Douglas Campbell KC
Joshua Creamer
Megan Brooks

Class Actions 101

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In this paper, we set out a list of the matters to consider whether your client is contemplating commencing a class action, your client is defending a class action or your client is deliberating about whether to join a class action. We have tried to provide practical tips - and identify common pitfalls - so you may avoid them.

Jurisdiction – the legislative framework

1. Class actions are a creature of statute. Their introduction into Australian law was not welcomed wholeheartedly. When Part IVA of the *Federal Court of Australia Act* (***FCA Act***) was first introduced in March 1992, it was suggested that it represented the thin end of the wedge and that it would introduce something similar to that found in the United States - a deluge of expensive and long running litigation that only benefits lawyers and few others. That dismal prophecy has provided to be incorrect and class actions in Australia makeup a very small percentage of commenced litigation, although the nature of the claims involved tend to make them more high profile.

2. Part IVA of the FCA Act plays a dominant role in class action jurisprudence. Its terms are reflected, almost word for word, in class action legislation introduced in NSW, Victoria and Queensland.[1] The dominance of the Federal Court is under challenge, particularly as State Judges gain more experience in the area.

3. The major differences between State based class actions and those commenced under the FCA Act are:
   (a) contingency fees. Victoria has introduced contingencies fees which means that legal firms can take a percentage of an award made on top of their normal regulated legal fees. This is not an uncontroversial innovation.[2]

[1] *Civil Proceedings Act 2011* (Qld) (Part 13A), *Civil Procedure Act 2005* (NSW) (Part 10), *Supreme Court Act 1986* (Vic) (Part 4A).

[2] The *Justice Legislation Miscellaneous Amendments Act 2020* (Vic) introduced s 33ZDA to the Supreme Court Act 1986 (Vic) (Supreme Court Act). Commentary: The amendment was said to have two objectives; (i) to 'pave the way for class actions to proceed where they otherwise may not have been viable' and hence 'promote greater access to justice' and (ii) to reduce the risk of a lead plaintiff being exposed to an adverse costs order or being required to provide security for costs. The Amendment was in response to a recommendation by the Victorian

(b) There is a lower bar for class actions commenced in New South Wales than in other jurisdictions following the decision of the Supreme Court in *Fernandez v State of New South Wales*.[3] The NSW legislation s 157(1) reflects s 33C(1) of the FCA Act. Both pieces of legislation also state "a person has a sufficient interest to commence representative proceedings against another person on behalf of other persons if the person has standing to commence proceedings on the person's own behalf against that other person." However, NSW also has the following text in section 158(2): Class representatives may commence proceedings on behalf of group members "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." In *Fernandez* Garling J remarked that s 158(2) was the "critical provision." Having regard to the wording of s 158 and the purpose of the CPA, his Honour concluded that the correct interpretation of s 158(2) was "that it is not necessary for a plaintiff to have a claim personally against each [defendant] joined to the proceeding. What is necessary, in accordance with s 158 of the CPA, is that either a plaintiff or a group member has a claim against at least one of the [defendants]." His Honour found there could be no reason why a plaintiff may not adequately represent group members in proceedings, though that plaintiff doesn't have a claim against all the defendants.

Practice Directions

Federal Court of Australia – Class actions Practice Note (GPN-CA) – 20 December 2019

https://www.fedcourt.gov.au/law-and-practice/class-actions#practice

4. This class action practice note applies to those actions commenced under Part IVA of the *Federal Court of Australia Act* 1976 (Cth) (the **FCA Act**) and is to be read with the Central Practice Note the Division 9.3 of the *Federal Court Rules* 2011 (Cth) and the relevant National Practice Area practice note.

5. It explains the Court's expectations as to the management of some of the practical issues that frequently arise in class actions, such as:

Law Reform Commission (VLRC) in its report Access to Justice: Litigation Funding and Group Proceedings. The report noted that had been debate for many years about whether lawyers should be able to charge contingency fees, but ultimately recommended they be introduced in Victoria.

[3] (No 2) [2021] NSWSC 471.

(a) how to draw the statement of claim such that the applicant claims is used as a vehicle for determining the common questions;

(b) disclosure of any retainers or costs agreements between the applicant's lawyers, the applicant and/or group members or any litigation funding charges, and what information that disclosure ought contain written in clear terms and involving an ongoing obligation to keep group members up to date with any changes;

(c) disclosure of those agreements to the Court and other parties;

(d) how any competing class action might be dealt with;

(e) how information pertaining to group members claims might be ascertained at an early stage to assist resolution by mediation;

(f) establishing a protocol for communication with unrepresented group members by the respondent;

(g) the form of the opt-out notice;

(h) how the initial trial might be structured (e.g. common issues/non-common issues concerning liability to be determined first);

(i) the procedure for settlement, including Court approval of any proposed settlement, and Court supervision of deductions for legal fees and litigation funding charges.

6. The GPN-CA is intended to set out some guiding principles for the conduct of class actions generally and is not intended to be inflexibly applied. Its purpose is to facilitate the efficient and expeditious conduct of class actions, particularly in relation to ensuring the issues in dispute are exposed early in the proceeding and that a class action not be unnecessarily delayed by interlocutory disputes.

7. One measure designed to facilitate both those goals outlined in the GPN-CA is one in which parties are encouraged to file a joint position paper in advance of the first case management hearing to inform the Court of preliminary issues in the proceedings and each parties' position as to those issues. A comprehensive preliminary discussion regarding disclosure will also be held.

8. The first case management hearing is intended to be a less formal 'exchange' of information between the parties with parties to be prepared to discuss a long list of matters that will have a bearing on how the proceeding will be managed.

Supreme Court of Queensland – Representative Proceedings Practice Direction 2017/2

https://www.courts.qld.gov.au/__data/assets/pdf_file/0015/510900/÷sc-pd-2of2017.pdf

9. Like the Federal Court's GPN-CA, this practice direction acknowledges the complexities of class actions and outlines the practices adopted to assist in the prompt and efficient resolution of those proceedings commenced under Part 13A of the *Civil Proceedings Act* 2011 (Qld) (**CPA**).

10. PD 2017/2 outlines the process for commencement of proceedings, the assignment of proceedings to a presiding judge by the Chief Justice in consultation with the Senior Judge Administrator, the matters the parties will be expected to deal with at the first case conference and then subsequent case conferences, how interlocutory disputes will be handled, the notices that might be sent to group members and that such notices require the approval of the Court,[4] and referral to mediation.

11. Rather than more formal direction hearings, case conferences are conducted in a manner designed to promote discussion between the parties and the judge "to explore the best method of bringing a case to hearing".

12. Parties are encouraged to file a joint position paper in advance of every case conference, identifying any issues and their position on each.

13. Unless the presiding judge orders otherwise, PD 2012/11 – Supervised Case List, PD 2011/10 - Use of Technology for the Efficient Management of Documents in Litigation and PD 2022/03 Commercial List will not apply to a class action proceeding in the Supreme Court of Queensland.

Getting started

14. The breadth of the jurisdiction includes but is not limited to:

(a) Personal injury, through contamination or defective products;
(b) Shareholders;
(c) Anti-cartel;
(d) Disasters;
(e) Consumer;
(f) Environmental;
(g) Human rights; and

[4] See ss 103H(4), 103T(1)(b), 103R, 103S(4), 103T(1)(c), 103T(3) and 103V(4) of the CPA.

(h) Employment.

15. Having been satisfied that the three threshold questions posed by the class action regime are met:

    (a) There must be:

        i. claims by seven or more persons; and
        ii. the claims must be against the same person.

    (b) The claims must arise out of the same, similar or related circumstances.
    (c) There must be a substantial common issue of law and fact. [5]

16. We turn to a number of the practical issues in commencing proceedings.

17. One of the main features which distinguish class actions from many other proceedings from the legal team's perspective is - control. In the initial stages prior to the commencement of the proceedings, the Applicant, Group Members and lay witnesses may yet to be identified. For that reason, there is often an exhaustive amount of work prior to filing, usually referred to as the investigation stage, this will involve research by your instructing solicitor, expert evidence, advices from counsel, interviewing potential groups members and the identification of a potential applicant. Only once that process of investigation is complete will pleadings be able to be drawn and an obvious candidate for an Applicant will present themselves, the sample group members and witnesses may be an involving concept and will not need to be determined until after the proceedings is filed.

Do we file in the Federal Court or the Supreme Court?

18. There are many aspects to consider when commencing class action proceedings, the paramount consideration is jurisdiction which we have already touched upon, this may largely be dependent upon the subject matter or the statutory power. There are other considerations particularly in respect of historical cases. Part IVA, s33B of the *Federal Court of Australia Act 1974* limits the ability to bring actions that commenced prior to the commencement of the regime in 1991. That limitation is not present in Queensland regime. In fact, the amendments to the *Civil Proceedings Act* by the *Limitations of Actions (Child Sexual Abuse) and Other-Legislation Amendments 2016 (Qld)* were done with the express consideration of commencing class actions for historical abuse.

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5 *Federal Court Act 1976*, s33C.

Do we need litigation funding?

19. There is also a question as to whether litigation funding should be sought. Graves, Adams and Betts in their text *Class Actions in Australia* 3rd ed. Note the use of third-party litigation funders, increased in proceedings commenced in the Federal Court of Australia, from 15 per cent during the period of March 1992 to March 2013 to 64 per cent during the period March 2013 and March 2018. The increase in the use of third-party litigation funders gained some political notoriety under the previous Commonwealth government. The issue was considered by Australian Law Reform Commission in its report *Integrity Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* published December 2018. It was further considered by a Parliamentary Joint Committee on Corporations and Financial Service into Litigation funding and the regulation of class actions, the Committee's report was published on 21 December 2020. Under the current Federal Government, the controversy seems to have abated – at least for now. Nevertheless, the consideration of the use of a Third-Party litigation funded is an important one, litigation funding will impact on the resources available in a case and the amount received by group members at the end of a case when the funder makes a claim for its costs and any commission.

Do we undertake a book build before filing?

20. Another practical consideration is a book build, whether the Applicant should take steps to register potential group members before the proceeding is filed. Lee J in *CJMcG Pty Ltd as Trustee for the CJMcG Superannuation Fund v Boral Limited (No 2*) [2021] FCA 350 at [76] noted:

> The Court has expressed the view on a number of occasions as to the waste of conducting an expensive book building exercise in circumstances where it is proposed that a funder will be remunerated by way of a CFO. At least from my point of view though, comments that I had made to that effect seemed of particular importance when the practice had developed within the Court of making what are now described as "Commencement CFOs". Once the heresy of Commencement CFOs was pointed out by the High Court in *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 94 ALJR 51, some of the force of those observations was diminished in that if, such as in the present case, no CFO was proposed to be sought, then it would be entirely appropriate for those seeking to promote a class action to book build. Indeed, the entire economics of the Martini proceeding are based on book build, in circumstances where it proposes to seek a funding equalisation order.

21. His Honour's comments highlight whether to conduct a book build prior to filing proceedings will largely dependent upon the strategy and economics of the proceedings. A closed class does require a book build, "closed classes are when the group definition is limited to persons who entered into retainer agreements with a particular law firm of third-party litigation funder."[6]

Do the Group Members have a substantial common issue of law and fact?

22. Section 103B (1)(c) of the *Civil Proceedings Act 2011* (Qld) and s33C(c) of the FCA require "the claims of all persons give rise to a substantial common issue of law or fact".

23. Legg and Metzger in their text *The Australian Class Action – A 30 year Perspective* cite the decision of the High Court in *Wong v Silkfield Pty Ltd* [1999] 199 CLR 255, Legg and Metzger note, 'what is required is that the claims give rise to a common issue of law or fact which is "substantial". Substantial may mean "large or weighty" or "real or of substance as distinct from ephemeral or nominal. The High Court found that the common issue requirement was not meant to be an onerous one and that in this context, substantial did not indicate a large or significant issue, or one that would have a major impact on the overall outcome of the litigation, but instead is 'directed to issues which are "real or of substance". [7]

24. Justice Murphy of the Federal Court notes "the model of Part IVA is that once the proceeding meets the threshold requirements of s 33C, and is otherwise suitable to proceed as a class action, the matter proceeds on the basis that any findings made at a trial of common issues bind not only the parties, but also all non-party class members to the extent that those issues arise in each class member's claim. In providing a remedy for mass civil wrongs there is a good basis for the proposition that to maintain the utility and efficiency of the regime the resolution of the common issues should (as far as possible) occur without the necessity for class members to participate as parties or be involved actively in the interlocutory steps and initial trial."[8]

25. In *Dillon v RBS Group (Australia) Pty Limited* [2017] FCA 896, Justice Lee of the Federal Court noted:

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[6] Graves, Adams and Betts, *Class Actions in Australia* 3rd ed at [16.150].
[7] Legg and Metzger 2023, *The Australian Class Action – A 30 year Perspective*, The Federation Press p9.
[8] Justice Murphy, The Operation of the Australian Class Action Regime, March 2013, https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy-j-20130309

> [31] Part IVA, s 33ZB, which provides that the orders made at the conclusion of an initial trial will bind all group members (other than any person who has opted out) by what the High Court described as a "*kind of statutory estoppel*": see *Timbercorp Finance Pty Ltd (in liquidation) v Collins; Timbercorp Finance Pty Ltd (in liquidation) v Tomes* [2016] HCA 44; (2016) 91 ALJR 37 at 47 [52]. Of course, the orders finally bind the applicant and respondent as parties in accordance with usual principles of *res judicata* subject only, of course, to a right of appeal. [31] Dillon v RBS Group (Australia) Pty Limited [2017] FCA 896

26. In reference to s33C of the FCA, His Honour held:

> [44] The 'claims' of all persons referred to in this 'gateway' provision are only required to be in respect of, or arise out of, similar or related circumstances and give rise to one substantial common issue of law or fact. It necessarily follows that the claims of the applicants (who represent the group) and group members (represented persons) can be quite different. As Gordon J explained in *Timbercorp* at [104], the legislative scheme:
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> > ...expressly contemplates and provides for the individuality of claims within a group proceeding. For example, a group proceeding may be commenced "whether or not the relief sought ... is the same for each person represented" and whether or not the proceeding "is concerned with separate contracts or transactions between the [respondent] and individual group members", or "involves separate acts or omissions of the [respondent] done or omitted to be done in relation to individual group members".

27. *Gill v Ethicon Sàrl & Ors (No 5)* [2019] FCA 1905 is a product liability class action brought by three women on behalf of women who suffered complications after surgery involving the transvaginal implantation of synthetic mesh. A case in which the Applicants were ultimately successful at trial [9] a decision that was upheld on appeal by Jagot, Murphy and Lee JJ[10] and also saw special leave refused. In an appeal of an interlocutory decision, *Ethicon Sarl v Gill* [2018] FCAFC 137 that concerned an amendment of the statement of claim to alter the description of the group members Allsop CJ, Murphy and Lee JJ held:

> [24] The group members were, as s 33A makes plain, "a member of a group of *persons* on whose behalf a representative proceeding has been commenced". In identifying or describing those persons, it was not necessary to name them, nor to specify their number (see s 33H(2)), but it was necessary that the group membership be certain: see *City of Swan v McGraw-Hill Financial Inc* [2014] FCA 931; 223 FCR 328 at 332 [9] (Rares J).
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> [25] As Lee J explained in *Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896; 252 FCR 150 at 160-161 [50]:
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> > It is important to bear in mind [a] fundamental concept which, although simple, is sometimes obscured: a group comprises *persons* and not

[9] *Gill v Ethicon Sàrl & Ors (No 5)* [2019] FCA 1905

[10] *Ethicon Sàrl v Gill [*2021] FCAFC 29

> the *claims* of persons. The best way of avoiding confusion is by imagining that a list of group members is always a list of names but, when actual names are not used, the "list" of persons is defined by a criterion (or more usually criteria) specified at the time the group is described. The identity of all persons is ascertainable and the characteristics describing membership, subject to leave under s 33K, will necessarily all be in existence immediately prior to the commencement of the proceeding on their behalf. The claims which are the subject of the proceeding are the entirety of the claim of each of those persons, which each existed separately from the proceeding.

> [26]…. The claims of group members (which is *not* the cause of action pleaded) had an existence independent of, and antecedent to, the commencement of the proceeding. It was not, of course, necessary that a claim had been made or asserted, nor was it necessary a claim amounted to a "right" or "entitlement" to relief (a matter which generally cannot be known until a final hearing): see *Dillon* at 159 [43]. In the context of the current proceeding, prayer one of the originating application claimed declaratory relief. Needless to say, the suffering of damage was not a necessary component of any claim which encompassed an alleged entitlement to that non-monetary relief. No suggestion is made that the representative proceeding was not validly commenced.

28. *In Philipsen v American Medical Systems LLC (No 2)* [2018] FCA 1580, a related product liability case which concerned the implantation of medical devices, her Honour Justice Katzmann of the Federal Court, who was the primary trial in the trial of *Gill* dealt with an interlocutory application concerning the amendment of the group description. Her Honour held:

> [27] It is clear from the terms of s 33C(1) that, provided the conditions set out in paragraphs (a)–(c) are made out, one or more persons can commence a proceeding representing some or all of the members of the group no matter how different their claims may be. As Gordon J observed in *Timbercorp* at [107], these conditions are "not only the minimum requirements but also the outer limit of the connection between the group members".
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> [28] The point is reinforced by s 33Q which provides that, where it appears that the determination of the questions common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining questions and for that purpose may establish sub-groups and appoint a representative party on behalf of the sub-group members. The important point here is that the section permits but does not require the Court to give directions establishing a sub-group of group members and to appoint a person to be a representative party on their behalf: see *Timbercorp* at [109], [134] (Gordon J). Furthermore, s 33R allows the Court to permit an individual group member to appear in the proceeding for the purpose of determining an issue that relates only to the claims of that group member.

'After the event' (ATE) insurance

29. There is significant and disproportionate financial risk to representative plaintiffs in class action litigation in comparison to non-class action litigation. Plaintiffs and increasingly defendant parties to class actions are commonly taking out litigation insurance or legal expense insurance. Such insurance protects an insured party against adverse costs orders and covers their own costs.

30. Insurers willing to cover parties to Australian class action litigation were previously limited to those operating out of the United Kingdom but it is likely more Australian-based insurers will enter this section of the insurance market.

31. A party can usually obtain ATE insurance immediately after a dispute has arisen and even after proceedings have already commenced. Such insurance usually covers the insured own fees such as counsel's fees and experts' fees, solicitors fees, and it is also possible to take out appeals insurance.

32. The prospective insurer will assess a client's prospects before offering a policy. The ability of a party to obtain such insurance may cause an opponent to reassess their own prospects in light of an insured opponent – which can increase possibility of resolution.

33. What will an insurer consider when assessing the prospects of the litigation? They may well ask to review:
    a. the current pleadings;
    b. costs estimates; and
    c. advices from counsel as to prospects and quantum.

34. ATE insurance may provide tiered or stepped premiums so that an insured need only obtain the insurance necessary as the litigation progresses stage by stage, but that will usually also involve the insurer undertaking a reassessment of risk and potentially increasing the level of cover.

35. ATE insurance policies often contain deferred premiums so the insured has no need to pay for the insurance up front and some allow for contingent premiums paid only in the case of resolution in that party's favour.

36. An important point to note for both solicitors and counsel is that legal advisors have been found to be negligent for failing to advise clients on their position as to ATE insurance.[11]

37. Insurers providing ATE insurance will want a degree of control or input over the litigation – particularly in settlement negotiations but also potentially in overall strategy. Your client should know and understand extent of that involvement under the policy – at a minimum they will want to be kept up to date as litigation progresses. The extent of the coverage particularly where the policies provides tiered coverage and what constitutes a breach of the policy should be carefully scrutinised.

ATE insurance for security for costs in Queensland

38. A major benefit of ATE insurance is that it can minimise the impact of tactical security for costs applications by a comparatively well-resourced defendant.

39. The protection afforded by an order for security for costs has typically been a payment of monies into the Court or the provision of a bank guarantee from an Australian banking institution, ensuring the funds to satisfy any costs order are sitting somewhere within the jurisdiction and the defendant is not left with the task of enforcing the order in another. The form in which the security is provided is a matter that falls within the Court's general discretion.

40. In *Adeva Home Solutions Pty Ltd v Queensland Motorways Management Pty Ltd* [2020] QSC 361, the plaintiff offered security for costs in the form of ATE insurance, provided by AmTrust Limited. AmTrust held no assets in within the jurisdiction. The Court at first instance held that such insurance was not appropriate on the basis that the defendant would be put to significant expense if enforcement proved difficult, and that the financial position of a foreign insurer was not guaranteed.

41. The plaintiff appealed that decision, which was upheld by the Court of Appeal.[12] The Court was reluctant to interfere with the exercise of the trial judge's discretion. It also found there was no authority supporting the existence of a right or entitlement of the plaintiff to provide security in a form the least disadvantageous to it, despite the

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11 *Adris v Royal Bank of Scotland Plc* [2010] EWHC 941 (QB).

12 *Adeva Home Solutions Pty Ltd v Queensland Motorways Management Pty Ltd* [2021] QCA 198.

established practice that a plaintiff could generally do so, provided there was no detriment to the defendant. The Court of Appeal held unless there was a discernable prejudice to the plaintiff, the security ought be paid in the usual way. This was despite evidence in the matter that the provision of security via the plaintiff's ATE insurance would obviate the need for higher contributions from group members to their litigation funder, who would otherwise have to meet the security.

42. The provision of security for costs via AmTrust Limited has been accepted by the courts in other jurisdictions.[13] Whether the prevailing view that ATE insurance in not an appropriate means to provide security for costs in Queensland has any impact on the attractiveness to plaintiffs of the state's class action regime remains to be seen.

Security for Costs

43. Party IVA of the *Federal Court of Australia Act* (**FCA Act**) does not modify the general rule that costs follow the event. The result is that a losing party of a class action normally bears the costs of the action.
44. The fear of being saddled with a costs order is often enough to deter most would-be lead applicants, unless there is someone of worth standing behind them. This deterrent is commonly exploited by respondents who will seek security for costs at an early stage, bringing home to a lead applicant the spectre of an adverse costs order.
45. Section 33ZG(c)(v) of the FCA Act deals specifically with security for costs. It provides that nothing in Part IVA affects "the operation of any law relating to … security for costs". This provision does not sit completely comfortably with s. 43(1A) which provides that in representative proceedings a court may not award costs against a person on whose behalf the proceeding has been commenced (a group member), other than a party to the proceeding who is representing such a person. The effect of this is that under s 43(1A) a lead applicant who brings a class action for the benefit of group members, personally bears the burden of any costs order made in the respondent's favour, while group members who gain the benefit of the action face no such determent.
46. It can been seen from this that there was no attempt in the legislation to balance the altruistic nature of the lead plaintiff's actions against the commercial need for security.
47. When it came to ordering security for costs, some judges have been more sympathetic to the altruistic nature of the lead applicant's actions and the financial implications of a

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13 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited [2017] FCA 699; In the matter of Tiaro Coal Ltd (in Liq) [2018] NSWSC 746.*

security order. But it must be said that on balance courts have had little sympathy for lead applicants in class actions, at least so far as security for costs is concerned.

48. The starting point for the applicability of a security for costs in class actions are two decision of the Full Court of the Federal Court – *Bray v. F Hoffman-La Roche Limited* [2003] FCAFC 153 and *Madgwick v Kelly* [2013] FCAFC 61. Both decisions are controversial amongst some commentators.[14]

49. *Bray* was a class action which considered whether there was a price-fixing cartel between vitamin manufacturers. Merkel J at first instance dismissed an application for security for costs on evidentiary grounds and also because public policy considerations militated against an order for security because it would impede or hinder the group members' claim. On appeal, the Full Court overturned this decision.

50. *There* appears to be three concerns underlying the Full Court's decision in *Bray*. The first was that a class action could be commenced deliberately using an impecunious lead applicant. In other words a commercial strategy may be used to choose a lead applicant which would defeat any costs order made in a respondent's favour. As there was no certification process as found in the American system, the process could be exploited by an impecunious lead applicant in a way which was unfavourable to a respondent. It would place a respondent at financial risk of having to defend an action which might be speculative or have no real prospects of success in circumstances where in the end no costs will be able to be recovered. In a way this could pervert the court's process by encouraging litigation in the hope that a commercial settlement is reached solely on the basis of a respondent avoiding the expense of defending the action. The second is the court's belief that if a lead applicant had the capacity to commence a class action there must be someone standing behind it who will ultimately benefit from a successful result. The third concerns the ability of group members to contribute to any security order.

51. *Bray* fell for consideration by the Full Court in *Madgwick*[15]. That case involved claims by over 3,000 investors who had acquired an interest in the "Willmot Forrest Managed Investment Schemes". Proceedings were brought against the former responsible entities of the schemes, the directors and the lenders who lent funds to investors to invest in the schemes. Murphy J, who was the judge at first instance, considered that the practical effect of ordering security for costs would be to remove or substantially reduce the costs immunity conferred on group members by s.43(1A) of the Act. The plaintiff had put together information on the financial position of a number of group members, being

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14 See Morabito and Hatcher "*Security for costs in unfunded Federal class action; back to the future"* (2018) 92 ALJ 105 (***Morabito and Hatcher***).

15 *Madgwick v Kelly* [2013] FCAFC 61.

those who were represented by the solicitors for the applicant (about 400, by conducting a survey of a sample of 50 of those group members. The primary judge concluded from that factual evidence obtained from this financial survey that the group members were "relevantly impecunious" and that they would not be able to meet the adverse costs orders likely to be made in the event that their claims were unsuccessful. This at least gave lip-service to the requirements set out by the Full Court in *Bray* with regard to contributions by group members.

52. *The* Full Court upheld the appeal overturning the primary judge's refusal of security. Their Honours found that on the evidence a positive finding that the proceedings were "stultified" by an order for security for costs could not be made out. In making this finding, the Full Court took a different view as to the financial position of the known group members, with Allsop CJ and Middleton J finding that there was a sufficient number of known group members with what they described as "significant net assets" who ought at least to be asked to fund the security. Their Honours were influence by the fact that the litigation was commercial and involved a commercial arrangement.

53. More recently, some judges have expressed concern about applications for security for costs being used aggressively, in unwarranted situations, and for the purpose of stifling litigation. There appears to be a growing view among some judge that general sweeping rules of the type set out in *Bray* and *Madgwick* are to be tempered by a strong dose of judicial discretion

54. Critically, context is everything. Nothing in *Bray* or *Madgwick* should be seen as curtailing the broad discretion the Court has to order (or decline to order) security. It is a discretion to be exercised judicially having regard to a consideration of the particular facts of the case.[16] Further, provided they are relevant, the factors that ought be taken into account in the exercise of this discretion are unrestricted and the weight that should be given to them depends on the relevant fact's own intrinsic persuasiveness and their impact on other circumstances which have to weighed.[17]

55. Recently the issue of whether security should be ordered in an unfunded class action came up for consideration by the Full Court of the Federal Court in *Goodwin v St Mary's Hogg's Pty Ltd* [2022] FCAFC 166. The Appeal concerned the decision of a primary judge who made orders for security for costs. The Appeal challenging this order was unsuccessful. Justice Lee sat on the Full Court and wrote a joint judgment with Middleton J dismissing the appeal and effectively requiring the provision of security.

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16 *Abbott v Zoetis Australia Pty Ltd (No 2)* [2019] FCA 461 at [15]; *Merribee Pastoral Industries Pty Ltd v ANZ* [1998] HCA 41.

17 *Capic v Ford Motor Company (No 2)* [2016] FCA 1178.

56. The case involved breaches of contract, unconscionable conduct and unlawful exclusive dealing, effectively giving rise to statutory compensation. It was very much a commercial case. The Court did not challenge that the representative applicants had a bona fide case with reasonable prospects of success. However, the evidence did not establish that the representative applicants were impecunious or if they were impecunious, that this was caused by the respondent's conduct. The material filed suggested that the lead applicant would be unable to pay the respondent's costs as currently estimated if they were successful in their defence.

57. The appeal was form an interlocutory decision, meaning that leave was required. In *National Wide News Pty Ltd v Rush* [2008] FCAFC 70[18], the Full Court indicated that the starting point in exercising a grant of leave to appeal from an interlocutory decision is that regard must be had to the statutory charge set out in s.37M(3) of the FCA Act, namely that the power must be exercised or carried out in the way that best promotes the over-arching purpose, being the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. There has been clear judicial reticence in allowing leave against interlocutory judgments.[19] Because of this the first and probably highest hurdle that the appellant had to overcome in *Goodwin* was not whether the correct principles had been applied by the Court but rather whether the appealed decision was attended with sufficient doubt to warrant its reconsideration on Appeal, or whether it was wrong and that a substantial injustice would result if leave were refused (the Décor test)[20]. *Rush* does not really set out the principles that ought to be applied when security for costs is considered at first instance but rather whether a primary judge's discretion to require security ought to be over-turned. The Court commented that the difficulty with the Appeal was that the appellant could not make out a relevant case on the facts or that issues were present which showed that there was likely to be an adverse impact of the class action caused by the security order. The Court commented with regard to Lee J's decision in *Abbott* that the issue of security in class action cases "*is a task to be performed on a bespoke basis depending upon the particular facts and circumstances that present themselves*".

58. The labyrinth that surrounds class actions and in particular the requirement for security for costs does not end here. This is because, if a class action fails, a lead applicant will

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18 At [2] to [4].
19 *Bellamese Australia Limited v Basil* [2019] FCAFC 147 at [6].
20 *Décor Corp v. Dar Industries* (1991) 33 FCR 397 at 398-9.

normally be required to pay the respondent's costs. The costs of running a class action are often very high. The response perhaps has been for group members to find a lead applicant who is either a corporation with no assets or an individual who is prepared for the sake of the class action to face bankruptcy should a costs order be made against him or her. In other words, there is a cynical exercise whereby a lead applicant is chosen who will be the least responsive to any costs order that may made. Some may say that there is nothing inherently wrong in this, after all we can arrange our financial affairs in such a way to pay the least amount of tax, so why not structure a claim so that the least financial damage is done should it be unsuccessful. But it must be said that this type of conduct may be one dominant reason why security for costs orders are commonly seen.

The opt-out and notice regime

Don't send a notice without it being approved by the Court.

59. Section 103T of the *Civil Proceedings Act 2011* and s33X its equivalent in the *Federal Court Act 1976* proscribes when notices must be given. Section 103T provides:

> (1) Notice must be given to group members of the following matters in relation to a representative proceeding—
>
> (a) the starting of the proceeding and the right of the group members to opt out of the proceeding before the date fixed by the court under section 103G;
>
> (b) an application by the defendant for the dismissal of the proceeding on the ground of want of prosecution;
>
> (c) an application by a representative party seeking leave to withdraw under section 103S as representative party.
>
> (2) The court may dispense with a requirement of subsection (1) if the relief sought in the representative proceeding does not include a claim for damages.
>
> (3) If the court orders, notice must be given to group members of the payment into court of money in answer to a cause of action on which a claim in the representative proceeding is based.
>
> (4) Unless the court considers it just, an application for approval of a settlement under section 103R must not be decided unless notice has been given to group members in the representative proceeding.

(5) The court may, at any stage, order that notice of any matter be given to a group member or group members.

(6) Notice under this section must be given as soon as practicable after the happening of the event to which it relates.

60. Section 103U *Civil Proceedings Act 2011 and s33Y* of the Federal Court Act proscribe the form of the notice which includes importantly includes that notices must be approved by the Court, which will have regard to the form, content, who will receive the notice and who will provide the notice o the group members, which could be a party to the proceedings or a third party. A notice can also include information via phone, radio, television or through social media. In all instances scripts or advertisements and their mode of circulation must be approved by the Court.

Do we or don't we Opt Out?

61. Pursuant to section 103G of the *Civil Proceedings Act 2011 and s33J of* the Federal Court Act 1976 group members have a right to Opt Out of the proceedings. The majority in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (Keifel, Bell and Keane JJ) [2019] HCA 45 noted:

> [72] The provisions of Pt IVA of the FCA and Pt 10 of the CPA envisage the identification of all group members so far as that is possible. That identification facilitates the distribution of any proceeds of the proceedings, whether derived from a settlement or a favourable judgment. Section 33J of the FCA (which is to the same effect as s 162 of the CPA) is in the following terms:
>
> "**Right of group member to opt out**
>
> (1) The Court must fix a date before which a group member may opt out of a representative proceeding.
>
> (2) A group member may opt out of the representative proceeding by written notice given under the Rules of Court before the date so fixed.
>
> (3) The Court, on the application of a group member, the representative party or the respondent in the proceeding, may fix another date so as to extend the period during which a group member may opt out of the representative proceeding.
>
> (4) Except with the leave of the Court, the hearing of a representative proceeding must not commence earlier than the date before which a group member may opt out of the proceeding."

[73] Under s 33J of the FCA, the court must fix a date before which a group member may opt out of a representative proceeding. Because that date will usually fall before the

outcome of the action is known, the problem of "free riding" by group members who would seek to opt in to the proceeding only after a favourable outcome is achieved is addressed. As this Court has noted, the opt out model adopted by Pt IVA of the FCA and Pt 10 of the CPA is designed so that a representative proceeding may continue even if group members are unaware of it; and group members "are under no obligation to identify themselves". That said, both legislative schemes do allow identification of all group members (as far as is possible) in order to distribute any proceeds. That this is so is apparent from ss 33V, 33X(3)-(4), 33Z and 33ZA of the FCA. Reference to the terms of these provisions confirms that the legislative scheme contemplates that the occasion for the making of orders in relation to distribution of the proceeds of the action is its successful completion. (References omitted)

Considerations for mediation and trial

Mediation

62. Class action mediations have features common to all mediations. Each party and their representative attend with authority to agree to settlement terms, a mediator is chosen by agreement and parties will provide a position paper and other materials to the mediator ahead of time. However, in mediation for a class action, there may be more than one representative plaintiff and the number and complexity of the matters to be agreed increased significantly. In an effort to limit the number of people in the room, plaintiffs are often not in attendance but rather just their representatives, and opening statements are often unnecessary when the lawyers are fully appraised of their opponent's case.
63. The process is complicated and can take several days. The mediator must have significant experience in class actions. Suitably experienced retired judges can draw on their experience to encourage resolution and suggest innovative and efficient settlement options.
64. Because mediation of class actions is or ought to be aimed at resolving the claims of all group members and not just the representative plaintiff's claim, the potential total liability of the defendant is obviously an issue relevant to the successful resolution of the litigation. Prospects of resolution in the absence of an estimate of what that liability might ultimately be are low. Limiting the claims by 'closing the class' is the means by which an estimate of the final quantum is undertaken.
65. The timing of any mediation in a class action is critical; the case must be sufficiently advanced such that parties know what it is, and some steps towards identifying the group members and their potential subgroups via some disclosure from both the plaintiffs and sample group members as well as the defendant, is typical. Orders for discover in order to facilitate resolution at mediation are often made by the court, as are orders for class closure in which the definitive limit on the group is determined.

66. Orders to close the class are not just to the benefit of defendants. Such orders ensure all parties are engaged in a well-informed and ultimately productive resolution process. Plaintiffs, with their responsibilities to group members, also benefit from knowing how dilute any recovery may be and that information can aid their decision making around settlement.

67. Traditionally, 'hard' class closure orders prevented a group member from claiming any share in settlement or judgment unless they took positive steps to register their interest, and 'soft' class closure orders allowed group members to continue to 'participate' if the anticipated settlement did not eventuate.

68. After the decision in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 269 CLR 574 (*Brewster*; discussed in detail below), the NSW Court of Appeal in *Haselhurst v Toyota Motor Corporation Australia Ltd* (2020) 101 NSWLR 890 overturned orders by the primary judge that extinguished the rights of group members who had failed to register their interest or opt out once a settlement received the court's approval. It held such orders were beyond the power of section 183 of the *Civil Procedure Act* 2005 (NSW). In a similar vein, a notice that would inform group members of the likelihood of a similar order being sought was also held to be beyond power of section 183 of the CPA,[21] with the Court stating the practical effect of the order was contrary to a 'fundamental precept' that group members are entitled to remain passive until there was an outcome of the proceeding. That sentiment was expressly disavowed in *Parkin v Boral* [2022] FCAFC 47 with the Court finding there was nothing in Part IVA of the FCA Act that required that group members never be required to anything and that the power in 33X(5) of the FCA Act (that the Court may, at any stage, order that notice of any matter be given to a group member) was broad and unqualified. That provision is identical to section 103T(5) of the *Civil Proceeding Act* 2011 (Qld).

Trial

69. Preparation of a class action for trial requires consideration of:

    (a) Any preliminary determinations that ought to be made;

    (b) The common questions to be determined together with any non-common questions particular to the representative plaintiff or plaintiffs;

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21 *Wigmans v AMP Limited* [2020] NSWCA 104.

(c) Disclosure - usually limited to that required to determine the representative plaintiff's claim as that claim is the vehicle for the determination of the common issues as between the group members and the defendant;

(d) Evidence - given the nature of the disputes litigated in class actions, expert evidence is commonly required. This can also involve the provision of concurrent evidence to the court, or conferences or conclaves between experts.

(e) Competency of representative plaintiff – will the determination of the lead plaintiffs claim answer the common questions or is substitution required?

Settlement and settlement agreements

70. Class actions allow for very large numbers of people who have suffered a wrong to be compensated efficiently.

71. A measure of the class action regime's success is then obviously whether all those are entitled to be compensated are in fact compensated, and with an amount that satisfies the goal of putting them in the same position as a far as possible had the wrongful act not occurred, 'rectifying the consequences of the wrong'.[22]

72. The fraught uncertainty associated with class action litigation for applicants was summed up by Justice Wigney thus:

> *"… despite a 17 week trial, and despite the applicants' intuitively strong case, there remained considerable uncertainty and risk for the applicants and group members in terms of the outcome of the trial. And the stakes were very high indeed. To put it bluntly, the risk of the applicants failing completely could not be excluded. That would have meant no recovery by the applicants and group members at all, and the likelihood of an adverse costs order against the applicants for potentially many millions of dollars. Nor was it possible to exclude the risk that, even if successful on liability, the applicants might have obtained a materially lower award of damages than they contended for."*[23]

73. Further, where respondents and insurers seek to minimise their risk arising out of the litigation, third party funders are looking for a predictable and solid return on their investment - and lawyers are usually pretty keen on recovering their fees - it is perhaps no surprise then most class actions settle before a trial.[24]

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22 *Lewis and Australian Capital Territory* [2020] HCA 26; 271 CLR 192 at [150] per Edelman J.

23 *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 at [125].

24 Moribito, Vince "*Empirical Perspectives on 30 Years of Class Actions in Australia: The Role Played by Costs Consultants at the Settlement Approval Stage of Federal Class Actions"* (May 2022), SSRN, 5.

74. Of course, a settlement agreement may also be made after an initial trial of the representative plaintiff's action which also resolved the common questions that arise out of group members claims such that no further determinations of group or subgroup members claims are required.

75. The High Court has found a representative party can owe group members a fiduciary duty,[25] but whether a representative party is really in a position to decide what a good outcome might be for the group is debatable. In some cases, litigation guardians[26] or a contradictor[27] have been appointed.[28] Because the class action regime involves the resolution of legal dispute between each group member and the defendant where the group member has little to no control of the litigation but will be bound by any decision, the class action regime requires the court to approve the settlements of class actions. As expressed frankly by Professor Michael Legg:

> *"[s]ettlements are usually viewed as a form of contract in which the parties can settle their dispute for whatever amount they agree upon. The fairness of the settlement amount is not examined provided the parties are competent and not under any disability. In class actions the settlement amount needs to be reviewed because the lawyer for the class is potentially an unreliable agent of the class and the class is unable to effectively monitor the lawyer. In terms of principal (class) and agent (lawyer), the principal has too little at stake to expend resources monitoring the agent and the agent has superior information."*[29]

76. Section 33V of the *Federal Court of Australia Act* 1976 (Cth) (the **FCA Act**) provides:

> *"(1) A representative proceeding may not be settled or discontinued without the approval of the Court.*
>
> *(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."*

77. Section 33ZF(1) gives the Court power to '*make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding*'.[30]

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25 *Wigman v AMP Ltd* [2021] HCA 7; 270 CLR 623 at [117] per Gageler, Gordon and Edelman JJ.
26 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842 at [124].
27 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 11)* [2022] FCA 331 at [22] (***Davaria***).
28 Moribito, Vince "*Empirical Perspectives on 30 Years of Class Actions in Australia: The Role Played by Costs Consultants at the Settlement Approval Stage of Federal Class Actions"* (May 2022), SSRN, 8.
29 Legg, Michael "*Judges Role in Settlement of Representative Proceedings: Lessons from United States Class Actions"* (2004) 78 ALJ 58, 68.
30 Section 3ZF(1) of the FCA Act.

78. The parties make an interlocutory application for the Court's approval of a proposed settlement. Typical orders issued thereafter include orders requiring the group members be notified of the proposed settlement and provide the parties an opportunity to put on evidence in support of the proposed settlement.

79. The notice to group members regarding the proposed settlement requires extensive information be provided - and also requires the Court's approval. Group members who are unhappy with the proposed settlement can file an opposition to the proposal.

80. Section 33V provides no guidance as to how the Court should go about making orders that are 'just', but significant jurisprudence has developed such that the Court needs to be satisfied a proposed settlement is 'fair and reasonable' not just for the representative plaintiff and the defendant, but also in respect of the of the interests of the group members, relative to both the representative party and the defendant, but also as between the different cohorts of group members.[31]

81. Those matters that ought be addressed in an application for approval of a proposed settlement include the complexity and likely duration of the litigation, the reaction of the class to the settlement, the stage of the proceedings, the risks of establishing liability, the risks of establishing loss or damage, the risks of maintaining the class action, the ability of the defendant to meet a greater judgment, the range of reasonableness of the settlement in light of the best recovery, the range of reasonableness of the settlement in light of the attendant risks of litigation and the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.[32]

82. It is common for counsel's opinion as to their assessment of the prospects of success of the claim,[33] and that of any contradictor, which has been provided to the Court as well as any other document typically covered by legal professional privilege, to be the subject of confidentiality orders.[34]

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31 *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [5]; *Hall v Arnold Bloch Leibler (a firm) (No 2)* [2022] FCA 163 at [15]; *Owners of Cargo laden on board the MV "APL England" v CMB Ocean 13 Leasing Company Pte Ltd* [2022] FCA 565 at [22] – [26].

32 *Williams v FAI Homes Security Pty Ltd (No 4*) [2000] FCA 1925; 180 ALR 459 at [19].

33 *Pathway Investments Pty Ltd v National Australia Bank Ltd [No 3]* [2012] VSC 625 at [XX].

34 See, for example, orders pursuant to section 37AF and 37AG of the FCA Act made by his Honour Justice O'Callaghan in *Davaria* at [34]-[36].

83. The complexities attending class action litigation do not resolve at the settlement stage. Class action settlement agreements containing a settlement distribution scheme (**SDS**) are unavoidably complicated. Various methodologies are employed to ensure an appropriate distribution, such as:

(f) distribution of a global sum using a formula to allocate between group members that reflects their individual losses;

(g) distribution of a global sum using an individualised assessment of loss after a threshold entitlement has been demonstrated, i.e. "I drank Bon Soy soy-milk on this date," consideration of any statutory limitations that might apply to a personal injury claim as well as state-based caps on damages and any individual reimbursement obligations for treatment etc; or

(h) a scheme by which there is no global sum distributed but rather a maximum recovery set for each particular kind of loss and then a case by case assessment of liability and then damages for each claim.

84. Each process requires extensive collection of information in the first instance. The desire of a defendant to scrutinise each individual claim and then put on evidence in response can significantly extend the time it takes for distribution to take place. Two years for distribution of any settlement is the norm.[35] The Court is to be kept updated as to how the administration of the settlement is progressing, and whether the settlement monies are being distributed quickly and efficiently as significant cost and delay can attend the distribution process.[36] Oversight of the distribution process may be in the form of an amicus curiae or independent counsel on behalf of the Court.[37] Distribution of the settlement in the Black Saturday Class Action took 29 months and cost approximately $30 million.[38]

85. It is usual for legal fees for the representative plaintiff to be included an any settlement amount. This too is approved by the Court and about which independent expert

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35 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 42]* [2016] VSC 394 at [21].

36 See Legg, Michael "*Kilmore East Kinglake Settlement Distribution Scheme: Fairness, Cost and Delay Post-Settlement*" (2018) 44 Monash University Law Review 3, 658.

37 *Bolitho v Banksia Securities Ltd (No 18)(remitter)* [2021] VSC 666 at [552]; Dimopoulos D and Moribito V "*An Australian Perspective on the Judicial Review of Class Action Settlements"* (2021) 29 NZULR 529, 542.

38 Legg, Michael "*Kilmore East Kinglake Settlement Distribution Scheme: Fairness, Cost and Delay Post-Settlement*" (2018) 44 Monash University Law Review 3, 658 at 660.

evidence as to reasonableness of such costs from a costs consultant was usually obtained by the plaintiff. Where there have been 'years of interlocutory skirmishing'[39] pre-trial, an independent opinion is of great assistance. In order to ameliorate the difficult position in which an 'independent' costs expert called by a plaintiff is placed, a court appointed referee will typically provide a report to the court regarding lawyers fees, and often critiqued by a contradictor.[40]

86. Third party litigation funders also need to recoup their investment. Their slice of the pie is usually 25-40% of the total sum negotiated as settlement of the claims.[41]

87. Regulatory oversight of litigation funding implemented by the previous federal government will likely be reversed in the not too distant future. The Australian Law Reform Commission (ALRC) has recommended funding agreements be approved by the Court with the Court provided with power to alter the terms of a funding agreement.

Common Fund Orders

88. A common fund order is a court order that requires all Group Members in a class action to contribute equally to the legal and litigation costs of the proceedings regardless of whether the class member signed a litigation funding agreement.

89. Litigation Funding Agreements are agreements entered into between a Funder and a Group Member pursuant to which the group member agrees to pay the Funder a set proportion of any award which a Group Member may receive from a class action in consideration for the provision of funds to run the action.

90. At one time funding agreements were sought from all group members and membership of a class action was restricted to those Group Member who had entered into Litigation Funding Agreements with a funder. This was done by making the existence of a Litigation Funding Agreement one of the qualifications needed to become a group member. This attitude was liberalised by the introduction of common fund orders (***CFO***) by which the Court could require all group members to pay the cost of funding on a pro-rata basis, even if no Litigation Funding Agreement had been entered into.

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39 A submission made by senior counsel for the applicant in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 at [31].

40 The contradictor in the two current pelvic mesh class actions considered the legal fees sought by the lawyers for the applicants were 'wholly unreasonable." See https://www.lawyerly.com.au/300m-jj-class-action-settlement-massively-short-of-what-pelvic-mesh-victims-owed-court-told/.

41 Legg, Michael "*The Australian Class Action: A 30-Year Perspective*" (2023) page 48.

91. This somewhat liberal equilibrium was disrupted by the High Court in *BMW Australia Limited v Brewster*[42]. In *Brewster* the High Court considered the question of whether the Federal Court had power to make a common fund order at a preliminary stage in the proceedings under s. 33ZF. The High Court found that the Federal Court did not possess such power, but it seemingly left open the question as to whether a common fund order could be made at the time of the sanction of a settlement agreement under s. 33V(2).

92. Some Federal Court Judges embraced this constriction of *Brewster*: for example, see *Hall v Arnold Bloch Lieber (a firm) (No 2)* [2022] FCA 163 at [24] per Beech J.

93. In *Asirifi-Otchere v Swan Insurance Limited (No 3)* [2020] FCA 1885 Lee J commented at [15]:

> *"Thus, as the contradictor submitted, the prevailing orthodoxy is that the Court has power to make a settlement CFO [common fund order] on the basis that: (a) it is fair, reasonable and in the interests of all group members (s. 33V(1)); or (b) within the conception of a just order "with respect to the distribution of any money" (s. 33V(2)). It follows that at this time and in light of the clear statements by the Full Court of New South Wales Court of Appeal as to the effect and extent of Brewster, it cannot be that the prevailing orthodoxy is plainly wrong so as to preclude the principle application of s. 33V in making a settlement CFO. Indeed, I am of the view that there is ample power to make a settlement CFO, the question is rather one of discretion as to whether a proposed form of order should be made in all the circumstances of the case."*

94. The plurality in *Brewster* do not indicate whether there was power to make a common fund order at the time of settlement. Despite this there have been some members of the Federal Court who took the view that following *Brewster* there was no power to make a CFO. The relevant authorities were considered by Foster J in *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637 at [310] to [421]. In that case, His Honour found that the Court did not have power to make a common fund order at settlement.[43] This view has very recently been adopted by O'Callaghan J in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84, where His Honour said at [183]:

> *"Although the decision of the High Court in BMW Australia v Brewster was concerned with the power to make a common fund order at a preliminary stage of proceedings under s. 33ZF, the reasoning of the Majority points clearly enough to the conclusion that there is similarly no power to make a common fund order upon settlement under s. 33V(2)."*

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42 (2019) 269 CLR 574.

43 See in particular, [418] to [421].

95. As can be seen by the brief discussion set out above, whether the Federal Court (or other Courts under similar statutory provisions) have power to make common fund orders is both controversial and moot. Until the decision of O'Callaghan J in *Davaria* it appeared that the Federal Court was slowly supporting the view that common fund orders could be made at least at the time of settlement and there were a growing number of authorities where this had been done. However, the matter now is clearly in issue. Its likely that this point can only properly be resolved at the appellate level.

Douglas Campbell KC
Joshua Creamer
Megan Brooks