether or not consent is required from persons who are to be group members in representative proceedings, the position of persons under disability, the right of a group member to opt out of a representative proceeding, alterations to the description of the group, settlement and discontinuance of proceedings, and the giving of various notices to group members.[36]

2.20 His Honour continued:

> [I]f class actions of the kind now available in the Federal Court are to be permitted in New South Wales … then this should only be done with the backing of appropriate legislation or rules of court, adequate to the complexity of the problem, and appropriate to the requirements of justice.[37]

31 Cashman P, *Class Action Law and Practice* (Sydney: Federation Press, 2007) 57.
32 (2006) 229 CLR 386.
33 Ibid 417.
34 Morabito V, 'Statutory Limitation Periods and the Traditional Representative Action Procedure' (2005) 5 *Oxford University Commonwealth Law Journal* 113, 114.
35 (1992) 29 NSWLR 382.
36 Ibid 388.
37 Ibid 390. See also Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed., 2012) [1.350].

2.21 Four years before *Esanda*, the ALRC identified the following deficiencies in the rules-based regime:

(a) individuals have no means of enforcing legal remedies in courts where the amount of the claim, though significant, does not warrant the cost of legal proceedings; in any event, where claims arise from multiple wrongdoing, individual litigation is not an efficient use of resources;

(b) alternative, less expensive means of resolving small claims are not available in all cases; alternate means require individual action and are inadequate to deal efficiently with multiple wrongdoing;

(c) there is no effective federal procedure by which claims for damages arising from multiple wrongdoing can be grouped together so that common issues can be dealt with at one time, thus reducing the cost of litigation to the individual and avoiding a multiplicity of proceedings; and

(d) there is no federal procedure enabling proceedings to be brought for damages on behalf of a group or class of people who have suffered loss or injury as a result of a multiple wrong.[38]

2.22 Moreover, the generally restrictive interpretation of the 'same interest' requirement has provided fertile ground for lawyers to dispute, at an interlocutory stage, whether a representative proceeding can be validly brought. Such arguments based on the 'same interest' requirement are certainly not new.[39]

2.23 The Commission considers that these deficiencies are similarly applicable to Order 18 Rule 12 of the RSC.

2.24 The Law Reform Commission of Hong Kong, in its report relating to class actions, observed that the practical impact of the principles identified by Lord McNaghten in *Duke of Bedford v Ellis*,[40] was 'that all class members have to show identical issues of fact and law, and have to prove':[41]

(a) the same contract between all plaintiff class members and the defendant – a representative action could not be founded upon separate contracts between each of the class members and the defendant. Separate contracts do not have a "common source of right" and are "in no way connected".[42] The result is that a representative action is not available in consumer cases, even where each class member's claim arises out of a "standard form" contract with the same defendant. In other words, a representative action is unavailable where it is otherwise likely to have most effect.

(b) the same defence (if any) pleaded by the defendant against all the plaintiff class members – if a defendant can raise separate defences against different plaintiff class members, separate trials may be required and liability cannot be decided in the same proceedings. On the other hand, it would be unjust to disallow the defendant from raising such defences which could have been raised in a unitary action. The result is that the mere availability of a defence against one member of a plaintiff class is sufficient to deny the class the "same interest" in the proceedings.

38 ALRC, *Grouped Proceedings in the Federal Court: Summary of report and draft legislation,* Report No 46 (1988) [58].

39 Jamieson P, Senior Legal Research Officer, 'Representative Proceedings – Need for Reform of Supreme Court Rules (WA) O18 R12' (unpublished memorandum, Supreme Court of Western Australia, 30 March 2011) 7; Mulheron R, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004) 80.

40 [1901] AC 1.

41 The Law Reform Commission of Hong Kong ('LRCHK'), *Report: Class Actions* (May 2012), 13-15 [1.8] (emphasis original and citations retained) ('LRCHK Report').

42 [1910] 2 KB 1021 (CA) 1040 (Fletcher Moulton LJ) (commentary included in the LRCHK Report) (footnote omitted).

(c) the same relief claimed by the plaintiff class members – no representative action could be brought where the relief sought by the representative plaintiff is damages on behalf of all class members severally.[43] Since proof of damages is unique to each class member and the facts underlying the measure of damages would be different, the damages awarded may not be the same for all class members. This further limits the utility of the representative procedure. The phrase "beneficial to all" in Lord MacNaghten's statement can also be interpreted to mean that "the plaintiff must be in a position to claim some relief which is common to all", but there is no objection if he also claims relief unique to himself.[44] The result is that because of the same relief requirement, representative proceedings cannot be used to claim damages where some class members do not have a claim for relief identical to those of all other members, even though their claims have the same factual basis (for example, where passengers on a ship which sinks can claim personal injury or property damage or both). Proof of damage is a necessary ingredient of a tortious cause of action, and the representative plaintiff cannot, by proving his or her own damage, claim to represent the class and obtain relief on behalf of all class members.[45] Hence, equitable relief, such as a declaration or injunction, has normally, if not invariably, been the only form of relief which has been awarded in English representative actions.[46]

2.25 It may be argued that the High Court consideration of *Esanda in Carnie v Esanda Finance Corporation Ltd*[47] gives a broader interpretation to the representative proceedings 'interest requirement' than previous cases. Regardless of the scope given to the 'interest requirement', in almost any representative proceeding in which damages are sought an attack will likely be mounted by the defendant on the ground that the requirement is not met.

LIMITATION PERIODS AND ORDER 18 RULE 12 OF THE RULES OF THE SUPREME COURT 1971 (WA)

2.26 In addition to the restrictions identified above, another aspect of the limited application of the Rule relates to limitation periods that may apply to claims otherwise brought as representative proceedings.

2.27 Morabito has observed:

> [I]t has been acknowledged that the uncertainty that has been created by the excessive brevity of the rules governing representative actions greatly hinders the ability for such proceedings to secure the social benefits described above [namely, access to justice, reduced costs, increased efficiency and ensuring defendants are not exposed to conflicting judgments]…[48]
>
> [I]n both representative proceedings and class actions, the only claimants who are named on the originating process are the representative plaintiffs. Consequently, as far as the personal causes of action of the representative plaintiffs are concerned, time stops running when the representative proceedings are initiated before the expiry of the limitation period.[49]

2.28 After reviewing authorities regarding the interaction between limitation of actions legislation and traditional representative actions, Morabito concluded:

> There are conflicting judicial conclusions as to whether limitation periods constitute an obstacle for those class members who wish to be appointed as named plaintiffs in the representative proceedings where the court holds that the proceedings should not have been brought as representative proceedings.[50]

43 Ibid 1040–41 (Fletcher Moulton LJ). In this case, each of the class members had a separate measure of damages (i.e. the value of their lost cargos) and had no interest in the damages claimed by the representative plaintiffs. Hence, proof of damages was personal to each class member and had to be proved separately since the facts underlying the measure of damages differed.

44 Ibid 1045 (Buckley LJ).

45 See R Mulheron, *The Class Action in Common Law Legal Systems: A comparative perspective* (Oxford: Hart Publishing, 2004) 82: '[T]here was a long-held view that, under the English representative rule, "if the cause of action of each member of the class whom the plaintiff purported to represent was founded in tort and would, if established, be a separate cause of action and not a joint cause of action belonging to the class as a whole, no representative action could be brought." Proof of damage was a necessary ingredient of a tortious cause of action, and the representative plaintiff could not, by proving his or her own damage, claim to represent the class and obtain relief on behalf of all class members.'

46 *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229, 244, 255. His Lordship went on to say that even with injunctive relief, there was the 'separate defences' problem – class members needed to prove separately an apprehension of injury and were subject to individual defences of laches or acquiescence.

47 (1995) 182 CLR 398.

48 Morabito V, 'Statutory Limitation Periods and the Traditional Representative Action Procedure' (2005) 5 *Oxford University Commonwealth Law Journal* 113, 114.

49 Ibid 115.

50 Ibid 138.

2.29 Curthoys and Kendall preferred the view that a Western Australian representative proceedings provision should provide for the limitation periods for the recovery of damages to continue to run against any member of the class of representative persons until they bring their own action.[51]

2.30 This position can be distinguished in the federal framework, as illustrated by *Fostif Pty Ltd v Campbell's Cash & Carry Pty Ltd.*[52] In that case it was held that where the rule for the commencement of representative proceedings is properly engaged, limitation periods stop for the whole of the representative group.[53] For a more detailed discussion of the issue of limitation periods and representative actions, see Chapter 3 of this Report.

2.31 Order 18 Rule 12 of the RSC, despite being a rule created for convenience, is unlikely to be used by plaintiffs for the purpose of litigation when there are many potential class members. Its restrictive scope renders representative proceedings vulnerable to being struck out; and if a proceeding is struck out, only the named plaintiff is protected from the expiration of time limits.

2.32 Having regard to the above discussion, there are grounds for genuine concern as to whether the current scope of Order 18 Rule 12 of the RSC can adequately ensure a balanced, equitable result for parties who find themselves in representative action litigation.

2.33 Submissions received from interested parties supported the Commission's concerns about the current scope of Order 18 Rule 12 of the RSC. The Law Council of Australia, in its submission dated 7 June 2013, commented that the current rule was 'inadequate'.[54] The Western Australian Bar Association, whilst in agreement with the submission of the Law Council of Australia, also observed that the current rule 'does not contain many of the procedural provisions that necessarily deal with the issues arising after the commencement of a representative proceeding'.[55]

REPRESENTATIVE PROCEEDINGS IN OTHER STATES

2.34 The terms of reference require the Commission to take into account 'recent developments regarding representative proceedings in other jurisdictions both nationally and internationally'.

2.35 The developments within the Australian context can be loosely divided into two types: those jurisdictions that have adopted statutory frameworks for representative actions (see Chapter 3); and those in which the only mechanism to bring representative proceedings is derived from the Rule.

Queensland

2.36 In Queensland, representative proceedings may only be commenced under a scheme derived from the Rule. Before 1 July 1999, representative proceedings in Queensland were governed by Order 3 Rule 10 of the *Rules of the Supreme Court 1900* (Qld). Rule 10 provided:

> When there are numerous persons having the same interest in the subject matter of a cause or matter, 1 or more such persons may sue, and the Court or a Judge may authorise 1 or more of such persons to be sued, or may direct that 1 or more of such persons shall defend, in such cause or matter, on behalf or for the benefit of all persons so interested.

In 1999, the Queensland Parliament instituted widespread civil procedural reforms by enacting the *Uniform Civil Procedure Rules 1999* ('UCPR (Qld)'). The reforms were intended to provide uniform court rules for the conduct of civil litigation in the Supreme, District and Magistrates Courts in Queensland. As part of these reforms the rules governing representative proceedings were amended.

51 Curthoys J & Kendall C, LexisNexis Butterworths, *Civil Procedure in Western Australia* (at Service 162) [18.12.1B], citing *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229, 255 (Vinelott J).
52 (2005) 63 NSWLR 203.
53 Ibid 214-5, [44] (Mason P).
54 Law Council of Australia, Submission (7 June 2013) [15].
55 Western Australian Bar Association, Submission (7 June 2013) [4].

2.37 Under Rule 75 of the UCPR (Qld):

> A proceeding may be started and continued by or against 1 or more persons who have the same interest in the subject matter of the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding.

2.38 The major differences between the old and new regimes relate to:

(a) the removal of a requirement to obtain court authorisation to proceed against a representative defendant; and

(a) the addition of a requirement that all represented persons or parties could have been joined in the proceedings.

2.39 In *Minister for Industrial Development of Queensland v Taubenfeld ('Taubenfeld')* Justice McKenzie considered the two regimes.[56] He noted the absence of the requirement for court authorisation under Rule 75 UCPR (Qld) and held that court approval for the appointment of a representative defendant was no longer required.[57] However, neither change appears to have attracted significant academic or judicial comment.

2.40 Despite the change, the Commission understands that there has been no material change in the issuing of representative proceedings in Queensland.[58]

Examples of representative proceedings in Queensland

2.41 There are limited case examples in Queensland that have made use of the UCPR (Qld) provisions.[59]

2.42 In *Taubenfeld*, the Minister brought an action against a defendant who was a representative of protesters occupying a site where a food irradiation plant was being constructed.[60] The Supreme Court of Queensland held that court approval was not required for the appointment of a representative defendant.[61] However, the applicant who commences proceedings is obliged to define with sufficient particularity the class said to have the same interest in the subject matter of the proceeding.[62] In this case, choosing Ms Taubenfeld as the representative of 'all protestorsin occupation' of the occupied site, failed to meet this requirement.[63]

2.43 In *Jones v Public Trustee (Qld),*[64] the Supreme Court of Queensland ruled that the plaintiff, an elder of the Dalungdalee people, was not entitled to bring representative proceedings under Rule 75 UCPR (Qld). This decision was made on the basis that the plaintiff did not share an interest with three other Dalungdalee people who were also beneficiaries of the will in dispute in the proceedings.[65]

2.44 In *Schache v GP No 1 Pty Ltd*,[66] Justice Martin accepted that a representative claim could potentially be brought under Rule 75 UCPR (Qld) by applicants seeking interlocutory orders against several companies involved in a managed investment scheme.[67]

56 [2003] 2 Qd R 655 [17].
57 Ibid. See also Cashman P, *Class Action and Practice* (Sydney: Federation Press, 2007) 54–5.
58 Rod Hodgson, Maurice Blackburn Queensland, Consultation (5 May 2012).
59 A 'class action' arising from the Queensland floods in early 2014 has been commenced in the Supreme Court of New South Wales rather than the Queensland Supreme Court. See http://www.mauriceblackburn.com.au/areas-of-practice/class-actions/current-class-actions/queensland-floods-class-action.aspx
60 *Minister for Industrial Development of Queensland v Taubenfeld* [2003] 2 Qd R 655.
61 Ibid 658 [17].
62 Ibid 660 [24], citing *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 422.
63 Ibid 659–60.
64 *Jones v Public Trustee (Qld)* (2004) 209 ALR 106.
65 Ibid 110 –111.
66 *Schache v GP No 1 Pty Ltd* (2011) 87 ACSR 214.
67 Ibid 218 [15].

South Australia

2.45 Until 1987 in South Australia, representative proceedings were brought under provisions derived from the Rule.[68] The introduction of Rule 34 of the *Supreme Court Rules 1987* (SA) resulted in four major amendments:

(a) cases could proceed as representative actions on a broader assessment of common issues of fact and law;[69]

(b) representative parties were required to seek an order from the court allowing the action to be maintained as a representative proceeding;[70]

(c) individual assessments of damages (and other individual remedies sought) were not to preclude a representative action from proceeding;[71] and

(d) procedural guidelines were imported into the rules.[72]

2.46 In 2006, Rule 34 was replaced with the current expanded provision (Rules 80–84).[73]

2.47 Rule 80(1) provides that where a group of persons:

> has a common interest in the subject matter of an action or proposed action and a member of the group is authorised in writing by the other members of the group to bring or defend the action as representative of the group, the person may bring or defend the action as representative of the group.

The written authorisation by each member of the represented group must be filed by the class representative when filing the originating process.[74] Rule 80(5) empowers the Supreme Court of South Australia to terminate, at any time, the right of a representative plaintiff or defendant to represent the relevant group of plaintiffs or defendants.

2.48 Rule 81 implements Australia's only certification regime. It empowers the Supreme Court of South Australia to authorise a plaintiff to 'bring an action as representative of a group with a common interest in questions of law or fact to which the action relates'. An application for authorisation must be made within 28 calendar days after the time allowed for the defendant to file a defence.[75] This authorisation is not to be refused on the ground that:

(a) damages which would require individual assessment are sought by way of remedy; or

(b) the action is based on separate contracts or transactions between individual members of the group and the defendant.[76]

2.49 A judicial order authorising a class representative to proceed with a representative action must:

(a) define the group on whose behalf the action is brought;

(b) define the nature of the claims made on behalf of the members of the group and specify the remedy sought;

(c) define the common questions of law or fact that are to be determined in the action; and

(d) give directions about the determination of other issues raised in the action that are not common to all members of the group.[77]

68 *Supreme Court Rules 1947* (SA) Order 16, Rule 9.
69 Cashman P, *Class Action and Practice* (Sydney: Federation Press, 2007) 45.
70 *Supreme Court Rules 1987* (SA) r 34.02(a).
71 *Supreme Court Rules 1987* (SA) r 34.03(a).
72 Cashman P, *Class Action and Practice* (Sydney: Federation Press, 2007) 45.
73 Division 3 of the *Supreme Court Civil Rules 2006* (SA).
74 *Supreme Court Civil Rules 2006* (SA) r 80(2).
75 Ibid r 81(3).
76 Ibid r 81(4).
77 Ibid r 81(5).

2.50 This approach seeks to address some of the major shortcomings of the Rule-based approach. It does so in a less detailed manner than the federal and Victorian class action regimes.[78]

Tasmania, the Australian Capital Territory and the Northern Territory

2.51 The rules of the Supreme Courts of Tasmania,[79] the Australian Capital Territory[80] and the Northern Territory[81] are not materially different from Order 18 Rule 12 of the RSC.

SUMMARY

2.52 Rule-based representative proceedings provisions are often criticised for their brevity and lack of clarity. The Commission received no submissions contrary to this view.

2.53 The Commission considers that none of the Rule-based regimes in Australia are sufficiently clear and detailed for them to achieve substantial usage. Appropriate case management can assist but is not a solution to this difficulty.

2.54 The Commission also considers that it is desirable to have some degree of uniformity in federal and state jurisdictions for reasons including to discourage forum-shopping.

2.55 Also, given:

(a) the inherently restrictive scope of the Rule-based provisions; and

(b) the inability of those provisions to protect members of the class from exposure to limitations difficulties if the representative proceeding is disbanded,

the Rule-based provisions are unlikely to promote the objectives noted by the ALRC back in 1988.[82]

78 Law Reform Committee of South Australia, *Report Relating to Class Actions*, Report No 36 (1977). In this report, a detailed legislative class action regime was recommended. This recommendation was never implemented by the South Australian legislature. Instead, in 1987, Rules 34.01–34.06 of the *Supreme Court Rules 1987* (SA) came into operation.

79 Part 10 Division 5, Rule 335 of the *Supreme Court Rules 2000* (Tas). There is also scope for a representation order to be made in the Magistrate's Court in Tasmania, as a result of *Magistrates Court (Civil Division) Rules 1998* (Tas) pt 3 div 1 rr 16–17.

80 Rules 265–270 of the *Court Procedures Rules 2006* (ACT).

81 Rules 18.01, 18.02 and 18.04 of the *Supreme Court Rules* (NT).

82 *Grouped Proceedings in the Federal Court* [1988] ALRC 46.

CHAPTER 3

REPRESENTATIVE ACTIONS

THE SHIFT TO A LEGISLATIVE SCHEME: 1977 AND THE AUSTRALIAN LAW REFORM COMMISSION

3.1 As far back as 1 February 1977, the then Commonwealth Attorney-General requested the ALRC to provide information regarding the representative proceedings provisions that were in place at the time.[83]

3.2 The Commonwealth Attorney-General's brief to the ALRC in 1977 reflected an inherent concern that the federal representative proceeding provisions, as they were then drafted, did not satisfy the intended purposes. There was a perception that these provisions did not promote access to justice. It was also commonly understood that they did not promote efficiency within the court system where large numbers of individual claimants all had the same, or strikingly similar, causes of action. This was particularly so in circumstances where the damages sought were relatively modest.[84]

3.3 Eleven years later, in 1988, the ALRC produced a report entitled *Group Proceedings in the Federal Court,*[85] which recommended a significant overhaul of the federal representative proceeding provisions. The federal government subsequently introduced the recommendations as part of a package of reforms into the House of Representatives on 14 November 1991.[86]

3.4 In its 1988 report, the ALRC identified five key questions relevant to reforming the federal regime:

1. Would a reform have resulted in reducing the cost of court proceedings to the individual?
2. Would reform enhance access by the individual to legal remedies?
3. Would reform promote efficiency in the use of court resources?
4. Would reform ensure consistency in the determination of common issues?
5. Would reform make the law more enforceable and effective?[87]

3.5 In 1992, 15 years after the ALRC reference was issued, Part IVA to the *Federal Court of Australia Act 1976* (Cth) was introduced, commencing operation on 5 March 1992.

3.6 The second reading speech noted that Part IVA was introduced in order to:

(a) provide a mechanism where many people are affected but each person's loss is small and it is not economically viable to recover in individual actions; and

(b) deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent.[88]

3.7 When introducing the legislative reforms, the then Commonwealth Attorney-General, Mr Michael Duffy, observed that:

> [s]uch a [class action] procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.
>
> The second purpose of the Bill is to deal efficiently with the situation where damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case in individual actions.[89]

83 The provision contained in the Federal Court Rules was (and still is) a provision similar to our current Order 18 Rule 12 of the RSC, with its origins dating back to the English Courts of Chancery: see *Federal Court Rules 2011* r 9.21.

84 ALRC, *Access to the Courts, II: Class Action*, Discussion Paper No 11 (1979); see also *Grouped Proceedings in the Federal Court* [1988] ALRC 46. However, the move towards law reform discussion in relation to representative actions was not confined to the federal jurisdiction. In the late 1970s, the Law Reform Committee of South Australia also reported on class actions. For further discussion of this reference, see Chapter 3 below.

85 *Grouped Proceedings in the Federal Court* [1988] ALRC 46.

86 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General).

87 *Grouped Proceedings in the Federal Court* [1988] ALRC 46 at [6].

88 Commonwealth, Senate, *Parliamentary Debates*, 12 September 1991, 1447 (Michael Tate, Minister for Justice and Consumer Affairs).

89 See Commonwealth, House of Representatives, *Parliamentary Debates*, 14 November 1991, 3174–6 (Michael Duffy, Attorney-General). See also Morabito V, 'Class Actions in the Federal Court of Australia – The Story So Far' (2004) 10 *Canterbury Law Review* 229.

3.8 The constitutional validity of Part IVA was challenged in *Femcare Ltd v Bright.*[90] The Full Court of the Federal Court held the legislation to be valid.

3.9 Part IVA allowed plaintiffs to bring proceedings in various circumstances where the relatively narrow interpretation of Order 18 Rule 12 of the RSC would have prevented such litigation from proceeding. Part IVA is set out in full in Appendix 1 of the Discussion Paper.

3.10 Following the commencement of Part IVA, Victoria followed suit, starting with reforms to the *Supreme Court Act 1958* (Vic). In 2000, Part 4A was enacted, giving Victoria a legislative framework in substantially similar terms to Part IVA.[91]

3.11 In 2005, the New South Wales Parliament enacted Part 10, which is a statutory framework for representative actions that is also substantially similar to Part IVA.

3.12 State jurisdictions without such statutory amendment (South Australia, Queensland, Tasmania and Western Australia) have their own rules of procedure relating to the bringing of representative proceedings.[92]

3.13 In summary, the approaches taken in Australia in relation to traditional representative proceedings rules have either involved:

(a) altering the existing rules of procedure; or

(b) complementing the existing rules with a statutory framework specifically dedicated to the concept more colloquially known as the 'class action'.[93]

THE COMMONWEALTH LEGISLATION – KEY FEATURES

3.14 Notwithstanding some legislative differences (discussed in more detail below), the Victorian and New South Wales legislative schemes are substantially similar in operation to the federal regime, based largely on Part IVA.

3.15 For the balance of this chapter, the relevant legislative provisions will be dealt with simultaneously, unless otherwise indicated.

3.16 Unless specific reference is made to a particular Act, a reference to any section should be taken as a reference to the section in Part IVA.

Criteria for characterisation and identification of a group or a class

3.17 The threshold requirements for commencing a representative action under the Federal Court model are dramatically different from the requirements of Order 18 Rule 12 of the RSC.

3.18 In contrast to the traditional rule, the threshold requirements for the commencement of a proceeding under the federal legislative framework are set out in s 33C of Part IVA.[94]

90 (2000) 100 FCR 331 (Black CJ, Sackville & Emmett JJ).

91 The Victorian legislation adopts much of the same numbering as its federal counterpart – with the exception of the numbering in its title – note the use of Hindu Arabic numbering as opposed to Roman numeral numbering.

92 Discussed in Chapter 2 above.

93 Issues relating to nomenclature are set out in detail in Chapter 1 above.

94 Section 157 of the *Civil Procedure Act 2005* (NSW) is substantially similar to s 33C of the *Federal Court of Australia Act 1976* (Cth) and s 33C of the *Supreme Court Act 1986* (Vic).

Commencement of the action

3.19 Section 33C of Part IVA establishes the threshold test for commencing representative actions and is central to the statutory regime.[95] There are three requirements for the commencement of a representative action:

(a) there must be a claim by seven or more persons against the same person;

(b) the claims must arise out of related circumstances; and

(c) there must be a substantial common issue of law or fact.[96]

Nature of a 'claim'

3.20 The word 'claim' in s 33C has been interpreted broadly and is not limited to a cause of action.[97] It encompasses 'everything that might lawfully be brought before the Court for a remedy'.[98] Section 33C does not require that the claimants have 'the same claim', but they must satisfy the requirements of s 33C.[99]

3.21 Justice Lindgren considered a number of key aspects to determine whether a claim exists for the purpose of s 33C in *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd.*[100] These included:

(a) claims need to be recognised by the law;

(b) claims are not confined to claims to relief as of right (s 33C(2)(a)(i) allows claims for discretionary equitable relief); and

(c) it is also not required that the persons who have the claims be aware that they have them, let alone that they have asserted them.

Claimants

3.22 The following threshold tests apply under Order 18 Rule 12 of the RSC:

(a) there must be 'numerous persons';

(b) they must have the 'same interest' in any proceedings; and

(c) unless the court otherwise orders, the proceedings may be continued by or against any one or more of them as representing all or as representing all except one or more of them.

3.23 In order to meet the threshold of 'numerous persons' it is suggested that five persons 'would not normally be regarded as 'numerous".[101]

3.24 Section 33C(1)(a) of Part IVA requires seven or more persons to have a claim;[102] however, it is not necessary to name or specify the number of group members.[103] Where the number of group members proves to be less than seven persons, the court may in its discretion order proceedings to continue as a representative action.[104]

95 *Mobil Oil Australia Pty Ltd v The State of Victoria* (2002) 211 CLR 1, 30–31 [35] (Gaudron, Gummow & Hayne JJ).
96 Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [4.100].
97 *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209, 219 [23]–[24], 222–223 [34]–[35]; *Morgan, Re; Brighton Hall Pty Ltd (in liq)* (2013) 96 ACSR 232.
98 *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179, 186 [20]; *Morgan, Re; Brighton Hall Pty Ltd (in liq)* (2013) 96 ACSR 232.
99 *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209, 213–214 [7]; *Morgan, Re; Brighton Hall Pty Ltd (in liq)* (2013) 96 ACSR 232.
100 (1998) 84 FCR 512, 523.
101 *Re Braybrook; Braybrook v Wright* [1916] WN 74.
102 Note that in its report the ALRC did not recommended a minimum number of claimants as part of the threshold requirements, but did include an equivalent of s 33L giving the Court discretion to disallow proceedings if fewer than seven claimants appeared: *Grouped Proceedings in the Federal Court* [1988] ALRC 46 Appendix A, Cl 10.
103 *Federal Court of Australia Act 1976* (Cth) s 33H.
104 *Federal Court of Australia Act 1976* (Cth) s 33L.

3.25 Justice Wilcox explained the apparent contradiction in these provisions, stating that the object of s 33C(1)(a) of Part IVA is to 'weed out' claims that obviously involve fewer than seven persons.[105] The current approach to s 33C(1)(a) asks whether there is a likelihood of there being seven or more persons on the assumption that the facts were as alleged.[106]

3.26 In *Falfire Pty Ltd v Roger Davis Stores Pty Ltd*,[107] 32 of the 35 group members opted out of the proceedings and so the matter did not continue as a representative action. In *Symington v Hoechst Schering Agrevo Pty Ltd,*[108] it was not clear whether seven or more persons had the same claim, and Justice Wilcox determined that the claimants must satisfy the court 'at some appropriate time' that the claim was shared by seven persons.[109] In *Council for the City of the Gold Coast v Pioneer Concrete Pty Ltd,*[110] Justice Drummond exercised the discretion under s 33N to order that the proceedings not continue as a representative action since the representative plaintiff failed to demonstrate that at least seven class members suffered as a result of the defendant's conduct.[111]

3.27 Many attempts have been made to improve the representative proceedings regime in Victoria. The first substantive attempt occurred in 1984. At that time, s 62(1C) was introduced into the *Supreme Court Act 1958* (Vic) to allow the bringing of representative action in certain circumstances. It provided:

> Where provision is made by any Act, law or rule for two or more persons to be joined in one action as plaintiffs one or more of such persons may… sue on behalf of or for the benefit of all the persons who may be so joined.

3.28 The construction of this provision was not without its problems. In *Marino v Esanda Ltd,*[112] Justice Tadgell found that the rules did not justify the joining of all members of the 'class' of plaintiffs. It was held that representative proceedings could only be brought where the actions arose from the same series of transactions.[113]

3.29 In response to *Marino v Esanda Ltd*, ss 34 and 35 of the *Supreme Court Act 1958* (Vic) were introduced to provide new procedures to govern representative proceedings.[114] However, in *Zentathope v Bellotti,* Justice Tadgell was critical of these describing the amendments as 'so attenuated and imprecise as to leave almost to guesswork what the draftsman had in mind'.[115]

3.30 In 1995 an expert report of the Victorian Attorney-General's Law Reform Advisory Council recommended the adoption of a legislative representative action scheme similar to Part IVA.[116] This recommendation was not immediately adopted. Instead, in December 1999 the Supreme Court of Victoria amended the Rules of the Court[117] pursuant to s 25(1) of the *Supreme Court Act 1986* (Vic). This amendment introduced Order 18A to create a representative proceedings regime modelled on Part IVA. Not long after its introduction, the Court of Appeal of the Supreme Court of Victoria rejected a challenge to the validity of Order 18A.[118]

105 *Tropical Shine Holdings Pty Ltd (t/as KC Country) v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 462 (Wilcox J).

106 See for example: *Tropical Shine Holdings Pty Ltd (t/as KC Country) v Lake Gesture Pty Ltd* (1993) 45 FCR 457; see also Wilcox M, 'Representative Proceedings in the Federal Court of Australia: A progress report' (1996–67) 15 *Australian Bar Review* 91, 92.

107 [1996] FCA 853.

108 (1997) 78 FCR 164.

109 Ibid 166.

110 (1997) ATPR 41-585.

111 This ruling has been criticised on the basis that 'making access to Part IVA dependent on clear evidence of the existence of seven class members, and on the fact that each of the represented persons was interested in seeking legal redress through the Part IVA proceeding, is inconsistent with the opt-out regime employed in Part IVA and is tantamount to the introduction of an opt-in regime': see Morabito V, 'The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions' (2004) 42(3) *Osgoode Hall Law Journal* 473, 489-490.

112 [1986] VR 735, 741.

113 Order 16 Rule 1 of the *Supreme Court Rules* (Vic) allowed plaintiffs to sue jointly for the 'same transaction or series of transactions', and it was found that the plaintiffs' right to relief did not arise from the same series of transactions: ibid 740–41.

114 See Victoria, *Parliamentary Debates,* Legislative Council, (5 December 1986) 1657-1659 (Jim Kennan, Attorney-General), reproduced in Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [2.340].

115 Unreported, Vic Sup Ct, Appeal Div, 2 March 1992 (Tadgell J). See also, Grave Adams & Betts, ibid; Morabito V & Epstein J, *Class Actions in Victoria – Time for a New Approach*, Expert Report No 2 (Melbourne: Victorian Attorney-General's Law Reform Advisory Council, 1997) [3.1]–[3.37].

116 Morabito V & Epstein J, *Class Actions in Victoria – Time for a New Approach,* Expert Report No 2 (Victorian Attorney-General's Law Reform Advisory Council, Melbourne 1997). See also, *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545, 549 [9] (Brooking JA).

117 *Supreme Court (General Civil Procedure) Rules 1996* (Vic).

118 *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545 (Ormiston, Phillips & Charles JJA; Winneke P & Brooking JA dissenting).

3.31 Despite that amendment, in 2000 the Victorian Parliament introduced Part 4A into the *Supreme Court Act 1986* (Vic) ('SCA'). This legislative provision is based on the federal legislation and is very similar to the regime created by Order 18A.[119] Part 4A of the SCA came into operation retrospectively on 1 January 2000. The legislative regime has also survived a challenge to its validity in *Mobil Oil Australia Pty Ltd v Victoria*.[120]

3.32 As a result of these developments, Victoria now has both a rules regime and a legislative regime. However, the legislative regime has some restrictions in its scope of operation.[121] The 'traditional' representative proceeding rule is still contained within Order 18.01 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic). Order 18.02 provides that:

> [a] proceeding may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more persons having the same interest as representing some or all of them.

3.33 Order 18.01 applies 'where numerous persons have the same interest in any proceeding', but *does not apply* to:

(a) a proceeding under Part 4A of the SCA; or

(b) to a proceeding concerning:

(i) the administration of the estate of a deceased person; or

(ii) property subject to a trust.[122]

3.34 Until 2005, Part 8 Rule 13 of the New South Wales *Supreme Court Rules 1970* (NSW) contained a representative proceeding provision similar to the current provision in the RSC. In 2005, the provision was replaced by ss 7.4 and 7.5 of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR (NSW)').

3.35 In *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd,* Justices Gummow, Hayne and Crennan noted that the UCPR (NSW):

> [c]ontained few provisions equivalent to those found in the more elaborate regulation of representative proceedings provided by Part IVA.[123]

In 2010, the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) inserted Part 10 into the *Civil Procedure Act 2005* (NSW) ('CPA (NSW)'). Part 10 of the CPA (NSW) came into operation on 4 March 2011 and it creates a statutory representative procedure that is substantially similar to that in Part IVA and Part 4A of the SCA.

119 The *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic) received royal assent on 28 November 1999 and commenced 1 January 2000.

120 (2002) 211 CLR 1 (Gleeson CJ, Gaudron, Gummow, Kirby, Hayne & Callinan JJ). For a discussion of this case see: Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [2.452]–[2.465].

121 Part 4A of the *Supreme Court Act 1986* (Vic) does not apply to a) a proceeding commenced under ss 34 and 35 of the Act (s 33B(2)(a)); b) a proceeding concerning the administration of the estate of a deceased person (s 33B(2)(b)(i)); c) a proceeding concerning property subject to trust (s 33B(2)(b)(ii)); or d) a proceeding commenced under Order 18 (s 33B(2)(c)).

122 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 18.01.

123 (2006) 229 CLR 386, 419 [47]. See also *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382, 388 (Gleeson CJ).

PLAINTIFF GROUPS – OPEN CLASSES AND CLOSED CLASSES

3.36 As Justice Jessup of the Full Court of the Federal Court explained, '[a]n applicant will define on whose behalf the proceeding is brought and, unless they opt out, all persons who fit within the relevant definition will be part of the group, and bound by any result'.[124] This device is commonly known as the 'opt-out' device, which rests on two provisions in Part IVA – s 33J and s 33ZB.

3.37 Section 33J provides that class members have the right to opt out of the class action before the court fixes a date. 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.

3.38 Section 33ZB provides that a judgment handed down in a class proceeding:

> [b]inds all such persons [described or otherwise identified in the judgment] other than any person who has opted out of the proceeding under section 33J.[125]

3.39 As a result of the Federal Court's interpretation of s 33C(1)(a), one can have 'open' class actions or 'closed' class actions. As Justice Murphy explained, an open class action comprises 'all persons affected by the alleged civil wrongs', whilst a closed class action is 'a representative proceeding with a class limited to a subset of all persons affected by the alleged wrongs through use of a restricting criterion in the class definition'.[126]

3.40 More commonly known as the 'Visy/Amcor class action', *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited*[127] provides an example of a representative action that was issued (and subsequently resolved) by way of a closed class action.

3.41 The Visy/Amcor class action arose out of an allegation of price fixing and market sharing in the cardboard packing industry. The plaintiff group was defined as persons who had purchased more than $100,000 of corrugated fibreboard packaging between 1 May 2000 and 1 May 2005.[128] This restricted the class of persons who could take part in the action to approximately 7,500 claimants.[129]

124 *Madgwick v Kelly* (2013) 212 FCR 1, 39 [151].

125 This provision has been described by the Full Federal Court as the 'pivotal provision of [Part] IVA': *Femcare Ltd v Bright* (2000) 100 FCR 331, 338 [25] (Black CJ, Sackville & Emmett JJ).

126 *Kelly v Willmott Forests Ltd (in Liquidation)* (2012) 300 ALR 675, 690 [64]. As recently explained by Forrest J of the Supreme Court of Victoria, this concept of a closed class needs to be distinguished from the 'different concept' of class closure: 'this [latter] expression means … that a court may require group members to identify themselves by a certain point in time as having an interest in any judgment or proposed settlement. Failing a declaration of such interest (normally achieved by registering with the court or a firm of solicitors by a certain date), any subsisting entitlement to damages of the group members relating to the claim may be extinguished': *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Ltd* (2013) 39 VR 255, 262 [23].

127 [2011] ATPR 42-361.

128 See 'Notice of Proposed Settlement – Amcor/Visy Class Action (Cardboard Box Cartel)' in Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [A7.700].

129 See Andrew Main, 'Amcor, Visy settle cartel class action out of court' *The Australian* (online) 8 March 2011 <http://www.theaustralian.com.au/archive/business-old/amcor-visy-settle-cartel-class-action-out-of-court/story-e6frg98x-1226017902626>.

PROCEEDING WITH A CLAIM AGAINST MULTIPLE RESPONDENTS

3.42 One of the key distinctions in the federal and Victorian legislative schemes, as opposed to the scheme in New South Wales, is the extent of the ability to proceed in a representative action against multiple respondents.

3.43 In Part IVA proceedings and in the Victorian scheme, if one applicant is suing multiple respondents on behalf of a group, then that applicant must have a claim against each respondent.[130]

3.44 The question of whether every group member must have a claim against each respondent is a contentious issue. The conflicting authorities are summarised as follows:[131]

(a) in *Nixon v Philip Morris (Australia) Ltd,*[132] Justice Wilcox (following his decision in *Symington v Hoechst Schering Agrevo Pty Ltd*[133]) held that all applicants must have a claim against each respondent. On appeal in *Philip Morris (Australia) Ltd v Nixon ('Philip Morris')* the applicants conceded that every group member must have a claim against each respondent;[134]

(b) in *Bray v F Hoffmann-La Roche Ltd ('Bray'),*[135] two judges held that there was no such requirement;

(c) Justice Kiefel in *Milfull v Terranora Lakes Country Club Ltd (in Liq)*[136] followed the decision in *Bray;*

(d) however, in *Johnstone v HIH Ltd,*[137] the trial judge followed the *Philip Morris* decision, taking the comments in *Bray* as obiter only;

(e) *Guglielmin v Trescowthick (No 2)*[138] ('*Guglielmin*') followed *Johnstone v HIH Ltd* in applying the *Philip Morris* rule; and

(f) *Gray v Cash Converters International Ltd*[139] followed *Bray* rather than *Philip Morris*, and this decision was not overruled on appeal.[140]

3.45 There remains concern as to the effect of *Philip Morris* (see the extended discussion in Chapter 5).[141] However, the contention was resolved for New South Wales when that state introduced its new regime that specifically allowed claims against multiple respondents.

3.46 Section 158(2) of the *Civil Procedure Act 2005* (NSW) provides that a person 'may commence representative proceedings on behalf of other persons against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings'.[142]

3.47 In the federal and Victorian jurisdictions, the practice undertaken by plaintiff law firms has been to issue multiple claims against separate respondents and then apply to consolidate them into a unified representative action. This appears to occur without significant resistance from defendants or the court and, accordingly, appears to be a de facto solution to the *Philip Morris* issue.

130 *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164, 166.
131 See further discussion of conflicting Full Court of the Federal Court of Australia authorities in Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [4.330]–[4.430].
132 (1999) 95 FCR 453.
133 (1997) 78 FCR 164.
134 (2000) 170 ALR 487.
135 (2003) 130 FCR 317.
136 (2004) 214 ALR 228.
137 [2004] FCA 190.
138 (2005) 220 ALR 515.
139 (2014) 100 ACSR 29, 64.
140 (2014) 314 ALR 154.
141 See e.g. *Richards v Macquarie Bank ltd* [2011] FCA 1085, [7]–[9].
142 Discussed further in Chapter 5 below.

'Claims must arise out of related circumstances'

3.48 Section 33C(1)(b) of Part IVA provides that the claims must be 'in respect of, or arise out of, the same, similar or related circumstances'.[143] Whether the circumstances giving rise to the claims are sufficiently related requires practical judgment.[144]

3.49 In *Zhang v Minister for Immigration, Local Government and Ethnic Affairs*,[145] Justice French (as he then was) stated:

> The question of whether the claims of the persons who are proposed as members of a group arise out of the "the same, similar or related circumstances" as required by s 33C(1) is not to be answered by an elaboration of that verbal formula.... The word "related" suggests a connection wider than identity or similarity. In each case there is a threshold judgment on whether the similarities or relationships between circumstances giving rise to each claim are sufficient to merit their grouping as a representative proceeding. At the margins, these will be practical judgements informed by the policy and purpose of the legislation. At some point along the spectrum of possible classes of claim, the relationship between the circumstances of each claim will be incapable of definition at a sufficient level of particularity, or too tenuous or remote to attract the application of the legislation.[146]

3.50 In *Connell v Nevada Financial Group Pty Ltd*[147] *('Connell'),* 16 group members represented by six applicants brought an action against the respondent for misleading representations made to different group members at different times and in differing ways. Justice Drummond held that, although each representation was made at a different time, they were made by representatives of the respondent and had the same substance and effect, thereby satisfying s 33C.[148]

3.51 *Philip Morris*[149] concerned a group that suffered injury from smoking the respondent's cigarettes after viewing the company's advertisements. The Full Court of the Federal Court found that the claims were not sufficiently related because the specific advertisement that each smoker saw and the effect that it had on them needed to be related.

3.52 The plaintiffs in *Williams v FAI Home Security Pty Ltd (No 2)*[150] commenced proceedings alleging misleading representation concerning home alarm systems sold through door-to-door sales. Justice Goldberg, agreeing with Justice Drummond in *Connell,* found that the subject matter and effect of the various representations were sufficiently linked.

3.53 *Guglielmin*[151] concerned allegations that the directors of a company had made misleading and deceptive representations. The applicants submitted 77 documents on which the group members were alleged to have relied when purchasing their shares. Despite diverse representations and the extended time over which the representations were made, Justice Mansfield allowed the representative action.

3.54 Doubtless, the threshold to group claims on the basis of facts arising out of the same, similar or related circumstances is much broader and easier to satisfy than the 'same interest test' that applies to representative proceedings conducted under Order 18 Rule 12 of the RSC.[152]

143 Note that s 33C(2)(b)(i) allows proceedings to be brought relating to 'separate contracts or transactions between the respondent in the proceedings and individual group members'.

144 Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [4.500]; *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 404 (French J).

145 (1993) 45 FCR 384.

146 Ibid 404–405.

147 (1996) 139 ALR 723. See also *Larsson v WealthSure Pty Ltd* [2013] FCA 926 [22]–[24] where Buchanan J considered whether there was a sufficient connection between the causes of action.

148 Ibid 728, 730 (Drummond J).

149 (2000) 170 ALR 487.

150 [2000] FCA 726.

151 (2005) 220 ALR 515.

152 This threshold is also discussed in detail in Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [4.490]–[4.555].

'Common issue of law or fact'

3.55 A further threshold requirement under s 33C – that the claims give rise to a 'substantial common issue of law or fact' – may be difficult to establish in circumstances where there is more than one respondent.[153] This requires the identification of at least one issue of law or fact that is common to all claims.[154]

3.56 In *Brisbane Broncos Leagues Club v Alleasing Finance Australia Pty Ltd,*[155] the Federal Court confirmed that there need only be one common issue and it need not be large or of major importance to the litigation. This is because proceedings can be discontinued as class actions at a later stage if there is no benefit in determining the common issues together.

REPRESENTATIVE ACTIONS AND TIME LIMITATIONS

3.57 As discussed in Chapter 2, Order 18 Rule 12 of the RSC is silent in relation to limitation periods. If a representative proceeding is commenced and later ordered by the court to be disbanded, there is no protection afforded to those represented persons not named as parties to the proceedings.

3.58 Despite this issue creating a clear disincentive to the bringing of representative proceedings it has been noted that:

> [t]he effect that the commencement of a representative proceeding (action) has on limitation periods is one area where class action jurisprudence has not evolved much to date in Australia.[156]

3.59 One reason for this may be that alteration of limitation periods upon commencement of representative proceedings is considered in many jurisdictions, including Australia, to be an issue of substantive law requiring legislative intervention rather than amendment to the rules of court.[157]

3.60 Given this understanding, it appears that the only way to ensure certainty (as well as consistency and fairness) is to implement a regime by way of legislative amendment, as opposed to amending the rules.

3.61 One example of a legislative intervention that was crafted to address problems with limitation periods is found in s 33ZE of Part IVA. That section reads as follows:

> 33ZE Suspension of limitation periods
>
> Upon the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended.
>
> The limitation period does not begin to run again unless either the member opts out of the proceeding under section 33J or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim.

3.62 The issue of suspension of limitation periods is discussed in further detail with reference to submissions received from interested parties in Chapter 5.

153 Grave, Adams & Betts, ibid [4.590].

154 *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 37 ACSR 326, 340-341 [63].

155 [2011] FCA 106.

156 Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [18.100].

157 Mulheron R, 'Implementing an Opt-Out Collective Action in England and Wales: Legislation versus Court Rules', Appendix N in Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* (2008) 421–22; Morabito V, 'Statutory Limitation Periods and the Traditional Representative Action Procedure' (2005) 5 *Oxford University Commonwealth Law Journal* 113, 128–9 (footnotes omitted); *General Motors of Canada Ltd v Naken* [1983] 1 SCR 72, 105; *John Pfeiffer & Co v Rogerson* (2000) 203 CLR 503.

DIFFERENCES BETWEEN LEGISLATIVE SCHEMES

3.63 Whilst substantially similar in many respects, there are some differences between Part 10 of the CPA (NSW), Part 4A of the SCA and Part IVA.[158]

3.64 These differences include:

(a) some differences in language between the regimes in relation to nomenclature and the description of proceedings, parties and method of commencement of a representative action;[159]

(b) Part 10 of the CPA (NSW) contains a provision that allows a court to order that a proceeding be discontinued if the representation of the interests of the group members is inadequate;[160]

(c) section 166(2) of the CPA (NSW) facilitates the use of closed classes. In contrast, there has been dispute as to whether and when this could occur under the frameworks contained in Part 4A of the SCA and Part IVA (the issue of 'closed classes' is discussed in further detail in Chapter 5); and

(d) section 158(2) of the CPA (NSW), in contrast to Part 4A of the SCA and Part IVA, does not require all represented plaintiffs to have claims against all of the defendants in a proceeding. This issue is commonly known as the *Philip Morris* issue (again discussed in further detail in Chapter 5).[161]

OTHER FEATURES OF THE LEGISLATIVE REGIME

Costs and security for costs

3.65 Group members are immune from an adverse costs order with the exception of costs authorised by ss 33Q or 33R of Part IVA.[162] Section 33Q allows the court to establish a sub-group to address issues common to the claims of some of the group members. Where a sub-group is established, the appointed representative party is liable for the costs associated with the determination of the common issues. Under s 33R, an individual may be permitted to take part in a proceeding for the purpose of determining an issue relating only to that person. That person will be liable for the costs of that determination.

3.66 In Australian representative proceedings, costs generally follow the event. In other words, the successful party is usually entitled to be reimbursed for a substantial amount of its costs. The ALRC observed that:

> [A]lthough retaining the 'costs follow the event' rule and making the principal applicant liable for any costs may discourage the commencement of these proceedings in certain circumstances, there are no entirely satisfactory alternatives. Furthermore, most alternatives have harmful side effects such as the encouragement of weak claims. For these reasons it is recommended that the existing discretion in relation to the awarding of costs be retained…[163]

3.67 In bringing proceedings, plaintiffs volunteer to be exposed to the risk that they will be required to pay the costs of the defendants in the event that the claims are unsuccessful. Defendants do not have the privilege of voluntarily assuming this risk.[164] In recognition of this distinction, and in an effort to address unfairness that may arise from an unsuccessful plaintiff being unwilling or unable to meet the defendant's costs, a court may order that the plaintiff provide security for a defendant's costs.

158 For further discussion see Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [2.495].
159 Ibid.
160 See s 166 of the CPA (NSW).
161 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487.
162 *Federal Court of Australia Act 1976* (Cth) s 43(1A); *Supreme Court Act 1986* (Vic) s 33ZD.
163 *Grouped Proceedings in the Federal Court* [1988] ALRC 46 at [271].
164 Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [10.110].

3.68 Matters such as vexation, oppression and concerns that the administration of justice may be perverted are commonly cited reasons for courts to exercise their discretion and order that the plaintiff provide such security.[165] The ALRC noted however that while the *Federal Court of Australia Act 1976* (Cth) allows the Court to order that a plaintiff give security for the payment of costs which may be ordered against him or her, in the case of representative proceedings that discretion should be limited. The ALRC recommended that:

> [a]n order for security should not be made against the principal applicant on the ground that he or she is suing not for his own benefit but for the benefit of a group member.[166]

3.69 A more recent review of representative proceedings in Australia also concluded that security for costs applications is '"not a major concern" to the bringing of such proceedings'.[167]

Some advantages and criticisms of the legislative representative action regimes

3.70 The ALRC identified a number of advantages of a representative action regime. These are as follows (separated for the purposes of clarity):[168]

> Where a number of people suffer loss, injury or damage as a result of a multiple wrong, a class action or other effective grouping procedure could help to reduce costs for each member of the group as well as promote efficiency in the administration of justice …
>
> Where the claims are 'individually recoverable', the primary policy goals of such procedures are to enable the most efficient use to be made of resources and to ensure consistency in decision-making …
>
> Where the claims are 'individually non-recoverable', that is, where the cost of legal proceedings is high in relation to the amount claimed, the grouping of claims may reduce the costs of litigation to the individual and thus enhance access to a legal remedy …
>
> There are however some claims which are so small, that even where efficient, economic and fair grouping procedures are available, the costs of recovery will exceed the total benefits of litigating. These are called 'non-viable' claims. It is not necessary to extend new procedures to this kind of case …
>
> The objective of new procedures should be to reduce the costs of litigation where it is necessary and worthwhile in the interests of justice, not to encourage abuse or the pursuit of the trivial.

3.71 However, that model has been questioned:

(a) Some critics predicted that the introduction of the representative action regimes would 'open the flood gates' for litigation. However, that conclusion has apparently not been proven in practice;[169]

(b) Representative actions have also been criticised for the length and complexity of the plaintiff's pleadings.[170] In *Mercedes Holdings Pty Ltd v Waters (No 3),*[171] the presiding judge restricted the plaintiff to a 50-page limit, refusing leave to file an amended claim that was over 600 pages long; and

(c) The potential for competing representative action claims has given rise to concerns (discussed above). Of the 28 class actions brought under Part 4A between 2001 and 2009, six proceedings related to three disputes.[172]

3.72 The Commission considers that the legislative models adopted in Australia provide greater certainty, clarity and guidance for all parties than the model currently adopted in Western Australia based on the Rule.

165 Ibid, citing *McHenry v Lewis* (1882) 22 Ch D 397, 408.
166 *Grouped Proceedings in the Federal Court* [1988] ALRC 46 at [271].
167 Murphy B & Cameron C, 'Access to Justice and the Evolution of Class Action Litigation' (2006) 30 *Melbourne University Law Review* 399, 420.
168 *Grouped Proceedings in the Federal Court* [1988] ALRC 46 at [61].
169 Morabito V, *An Empirical Study of Australia's Class Action Regimes: Second Report* (Australian Research Council, 2010) 25.
170 King & Wood Mallesons, *Class Actions in Australia: The year in review 2011* (2011) 11 available online at < http://www.kwm.com/en/au/knowledge/downloads/class-actions-in-australia-the-year-in-review-2011-20120301>.
171 [2011] FCA 236.
172 Morabito V, *An Empirical Study of Australia's Class Action Regimes: Second Report* (Australian Research Council, 2010) 24.

OVERSEAS JURISDICTIONS

3.73 In addition to an analysis of the various Australian jurisdictions, and in accordance with the terms of reference, the Commission has also extensively examined various frameworks relating to representative proceedings that operate overseas.

3.74 In Chapter 5 of the Discussion Paper, the English, Canadian, New Zealand, South African and United States models were reviewed. The purpose of the review was to examine whether there were any aspects of the overseas models that could usefully be adopted in any proposed Western Australian framework. There were no submissions from any interested parties suggesting that the Commission adopt aspects of an overseas model.

3.75 As set out in the Discussion Paper,[173] the Commission observed a number of common themes from the overview of the international representative action frameworks.

3.76 The absence of clarity in the expression 'same interest' arises in each of the jurisdictions considered. Those jurisdictions have either solved this problem by a comprehensive regime concerning litigation by claimants arising from common circumstances or they have recognised the difficulty and are seeking to overcome it by legislative or Rule-based reforms. That is, the issue arising in Western Australia is not unique, and there is wide agreement that the 'same interest' requirement is inadequate.

3.77 Overall, while an analysis of overseas models relating to representative actions is helpful to inform the debate, the Commission does not consider that the overseas common law models provide any better or more suitable legislative solution than the legislative models at the federal level and in both New South Wales and Victoria.

3.78 The legislative scheme that began with amendment to the *Federal Court of Australia Act 1976* (Cth) has been adopted in two other states without significant dissent from stakeholders.

3.79 The model proposed in New Zealand, which expressly provides for a regime to deal with opt-in or opt-out arrangements, has not yet been adopted in New Zealand or anywhere else. How that proposal would operate in practice is therefore unknown and there is, obviously, no case authority on its operation (and if the proposal is not adopted there may never be). Furthermore, this regime has been vigorously criticised by some scholars.[174]

3.80 The Commission considers it preferable to model any new provisions on a group proceedings regime which has been tested by experience in circumstances comparable to those in Western Australia. The model contained in Part IVA and, which has also been substantially adopted in New South Wales and Victoria, provides a tested solution.

3.81 This is not to suggest the Commission should adopt a model simply by virtue of the fact that it has been adopted in another Australian jurisdiction. However, given the relative success of the adoption of the federal model, the Commission considers it preferable to adopt a model based on Part IVA rather than an overseas regime, for the following reasons:

(a) the absence of any compelling reasons to instead adopt an overseas model;

(b) the absence of dissent from such an approach by interested parties who provided submissions in response to the Discussion Paper; and

(c) the desirability that legislative reform promote efficiency and consistency between jurisdictions in Australia.

173 See Discussion Paper [5.123]–[5.129].

174 See, for instance, Morabito V, 'Opt-in or Opt-out? A Class Dilemma for New Zealand' (2011) 24(3) *New Zealand Universities Law Review* 421.

CHAPTER 4

WHY LEGISLATION IS THE MOST APPROPRIATE VEHICLE FOR REFORM

NEED FOR AMENDMENT[175]

4.1 In the Discussion Paper, the Commission concluded that the current rule relating to representative proceedings is unsatisfactory and required amendment. This conclusion was supported by the submissions that were provided to the Commission.

4.2 In these circumstances where the need for reform is accepted, the Commission's focus in this Final Report is to identify the most effective framework for reform.

4.3 The options for reform that are available have previously been tested in the current federal, Victorian, New South Wales and South Australian regimes. Each of these have been created by way of substantial amendments being made to either:

(a) the court rules; or

(b) the legislation from which the court rules derive their power.

4.4 This chapter sets out practical issues relevant to the implementation of reform to the representative proceedings provisions in Western Australia, in particular whether there should be any consideration given to reform through the RSC or whether such reform should be achieved by legislation.

Court rules as an appropriate vehicle for reform?

4.5 Whether or not the traditional procedures are retained as part of any reform, the question arises whether there is power to make court rules embodying the more detailed provisions found in the statutory regimes.

4.6 The Class Actions Sub-Committee of the Law Reform Commission of Hong Kong in its November 2009 Consultation Paper on Class Actions noted that:

> The Ontario [Law Reform] Commission[176] acknowledged that subordinate legislation provides greater flexibility and easier amendment but, for two reasons, it recommended primary legislation. The first reason was that it was often difficult to determine whether a provision was substantive or procedural and if a provision contained in a rule were held to be substantive it would be liable to be struck down as being ultra vires. Primary legislation might be necessary if it was desired to confer new power on the court.[177]

4.7 Prior to Victoria's statutory regime being enacted,[178] the rules of the Victorian Supreme Court were amended to closely follow the then terms of Part IVA.[179] As previously discussed, a challenge to the validity of these rules failed (by majority 3:2) in the Victorian Supreme Court of Appeal in *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd ('Schutt')*.[180]

4.8 An application for special leave to appeal *Schutt* to the High Court was made, but that application was overtaken by re-enactment of the amendments of the rules of the Victorian Supreme Court in the form of legislation that was made effective from 1 January 2000 (the date on which the controversial amendments to the rules of the Victorian Supreme Court took effect).[181]

4.9 In *Mobil Oil Australia Pty Ltd v Victoria ('Mobil')* Callinan J commented that the legislative change was:

> … no doubt in order to remove any question that might arise following the division of opinion in the Court of Appeal with respect to the validity of the measures the subject of the rules of court, and substantially now, therefore of an enactment.[182]

175 The bulk of this chapter has been modified from Jamieson P, Senior Legal Research Officer, 'Representative Proceedings – Need for Reform of Supreme Court Rules (WA) O18 R12' (unpublished memorandum, Supreme Court of Western Australia, 30 March 2011). The Commission is grateful for Mr Jamieson's assistance.

176 Ontario Law Reform Commission, *Report on Class Actions* (1982) 305–6.

177 Law Reform Commission of Hong Kong (Class Actions Sub-Committee), *Class Actions*, Consultation Paper (2009) [9.10]. The second reason is set out below at [4.21].

178 On 9 December 1999, with effect from 1 January 2000.

179 See Ormiston & Brooking JJA (though dissenting in the result) in *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545, 549, 561.

180 Ibid. A discussion appears in Cashman P, *Class Action Law and Practice* (Sydney: Federation Press, 2007) 30ff.

181 See e.g. *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 20 (Gleeson CJ), 28–9 (Gaudron, Gummow & Hayne JJ), 40–1 (Kirby J) and see also 'materially similar' at 66 (Callinan J).

182 Ibid 66 (Callinan J).

4.10 *Schutt* and subsequent cases such as *Mobil* establish that it is not clear whether all of the characteristics of a statutory regime can be created through amendments to the rules of the court. In other words, implementation of a statutory regime will require changes to the substantive law that cannot be effected by way of amendments to the rules of practice and procedure.[183]

4.11 One aspect identified as a matter of substantive law, and therefore requiring legislation and not merely rules of court, was the disruption to limitation periods which may be necessary for the operation of an effective regime (discussed in Chapter 3).

Effectiveness of more detailed rules provision?

4.12 In New South Wales, under the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR (NSW)'), Rule 7.4 provided a representative procedure 'similar to the requirements for representative proceedings in Part IVA'.[184] Rule 7.4 has since been repealed in favour of a statutory regime. The second reading speech for the Act that introduced this regime[185] stated that the reform was needed to address the lack of procedural clarity under the existing (albeit already enhanced) rules:

> In New South Wales, rules 7.4 and 7.5 of the *Uniform Civil Procedure Rules 2005* make some provision for representative proceedings. However, these rules lack procedural clarity. The regime that is proposed by these amendments will provide a greater level of certainty for both litigants and the court, and will enhance the community's access to justice.[186]

4.13 The *Supreme Court Civil Rules 2006* (SA) have also moved in some respects towards the statutory regimes, providing an alternative procedure under Rule 81(1) with a more liberal test of 'commonality' than the 'same interest' test of the traditional representative procedure. This is coupled with a requirement that the representative parties must apply to the court for an order authorising the action to be maintained as a representative action. This continues the procedures that first appeared in Rule 34 of the *Supreme Court Rules 1987* (SA). Although 'embryonic', '[a]n attempt was also made to include in the rules some machinery provisions such as those which are now embodied in statutory class action provisions'.[187]

4.14 The Commission notes that the South Australian model has rarely been utilised in the years since its introduction.[188] Indeed, *Cook v Pasminco Ltd*[189] has been interpreted as an example of South Australian residents seeking to use 'the federal jurisdiction to take advantage of the class action rules, which do not exist in South Australia'.[190]

Legislative reform – 'a prudent approach'

4.15 While there may be debate as to whether it is strictly necessary to introduce representative actions through legislation rather than rules of the court, the legislative approach that was followed in Victoria is considered to be the prudent one.[191]

4.16 Recent international consideration of the issue has consistently advocated a prudent approach. The Class Actions Sub-Committee of the Law Reform Commission of Hong Kong concluded that:

> [o]verseas experience shows that it may be preferable to introduce reform through statutory enactment rather than subsidiary legislation'.[192] The New Zealand Rules Committee has also concluded that '[a] class action regime necessarily has some features going beyond rules of practice and procedure. This makes it necessary to seek primary legislation.[193]

183 As set out in Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* (2008) 103ff (and see also a detailed consideration of the issues starting at 91). See also Haylock J, 'National Class of Extraterritorial Legislation' (2009) 32(2) *Dalhousie Law Journal* 253, 264ff.

184 Legg M and Dowler M, 'The Class Actions Juggling Act' (2010) 48(6) *Law Society Journal* 59, 59.

185 New South Wales, *Parliamentary Debates,* Legislative Council, 24 November 2010, 28065 (John Hatzistergos).

186 Ibid 28067.

187 Cashman P, *Class Action Law and Practice* (Sydney: Federation Press, 2007) 45.

188 A recent, yet not widely known, representative proceeding that was filed in the Supreme Court of South Australia was revealed by a leading plaintiff solicitor, Maurice Blackburn's Ben Slade. During a seminar on class actions held in October 2012 he revealed that two representative proceedings were filed in that Court by the firm of Duncan Basheer Hannon on behalf of victims of allegedly defective DePuy ASR prosthetic hips and that in February 2012 it agreed for these proceedings to be transferred to the Federal Court: Ben Slade, 'The Future of Class Actions' (paper presented at a Class Actions Seminar, University of New South Wales, Sydney, 25 October 2012) [2.10].

189 (2000) 99 FCR 548.

190 Bick, D et al, A Gold Mine for Environmental Class Actions in Australia? (2010) 25(9-10) *Australian Environment Review* 8, 9.

191 Walker J, 'Are National Class Actions Constitutional?: A Reply to Hogg and McKee' (2010) 48(1) *Osgoode Hall Law Journal* 95, 111.

192 Law Reform Commission of Hong Kong (Class Actions Sub-Committee), *Class Actions*, Consultation Paper (2009) [9.12].

193 Rules Committee, *Class Actions for New Zealand*, Second Consultation Paper (2008) [2].

4.17 Similarly, the Civil Justice Council of the United Kingdom recently recommended that:

> [w]hile there is considerable scope for reform of CPR 19.6, the Civil Justice Council recommends that it is preferable that reform be taken forward by primary legislation. This will enable those elements of reform which effective (sic) substantive law to be debated fully and implemented in a way that would preclude vires challenges.[194]

4.18 Quite apart from any potential for subsequent challenge in the court to the validity of such rules, in *Western Canadian Shopping Centres Inc v Dutton,*[195] the Supreme Court of Canada provided a different explanation for introducing class actions by way of legislation. In summary, the court explained that the complexity of class action procedure warranted comprehensive treatment in a statute, rather than piecemeal introduction through discrete rulings in specific cases.[196]

4.19 The Class Actions Sub-Committee of the Law Reform Commission of Hong Kong in its November 2009 Consultation Paper on Class Actions similarly noted that:

> The Ontario [Law Reform] Commission[197]… for two reasons … recommended primary legislation … The second reason was that the potential impact of the introduction of a class action on the courts, the parties and the public raised important and controversial issues that deserved to be debated fully in the legislative assembly, rather than passed by way of regulation.[198]

4.20 Similarly, the view has been expressed in the United Kingdom by the Civil Justice Council's Comparative Law Committee Collective Redress Working Party that:

> The same view may therefore be taken as the Ontario Law Reform Commission … that such an important reform, 'deserved to be debated fully in the Legislative Assembly, rather than passed by way of regulation pursuant to the *Judicature Act*'.[199]

Submissions received

4.21 All submissions received from interested parties, including from the Chief Justice of Western Australia on behalf of the Supreme Court of Western Australia,[200] supported the contention that a regime facilitating representative actions should be implemented by the passage of legislation.

4.22 The Western Australian Bar Association observed that legislative reform would 'increase certainty and access to justice for those affected by multiple wrongdoing by':

(a) providing clarity of process and procedure;

(b) increasing the capacity for the commencement of and participation in representative proceedings in Western Australia;

(c) providing a more cost- and resource-efficient means of recovery; and

(d) addressing issues such as suspension of limitation periods for group members.[201]

194 Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* (2008) 159.
195 *Western Canadian Shopping Centres Inc v Dutton* [2001] 2 SCR 534.
196 Walker J, 'Are National Class Actions Constitutional?: A Reply to Hogg and McKee' (2010) 48(1) *Osgoode Hall Law Journal* 95.
197 Ontario Law Reform Commission, *Report on Class Actions* (1982) 305–6.
198 Law Reform Commission of Hong Kong (Class Actions Sub-Committee), *Class Actions*, Consultation Paper (2009) [9.10].
199 Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* (2008) 111, see also 97 and 347.
200 See Chief Justice of Western Australia, Submission (13 June 2013) 1.
201 Ibid [7].

4.23 The Law Society of Western Australia submitted that the adoption of such a regime would provide the following advantages:

(a) increased capacity for and certainty in bringing such proceedings in the jurisdiction of the Supreme Court of Western Australia;

(b) consistency with an existing structure and body of authority for interpreting such procedures;

(c) the removal of uncertainty that may result from the adoption of such procedures as Rules only, in particular in respect of issues arising from merger of actions, applications to closed classes and effect on limitation periods; and

(d) avoidance of inefficiencies and distortions associated with forum-shopping between the Federal Court and the Supreme Court of Western Australia if different regimes were in place.[202]

4.24 Maurice Blackburn Lawyers put forward a number of reasons why, in its view, a legislative scheme relating to representative proceedings is to be preferred:

(a) it is necessary to avoid uncertainty regarding the suspension of limitation periods for group members. Without such legislation there may be uncertainty about the status of limitation periods for group members;

(b) a provision like s 33ZE [the provision applicable to limitation periods] provides a plenary power for the making of appropriate orders where the interests of justice require. The history of Part IVA in particular provides many examples of important uses of this power to deal with matters arising in representative proceedings; and

(c) a legislative scheme broadly consistent with the existing legislative regimes will assist in reducing interlocutory disputation as well as providing greater procedural certainty for parties and group members.[203]

202 Law Society of Western Australia, Submission (21 May 2013) 1.
203 Maurice Blackburn Lawyers, Submission (31 May 2013) 1.

CONCLUSION

4.25 While the Supreme Court of Western Australia may amend Order 18 Rule 12 of RSC through its delegated powers, such an exercise is likely to:

(a) give rise to uncertainty; and

(b) be at odds with the federal approach to the harmonisation of laws (with the potential to create inconsistency in the understanding and application of laws around Australia).

4.26 Consistent with the submissions received, the Commission considers that any amendment to the Western Australian rule relating to representative proceedings should be undertaken by way of legislative amendment closely akin to Part IVA.

Retention of a dual structure

4.27 Assuming a legislative model is introduced, an issue arises as to whether Order 18 Rule 12 of the RSC should be retained.

4.28 While Order 18 Rule 12 of the RSC lacks detail and clarity, it nonetheless is likely to have utility for some representative proceedings even if a legislative model for representative actions is introduced.

4.29 As previously discussed, this dual framework approach is a hallmark of the federal and Victorian regimes.[204]

4.30 Similarly, South Australia has two separate procedures, although both are provided for in the rules. In *Abrook v Paterson,*[205] Justice Burley in the Supreme Court of South Australia commented of the dual structure:

> The rule provides for two categories of representative action: SCR34.01 to 34.06 deal with what may have been described as "class actions" and SCR34.08 is the equivalent of the former O.16, R9 of the 1947 Rules of Court. The latter deals with "representative actions". The terms "class action" and "representative action" are probably confusing when dealing with SCR34 as a whole and in light of current authority. There will, inevitably, be overlap between the two sets of provisions, and a litigant will choose one or the other, or both, according to the particular circumstances of the case.
>
> …
>
> As far as I am aware, there are no decided cases on the scope and operation of SCR34.01. If it provides for "class actions", its lack of detail is in marked contrast to the provisions contained in Pt IVA of the *Federal Court of Australia Act 1976* …

4.31 While New South Wales does not have a dual structure (as its rules were repealed in enacting its statutory regime), those rules were, by the time of their repeal, 'similar to the requirements for representative proceedings in Part IVA',[206] upon which New South Wales' statutory regime has been substantially modelled.

4.32 Submissions received were either broadly supportive of retaining the existing rule or silent on the issue.

4.33 The Law Society of Western Australia supported the proposal that Order 18 Rule 12 of the RSC be retained in its current form as a 'surviving alternative'.[207]

4.34 The Western Australian Bar Association stated that it did not have a strong view as to whether the current rule should be retained, and observed that Order 18 Rule 12 of the RSC could be left with 'little work to do once an effective legislative scheme is introduced'.[208]

4.35 In the absence of a compelling reason to the contrary being demonstrated, the Commission recommends that Order 18 Rule 12 be retained as part of a dual structure.

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204 See *Federal Court Rules 2011* (Cth) r 9.21 and *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 18. See also *Grouped Proceedings in the Federal Court* [1988] ALRC 46 at [6].
205 (1995) 181 LSJS 24 at 30.
206 Legg M and Dowler M, 'The Class Actions Juggling Act' (July 2010) 48(6) *Law Society Journal* 59, 59.
207 Law Society of Western Australia, Submission (27 May 2013) 2.
208 Western Australian Bar Association, Submission (7 June 2013) [2], [9].

CHAPTER 5

KEY FEATURES OF THE PROPOSED LEGISLATIVE REFORM

5.1 In seeking submissions for the purposes of this Report, the Commission sought comment, in particular, in relation to the following issues: [209]

(1) On the basis that a legislative framework was the preferred choice for reform, whether there should be statutory provisions that:

(a) allow claims to proceed against multiple respondents, irrespective of whether or not the persons affected have a claim against every defendant in the action (known as the *Philip Morris* issue); and

(b) allow for the creation of closed classes.

(2) Whether there were opportunities to improve upon the existing representative actions legislative framework, with a particular focus upon whether:

(a) there should be codification of the role of the representative plaintiff, including requirements for removal of a representative plaintiff;

(b) limitation periods should be suspended, in the event a proceeding is disbanded;

(c) there should be a more prescriptive legislative framework in relation to security for costs in representative actions;

(d) more prescriptive provisions are required in order to ensure class members are aware of their right to opt out of a representative action; and

(e) formal criteria are required in relation to the resolution of representative actions, either by way of settlement or discontinuance.

WHETHER CLAIMS SHOULD BE ABLE TO BE BROUGHT AGAINST MULTIPLE RESPONDENTS

5.2 The federal and Victorian Acts and their New South Wales counterpart differ in relation to the circumstances in which claims may be brought as representative actions against more than one person.

5.3 In *Philip Morris (Australia) Ltd v Nixon,* [210] the Full Court of the Federal Court concluded that all represented plaintiffs must have a claim against each of the named defendants in the proceeding to satisfy the requirements of s 33C(1)(a) of Part IVA and proceed as a Part IVA proceeding. The correctness of this view has however been questioned in two appeals to the Full Court of the Federal Court.[211] The Commission considers that the authorities overwhelmingly favour the proposition that the *Philip Morris* approach is not generally applicable. However the possibility remains, no matter how slight, that the High Court may restore the *Philip Morris* approach to primacy and thus it cannot be ignored.

5.4 In contrast, the New South Wales legislation expressly resolves the ambiguity as to the correct approach by providing in s 158(2) of the CPA (NSW) that a person:

> [m]ay commence representative proceedings on behalf of other persons against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings

5.5 For reasons that follow, the Commission recommends that the New South Wales approach to this issue be adopted in Western Australia to remove any uncertainty brought about by the *Philip Morris* decision. In making this recommendation, the Commission acknowledges that more recent authority supports the proposition that the *Philip Morris* approach is not generally applicable and that s 33C(1)(a) is to be given the effect of the express wording in s 158(2) of the CPA (NSW).[212]

5.6 The question of whether the *Philip Morris* approach or the New South Wales approach is to be preferred raises conceptual and practical issues. Differences in conceptual approaches to this issue have led to different rulings by courts in Canada and the United States of America.[213]

209 Discussion Paper, [6.30].

210 (2000) 170 ALR 487.

211 *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317; *Cash Converters International Ltd v Gray* (2014) 314 ALR 154 at [32]-[33].

212 See also *Bray v F Hoffman – La Roche Ltd* (2003) 130 FCR 317 and *Cash Converters International Ltd v Gray* (2014) 314 ALR 154 at [32]-[33].

213 See Mulheron R, *The Class Action in Common Law Legal Systems: A comparative perspective* (Oxford, Hart Publishing; 2004), 145–50, 157–64; Morabito V, 'Standing to Sue and Multiple Defendant Class Actions in Australia, Canada and the United States' (2003) 41 *Alberta Law Review* 295, 303–31; M-A Grou, 'Multiple Defendant Class Actions in Quebec: Recent developments in the jurisprudence' (2007) 4 *Canadian Class Action Review* 83; *Marcotte v Banque de Montreal* [2012] RJQ 1541, [40]–[81]; *Miller v Purdue Pharma Inc*, 2013 SKQB 193, [57]–[59].

5.7 A conceptual view that is broadly consistent with the *Philip Morris* approach is that:

> The class action is essentially a procedural device by which a class of persons, who each individually have a good cause of action and locus standi to pursue it but are unable to do so effectively because the amount of the individual claims is disproportionate to the cost of litigating them, may enforce their rights through a representative plaintiff and by utilising the class action machinery.[214]

5.8 A contrasting view, which more recent authority seems to support, is that regimes governing class actions:

> [r]epresent a careful balancing of the need for efficiency with the need to ensure adequate protection for the individual members of the class, factors not present in nonclass action contexts. Cases addressing standing in other contexts are therefore inapplicable.[215]

5.9 A number of commentators consider that the *Philip Morris* approach undermines objectives of legislative representative action regimes.[216] Arguably the adoption of that approach undermines the ability to secure, in multiple respondent actions:

> … the reduction of legal costs, the enhancement of access by individuals to legal remedies, the promotion of the efficient use of court resources, ensuring consistency in the determination of common issues, and making the law more enforceable and effective.[217]

5.10 In May 2008 the Victorian Law Reform Commission recommended that Part 4A be amended and that there be no legal requirement that all class members have individual claims against all defendants in representative actions brought pursuant to Part 4A.[218]

5.11 In September 2009, the Access to Justice Taskforce of the federal Attorney-General's Department remarked that the *Philip Morris* approach:

> [c]an significantly limit the availability and flexibility of class actions to deal with a full range of related claims, and has affected a number of claims. Given the significant impact of *Philip Morris* and the conflicting authority in *Bray v Hoffmann-La Roche Ltd* further consideration of the policy merits of the approach is desirable.[219]

5.12 Further, the empirical evidence shows that the *Philip Morris* approach has contributed to the frequent phenomenon of multiple Part IVA proceedings being filed by the same lawyers with respect to the same legal dispute and then a subsequent application being made to consolidate proceedings.[220] This approach has costs consequences for both defendants to whom claims are directed and those who are non-interested bystanders.

5.13 The New South Wales approach is also not without criticism due to its potential to increase the costs of defendants who need to consider all claims, even if the consideration extends no further than deciding which claims to defend.

5.14 It is the Commission's view that irrespective of whether or not a legislative approach is preferred, legal work will arise and there will be costs consequences to all defendants. In these circumstances there is no reason to prefer either approach based on costs consequences alone.

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214 Law Reform Committee of South Australia, *Report Relating to Class Actions*, Report No 36 (1977) 11. See also Mercer PP, 'Group Actions in Civil Procedure in Canada' in Institute of Comparative Law, *Contemporary Law: Canadian Reports to the 1990 International Congress of Comparative Law* (Montreal: Les Editions Yvon Blais Inc, 1990) 249, 250: 'representative or class actions are civil actions brought by one or more representative plaintiffs on behalf of others having similar grievances. Members of the class each have a cause of action under the substantive law and each have *locus standi* to prosecute the particular cause of action. The latter point is significant: a person with no individual right to sue cannot sue as representing others'.

215 *Gottlieb v Wiles* 11 F3d 1004, 1007 (10th Cir 1993), cited in Morabito V, 'Class Members Who File Appeals – Effective Guardians of the Interests of the Class or Mere Spoilers?' (2013) 32(4) *Civil Justice Quarterly* 445, 460.

216 See, for instance, Lipp B, 'Mass Tort Class Actions under the Federal Court of Australia Act: Justice for All or Justice Denied?' (2002) 28 *Monash University Law Review* 361, 382-383; Morabito V, 'Standing to Sue and Multiple Defendant Class Actions in Australia, Canada and the United States' (2003) 41(2) *Alberta Law Review* 295; Murphy B & Cameron C, 'Access to Justice and the Evolution of Class Action Litigation' (2006) 30(2) *Melbourne University Law Review* 399, 420.

217 *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317, 374. See also *Johnson Tiles Pty Ltd v Esso Australia Ltd (No 2)* [1999] ATP 41-698 [16]; *Grouped Proceedings in the Federal Court* [1988] ALRC 46 at [69]; and *Hollick v Toronto (City)* (2001) 205 DLR (4th) 19, 28-29.

218 Victorian Law Reform Commission, *Civil Justice Review,* Report No 14 (2008) 559, recommendation 99.

219 Commonwealth of Australia, Department of the Attorney-General: Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 115 (footnotes omitted).

220 Morabito V, *Class Action Facts and Figures: An Empirical study of Australia's Class Action Regimes,* First Report (Australian Research Council 2009) 18; Morabito V, *An Empirical Study of Australia's Class Action Regimes: Second Report* (Australian Research Council, 2010) ch 2. See also Caruana J & Morabito V, 'Australian Unions – the Unknown Class Action Protagonists' (2011) 30(4) *Civil Justice Quarterly* 382, 389.

SUBMISSIONS RECEIVED

5.15 Overall, submissions received by stakeholders in relation to the *Philip Morris* issue[221] were generally (but not uniformly) supportive of a legislative amendment expressly permitting claims to proceed against multiple defendants irrespective of whether each of the represented plaintiffs had a claim against all of the defendants. This would lead to a regime similar to that created by s 158 of the CPA (NSW).

5.16 The Western Australian Bar Association supported the inclusion of a provision equivalent to s 158(2) of Part 10 of the CPA (NSW). It was of the view that this was desirable as it eliminated the need to issue multiple actions against several respondents and then to consolidate them. It submitted that '[a] provision in similar terms to section 158(2) will provide a more streamlined procedure and will limit the burden on the Court's resources and the cost of issuing and conducting multiple actions'.[222] This approach was supported by the Chief Justice of Western Australia on behalf of the Court.[223]

5.17 Maurice Blackburn Lawyers also supported the New South Wales approach, suggesting that it was 'undesirable to have … judicial uncertainty regarding a procedural issue as fundamental as who may sue on behalf of whom'.[224]

5.18 In addressing the *Philip Morris* issue, the Law Society of Western Australia observed that it could not be definitively stated whether the federal regime does or does not allow representative proceedings where group members do not have claims against all defendants.[225] While acknowledging that the policy arguments in favour of expressly permitting group members to advance claims against different defendants were finely balanced, it submitted that:

> [i]t is in the interests of justice that such representative proceedings be commenced in the most flexible of ways, and therefore provisions similar to that in NSW that provide express permission to issue representative action against multiple defendants, irrespective of whether or not the persons affected have a claim against every defendant in the action, should be adopted in Western Australia.[226]

5.19 The Law Council of Australia submitted that Western Australian legislation should resolve the *Philip Morris* issue and that whilst there should be legislative clarity, the New South Wales legislative solution was not necessarily 'ideal'.[227]

5.20 Clayton Utz did not support the New South Wales approach, expressing the view that:

> … if the members of a class do not all have claims against multiple defendants then such provision will create very significant difficulties in defining "common questions". A preferable practice is to have multiple class actions managed together.[228]

5.21 The Commission considers that the proposed legislative representative action regime in Western Australia should expressly address whether all of the represented plaintiffs must have claims against all of the defendants. This will avoid the type of disputation that has arisen in the federal and Victorian jurisdictions. The Commission acknowledges that adoption of the New South Wales approach may, in some cases, expose defendants to increased costs and complexity from participating in a much broader claim. However, the Commission is of the view that while it is likely that the *Philip Morris* approach has little application in Australia, when regard is had to ensuring access to justice, effective case management and clarity of the law, the interests of justice are balanced in favour of adopting the New South Wales approach. It therefore recommends that an express provision similar to s 158 of the *Civil Procedure Act 2005* (NSW) be included in any new legislative scheme in Western Australia.

221 Notably all submissions were received prior to the decision of the Full Court of the Federal Court in *Cash Converters International Ltd v Gray* (2014) 314 ALR 154 which has substantially clarified the applicable law.
222 Western Australian Bar Association, Submission (7 June 2013) [14]–[17].
223 Chief Justice of Western Australia, Submission (13 June 2013) 1.
224 Maurice Blackburn Lawyers, Submission (31 May 2013) 5.
225 Law Society of Western Australia, Submission (27 May 2013) 4.
226 Ibid 5.
227 Law Council of Australia, Submission (7 June 2013) 6.
228 Clayton Utz, Submission (28 May 2013) 2.

5.22 In its Discussion Paper, the Commission also invited comment as to whether the proportionate liability provisions in the *Civil Liability Act 2002* (WA) could produce anomalous results depending on whether, under a new legislative regime, every group member would be required to have a claim against each named respondent.[229] The Commission did not receive any submissions suggesting that there would be any difficulties if the above requirement was or was not included in a new legislative regime.

Closed classes

5.23 Reference has been made in this Final Paper to the increased use of the 'closed class'.[230] As described earlier, a 'closed class' is an expression used to describe a situation where the membership of the plaintiff group is restricted, usually to those who enter into a specific retainer agreement with either a law firm or a litigation funder. Often the law firm or litigation funder will themselves impose a restriction upon those who are eligible to join the group (as illustrated by the Amcor/Visy class action referred to in Chapter 3).[231]

5.24 Closed classes have a number of advantages. Proceeding by way of a closed class may make the management of the claim less costly for solicitors or litigation funders, because there will be fewer plaintiffs with whom to deal and those claims may have a higher claim value. In addition, closed classes may narrow the matters that may need to be proved at trial in order to establish a common interest. For example, in a hypothetical representative action on behalf of smokers who are said to have contracted lung cancer as a result of inhalation of tobacco smoke, restricting the class of plaintiffs to those with a particularly high level of tobacco consumption might facilitate proof of causation for that class.[232]

5.25 A closed class will also facilitate requests for further and better particulars of the claims by defendants of each group member, because the claimants are identified with greater precision (and are likely to be fewer and more readily identifiable).[233]

5.26 In October 2005, Justice Stone of the Federal Court ordered the discontinuance of the *Dorajay Pty Ltd v Aristocrat Leisure Ltd* Part IVA proceeding for the following reasons:

> I find that the requirement that group members opt in to the proceeding to be inconsistent with the terms and policy of Pt IVA. It is inappropriate that the proceeding continue under Pt IVA while the MBC [the applicant's solicitors] criterion is part of the description of the representative group. I also find that, in the way in which the MBC criterion subverts the opt-out process, it is an abuse of the Court's processes as established by Pt IVA.
>
> The second, perhaps even more fundamental, objection to the MBC criterion is that it dictates who should represent group members. I find it an extraordinary proposition that the definition of the representative group should be used to confine a representative group to the clients of one solicitor, however narrowly the group is otherwise defined. In my view there is no support in principle or authority for this proposition and it is repugnant to the policy of the Act.[234]

5.27 What prompted this vigorous judicial response was the so-called 'MBC criterion'. Under this criterion, the group represented in (and thus bound by the outcome of) the proceeding, was limited to those shareholders who were also clients of the law firm acting for the plaintiff representative.[235]

5.28 In contrast, a slightly different closed class mechanism, used in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd ('Multiplex'),*[236] was held by the Full Court of the Federal Court not to contravene the requirements of Part IVA.

229 See Discussion Paper [4.17], [6.31D].

230 For discussion, see Chapter 3 above.

231 See above [3.33].

232 See Cashman P, 'Class Actions on Behalf of Clients: Is This Permissible?' (2006) 80(11) *Australian Law Journal* 738, 738–9, 750; Morabito V, 'Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29(1) *Sydney Law Review* 5, 36–7.

233 *Meaden v Bell Potter Securities Ltd* [2011] FCA 136.

234 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394, 431 [125]–[126] (Stone J). Stone J's reasoning was recently applied by Buchanan J in ordering the discontinuance of a Part IVA proceeding: see *Larsson v WealthSure Pty Ltd* [2013] FCA 926. It was also applied in the Victorian context, in *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449.

235 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394, 398 [10] (Stone J).

236 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275. In *Multiplex*, to be eligible to be part of the plaintiff group, a person was required to be a client of the litigation funders at the time the class proceeding was commenced. This difference led to the Full Federal Court in *Multiplex* distinguishing judicial findings in earlier cases on the basis that, in those cases, the ability of claimants to become class members *at any time after the start of the proceeding* constituted, in effect, an opt-in device.

5.29 Professor Morabito has pointed out that restricting the ambit of class proceedings to those persons who have taken the step of expressly instructing the class representative's solicitors to act on their behalf constitutes 'a far cry from the class action landscape … envisaged by the [ALRC] and by the Federal Parliament when they selected the opt-out mechanism'.[237]

5.30 The same observations may be made where a criterion requires persons to sign a litigation funding agreement with a named funder. It has been observed that '[i]t is difficult to see how this can be reconciled with the goals of enhancing access to justice and judicial efficiency in the form of a common binding decision for the benefit of all aggrieved persons'.[238]

5.31 The Full Court of the Federal Court's decision in *Multiplex* was predominantly based on the conclusion that the phrase 'some or all', found in s 33C of Part IVA, evinced a clear legislative intention that the employment of Part IVA was not to be restricted to proceedings brought on behalf of all the alleged victims.[239]

5.32 In 2008, the Victorian Law Reform Commission ('VLRC') concluded that it was desirable for the Victorian legislature to end the uncertainty surrounding this important issue created by conflicting judicial pronouncements.[240] It was concerned that the employment of closed class mechanisms 'has a number of undesirable policy consequences given that the class action procedure was designed as a means of obtaining a remedy for "all" of those adversely affected by the conduct giving rise to the litigation'.[241] Nevertheless, its preferred strategy was for express authorisation of limited closed class mechanisms.

5.33 Justice J Forrest of the Supreme Court of Victoria has also recently observed that:

> [i]t is clear from the text of the second reading speech and the Australian Law Reform Commission Report that one of the original aims of the federal legislation was to enable a claim to be brought on behalf of all persons who may have a claim against a defendant or defendants arising out of a particular event, rather than on behalf of a limited number.[242]

5.34 Several scholars and entities have suggested that bringing a representative action on behalf of some, but not all, of the victims of allegedly unlawful conduct is irreconcilable not only with the goal of access to justice, but also with the philosophy underpinning the opt-out device.[243]

5.35 As discussed below, the principal rationale for the opt-out device is to ensure that those claimants who, as a result of economic and non-economic barriers, are unable to take positive steps to be included in a representative action (that is, to opt-in), are not deprived of access to our legal system. These are the people who will most likely be harmed by the implementation of a closed class mechanism that restricts the litigation to, for instance, those who sign fee and retainer agreements and/or funding agreements with the class representative's lawyers and commercial litigation funders.

5.36 In contrast to the federal and Victorian regimes, the New South Wales regime effectively permits certain closed class actions to proceed.[244] It does so by expressly providing that it is not inappropriate for claims to be pursued by means of representative proceedings merely because group members do not include all members on whose behalf those proceedings might have been brought or are aggregated together for a particular purpose such as litigation funding.

237 Morabito, V. 'Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors' [2007] 29 (5) *Sydney Law Review,* 22.

238 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 292 [117] (Jacobson J).

239 Ibid 279 [10] (Lindgren J): 'the concluding words of s 33C(1) "as representing some or all of them" show positively an intention that there was to be no right of complaint merely because some of the persons falling within paras (a), (b) and (c) of s 33C(1) had been omitted from the group as defined'.

240 Victorian Law Reform Commission, *Civil Justice Review,* Report No 14 (2008) 524, 526.

241 Ibid 616.

242 *Matthews v SPI Electricity (No 13)* (2013) 39 VR 255, 262 [21]. See also Commonwealth of Australia, Department of the Attorney-General: Access to Justice Taskforce*, A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 115.

243 See, for instance, Legg M, 'Funding a Class Action through Limiting the Group: What does Pt IVA of the Federal Court of Australia Act 1976 (Cth) permit?' (2010) 33(1) *Australian Bar Review* 17, 21–23; Morabito V, 'Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29(1) *Sydney Law Review* 5, 22–3; King & Wood Mallesons, *Class Actions in Australia: The Year in review 2011* (2011) 8–9 available online at < http://www.kwm.com/en/au/knowledge/downloads/class-actions-in-australia-the-year-in-review-2011-20120301>.

244 *Civil Procedure Act 2005* (NSW) s 166(2).

5.37 The lawyers and litigation funder who discussed the situation with the Commission and who regularly commence proceedings in New South Wales have not suggested that this difference has led to different practical outcomes in that state. Those practitioners suggest that since the decision in *Multiplex*, commencing proceedings with a closed class in the Federal Court or the Supreme Court of Victoria has largely occurred without controversy.[245]

Submissions received

5.38 Submissions were fairly evenly balanced as to whether an express provision should or should not be included in any Western Australian legislation to facilitate closed classes in a similar manner to that set out in s 166(2) of Part 2 of the CPA (NSW).

5.39 The Law Council of Australia observed that closed class representative actions were relatively common in the Federal Court. It suggested that while an express provision may be unnecessary in the light of the decision in *Multiplex*, such a provision would remove the threat of such controversy arising in Western Australian actions. The Law Council of Australia also suggested that use of closed classes may have benefits including enabling defendants to 'better ascertain their potential liability'.[246]

5.40 The Chief Justice of Western Australia supported adoption of the New South Wales approach to this issue in any legislation introduced in Western Australia.[247]

5.41 So too did Maurice Blackburn Lawyers, which suggested that from a plaintiff's perspective, litigation funding is more likely to be forthcoming with closed classes.[248]

5.42 The Law Society of Western Australia indicated that it did not support an automatic closed class system. It referred to the position adopted by the ALRC in its report into Grouped Proceedings in the Federal Court [249] and indicated that the issue of whether a class should be closed should be ultimately subject to judicial discretion.[250] This approach was also endorsed by the Western Australian Bar Association, which made the observation that:

> [a]ny legislative regime introduced in Western Australia should operate so as not to automatically close out genuine claims, but should be sufficiently flexible to allow those with valid claims to be included in the class with the ability to opt out.[251]

5.43 There has been some controversy as to the circumstances in which closed classes may be allowed under that model. Clayton Utz contended that given the relatively limited serious judicial consideration of the New South Wales legislation, the considerable body of judicial authority relating to the federal model would create greater certainty.[252]

5.44 The Commission recognises that there is merit in each of the competing submissions and that the choice of the approach to adopt is a finely balanced one. Nonetheless, the Commission considers that it is preferable to adopt the existing federal and Victorian approach rather than one based on the less tested s 166(2) of the CPA (NSW). A provision which effectively allows a closed class to proceed automatically in circumstances provided for in s 166(2) of the CPA (NSW) is arguably less consistent with enhanced access to justice for all.

5.45 The Commission recommends that any Western Australian legislation introducing a representative action model does not include an express provision such as that currently found in s 166(2) of Part 10 of the CPA (NSW).

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245 The Commission refers to previous discussions with firms such as Clayton Utz, Freehills, Maurice Blackburn Lawyers and Slater & Gordon Lawyers, as well as IMF Australia, in relation to common current case management practices in such circumstances.

246 Law Council of Australia, Submission (7 June 2013) [24]–[26].

247 Chief Justice of Western Australia, Submission (13 June 2013) 1.

248 Maurice Blackburn Lawyers, Submission (31 May 2013) 2.

249 The ALRC expressed the following position: 'An effective grouping procedure is needed as a way of reducing the cost of enforcing legal remedies in cases of multiple wrongdoing. Such a procedure could enable people who suffer loss or damage in common with others as a result of a wrongful act or omission by the same respondent to enforce their legal rights in the courts in a cost-effective manner. It could overcome the cost and other barriers which impede people from pursuing a legal remedy. People who may be ignorant of their rights or fearful of embarking on proceedings could be assisted to a remedy if one member of a group, all similarly affected, could commence proceedings on behalf of all members. The grouping of claims could also promote efficiency in the use of resources by enabling common issues to be dealt with together. Appropriate grouping procedures are an essential part of the legal system's response to multiple wrongdoing in an increasingly complex world': *Grouped Proceedings in the Federal Court* [1988] ALRC 46 at [69].

250 Law Society of Western Australia, Submission (27 May 2013) 2.

251 Western Australian Bar Association, Submission (7 June 2013) [13].

252 Clayton Utz, Submission (28 May 2013) 1.

Codification of the role of the representative plaintiff

5.46 Consistent with the Commission's tentative view, most submissions that the Commission received on the question of codification of the roles and responsibilities of the representative plaintiff were to the effect that it was not strictly necessary.

5.47 Maurice Blackburn Lawyers submitted that codification was unnecessary on the basis that s 33T of Part IVA has not been heavily litigated 'because group members have elected not to avail themselves of that remedy'.[253] It also made the point that further indicators 'of the lack of significant group member concern regarding adequacy of their representatives are the relatively low levels of opting out in most Australian class actions and the low numbers of objections to settlement'.[254]

5.48 The Law Council of Australia submitted that there was no evidence to support a contention that group members have been dissatisfied with the adequacy of representation by the class representative. Accordingly, the Law Council of Australia could not see any reason to amend the federal position.[255] This approach was echoed by Clayton Utz, which was of the view that s 33C of Part IVA was sufficiently flexible.[256]

5.49 In contrast, both the Western Australian Bar Association and the Law Society of Western Australia supported – to a certain extent – codification of the role of the representative plaintiff.

5.50 The Western Australian Bar Association observed that there is currently 'no provision to deal with a conflict of interest between the representative plaintiff and the class'.[257] The Association suggested that consideration could be given to the formulation of a provision setting standards for the representative plaintiff. Such standards could include:

(a) requiring the representative plaintiff to certify that they have no interest adverse to the group and that they will act in the best interests of the group;

(b) allowing the separation of any individual action from the representative action where there is actual or perceived conflict between the representative plaintiff and other parties in the action; and

(c) expanding the terms of a section otherwise equivalent to s 33T to provide that on application by a group member, if it appears to the court that there is an actual or potential conflict of interest … then another representative group may be substituted … or the court may order separation of the claim … in respect of which there is a conflict from the balance of the group members.[258]

5.51 The Law Society of Western Australia considered whether there was a need for codifying the representative plaintiff's role as well as the requirements for removing the plaintiff. It supported the court and the parties being afforded as much flexibility as possible and suggested that these issues were best dealt with by the court determining what was in the interests of justice in each proceeding.[259]

5.52 The Chief Justice of Western Australia indicated that the Court agreed that it was not necessary to codify the precise role of a representative plaintiff. His Honour observed that it may be desirable to broaden the circumstances in which a representative party may be removed and replaced by another by inclusion of a 'sweeper provision' such as 'where it is in the interests of justice'.[260]

5.53 In the Commission's view, given:

(a) the relative lack of jurisprudence in relation to s 33T of Part IVA; and

(b) feedback from practitioners in the area to the effect that the current regime is satisfactory,

there is little justification to depart significantly from the established position.

253 Maurice Blackburn Lawyers, Submission (31 May 2013) [4].
254 Ibid.
255 Law Council of Australia, Submission (7 June 2013) [32]–[33].
256 Clayton Utz, Submission (28 May 2013) 2.
257 Western Australian Bar Association, Submission (7 June 2013) [19].
258 Ibid [22].
259 Law Society of Western Australia, Submission (27 May 2013) 6.
260 Chief Justice of Western Australia, Submission (13 June 2013) 2.

5.54 However, the Commission considers that it is desirable to broaden the circumstances in which the court may remove and substitute a representative party to include where it is in the interests of justice to do so.

5.55 The Commission recommends that any new legislative scheme in Western Australia include a provision based on s 33T of Part IVA but expanded so that a representative party may be removed and substituted by another where it is in the interests of justice to do so.

Limitation periods and representative actions

5.56 All submissions supported the view that the proposed legislative regime should contain a limitation suspension provision at least equivalent to s 33ZE of Part IVA. As observed by the Chief Justice of Western Australia:

> [t]he need to suspend the running of limitation periods while representative actions are on foot is, of course, one of the primary reasons why a legislative regime is necessary'.[261]

5.57 The Law Society of Western Australia noted that the federal scheme does not deal completely with the issue of limitation periods. In particular, the federal scheme has left open the way in which limitation periods are to be treated for parties that are subsequently excluded or removed from a class or in situations where a class is disbanded.[262] In the view of the Law Society, it should be made clear via legislation that relevant limitation periods cease to be suspended when a class is disbanded.

5.58 Of course, suspension of limitation periods, no matter how just it may otherwise be, will have consequences for opposing parties and their insurers. In these circumstances it is understandable that there are competing views about the extent to which limitation periods should be suspended.[263]

5.59 Overall, the Commission considers that having an equivalent to s 33ZE of Part IVA is justified in order to facilitate the policy objective of ensuring access to justice. While that provision does not cover all situations, the Commission does not recommend, at this stage, that there be any departure from it. Further, the Commission considers that should there be any legislative development concerning the suspension of limitation periods where a representative action is disbanded, it would be preferable for this to be dealt with in a nationally consistent manner.

Security for costs

5.60 The developed jurisprudence with respect to security for costs in federal representative actions will guide the courts with respect to Western Australian representative actions. The absence of explicit legislative criteria has however arguably resulted in conflicting decisions of federal judges and the need for the 'intervention' of the Full Court of the Federal Court on two separate occasions.

5.61 On the other hand, codification of factors relevant to security for costs may impede the development of the common law in this area.

5.62 Following a detailed study of security for costs and associated costs orders, the New South Wales Law Reform Commission recommended in December 2012 that the legislation governing representative actions in that state be amended to provide that:

> [i]n considering any application for security for costs, the court may take into account, among other factors, the immunity from costs orders for group members provided in s 181 [of the *Civil Procedure Act 2005* (NSW)], and the function of representative actions in providing access to justice.[264]

5.63 In its Discussion Paper, the Commission expressed the tentative view that the existing law with respect to security for costs can adequately deal with such issues to the extent they arise in representative proceedings. Submissions that the Commission received almost uniformly endorsed that view. These included submissions from the Chief Justice of Western Australia, the Western Australian Bar Association, the Law Society of Western Australia and the Law Council of Australia.

261 Chief Justice of Western Australia, Submission (13 June 2013) 2.
262 Law Society of Western Australia, Submission (27 May 2013) 6.
263 Clayton Utz, Submission (28 May 2013) 2.
264 New South Wales Law Reform Commission, *Security for Costs and Associated Costs Orders,* Report No 137 (2012) 72 [3.110] Recommendation 3.3.

5.64 The Commission accordingly does not recommend that a specific legislative provision be included in relation to security for costs in the proposed Western Australian legislative regime for representative actions.

Opting in or out of the proceedings and notice of the proceedings

5.65 The terms of reference require the Commission to consider:

> [T]he need to ensure that representative proceedings are conducted in a fair manner which give those who will be bound by the orders made in the proceedings a reasonable opportunity to decide whether or not to participate in the proceedings and be heard in relation to issues affecting their rights.

5.66 The freedom of a potential claimant to choose whether to be part of the representative action is a crucial element of any representative action regime.[265]

5.67 As explained by the Ontario Law Reform Commission in 1982:

> [O]ne of the most controversial issues in the design of a class action procedure is whether class members should be bound automatically by the judgment, unless they exclude themselves from the action after certification, or whether class members, other than the representative plaintiff, should be required to take affirmative action after certification in order to be bound by the judgment on the common questions and as a prerequisite to receiving any benefits of the suit. This fundamental question has been referred to in the literature on class actions as the 'opt-out/opt-in' issue.[266]

5.68 It is important to make clear the difference between the two main mechanisms traditionally used for participating in a representative action.[267] The first is to opt in to a representative action. Opting in (as described in Chapter 3 above) 'is used to describe the means of determining the members of the group where the persons represented must consent in writing before the commencement of the proceeding (or with leave thereafter) in order to receive the benefit of any judgment'.[268]

5.69 Opting out, however, is a process where group members who fit the 'related circumstances' criteria are deemed to be part of the group, even if they have not given their consent. However, group members can formally elect not to continue as group members if they wish, and they may then pursue their own claim.

5.70 As noted by the Law Reform Commission of Hong Kong, 'law reform agencies in other jurisdictions have regularly acknowledged that the choice between an opt-in and opt-out regime is possibly the most controversial issue in the design of a multi-party litigation regime'.[269]

5.71 In its 1988 report,[270] the ALRC concluded that:

> [S]ubject to the provision of appropriate protection, it should be possible to commence a group member's proceeding without first obtaining the consent of that group member. Provision should be made to ensure that group members are notified of the proceedings and that a group member can discontinue his or her proceeding or continue it independently. The rights of persons should not be prejudiced with the commencement of proceedings without consent.[271]

5.72 The opt-out model was considered by the ALRC to enhance access to legal remedies and reduce costs whilst increasing efficiency.[272]

265 See generally Mulheron R, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004) 37–8; Morabito V, 'Class Actions – the Right to Opt-out under Part IVA of the Federal Court of Australia Act 1976 (Cth)' (1994) 19(3) *Melbourne University Law Review* 615.

266 Ontario Law Reform Commission, *Report on Class Actions*, Report No 48 (1982) 467.

267 Many modified versions of these two models are possible: see generally Mulheron R, 'Opting-in, Opting-out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers' (2011) 50 *Canadian Business Law Journal* 376.

268 Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [8.100] See also *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 259 [280] (Mason P) citing: Morabito V, 'Class Actions – the Right to Opt-out under Part IVA of the *Federal Court of Australia Act 1976* (Cth)' (1994) 19(3) *Melbourne University Law Review* 615, 615-616.

269 Law Reform Commission of Hong Kong, *Report on Class Actions* (2012) 110 [4.1].

270 See *Grouped Proceedings in the Federal Court* [1988] ALRC 46 ch 4.

271 Ibid 56–57 [127].

272 Ibid 50 [108].

5.73 An effective opt-out regime requires strong provision for notification to advise potential group members that they have ability to opt out of the proceeding by a specified date:

> [I]t is important that the notice contain sufficient information to enable group members to exercise their rights in relation to the proceeding and that the content of any notice be clear and easy to understand. There needs to be a balance between the sometimes conflicting objectives of accuracy, simplicity and the avoidance of unnecessary distress to recipients.[273]

5.74 After considerable debate, the 'opt-out' process was adopted in Part IVA and is now reflected in all three Australian jurisdictions with legislative representative action provisions.[274] The Commission agrees with that approach.

5.75 Adoption of an opt-out regime (together with clear notification requirements) would promote consistency and uniformity in procedure and judicial interpretation. Empirical studies have also demonstrated that the employment of an opt-in regime decreases significantly the number of claimants that will be included within the ambit of the class action.[275] Adoption of an opt-in regime in Western Australia would place it at odds with other Australian jurisdictions and may increase the prospect of forum-shopping.

5.76 Submissions in relation to opting out of the representative proceedings were relatively uniform in their feedback. The Chief Justice of Western Australia, the Western Australian Bar Association, the Law Society of Western Australia, the Law Council of Australia and others were of the view that the current legislative provisions on opting out[276] can ensure that class members are made sufficiently aware of their opt-out rights. Further, the Commission notes that the Federal Court Practice Note CM 17 provides significant detail and guidance in relation to notices to group members.[277]

5.77 The Commission considers that any Western Australian legislative regime should adopt the opt-out model utilised in the federal scheme and in New South Wales and Victoria.

Approval of settlement or discontinuance

5.78 Settlement is the most frequent outcome of representative actions[278] and is addressed in substantial detail by many commentators.[279]

5.79 As the ALRC has observed:

> [A]part from the question of fairness to group members, it may be necessary for the Court to ensure that the precise scope of the settlement, with respect to the description of the group members and, in appropriate circumstances, with respect to the questions resolved by the settlement, has been adequately considered. Further, it may be necessary for the Court to be satisfied that appropriate methods for distributing any monetary relief have been devised and to give specific attention to possible conflicts of interest. In considering any application for approval, the Court could use its general powers to close the Court or impose reporting restrictions if it considered that potential prejudicial material should not be disclosed in open Court or reported to the general public.[280]

5.80 When trial judges are asked to approve settlement agreements executed by the parties to a representative action proceeding:

> [t]he role of the Court is important and onerous … It is protective. It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises…[281]

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273 Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Law Book Company, 2005) [8.120].

274 This approach is consistent with the approach taken by the Hong Kong Law Reform Commission in its report on Class Actions: see Law Reform Commission of Hong Kong, *Report on Class Actions* (2012) 112, recommendation 3; see also 122 [4.23].

275 Some of these American studies are summarised in Morabito V, 'Class Actions – the Right to Opt-out under Part IVA of the *Federal Court of Australia Act 1976* (Cth)' (1994) 19(3) *Melbourne University Law Review* 615, 629-633. See also Morabito V, *Class Action Facts and Figures: An Empirical study of Australia's Class Action Regimes*, First Report (Australian Research Council, 2009) 31; Mulheron R, '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.

276 See ss 33X and 33Y, as well as s 33J.

277 Federal Court of Australia, '*Practice Note CM 17: Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth)*' (9 October 2013). See also Clayton Utz, submission (28 May 2013) 3.

278 See Morabito V & Caruana J, 'Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia' (2013) 61 *American Journal of Comparative Law* 579, 603 (revealing a settlement rate of approximately 55% for Part IVA proceedings).

279 See, for example, Murphy B & Cameron C, 'Access to Justice and the Evolution of Class Action Litigation' (2006) 30(2) *Melbourne University Law Review* 399, 427–431; Grave D & Adams K, *Class Actions in Australia* (Sydney: Law Book Company, 2005) ch 13; Morabito V, 'An Australian Perspective on Class Action Settlements' (2006) 69(3) *Modern Law Review* 347; Cashman P, *Class Action Law and Practice* (Sydney: Federation Press, 2007) ch 6.

280 *Grouped Proceedings in the Federal Court* [1988] ALRC 46 at [218].

281 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [8] (Jacobson, Middleton and Gordon JJ). See also *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) (No. 9)* [2013] FCA 1350, (Jacobson J) [44]–[46] (Jacobson J); *Collin v Aspen Pharmacare Australia Ltd* [2013] FCA 1336, (Davies J) [4] (Davies J).

5.81 Settlement and discontinuance is dealt with in s 33V of the *Federal Court of Australia Act 1976* (Cth). It provides that:

(1) a representative proceeding may not be settled or discontinued without the approval of the Court; and

(2) if the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

5.82 Section 33V contains no guidance or criteria that a court should take into account when deciding whether to approve the settlement or discontinuance of an action. This has attracted criticism from some scholars.[282]

5.83 However, a significant body of case law has developed with respect to Part IVA settlement. This has also been supplemented by Federal Court Practice Note CM 17, which sets out a list of criteria to guide practitioners. It provides, for instance, that the party seeking approval of a settlement will usually be required to address at least the following factors:

(a) the complexity and likely duration of the litigation;

(b) the reaction of the group to the settlement;

(c) the stage of the proceedings;

(d) the risks of establishing liability;

(e) the risks of establishing loss or damage;

(f) the risks of maintaining a representative proceeding;

(g) the ability of the respondent to withstand a greater judgment;

(h) the range of reasonableness of the settlement in light of the best recovery;

(i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and

(j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.[283]

5.84 Many of the submissions received by the Commission observed that Federal Court Practice Note CM 17 is constructive and useful. The principles to be applied in approving settlement and discontinuance are now, as noted by the Law Council of Australia, relatively well settled. This is seen in the 'nine factor tests' used by Justice Goldberg in *Williams v FAI Home Security Pty Ltd (No 4)*.[284]

5.85 The Commission considers that it is desirable to achieve as much uniformity as possible between jurisdictions in relation to the way in which settlements of representative action proceedings are effected. This will reduce forum-shopping and provide benefits in terms of consistency of judicial approach.

5.86 Having regard to the similarity of the approach in the jurisdictions with legislative schemes, any framework adopted by Western Australia in relation to the settlement of claims also should be substantially based on the provisions of Part IVA and supported by the issuing of Practice Notes or Directions based on Federal Court Practice Note CM 17.

282 See, for instance, Mulheron R, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004), 397–8; Morabito V, 'An Australian Perspective on Class Action Settlements' (2006) 69(3) *Modern Law Review* 347, 381.

283 Federal Court of Australia, '*Practice Note CM 17: Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth)*' (9 October 2013) [11.2].

284 (2000) 180 ALR 459, 465–466 [19]. See also *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541; *Pathway Investments Pty Ltd v National Australian Bank Ltd* (No 3) [2012] VSC 625.

OTHER ISSUES

5.87 In addition to the issues upon which the Commission sought comment, a number of other issues relevant to representative actions were canvassed in the Discussion Paper. They included certification of the class, the issue of competing proceedings, litigation funding, interlocutory disputes and cy-près regimes.

5.88 While the Commission did not specifically seek comment on these issues, they were included (and are included in this Final Report) because they are relevant to a discussion of representative actions in the Australian court system.

Certification of the Class

5.89 A fundamental distinction between Part IVA proceedings in Australia and the American class action regime relates to class certification[285] by a judge that a proceeding is appropriate to be brought as a class action.

5.90 Such certification is not required under the Australian regimes which are based on the decertification regime the ALRC proposed for the Federal Court. The principal justification for not requiring certification was explained as follows by the ALRC:

> [I]n class actions in the United States and Quebec, the preliminary matter of the form of the proceedings has often been more complex and taken more time than the hearing of the substantive issues. Because the court's discretion is involved, appeals are frequent, leading to delays and further expense. These expenses are wasteful and would discourage use of the procedure. There is no need to go to the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure at any time.[286]

5.91 While many commentators have provided negative assessments of Part IVA's 'decertification' regime, Professors Morabito and Caruana suggest that some of this criticism relates not to the lack of a certification device[287] but to some of the features of the Part IVA decertification regime and the way it has been managed by trial judges.[288] Following a review of all the Part IVA proceedings filed in the first 17 years of Part IVA's operation, Professors Morabito and Caruana concluded that Part IVA's decertification regime had operated in a satisfactory manner. They found, for instance:

> [n]o evidence of claimants taking advantage of this absence of a compulsory certification device by regularly filing class actions with respect to claims that could not possibly be advanced fairly and efficiently through the class action device. On the contrary, [it was] found that for every ten class actions that defendants sought to have decertified, eight proceeded as class actions, with the support of the court. [It was] also discovered that, contrary to popular belief, defendants have not filed decertification applications in a majority of class actions as almost three out of every four cases were not the subject of decertification applications.[289]

5.92 While recognising there are competing views about the merits of a certification regime, the Commission does not recommend its incorporation into any Western Australian legislative regime. To do so would be fundamentally inconsistent with the federal, New South Wales and Victorian regimes. In the Commission's view, the inclusion of a certification regime should not occur in the absence of agreement for its uniform adoption by all relevant states and the Commonwealth.

285 For a detailed discussion, see Discussion Paper, ch 5.

286 *Grouped Proceedings in the Federal Court* [1988] ALRC 46 at [146].

287 Those who have been critical of the drafters of Part IVA for not including a certification device have included Justice Finkelstein of the Federal Court of Australia: see *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 116 [18].

288 Morabito V and Caruana J, 'Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia' (2013) 61 *American Journal of Comparative Law* 579, 583.

289 Ibid 614. They also found that defendants who 'did not seek decertification orders were able to secure more summary dismissals and less class-wide settlements than defendants who did seek decertification (but without success). Another positive finding for defendants was that when they failed to secure a decertification order, contrary to their US counterparts, defendants were not invariably faced with the prospect of a class-wide settlement. The empirical data concerning the operation of this decertification regime, when it was activated by the challenges launched by defendants, also revealed a different reality from that depicted in the legal literature. In fact, it showed that more often than not such challenges were dealt with more promptly than certification motions in the United States': ibid.

Competing representative actions

5.93 The employment of the opt-out device means that it is possible for different class representatives, represented by different law firms, to file class actions with respect to the same persons. The overlap between the classes of claimants represented in competing representative actions may also be partial rather than complete.

5.94 In January 2000, the ALRC noted that '[i]t is obviously unsatisfactory to have multiple representative [Part IVA] proceedings in relation to the same dispute'.[290] It drew attention to:

(a) the request by several practitioners for clear criteria for selecting which competing class actions should proceed;

(b) the important role played by the class representative's lawyers; and

(c) the lack of legislative guidance.

5.95 The ALRC recommended that the issue of competing representative actions be considered in a general review of the operation of Part IVA. It also recommended that the Federal Court promulgate additional rules in relation to issues such as criteria for selecting the appropriate [Part IVA] representative action and representative party amongst competing applications.[291]

5.96 In order to assess how frequently representative actions are commenced in relation to the same disputed subject matter, Morabito reviewed the 45 representative actions that were commenced (under the federal and Victorian legislation) between March 1992 and January 2012. He found that those actions concerned only 17 disputes.[292]

5.97 A concern[293] that arose after the decision in *Multiplex*[294] (which permitted representative actions to proceed as closed classes) was that the courts would see a dramatic increase in the number of competing representative actions. There appears to have been an increase in competing representative actions.[295] However, feedback from practitioners regularly working in the jurisdiction, as well as commentators, is that this competition is managed productively between the respective law firms, either through agreement or through the formation of a litigation committee.[296]

5.98 While acknowledging the above issues, the Commission is not persuaded that additional mechanisms should be included as part of the proposed legislative regime to manage competing representative actions.

290 ALRC, *Managing Justice – A Review of the Federal Civil Justice System,* Report No 89 (2000) 532 [7.96].

291 Ibid 551 [7.128], Recommendation 79.

292 Morabito V, 'Clashing Classes Down Under – Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives' (2012) 27(2) *Connecticut Journal of International Law* 245, 313.

293 Ibid 314.

294 (2007) 164 FCR 275.

295 Morabito V, 'Clashing Classes Down Under – Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives' (2012) 27(2) *Connecticut Journal of International Law* 245, 314.

296 Grave D, Adams K & Betts J, *Class Actions in Australia* (Sydney: Thomson Reuters, 2nd ed, 2012) [9.100].

Interlocutory disputes

5.99 An issue that has been raised with the Commission relates to the prevalence of interlocutory disputes that are sometimes characteristic of representative actions. As summarised by Justice Finklestein in *Bright v Femcare Ltd*:

> There is a disturbing trend that is emerging in representative proceedings which is best brought to an end. I refer to the numerous interlocutory applications, including interlocutory appeals,that occur in such proceedings. This case is a particularly good example. The respondents have not yet delivered their defences yet there have been approximately seven or eight contested interlocutory hearings before a single judge, one application to a Full Court and one appeal to the High Court. I would not be surprised if the applicants' legal costs are by now well in excess of $500,000. I say nothing about the respondents' costs. This is an intolerable situation, and one which the court is under a duty to prevent, if at all possible. One possible approach in these types of cases (that is, product liability or mass torts claims) is to bring the action on for speedy determination. By giving appropriate directions the court can ensure that the parties get on with the litigation and do not become bogged down in what are often academic or sterile arguments about pleadings, particulars, practices and procedures. What I say should not be taken as a particular criticism of the present respondents. But it is not unknown for respondents in class actions to do whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful.[297]

5.100 Justice Lindgren, when commenting extra judicially on practical measures that could be adopted to limit unnecessary interlocutory disputes, suggested that courts could commence a case management conference early in the proceeding.[298]

5.101 Much of the discussion around management of interlocutory disputes overlaps with the implementation of effective case management more generally. In each jurisdiction with a legislative regime practice notes have been issued in relation to how representative actions are managed.

5.102 In July 2010, for instance, a detailed practice note on Part IVA was released by the Federal Court. One of the express aims of this practice note was to facilitate 'the efficient and expeditious conduct of representative proceedings, in particular by ensuring that the issues that are in contest are exposed at an early date and that representative proceedings are not unnecessarily delayed by interlocutory disputes'.[299]

5.103 One of the major ways in which the note seeks to achieve this objective is by requiring the holding of an initial case management conference within six weeks from the date on which the application was filed.[300] At this conference, the parties should be in a position to address a number of matters including any issues regarding the description of the class and the timetabling of any interlocutory applications.[301] The court must also fix, as early as possible, dates for the filing, service and return of any interlocutory applications challenging the commencement of the proceeding as a Part IVA proceeding, seeking an order under s 33M or s 33N or otherwise modifying or removing the representative character of the action.[302]

5.104 The Commission is of the opinion that it would be prudent for the Supreme Court to issue a similar practice note or direction in Western Australia upon the introduction of a legislative regime for representative actions.[303]

297 *Bright v Femcare Ltd* (2002) 195 ALR 574, 607-608.

298 Lindgren KE, 'Some Current Practical Issues in Class Action Litigation' (2009) 15(2) *University of New South Wales Law Journal Forum* 16.

299 Federal Court of Australia, '*Practice Note CM 17: Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth)* (5 July 2010)' [1.2(b)]. Now reflected at [1.3(b)] of the current version of the practice note, issued on 9 October 2013: see http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm17.

300 Ibid [3.1].

301 Ibid [3.5].

302 Ibid [5.1].

303 For instance, the strategic conferencing system recently introduced into the Supreme Court of Western Australia is an example of a case management practice that could be adopted (successfully one might think) for representative actions commenced in that Court: see Western Australian Supreme Court, *Practice Direction No 4.1.2*, Case Management by Judges – the Commercial and Managed Cases (CMC) List, 31 March 2015 [11]–[19].

Cy-près regimes

5.105 A cy-près or 'next-best' regime refers to a situation where:

> [t]he class is entitled (via either judgment or settlement) to a sum of damages, but distribution of these damages to the class members individually or collectively is impractical or infeasible. In that case "the court [can] use cy-près principles to distribute unclaimed funds … for a purpose as near as possible to the legitimate objectives underlying the lawsuit, in the interests of class members, and the interests of those similarly situated".[304]

5.106 Cy-près relief is part of the Canadian class action regime, which is discussed in detail in Chapter 5 of the Discussion Paper. While the ALRC did not recommend the introduction of the regime in 1988,[305] the VLRC recommended the introduction of a cy-près regime into the Victorian legislation as part of its civil justice review in May 2008. To date, however, it has not been introduced.[306]

5.107 Professor Morabito partly attributed the apparent lack of support for the introduction of a cy-près regime in Victoria to a philosophical approach that the introduction of a representative action regime should not penalise respondents any more than provided for by existing remedies to causes of action otherwise brought in tort, contract or pursuant to a statute.[307]

5.108 The Commission does not recommend that cy-près relief be introduced as part of a Western Australian legislative regime, for similar reasons to those expressed in relation to the merits of introducing a certification procedure. If such relief were to be introduced it is preferable that this only occur as part of a harmonised approach across relevant jurisdictions.

Litigation funding

5.109 In the Commission's view, issues such as litigation funding (and arguably cy-près relief) do not directly fall within the terms of reference, which are primarily directed at the best framework within which representative actions should be conducted.

5.110 The Law Society of Western Australia observed in its submission that:

> [g]iven the unique relationship between representative proceedings and litigation funding, that despite litigation and funding having a broader ambit than representative proceedings, it is necessary for the Commission to give the issues arising from litigation funding at least some attention.
>
> Even with an effective representative proceedings regime aimed at improving access to justice, the cost of litigation continues to make it very difficult for the persons intended to enjoy the benefit of the regime to practically do so.[308]

5.111 The Commission's focus on the required reform at this point in Western Australia is what one might describe as threshold reform, to resolve the fundamental uncertainty created as a result of an absence of a legislative regime for representative proceedings. It does however acknowledge that the topic of litigation funding has gained prominence in recent years in relation to representative proceedings.

5.112 Litigation funding is a legally enforceable arrangement where a third party (the litigation funder) enters into an agreement with a plaintiff and/or claimants to an action. The substance of the agreement is usually an arrangement under which the funder agrees to meet the costs of the litigation, indemnify the plaintiffs/claimants in the event of an adverse costs order and if necessary, provide security for costs. In exchange, the plaintiffs/claimants usually agree to pay the funder a percentage of the damages they are awarded, which is usually between 25% and 40%.[309]

304 Mulheron R, as cited in Morabito V, 'The Victorian Law Reform Commission's Class Action Strategy' (2009) 15(2) *University of New South Wales Law Journal Forum* 107, 110.
305 In the Discussion Paper there is a broad discussion at [236]–[240] about how one would dispose of aggregate funds, although the notion of cy-près relief was not directly discussed.
306 *Civil Justice Review* [2008] VLRC 14 at 559.
307 Morabito V, 'The Victorian Law Reform Commission's Class Action Reform Strategy' (2009) 15(2) *University of New South Wales Law Journal Forum* 107, 110.
308 Law Society of Western Australia, Submission (27 May 2013) 8.
309 Standing Committee of Attorneys-General, *Litigation Funding in Australia*, Discussion Paper (2006) 4, 7; see also Law Council of Australia, *Regulation of third party litigation finding in Australia*, Position Paper (2011).

5.113 Litigation funding is often contended by its proponents to facilitate access to justice and provide a means of managing litigation risk. However, a number of issues arise. For instance, what is the appropriate level of control that a litigation funder should have in relation to the strategic direction of litigation? To what extent should the litigation funding industry have additional prudential regulation attached to it?[310]

5.114 A total of 18 Part IVA proceedings are believed to have been funded during the first 17 years of Part IVA proceedings in the Federal Court.[311] IMF Australia, considered to be the largest litigation funding company in Australia, had no group actions in its portfolio upon its listing. However, by 2009, IMF Australia was of the view that 'multi-party litigation will remain a prominent component of its total claims portfolio'.[312]

5.115 As can be seen from the brief discussion above, the issue of litigation funding is a topic of sufficient complexity to warrant a discussion paper in its own right. Consistent with the Commission's approach in the Discussion Paper, the issue of litigation funding is not further addressed in this report.

Maintenance and champerty

5.116 A further issue that was raised by a number of interested stakeholders in the submissions received by the Commission following the publication of the Discussion Paper related to the torts of maintenance and champerty.

5.117 The Law Council of Australia observed that whilst the torts of maintenance and champerty had been abolished in the Australian Capital Territory, New South Wales, South Australian, Victoria and in the United Kingdom, the status of these torts was not clear-cut in Western Australia.[313]

5.118 The Law Society of Western Australia was of the view that it would be appropriate to expressly abolish the torts of maintenance and champerty in this State in order to address the possibility of forum-shopping. It observed that:

> [o]ne of the Society's members has advised of firsthand experience of a litigation funder opting to commence representative proceedings in NSW, rather than Western Australia (to which a closer nexus lay), due to the uncertainty that results from maintenance and champerty continuing to be a tort in Western Australia.[314]

5.119 The scope of the torts of champerty and maintenance now appears to be of relatively limited potential application, particularly following the reasons of the High Court in *Campbells Cash & Carry v Fostif.*[315]

5.120 The Commission's view is that legislative abolition of the torts of champerty and maintenance or, at least, modification of the law in relation to their operation, may have merit. This is arguably consistent with the objectives of enhancing access to justice and ensuring that Western Australia is utilised as an appropriate forum for proceedings.

5.121 The Commission is conscious that this issue was not generally canvassed in its Discussion Paper or the submissions it received, and that a number of potentially competing policy considerations and views should be considered before a final decision is made. Therefore, the Commission has not formed a final view about this issue.

5.122 The Commission recommends that in conjunction with any legislative reform by way of the introduction of a legislative regime for representative actions, consideration be given to whether the torts of champerty and maintenance should be abolished, or the law in relation to their operation modified.

310 See Law Council of Australia, *Regulation of third party litigation finding in Australia*, Position Paper (2011) 17, 18.
311 Morabito V, *An Empirical Study of Australia's Class Action Regimes: Second report* (Australian Research Council, 2010) 37.
312 Walker, et al, 'Funding Criteria for Class Actions' (2009) 15(2) *University of New South Wales Law Journal Forum* 96.
313 Law Council of Australia, Submission (7 June 2013) [48]–[50].
314 Law Society of Western Australia, Submission (27 May 2013) 9.
315 (2006) 229 CLR 386.

CHAPTER 6
FINAL CONCLUSIONS AND RECOMMENDATIONS

6.1 Representative actions of the size and scale of those currently being issued in the federal, Victorian and New South Wales jurisdictions are increasingly becoming a feature of the legal landscape. This trend is likely to continue.

6.2 Order 18 Rule 12 of the *Rules of the Supreme Court 1971 (WA)* (RSC) is inadequate to facilitate large representative actions being litigated on their merits in our state courts. This impacts adversely on access to justice and the time, costs and risks associated with seeking redress through the courts of this state.

6.3 The introduction of a legislative scheme which is similar to Part IVA should address these concerns to a significant extent.

6.4 For the reasons set out in this report, and having considered the many submissions received, the Commission makes the following recommendations:

1. that Western Australia enact legislation to create a scheme in relation to the conduct of representative actions.
2. that the legislative scheme be based on Part IVA of the *Federal Court of Australia Act 1976* (Cth).
3. that Order 18 Rule 12 of the RSC be retained.
4. that the legislative scheme include a provision based on s 33T of Part IVA of the *Federal Court of Australia Act 1976* (Cth) but that it be expanded so that a court may remove and substitute a representative party where it is in the interests of justice to do so.
5. that a provision equivalent to s 158(2) of the *Civil Procedure Act 2005* (NSW) be included in the legislative scheme.
6. that a provision equivalent to s 166(2) of the *Civil Procedure Act 2005* (NSW) not be included in the legislative scheme.
7. that in conjunction with any implementation of the above recommendations, consideration be given by government to whether the torts of maintenance and champerty should be abolished or whether the law in relation to their operation should be otherwise modified in Western Australia.

APPENDIX A: LIST OF SUBMISSIONS

1. Mental Health Law Centre (Western Australia) (7 May 2013)
2. The Law Society of Western Australia (24 May 2013)
3. Clayton Utz (28 May 2013)
4. Maurice Blackburn Lawyers (31 May 2013)
5. Western Australian Bar Association (7 June 2013)
6. Law Council of Australia (7 June 2013)
7. Chief Justice of Western Australia (13 June 2013)