# Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study


## Vince Morabito

## Jarrah Ekstein*



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*Australia's class action regimes are known internationally because of the significant role that commercial litigation funders have, in recent years, played in this type of group litigation. Within Australia the attention of some sectors of the media and many scholars has also been placed on class actions filed on behalf of aggrieved investors. As a result, what has gone largely unnoticed is the significant role that these regimes have played in non-investor actions in providing access to the courts to claimants who would not have been able to commence individual legal proceedings as a result of the socio-economic, health, age-related, psychological and/or intellectual barriers they faced. The aim of this article is to address this lacuna in the jurisprudence on Australian class actions by providing an empirical study of the non-investor class actions that have been filed on behalf of these vulnerable persons in the country's first 22 years of class actions.*


## I. Introduction

In March 1992, Australia's first class action regime was introduced through Pt IVA of the Federal Court of Australia Act 1976 (Cth) (Pt IVA). A principal aim of this regime was to enhance access to the court system for similarly-situated claimants. The 1988 report of the Australian Law Reform Commission (ALRC)[1] on grouped proceedings, which provided the basis for Pt IVA, revealed that "an underlying purpose" of its proposed regime was "to enhance access to legal


* Vince Morabito is a Professor in the Ethical Regulation Research Group, Department of Business Law and Taxation, Monash Business School at Monash University. Jarrah Ekstein is an Associate in the Class Actions team at Maurice Blackburn Lawyers.


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[1] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No.46 (1988) (ALRC 1988 Report).

remedies for those who are disadvantaged either socially, intellectually or psychologically".[2]

The adoption of this philosophy by the drafters of Pt IVA was highlighted by the explanation provided in the Second Reading Speech for the decision to incorporate an opt out device, pursuant to which the express consent of a person to be a class member is not required.[3] Unless class members avail themselves of the opportunity that is normally extended to them to opt out of the litigation,[4] they will be bound by its outcome with respect to the common issues.[5] The then Attorney General explained that

> "the Government believes that an opt out procedure is preferable on grounds both of equity and efficiency. It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings."[6]

A legislative class action regime, almost identical to Pt IVA, has been available in the Supreme Court of Victoria since January 2000 as a result of the enactment of Pt 4A of the Supreme Court Act 1986 (Vic) (Pt 4A). The New South Wales Parliament is the other Australian legislature to introduce—through the enactment in March 2011 of Pt 10 of the Civil Procedure Act 2005 (NSW) (Pt 10)—a comprehensive class action regime. Part 10 is also based on, and is thus very similar to, the federal regime. Thus, it may be said that, to borrow a judicial description of a similar class action regime that operates in Ontario, the Victorian and NSW regimes also "have, as one of their purposes, the protection of the vulnerable".[7]

Many people with legal grievances would face serious financial hurdles in seeking legal redress through the courts without class actions.[8] For the most disadvantaged members of our society, those hurdles are near insurmountable. Quite apart from facing financial barriers to bringing individual litigation, the vulnerable claimants who are the subject of this article would almost certainly not have been able to commence individual proceedings to enforce their legal rights as a result of social, psychological, intellectual, age-related or health barriers. The vulnerability of some claimants stemmed from the loss or damage the subject of the class action; for example, those who suffered injury in natural disasters or as a result of faulty medical products. Other claimants may already have been vulnerable prior to their cause of action arising. For instance, asylum seekers, people with intellectual disabilities or children are less likely to be aware of and have the capacity to enforce their legal rights.

[2] *ALRC 1988 Report*, para.107.
[3] Part IVA s.33E(1).
[4] Part IVA s.33J.
[5] Part IVA s.33ZB.
[6] *Legislative Debates*, House of Representatives (14 November 1991), p.3175 (Duffy Attorney General).
[7] *1250264 Ontario Inc v Pet Valu Canada Inc* 2011 ONSC 3871 at [2] (per Strathy J). See, for instance, *Timbercorp Finance Pty Ltd (In Liq) v Collins and Tomes* [2015] VSC 461 at [672] where Robson J of the Supreme Court of Victoria recently explained that one of the purposes of Pt 4A was "ensuring that people, particularly those who are vulnerable, lack the means or are less aware of legal niceties, of obtaining redress, where they may be unable to take the positive step of having themselves included in the proceedings".
[8] The Full Federal Court of Australia has drawn attention to "the significant statutory and public policy in proceedings under Pt IVA. The statutory provisions for group action are more than a procedural device. They comprise an important statutory mechanism for the vindication of the rights of the parties": *Madgwick v Kelly* [2013] FCAFC 61 at [91], per Allsop CJ and Middleton J.

No study of the extent to which Australia's class action regimes have provided access to the courts for vulnerable persons has been undertaken to date. The aim of this article is to address this lacuna in the jurisprudence on Australia's class action regimes, as far as non-investor class actions are concerned, by providing an empirical study of the non-investor class actions that have been filed on behalf of these vulnerable persons in the country's first 22 years of class actions ("review period").[9] For the purposes of this article, vulnerable claimants are defined as those who—even if their individual claims would justify individual proceedings—would almost certainly have been unable to bring such proceedings because of the socio-economic, health, age-related, psychological and/or intellectual barriers that they faced.

This article explores the nature of the vulnerabilities of these claimants, their legal grievances and the funding and outcomes of these class actions. We also highlight, through several case studies, the main barriers that were faced by the lawyers representing these claimants and whether the judicial management of these class actions displayed an appreciation of, and an attempt to cater for, the vulnerabilities of the class members.

## II. Refugees and migrants

### *A. Migration class actions*[10]

The first Pt IVA proceeding filed on behalf of vulnerable claimants, *Wu v Minister for Immigration and Ethnic Affairs*,[11] was filed only eight months after Pt IVA came into operation. Wu brought this proceeding on behalf of a group of 65 people who had arrived in Australia from China in August 1992 in a boat subsequently code-named "Labrador" by Australian immigration officers. The class representative sought a review of the decisions of the delegates of the Minister for Immigration and Ethnic Affairs not to recognise him and the persons he represented as refugees.[12] There have been another 27 Pt IVA proceedings similar to *Wu* to the extent that the proceedings essentially sought to secure, on behalf of the relevant classes of claimants, permanent residence in Australia.

### *B. Main barriers faced*

As observed by Hill J of the Federal Court of Australia in September 1996, "it is hard to imagine a person more vulnerable than one who has left his or her country and gone to another in the hope of residing there permanently".[13] This vulnerability is most extreme when the individuals in question seek refugee status. As explained by Merkel J of the Federal Court in *Trong v Minister for Immigration, Local Government and Ethnic Affairs*[14]

[9] Since Pt IVA came into operation on 4 March 1992 the class actions canvassed in this article are those filed on or before 3 March 2014.

[10] Migration class actions include class actions brought on behalf of migrants, refugees and asylum seekers.

[11] *Wu v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 294. This was also the third proceeding filed pursuant to Pt IVA.

[12] *Wu* (1994) 48 FCR 294 at 295, per Wilcox J.

[13] *Tsang Chi Ming v Uvanna Pty Ltd* (1996) 140 ALR 273, 275.

[14] *Trong v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 66 FCR 239.

> "claims for asylum relate to fundamental human rights involving allegations of significant threats to life, personal security, liberty and dignity. The denial of such claims can have drastic consequences for an individual. In the present case at least some of the claimants face a risk of imprisonment (in the applicant's case, for a very long term) on their return to Vietnam."[15]

Asylum seekers who were represented in Pt IVA proceedings frequently included children[16] and were held in (often remotely located) detention centres throughout the litigation.[17] This lack of freedom created significant problems in finding solicitors to commence legal proceedings on their behalf[18] and to then provide instructions with respect to the conduct of the litigation. It is accordingly not surprising that in January 1995 the President of the Law Society of New South Wales issued a press release and wrote a letter to the Secretary of the Department of Immigration and Ethnic Affairs requesting that the Department take all steps necessary to ensure that detainees held in immigration processing and reception centres be given access to independent legal advice.[19]

In *Trong* Merkel J drew attention to the fact that in these two Pt IVA proceedings the class members had "little command of the English language and, I assume, even less knowledge and understanding of the Australian legal system".[20] Our review of the court files revealed that this was the case in each of the migration class actions.[21] In fact, we discovered that the class members, on whose behalf these class actions were filed, came from close to 70 countries with languages other than English as their mother tongue and with substantially different legal systems. Language barriers meant that, as remarked by the lawyer acting for the class in *Zhou v Minister for Immigration and Multicultural Affairs*, "each time I have to obtain instructions, I have to engage an official interpreter".[22]

Two other significant problems, of a financial nature, were faced by these claimants. The first was that, in light of the precarious financial circumstances of the class members and the high costs of litigation,[23] "litigation [was] prohibitively expensive for many visa applicants".[24] The second was the non-monetary nature

[15] *Trong* (1996) 66 FCR 239 at 244. See also *Heak v Minister for Immigration and Ethnic Affairs* (1993) 39 FCR 535 at 536, per Burchett J, where some of the asylum seekers represented in Pt IVA proceedings were described as "persons who have risked death by piracy, shipwreck, starvation or thirst to escape from South East Asian countries in often unseaworthy boats".

[16] See, for instance, *Fang v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 583 at 586, per Carr J.

[17] See, for instance, *Lek v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 at 102, per Wilcox J ("more than 3 years after their arrival in Australia, they are still in custody"); *Trong* (1996) 66 FCR 239 at 244, per Merkel J; and *Heak v Minister of Immigration, Local Government and Ethnic Affairs* (1993) 39 FCR 535 at 536, per Burchett J.

[18] In *Fang v Minister for Immigration and Ethnic Affairs*, for instance, several class members held in a detention centre commenced a hunger strike following repeated unheeded requests, over several months, that they be allowed to see a lawyer. They were subsequently able to contact a person from the Indo-Chinese Refugee Association who enabled them to get in touch with a lawyer from Legal Aid: Affidavit of Zhao Gui Fang (sworn on 20 March 1995), paras 13–17.

[19] Affidavit of Ben Slade (sworn in *Fang v Minister for Immigration and Ethnic Affairs* on 8 May 1995), paras 3–4.

[20] *Trong* (1996) 66 FCR 239 at 244.

[21] See also S. Harris, "Another Salvo Across the Bow: Migration Legislation Amendment Bill (No 2) 2000 (Cth)" (2000) 23 *University of New South Wales Law Journal* 208, 214.

[22] Affidavit of Philip Warre Parbury (sworn on 27 October 1998), para.6.

[23] In *Ling v Minister for Immigration and Multicultural Affairs*, for instance, it was revealed by the organisation that funded the proceeding, the Chinese Students Human Rights Organisation, that it had already spent over $300,000 despite the fact that no trial had yet been held: Affidavit of Ming Quan Fang (sworn on 22 March 1996), para.5.

[24] Commonwealth Parliament, Parliamentary Library, *Bills Digest No.140 1999 — 2000: Migration Legislation Amendment Bill (No 2) 2000*, p.4 (Bills Digest).

of the relief sought by these class members which rendered inapplicable the funding model that has been most frequently employed in class actions not supported by commercial litigation funders: the class representative's solicitors acting on a no win-no fee basis. These problems were exacerbated in July 1998 when "legal aid for asylum seekers applying to the Federal Court was severely restricted".[25]

The limited information contained in the court files on the funding of migration class actions revealed several funding arrangements. In some pre-1998 cases legal aid funding was secured. In other cases some of the country's leading commercial law firms, which subsequently acted for defendants in many of the country's biggest class actions, represented the class members (on a pro bono basis) but not with respect to any appeals filed. Various associations provided the required funding in several class actions.[26] Other associations undertook the task of collecting donations from members of the public of the same nationality as the relevant class members.[27] In several cases contributions from each class member, ranging from $350[28] to $1,500,[29] were requested or envisaged.

## *C. Judicial measures to address barriers*

Judges presiding over these Pt IVA proceedings frequently took steps to address some of the problems highlighted above. One measure they adopted, whenever possible, was to rule on the substantive claims, including on appeal, as soon as practicable.[30] Other measures included allowing the Human Rights and Equal Opportunity Commission[31] to intervene and file written submissions[32] and ordering that notices sent to class members be translated into the languages spoken by the class members in question.[33] In some cases the Court's Registrar waived the fees payable upon the filing of a legal proceeding.[34]

In *De Silva v Ruddock*,[35] after finding against the 164 claimants and awarding costs in favour of the Federal Government, Merkel J ordered that each of the 164 claimants be liable only for their proportionate share of the costs. Equally sensitive to the circumstances of the claimants was Lehane J in *Huang v Minister for*

[25] Harris, "Another Salvo Across the Bow: Migration Legislation Amendment Bill (No 2) 2000 (Cth)" (2000) 23 *University of New South Wales Law Journal* 208, 213. See also S. Taylor, "Should unauthorised arrivals in Australia have free access to advice and assistance?" (2000) 6 *Australian Journal of Human Rights* 35, 38–39; and Bills Digest, p.6.

[26] In some cases these associations were created solely for the purpose of supporting and co-ordinating the litigation: see V. Morabito, "An Empirical Analysis of Appeals by Class Members in Australia's Federal Class Actions" (2013) 42 *Common Law World Review* 240, 257.

[27] See, for instance, R. Tang, "Chinese Students Take Class Action", *Sydney Morning Herald*, 20 November 1993, p.6. See also *Bitel v Ruddock* [2001] NSWSC 43.

[28] This was the amount requested from class members in *Zhou Minister for Immigration and Multicultural Affairs*: Affidavit of Philip Warre Parbury (sworn on 30 October 1998), Annexure A.

[29] This was the amount that the class representatives in *Giraldo v Minister for Immigration and Multicultural Affairs* envisaged asking class members after securing a court order authorising such a contribution: Application, para.5.5.

[30] See, for instance, *Fernando v Ruddock* [2000] FCA 1151 at [22], per Sackville, Katz and Kenny JJ; *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 at 104, per Wilcox J; and *Din v Minister for Immigration and Multicultural Affairs* [1998] 961 FCA.

[31] Now the Australian Human Rights Commission.

[32] See, for instance, *Fang v Minister for Immigration & Ethnic Affairs* (1996) 135 ALR 583 at 586, per Carr J.

[33] See, for instance, *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 at 105, per Wilcox J.

[34] This occurred in, among others, *Rith v Minister for Immigration, Local Government and Ethnic Affairs*.

[35] *De Silva v Ruddock* [1998] 311 FCA.

*Immigration and Multicultural Affairs*[36] as his Honour rejected the defendant's[37] application to have this proceeding terminated as a Pt IVA proceeding. This ruling was based on the fact that if the proceeding had ceased to continue as a class action, the class members would have been time barred from commencing individual proceedings.

In *Trong*, Merkel J took active steps to assist the claimants. His Honour observed that

> "either scant or no attention was given in the Application and in the applicant's submissions to several issues which are raised by the evidence and which, on the tentative view I presently have, may be decisive in the present case".[38]

Subsequently, Merkel J gave the class representative leave to apply to amend the application to raise the issues that his Honour had identified. This step was acknowledged by Merkel J "to constitute a more interventionist role on the part of the court than is appropriate in a civil proceeding".[39] This eventually led to a successful outcome for the class.[40]

## *D. Prohibition of the use of the class action device in migration proceedings*

In March 2000 the then Minister for Immigration and Multicultural Affairs unveiled in the Federal Parliament the Migration Legislation Amendment Bill (No.2) 2000 (Cth). This Bill severely curtailed the ability to bring legal proceedings in migration-related matters in the Federal Court and the High Court through a number of measures, including the total prohibition of the employment of the Pt IVA regime. The principal justification advanced by the Minister for this latter measure was that

> "class actions have been taken out allowing significant numbers of people to obtain bridging visas to remain in Australia until the courts determined the matter. All 10 of the class actions decided so far … have been dismissed by the courts."[41]

Our review of the 28 court files in question revealed that, contrary to this claim, in five (approximately 18 per cent) of these migration class actions a favourable outcome was secured for most of the class members. Whilst this success rate may not be described as impressive, it is relatively positive when viewed in light of the formidable barriers, highlighted above, faced by the class members in question and, in particular, the funding barriers.

Most of the solicitors who acted for class representatives in these proceedings had no prior experience in class actions and very modest resources at their disposal. Thus, it is reasonable to conclude that the low success rate was, to a significant

[36] *Huang v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 134 at 139.

[37] In the Federal Court of Australia, plaintiffs are known as applicants whilst defendants are known as respondents but in this article the traditional terms will be used.

[38] *Trong* (1996) 66 FCR 239 at 244.

[39] *Trong* (1996) 66 FCR 239 at 244.

[40] *Trong v Minister of Immigration Local Government and Ethnic Affairs* [1996] FCA 1674.

[41] P. Ruddock MP, Minister for Immigration and Multicultural Affairs, Migration Legislation Amendment Bill (No 2) 2000, Second Reading Speech, *Legislative Debates*, House of Representatives (14 March 2000), p.14,623.

extent, attributable to the quality of the legal representation that the relevant class members could afford.[42] Furthermore, as observed by the Law Council of Australia in 2000, "even where the legal challenge had failed, the courts had conceded the significance of the issues raised".[43]

## *E. Aspiring residents seeking monetary relief*

In addition to the 28 federal class actions canvassed above, two Pt IVA proceedings and a Pt 10 proceeding were filed, during the review period, on behalf of people desiring to reside in Australia; but the relief sought in these proceedings was of a monetary nature rather than being permitted to remain in Australia. Successful outcomes were secured for the claimants in the two federal class actions, although in one of these cases a favourable outcome was arrived at after the proceeding was discontinued as a Pt IVA proceeding and the former class members were appointed as co-plaintiffs.

In the first proceeding, *Tang Jia Xin v Minister for Immigration and Ethnic Affairs*, damages, including exemplary damages, were sought against the Commonwealth Government on behalf of 38 Chinese refugees for wrongful imprisonment and trespass to person.[44] The claims of two of these class members were selected as test cases with respect to the crucial question of whether they were unlawfully detained in custody. Wilcox J found in favour of these two claimants.[45] Following this ruling all but one of the class members accepted the settlement offers extended to them by the defendant.

The other Pt IVA proceeding, funded by the NSW Legal Aid Commission, was *Tsang Chi Ming v Uvanna Pty Ltd*.[46] It was brought on behalf of a group of Chinese and Hong Kong citizens who entered into a contract with Uvanna Pty Ltd (Uvanna) pursuant to which Uvanna agreed to act as a migration agent to secure permanent resident status for these persons in exchange for substantial fees of $20,000 or more. Sixteen months after it was filed, Lockart J ordered that the proceeding no longer continue as a class action as "it had become apparent that it was inappropriate for the proceedings to continue as representative proceedings".[47] Hill J awarded compensation in excess of $400,000 to all but one of the 18 former class members who in the meantime had become co-plaintiffs.

In December 2013 a class action was filed in the Supreme Court of NSW against the Federal Government on behalf of non-Australian passengers of an Indonesian vessel that "on 15 December 2010 broke apart after smashing into rocks at Flying Fish Cove, Christmas Island".[48] As a result of this accident, "48 persons died and other persons suffered injury".[49] This case is still in progress.

[42] The solicitor that acted for the class representatives in two migration class actions, for instance, acknowledged that he "was an inexperienced practitioner [with] … little over 3 years' experience as a practising lawyer … I am a general practitioner and my knowledge in this area of law was not good": Affidavit of Chanaka Bandarage (sworn on 5 October 2000), p.7.

[43] Cited in Joint Standing Committee on Migration, *Review of Migration Legislation Amendment Bill (No 2) 2000*, p.24.

[44] *Tang Jia Xin v Minister for Immigration and Ethnic Affairs* [1996] FCA 1379.

[45] *Tang Jia Xin* [1996] FCA 1379.

[46] See *Tsang Chi Ming v Uvanna Pty Ltd* (1996) 140 ALR 273.

[47] *Tsang Chi Ming* (1996) 140 ALR 273 at 274.

[48] *Ibrahimi v Commonwealth of Australia*, Statement of Claim, 16 December 2013, para.18.

[49] *Ibrahimi*, Statement of Claim, 16 December 2013, para.113.

## III. Claimants with intellectual disabilities

Individuals with intellectual disabilities are among the most disadvantaged and vulnerable people in Australian society. An Australian study found, for instance, that "adults with an intellectual disability were more than twice as likely to be victims of personal crimes as the general adult population".[50] Furthermore, around 45 per cent of Australians with any kind of disability are living either near or below the poverty line.[51] The Australian Bureau of Statistics revealed in 2012 that

> "the unemployment rate for people with intellectual disability was high in comparison with other disability groups, regardless of severity. … This may partly reflect the unique barriers that people with intellectual disability face in assessing education and work."[52]

These vulnerabilities were apparent in the country's only three class actions, all Pt IVA proceedings, that were filed, during the review period, on behalf of intellectually disabled people. In two of them—*Nojin v Commonwealth of Australia* and *Duval-Comrie v Commonwealth of Australia*—unlawful discrimination against individuals who worked in Australian Disability Enterprises (ADEs)[53] was alleged.

### *A. Intellectually disabled workers*

The public significance of these proceedings was accurately described by H Borenstein SC during a directions hearing

> "these are cases which raise significant matters of public policy. They go to the validity of the assessment process which has been developed by the Commonwealth and applied by employers in respect of persons working in special employment situations."[54]

It was alleged that the assessment process in question—the Business Services Wage Assessment Tool (BSWAT)—devised by the Federal Government and employed to determine pro-rata wages for people working at ADEs, discriminated against people with intellectual disabilities, in contravention of the Disability Discrimination Act 1992 (Cth).

The first of these Pt IVA proceedings was filed in September 2008 by Elizabeth Nojin on behalf of her intellectually disabled son who worked at an ADE.[55] There were four defendants: the Commonwealth, the ADE where Nojin worked and two other ADEs where some of the 32 intellectually disabled persons, on whose behalf the class action was filed, worked. The relief sought by Nojin, who was represented by the AED Legal Centre, included compensation for the loss and damage suffered because of the unlawful discrimination and replacement of the BSWAT with other wage assessment tools which tested only productivity.

[50] S. Murray and A. Powell, "Sexual assault and adults with a disability" (2008) 9 *ACSA Issues* 1, 3.

[51] PWC, *Disability expectations: Investing in a better life, a stronger Australia* (November 2011), p.3, *http://www.pwc.com.au/industry/government/assets/disability-in-australia.pdf* [Accessed 6 November 2015].

[52] Australian Bureau of Statistics, Australian Social Trends, Disability and Work (March Quarter 2012), p.6.

[53] ADEs are non-profit organisations that receive funding from the Commonwealth "for the purpose of enabling them to provide support programs, including employment, for disabled people": *Nojin v Commonwealth of Australia* [2011] FCA 1066 at [4], per Gray J.

[54] *Transcript of Proceedings* (*Nojin v Commonwealth of Australia*; 9 April 2009), p.5.

[55] He suffers from "cerebral palsy and has a moderate intellectual disability. He also has epilepsy, causing frequent seizures of the kind known as 'petit mal'": *Nojin v Commonwealth of Australia* [2011] FCA 1066 at [2], per Gray J.

Following the objection by two of the ADEs that the proceeding failed to adhere to one of the requirements of Pt IVA, as a result of Nojin having no individual claims against them, the class representative secured two consent orders: (a) that the proceeding be discontinued with respect to the relevant defendants; and (b) that the proceeding against the remaining two defendants not proceed as a Pt IVA proceeding. Nojin was unsuccessful at first instance[56] but successful on appeal as the Full Federal Court held, by a majority, that the ADE where Nojin worked had engaged in unlawful discrimination, in contravention of s.15 of the Disability Discrimination Act 1992 (Cth).[57] At first instance both monetary and non-monetary relief were sought but on appeal the application for a compensation order was not pursued.[58]

Twelve months after the Full Federal Court decision, the *Duval-Comrie*[59] Pt IVA proceeding was filed against the Commonwealth by Maurice Blackburn in conjunction with the AED Legal Centre. It was brought on behalf of intellectually disabled workers employed at an ADE, as at 22 October 2013, who had been or were proposed to be assessed using the BSWAT. It is estimated that around 10,500 intellectually disabled workers matched this description and will thus be covered by this proceeding. The same injunctive, declaratory and compensatory relief that was sought at first instance in *Nojin* was sought in this class action. The same funding model was adopted in both proceedings: the solicitors and barristers recover their fees only from the defendants whilst the class representatives' litigation representatives (their mothers) bear the risk of adverse cost awards.

The class members in both class actions lacked the financial means to bring their own proceedings given that they were working for low wages (the subject of the class actions) and received the disability support pension. Furthermore, the amounts sought by each class member were relatively small as they were the difference between the wages they received under the BSWAT ($1.67 an hour in the case of the class representative in *Duval-Comrie*) and the wages they would have been paid if their wages were calculated under a different wage assessment tool ($3.34 in the case of the class representative in *Duval-Comrie*).

Apart from these financial barriers, there were challenges related to the legal capacity of the class members and communications with them. The community legal centre played a vital role in assisting with appropriate and effective communication. The capacity of class members to take a step in the proceeding (for instance opting out) was a challenge to be navigated as was identifying an effective way to communicate the meaning and consequence of opting out. For instance, in *Duval-Comrie* direct mail to class members written in "Easy English" and using pictures, either with the assistance of the Commonwealth or the employers distributing information directly, was proposed rather than a newspaper advertisement. This proceeding was ongoing at the time of publication.

[56] *Nojin* [2011] FCA 1066 at [2], per Gray J.
[57] *Nojin* [2012] FCAFC 192.
[58] *Nojin* [2012] FCAFC 192 at [158], per Buchanan J.
[59] *Tyson Duval-Comrie (by his Litigation Representative Claudine Duval) v Commonwealth of Australia* (VID1367/2013).

### *B. The Grand Western Lodge class action*

In September 2013 the *McAlister v State of New South Wales*[60] Pt IVA proceeding was filed seeking compensation for people with disabilities who were allegedly assaulted, falsely imprisoned or suffered financial losses while they were residents of Grand Western Lodge (GWL) over a period of 12 years. GWL was a licensed residential centre for people with disabilities in Millthorpe, NSW. The class representative Paul McAlister (by his litigation representative the NSW Trustee and Guardian) lived at GWL from 1988 until he was removed in 2011. He has a mild to moderate intellectual disability and has been diagnosed with schizophrenia.

It is alleged that the manager of GWL physically assaulted residents, encouraged a residents' committee to assault residents, confined residents as punishment and administered unprescribed quantities of psychotropic medication to sedate some residents. In the pleadings, it is also alleged that the licensee of GWL, Avibin Pty Ltd, failed to properly care for the physical and mental health of the residents, ensure adequate numbers of competent staff, provide enough food of adequate quality or suitable clothing or footwear, or maintain proper records of medications and expenditure. The NSW Department of Ageing Disability and Home Care, which was responsible for licensing GWL, is among the defendants as it is alleged that it was negligent in its monitoring and enforcement of licence conditions.

This proceeding was brought on behalf of class members who resided at GWL for some time within the period 1 January 2000 to 15 August 2011 and suffered loss or damage as a consequence of the conduct of the defendants. They have all been diagnosed with some form of intellectual disability and/or psychiatric disorder. Their vulnerability was further exacerbated by the alleged abuse and neglect they had suffered at GWL.

A number of barriers needed to be overcome in order to bring this class action. The removal of the class members from GWL and the identification of a legal claim was a result of long-term advocacy by disability advocates and investigations by a community legal centre and Maurice Blackburn. All class members had some form of cognitive impairment and were subject to financial management orders; as a result, the class members who engaged Maurice Blackburn did so via their financial manager. The class members also had very limited financial means. In fact, for the vast majority of the class members their only source of income was the disability support pension and it was alleged by the class representative that they were denied access to this income for the duration of their residence at GWL. The class action is being conducted on a pro bono basis and is ongoing.

## IV. Children and young people

### *A. Victims of abuse at a school farm*

It is difficult to imagine a more vulnerable group of persons than children who have suffered systemic abuse at residential institutions. This was essentially the case that was pleaded in *Giles v Commonwealth of Australia*, a Pt 10 proceeding. It was brought on behalf of persons who, as children, were allegedly physically

[60] *Paul Leslie McAlister ((by his Litigation Representative NSW Trustee and Guardian) v State of New South Wales* (NSD1968/2013).

and/or sexually assaulted whilst they were residents of the Fairbridge Farm School at Molong in regional NSW between 1937 and 1974.[61]

As explained by Garling J of the NSW Supreme Court, the aim of the foundation that established this farm school, the Fairbridge Foundation, was to establish schools in

> "rural communities of various of the colonies of Great Britain, and children who were living in poor and unhealthy conditions in Great Britain, having been sent there, would have an opportunity of growing up, being educated and learning a variety of skills in a much better and more healthy environment".[62]

What was alleged in this class action, in comments made to the media by some of the former residents of this school and in a book published in 2007 by David Hill[63]—which was based on documents found in the Foundation's archives and testimony from 40 former residents—reveals a diametrically opposed state of affairs. For instance, in the pleadings reference is made to

> "the prevalence of a number of paedophiles and violent and abusive persons who were engaged in various positions of employment and activity at Fairbridge Farm School in a largely unsupervised and uncontrolled environment and in which a number of instances of abuse regularly occurred".[64]

Some of the significant difficulties faced in seeking legal redress for these victims were adverted to by Garling J: "having regard to the time periods involved, it is safe to conclude that many of the 1,200 children who resided at Molong at one time or another would be dead. Many others are likely to be elderly or infirm".[65] Furthermore, it was reported in the media that many of the former students were barely literate;[66] a fact confirmed by David Hill at least with respect to the 40 persons that he interviewed.[67] Thus, they were not likely to be able to seek compensation on an individual basis. This class action was funded by Slater & Gordon. In June 2015 it was announced that it was settled for $24 million, "the largest compensation payment for survivors of institutional child abuse in Australian legal history".[68]

[61] *Giles v Commonwealth of Australia* [2014] NSWSC 83 at [11], per Garling J.

[62] *Giles* [2014] NSWSC 83 at [2].

[63] D. Hill, *The Forgotten Children: Fairbridge Farm School and its Betrayal of Australia's Child Migrants* (Random House, 2007).

[64] Second Amended Statement of Claim, 6 June 2012, para.9(a)(i). See also D. Murphy, "A far cry from family", *Sydney Morning Herald*, 28 April 2007, p.3; K. Jackson, "The damage done", *The Australian*, 4 July 2007, p.8; R. Guilliat, "Abuse of migrant kids 'covered up'", *The Australian*, 28 April 2007, p.10; D. Box, "Hill defies town's anger over abuse to spruik book", *The Australian*, 14 May 2007, p.11; and J. Minus, "State was 'aware of child abuses'", *The Australian*, 15 June 2011, p.10.

[65] *Giles* [2014] NSWSC 83 at [93]. See also E. Murray, "Child Migrants still struggle with brutal past", *Sydney Morning Herald*, 24 March 2006, p.5.

[66] See K. Jackson, "The damage done", *The Australian*, 4 July 2007, p.8; and L. Hall, "Child migrants sue over abuse at Molong school", *Sydney Morning Herald*, 15 June 2011, p.9.

[67] R. Guilliat, "Abuse was their single lesson", *The Australian*, 28 April 2007, p.4 ("he also noted an unusual trait shared by his interviewees; many of them struggled to fill in the consent form authorising their interviews because they had difficulty reading").

[68] R. Browne, "$24m abuse payout a 'historic moment'", *Sydney Morning Herald*, 30 June 2015, p.5.

## *B. False imprisonment of children and young people*

The *Amom v State of NSW*[69] class action was filed in the NSW Supreme Court seeking compensation for children and young people who had been wrongfully arrested and detained by NSW police for breach of bail. It was thought that up to 200 young people had been falsely imprisoned by police due to a problem with the police computer system containing out-of-date or incorrect bail information.

By way of illustration, bail conditions had been imposed on the class representative, who was 14 years old at the time of his arrest, in January 2010. In March 2010 a magistrate of the Children's Court dismissed the charges. The boy was free and no longer subjected to bail. Later in March 2010 and twice again in April 2010 the class representative was arrested for breach of bail conditions, which were no longer in force, and held overnight in a locked cell at the Blacktown Police Station. Whilst falsely imprisoned, the plaintiff was searched, fingerprinted, strip searched and handcuffed.

The systemic issue of wrongful arrests due to incorrect police information was identified through a partnership between the Public Interest Advocacy Centre (PIAC), Legal Aid NSW, Shopfront and PILCH (now Justice Connect). PIAC approached Maurice Blackburn to act as co-counsel on a class action, combining their complementary expertise in working with vulnerable client groups and conducting complex class action litigation.

The identification of class members was a significant challenge in this class action. At the time of their false arrest and imprisonment, the class members were aged between 11 and 18. Most were "socially and economically disadvantaged; one third [we]re indigenous; most [we]re from non-English speaking backgrounds".[70] The class members' capacity to know and pursue their legal rights was limited, and largely depended on awareness and referrals by their criminal lawyers.

Lawyers for the class focussed on raising awareness of the class action among criminal lawyers and other legal and social services which class members were likely to interact with. They distributed pamphlets on the case and wrote an article for the Law Society of NSW journal alerting criminal lawyers to the class action. Lawyers for the class also attempted to complement communication via more traditional forms of media by establishing a Facebook group which received 650 "likes". At the time of writing, only 32 class members had been identified; yet the class lawyers believe that there may be up to 200 children and young people who could, if aware of their rights, join and be compensated by the state.

Once class members were identified, maintaining contact with many of them was difficult at times. At the most basic level, maintaining current addresses and contact numbers for class members was challenging. Simply by virtue of the age of the class members, by the time the matter was before the court, many class members had moved out of the parental home. In addition, the practical manifestation of the socio-economic disadvantage experienced by many class members made communication even more difficult. Difficulty paying mobile phone bills, insecure housing, and (for some) further incarceration, meant that

[69] Formerly *Konneh v State of New South Wales*.

[70] M. Nagy and M. Tuckey, "Davids and Goliath: Konneh v State of New South Wales" (February 2014) *Law Society Journal* 53, 55.

class members' contact details changed frequently. To address this, the lawyers tried to contact clients every three months, by telephone, text message or letter, and they put in place a freecall number for clients. The lawyers also had their clients' authority to request contact details from Centrelink.

The various vulnerabilities of the class members in this class action rendered the pursuit of their legal rights particularly difficult. Access to justice in this instance would not have been possible without the class actions regime, nor without a collaborative legal team with strong referrer networks and creative approaches to communication.

In September 2013 the presiding judge decided a number of separate questions on the interpretation of the Bail Act 1978 (NSW), handing down a judgment[71] that no statutory defence to false imprisonment was available to the police if the person arrested was not on bail at the time of arrest. In August 2015 it was announced that the defendant had agreed to settle the proceeding for $1.85 million.[72]

## V. Socio-economic barriers

We have already canvassed class actions where some of the vulnerabilities of the class members were of a socio-economic nature. In this Part we explore class actions where the socio-economic barriers faced by the relevant claimants were particularly significant.[73]

### *A. HomeFund scheme*

In April 1986, the then Premier of NSW issued a news release announcing "a revolutionary new home loan scheme for New South Wales",[74] known as the HomeFund scheme, pursuant to which the NSW Government would "organise the provision of low start housing loans of $50 million to benefit upwards of 1,000 borrowers".[75] The Premier's release also revealed that the scheme would "be targeted principally to income earners in the $20,000 to $30,000 income bracket".[76] A central feature of this scheme was the use of a fixed interest rate that applied over the term of the loan, irrespective of prevailing market rates. However, as explained by the Full Federal Court in July 1996

> "a combination of falling interest rates, relatively stable incomes and static or falling property values [had] caused the amount owing by many borrowers to increase to such a degree as to decrease, or even eliminate, their equity in their properties. As a result, they have not been able to refinance at the lower interest rates now available from other financial institutions."[77]

[71] *Konneh v State of New South Wales (No.3)* [2013] NSWSC 1424.
[72] P. Bibby, "Youths win $1.85m for wrongful arrests", *Sydney Morning Herald*, 4 August 2015, p.2.
[73] The class members in some of the class actions canvassed in Pt VIII were in similar circumstances.
[74] Cited in *Woodlands v Permanent Trustee Co Ltd* (1996) 68 FCR 213 at 218, per Wilcox, Burchett and Olney JJ.
[75] *Woodlands* (1996) 68 FCR 213 at 218.
[76] *Woodlands* (1996) 68 FCR 213 at 218.
[77] *Woodlands* (1996) 68 FCR 213 at 218. See also K. Gosman, "A Desperate Cry for Help — We Only Want Justice, Say those trapped by HomeFund Debacle", *Sunday Telegraph*, 11 January 1998, p.8 ("with the lowest mortgage rate now 4.9 per cent, this means HomeFund families are paying three times above the lowest fixed, market rate").

This state of affairs led to the filing of two Pt IVA proceedings, funded by the NSW Legal Aid Commission, on behalf of the aggrieved borrowers. In July 1995 Wilcox J described as follows the age and socio-economic circumstances of the relevant borrowers/class members

> "many of the group members are elderly. Bearing in mind that HomeFund was a scheme created by the New South Wales Government to provide home finance for persons who would not satisfy the criteria of ordinary lending institutions, and many of whom were Housing Department tenants, it is reasonable to assume that few (if any) of the group members are affluent. Each [of the class representatives] has been granted legal aid under the Legal Aid Commission Act 1979 (NSW) in relation to which a means test generally applies."[78]

Both proceedings were settled in 2000.

## *B. Small Loans from Cash Converters*

In 2013, two Pt IVA proceedings[79] were commenced against Cash Converters entities for unconscionable conduct in the provision of financial services. Cash Converters is a pay day lender with around 150 stores in Australia providing consumer credit services and second hand goods retailing.

The great majority of borrowers of short-term credit are living on very low incomes. A government study conducted in 2011 indicated that 50 to 74 per cent of short-term credit customers have an annual income of less than $36,000; 50 per cent are partially employed or unemployed; between 46 and 50 per cent of short term customers are in receipt of government benefits; and up to 25 per cent, have incomes that are so low that they fall beneath the Henderson Poverty Line.[80] The class representative in both proceedings for instance—Ms Gray—left school at the age of 14 and, until 2001, was either at home caring for her children, or working in casual jobs in fast food preparation or cleaning. Ms Gray was in receipt of a disability support pension.

The two class actions were distinguished by the type of loan that was available from Cash Converters in NSW during the period 1 July 2010 to 30 June 2013. The "Cash Advances" class action was filed on behalf of class members who entered into one or more credit contracts in which $1,000 or less was advanced to the class members to be repaid within one month. Over a two year period Ms Gray entered into 21 "cash advances" under each of which Ms Gray was advanced between $100 and $250. The initial contract documentation had terms which included an annual percentage rate of 48 per cent and a loan term of 24 months. However a "deferred establishment fee" was payable when Ms Gray signed a further document to pay out the loan within one month. Ms Gray claimed that when she entered into the contract the parties intended that each loan would be repaid within a month. Therefore, under the relevant law, the deferred establishment fee was to be included

[78] *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139 at 142, per Wilcox J. Two of the class representatives were pensioners.

[79] *Julie Gray v Cash Converters International Ltd ACN 069 141 546* (NSD2089/2013) and *Julie Gray v Cash Converters International Ltd ACN 069 141 546* (NSD2090/2013).

[80] Treasury, *The Regulation of Short Term, Small Amount Finance Regulation Impact Statement* (June 2011), p.33, *http://ris.finance.gov.au/files/2011/09/RIS-Short-term-small-amount-finance.pdf* [Accessed 6 November 2015].

in calculating the applicable annual percentage rate such that the rate for Ms Gray's loans exceeded the 48 per cent statutory limit. Ms Gray sought reimbursement of amounts above the 48 per cent cap (plus interest) from Cash Converters for implementing this business system on the ground that it was unconscionable.

The "Personal Loans" class action related to a business system which was similar to that in Cash Advances. Amounts borrowed under these loans were typically more than for Cash Advances. For example, Ms Gray entered into three loans for $600. The effective term of the personal loans was typically seven months, rather than one month, when the borrower signed the document to repay the loan before the two year term stated in the initial contract.

It is estimated that Ms Gray's claim would be worth a few thousand dollars plus interest. A claim of such a size could never be the subject of individual civil litigation, particularly in circumstances where Ms Gray subsisted on the disability support pension. It is estimated that the group comprises approximately 45,000 members with similarly sized or smaller claims. In June 2015 it was announced that Cash Converters had agreed to pay $23 million to settle both proceedings.[81]

## *C. Ok Tedi Mining*

Another illustration of persons with legal grievances facing formidable socio-economic barriers in seeking legal redress, is furnished by the class members in *Gagarimabu v Broken Hill Proprietary Company Ltd*, a class action filed in the Supreme Court of Victoria in 2000.

It concerned the discharge into the Ok Tedi and Fly Rivers in Papua New Guinea of ore-tailings, waste products and harmful substances emanating from the mining operations of Broken Hill Proprietary Co Ltd and Ok Tedi Mining Ltd at the Ok Tedi copper mine. In this class action it was essentially claimed that, contrary to the terms of the settlement agreement of a previous legal proceeding, the defendants failed "to implement a waste management scheme (primarily a tailings pipeline to carry tailings away from the mine to a storage area downhill from the mountains)".[82]

Most of the 30,000 class members lived in isolated villages in the western province of Papua New Guinea which is the country's "largest, but least developed and most thinly populated, province".[83] They were described by Hedigan J of the Supreme Court of Victoria as "likely to be simple subsistence folk living on the rivers".[84] Some of the problems that were encountered in this class action were described as follows by his Honour:

> "This litigation has some unique features, probably unlikely to occur again … involving a vast area, impenetrable in parts, with a very great number of tribes, clans and languages."[85]

These unique features required unique measures such as, for instance, the opt out model that was ordered by Hedigan J. The opt out notice was communicated to

[81] J. Eyers, "Payday lender settles $23m class action", *The Age*, 19 June 2015, p.29. This settlement was judicially approved in October 2015: see *Gray v Cash Converters International Ltd (No.2)* [2015] FCA 1109.
[82] *Gagarimabu v Broken Hill Proprietary Co Ltd* [2001] VSC 304 at [10], per Hedigan J.
[83] *Gagarimabu* [2001] VSC 304 at [21].
[84] *Gagarimabu v Broken Hill Proprietary Company Limited* [2000] VSC 486 at [22], per Hedigan J.
[85] *Gagarimabu* [2001] VSC 304 at [12], per Hedigan J.

class members in three languages (English, Tok Pisin and Motu) orally, in writing, in newspapers, by radio broadcast and by a process of village meetings in which explanations were provided as to the nature of the claims and the opt out opportunity.[86] This class action was subsequently settled.

## VI. Aboriginal claimants

As explained by the Productivity Commission in September 2014:

> "Socio-economic disadvantage directly impacts on the ability of Indigenous people to access justice. Socio-economic disadvantage among Aboriginal and Torres Strait Islander Australians is widespread and multifaceted: various analyses show that, on average, Indigenous people experience poorer outcomes than non-Indigenous people in the areas of education, income, health and housing. Often disadvantage is cumulative …."[87]

The Law and Justice Foundation of NSW has also drawn attention to the fact that:

> "Indigenous Australians… face a daunting array of barriers to accessing justice, from institutional cultural insensitivity to significant information deficits. They suffer from 'visibility' and are over-represented in the criminal justice system. Generally, low socio-economic status further compounds these problems."[88]

In a dozen Pt IVA proceedings filed during the review period the class members were Indigenous Australians. All but one of the resolved class actions brought on behalf of Indigenous people were unsuccessful. These class actions concerned claims of unconscionable conduct,[89] racially discriminatory sentencing regimes,[90] racially discriminatory criminal prosecutions and police conduct,[91] breach of copyright in Aboriginal artwork,[92] compulsory acquisition of land without just compensation,[93] illegal grant of mining and petroleum exploration permits over native title land[94] and illegality with respect to the constitutional referendum on

[86] *Gagarimabu* [2001] VSC 304 at [12].

[87] Productivity Commission, *Access to Justice Arrangements*, Report No.72 (September 2014), p.764.

[88] L. Schetzer, J. Mullins and R. Buonamano, *Access to Justice & Legal Needs - A project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, Background Paper; Law and Justice Foundation of NSW (2002), p.30, *http://www.lawfoundation.net.au/ljf/site/articleIDs/012E910236879BAECA257060007D13E0/$file /bkgr1.pdf* [Accessed 6 November 2016].

[89] See *Gilbert v Elderslie*. This class action was brought on behalf of Aboriginal persons who entered into certain loan and mortgage contracts. It was alleged that the loans were all part of an unconscionable scheme designed to take advantage of the borrowers' limited ability to understand English and financial concepts and perpetrated with the assistance of senior members of the Aboriginal community. It was discontinued as a Pt IVA proceeding by the class representative. The former class members were then appointed as co-applicants and the proceeding was subsequently settled on confidential terms.

[90] *Glass v State of NSW* (1994) 52 FCR 336.

[91] See *Wotton v State of Queensland* [2007] FCA 280 (summarily dismissed) and *Wotton v State of Queensland* (commenced in August 2013 and still in progress). Both proceedings stemmed from the riots, police action and prosecutions that took place in Palm Island in November 2004 following the death of a resident member of the indigenous community whilst in police custody. See generally S. Healy, "We won't be palmed off", *Townsville Bulletin*, 3 July 2014, p.1; S. Healy, "Palm riot class action — new claims unarmed island residents held at gunpoint", *Townsville Bulletin*, 24 June 2014, p.1; and E. Channon, "Racism in riot claim of action", *Townsville Bulletin*, 30 August 2013, p.4.

[92] It was dismissed following a trial: *Bulun Bulun v R&T Textiles Pty Ltd* [1998] FCA 1082.

[93] The two class actions in question were dismissed following a trial: *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 1397.

[94] It was dismissed following a trial: *Holt v Manzie* [2001] FCA 627.

Australia becoming a republic[95] and public meetings with residents of a specified location.[96] This low success rate appears to be attributable, to a large extent, to the class representatives in question having either no legal representation or having solicitors acting for them that, in many cases, lacked the resources, expertise and/or experience required in running class actions.

The sole successful class action was *Eatock v Bolt*. It was brought with respect to articles published in the *Herald-Sun* on 15 April 2009 entitled "It's so hip to be black" and on 21 August 2009 entitled "White fellas in the black".[97] The Court accepted the class representative's submissions and held that the writing and publication of these articles constituted unlawful racial discrimination under the Racial Discrimination Act 1975 (Cth).[98]

## VII. Older people

A study of the legal needs of older people found that they experience a range of barriers to accessing legal information and advice[99] which can be compounded by economic disadvantage, poor health and disability, and discrimination.

The study identified a particular vulnerability for older people concerning legal issues related to accommodation and housing.[100] This vulnerability was evident in a Pt IVA proceeding filed for the benefit of elderly claimants: *Murphy v Overton Investments Pty Ltd*. It was filed on behalf of over 100 present lessees of a retirement village. The class representative claimed that, prior to entering into his lease, misleading statements were made on behalf of the defendant (which owned and operated the retirement village) concerning the extent of their liability under the lease to contribute to the expenses of operating the lease.

The class representative sought to persuade the Court not to accede to the defendant's request for an order—under s.33N of Pt IVA[101] that the proceeding no longer continue under Pt IVA—by drawing attention to the fact that many of the lessees were elderly and some of them may not have the capacity to give instructions to commence proceedings on their own behalf. Emmett J made a s.33N order and dismissed this proposition in the following manner

> "that is not a weighty consideration to be taken into account in determining the inappropriateness or otherwise of the claims being pursued by means of representative proceedings. Procedures are available, for example, whereby guardians *ad litem* can be appointed for incapacitated or disabled parties."[102]

[95] This proceeding was discontinued by the class representative. See generally *Buzzacott v Australian Electoral Commission* [1999] FCA 1525.

[96] *Thorpe v Barrett*. It was discontinued by the class representative.

[97] It was brought on behalf of people who have a fairer, rather than darker skin, and who by a combination of descent, self-indication and communal recognition are, and are recognised as, Aboriginal persons.

[98] *Eatock v Bolt* [2011] FCA 1103. See also *Eatock v Bolt (No.2)* [2011] FCA 1180.

[99] S. Ellison, L. Schetzer, J. Mullins, J. Perry and K. Wong, *Access to Justice and Legal Needs: Legal Needs of Older People in NSW* (Law and Justice Foundation of NSW, December 2004), p.xvi.

[100] Ellison, Schetzer, Mullins, Perry and Wong, *Access to Justice and Legal Needs: Legal Needs of Older People in NSW* (December 2004), p.xvii.

[101] This provision empowers trial judges, on an application by the defendant or of its own motion, to order the discontinuance of Pt IVA proceedings as Pt IVA proceedings where they are satisfied that: (a) it is in the interests of justice to do so; and (b) one or more of four specified circumstances exist.

[102] *Murphy v Overton Investments Pty Ltd* [1999] FCA 1123 at [120].

An approach more in keeping with the purpose of the class action mechanism has been followed by Canadian courts as they have generally considered the vulnerability of the class members as a significant factor in favour of certifying proceedings as class actions. [103]

## VIII. Personal injury claimants

We have identified over 50 class actions that were brought during the review period on behalf of persons who suffered various health problems that were claimed to have been caused by the negligence of defendants. The vulnerability of these claimants arose as a result of, or was compounded by, the injury the subject of the class action such as terminal cancer, brain injury and physical disabilities. As the analysis below will show, in addition to (frequently serious) health problems, many of these personal injury claimants: (a) were in extremely precarious socio-economic circumstances; (b) were minors or elderly persons; and/or (c) faced extremely expensive litigation as a result of the type of expert evidence that needed to be tendered in order to prove their claims. Individually, the class members in these personal injury class actions would have faced significant and likely insurmountable obstacles to commencing proceedings for compensation in their own right.

### *A. Tobacco*

Two Pt IVA proceedings were commenced in 1999 by different solicitors, working on a no win-no fee basis,[104] against tobacco manufacturers and distributors on behalf of persons who contracted various forms of cancer and/or lung disease (including emphysema) and vascular disease as a consequence of the use of cigarettes over a period of approximately 40 years.[105] These proceedings, which were subsequently consolidated, were not allowed to continue as Pt IVA proceedings as the Full Federal Court held that the claims in question failed to adhere to the three requirements, set out in Pt IVA's s 33C, that need to be satisfied in order to employ the Pt IVA regime.[106] The practical effect of this ruling was revealed by counsel for the class representatives before the High Court

> "there is no way that the tobacco litigation will continue as individual proceedings. It is financially impossible … there is another reason … and it is this … for an individual plaintiff to take on the tobacco companies while suffering from a terminal disease is, in the lingo, a big ask, and is not a realistic ask … because individual plaintiffs, in these circumstances, are probably unlikely to see the outcome of their individual litigation."[107]

[103] See, for instance, *Rumley v British Columbia* (2001) 205 DLR (4th) 39, 57, per McLachlin CJ; *WP v Alberta (No.2)* 2013 ABQB 296 at [110], per Rooke ACJ; *Slark (Litigation guardian of) v Ontario* 2010 ONSC 1726 at [68], per Cullity J; and *TL v Alberta (Director of Child Welfare)* 2006 ABQB 104, 58 Alta LR (4th) 23 at [117], per Slatter J.

[104] See "Class action for 'injured'", *The Advertiser*, 4 March 1999, p.7.

[105] *Nixon v Philip Morris (Australia) Ltd* [1999] FCA 1107 at [2]–[5], per Wilcox J. The most senior solicitor running these proceedings, Peter Gordon, revealed that over 60,000 smokers were covered by this litigation: F Hudson, "Smokers win right to sue", *Herald-Sun*, 14 August 1999, p.9.

[106] *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487.

[107] *Transcript of Proceedings* (*Nixon v Philip Morris (Australia) Ltd* 21 June 2000 Tobin QC) at 5 and 6.

This was confirmed by the fact that two of the original six class representatives died whilst the litigation was in progress.[108]

The adverse effects of tobacco were also the subject of the ninth proceeding filed pursuant to Pt IVA, *Cameron v Qantas Airways Ltd*. Here the claimants were not smokers but instead Qantas passengers who were exposed, against their wishes, to the smoking of other passengers.[109] Only one of the class members received some (albeit modest) monetary compensation.[110]

## *B. Prescribed drugs*

Serious health problems were also suffered by the class members in the two Thalidomide Pt 4A proceedings and the three Vioxx class actions. Two class actions were filed in 2010 and 2011 in the Supreme Court of Victoria[111] by Gordon Legal[112] together with Slater & Gordon on a no win-no fee basis on behalf of persons: (a) who were born in Australia and New Zealand between 1958 and 1970; (b) suffered since birth from a congenital malformation; and (c) whose mothers, while pregnant with them, consumed thalidomide drugs.

The gravity of the injuries suffered by these claimants, commonly known as thalidomiders, may be appreciated by considering the circumstances of the class representative in the second class action: Lynette Suzanne Rowe. The pleadings revealed that she was born without arms or legs and had suffered, among other things, brain injury (caused by febrile illness at approximately 11 months of age), scoliosis (requiring the surgical insertion of a "Harrington Rod") and narrowing of the canals of the ears.[113]

In December 2013 a settlement was secured on behalf of over 100 thalidomiders.[114] Some of the main barriers that had to be overcome in order to arrive at this favourable outcome were summarised as follows during the settlement hearing by Peter Gordon, the most senior member of the team of solicitors running these class actions

> "[the] injuries [of the class members] arose over 50 years ago over a cause of action in which there has never been a successful civil suit in England or in Australia, where much of the evidence is now missing and many of the main witnesses deceased or infirm [and] where the principal thrust of the challenge to the medical orthodoxy was originated not by doctors or scientists, but by lawyers."[115]

[108] See B. Lane, "Tobacco giants stub out class action", *The Australian*, 14 March 2000, p.11; and *Nixon v Philip Morris (Australia) Ltd* [1999] FCA 1107 at [17], per Wilcox J. The day before the first-named class representative died he "recorded his testimony because he knew he would not live to give his evidence in person": "Damages vindicate a fight to the death", *The Australian*, 13 April 2002, p.4. See also C. Harvey, "Smokers' cases to go ahead", *The Australian*, 14 August 1999, p.11.

[109] *Cameron v Qantas Airways Ltd* (1993) ATPR 41-251.

[110] *Cameron v Qantas Airways Ltd* (1995) 55 FCR 147; and *Qantas Airways Ltd v Cameron* [1996] FCA 1702.

[111] *Robbins v Grunenthal GmbH* and *Rowe v Grunenthal GmbH*.

[112] This firm was established in 2010 "for the specific purpose of helping thalidomide survivors in Australia and in other parts of the world", *http://www.gordonlegal.com.au* [Accessed 6 November 2015].

[113] Statement of Claim (*Rowe v Grunenthal GmbH* 8 July 2011) at [7]. See also A. Petrie, "Birth drug victims take action", *The Age*, 30 October 2010, p.4; and A. Rule, "Lifelong fight for justice", *Herald-Sun*, 25 June 2011, p.5.

[114] See M. Russell, "Thalidomide win", *The Age*, 8 February 2014, p.5; "Closure at last for thalidomide victims", *Herald-Sun*, 8 February 2014, p.13; and N. Toscano and M. Russell, "Thalidomide victims win $89 million after class action", *Sydney Morning Herald*, 3 December 2013, p.10.

[115] *Transcript of Proceedings* (*Rowe v Grunenthal GmbH* 7 February 2014) at 7. Other barriers included the fact that "the most culpable defendant (the German manufacturer Grunenthal) had not been pursued outside Germany

The principal Vioxx proceeding, *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd*,[116] was brought in the Federal Court on behalf of all persons who, after 30 June 1999, obtained from a medical practitioner in Australia prescriptions of the non-steroidal anti-inflammatory drug Vioxx, consumed such tablets, suffered or were diagnosed as having suffered one or more of specified cardiovascular conditions, thrombotic stroke and vascular disease. The class representative, for instance, "had a serious heart attack".[117] It was revealed by Slater & Gordon, which ran these class actions on a no win-no fee basis, that it had incurred costs in excess of $10.5 million.[118] These proceedings were eventually settled.[119]

Two Pt IVA proceedings were filed by Arnold Thomas & Becker in January 2010 seeking compensation for loss and damages arising from the consumption of Cabaser, Dostinex or Permax. These tablets were prescribed to the class members for the treatment of Parkinson's Disease, Restless Leg Syndrome and pituitary gland tumours. It was alleged that the consumption of these drugs caused class members to suffer from various forms of compulsive behaviour.[120] Arnold Thomas & Becker "have funded the litigation themselves",[121] following the firm's unsuccessful attempts to secure the support of a commercial litigation funder. Both proceedings were settled.[122]

A settlement was also secured for class members in *Reynolds v Key Pharmaceutical Pty Ltd*. This Pt 4A proceeding, conducted on a no win-no fee basis, was brought on behalf of over 100 persons who consumed travel-sickness tablets, called Travacalm, and claimed to have suffered personal injury as a result of such consumption.[123]

No favourable outcome was secured in the remaining two class actions filed with respect to allegedly harmful prescribed drugs. The first was a Pt 4A proceeding, run on a no win-no fee basis, filed on behalf of persons who consumed

and its most germane documents had never been translated or examined for what they revealed about their state of knowledge and disclosure policies to distributors outside Germany. Even the prosecution brief and the court judgment of the criminal trial of the executives had never been translated into English. We did that for the first time in this trial." Email to first-named author from Peter Gordon on 10 August 2014.

[116] It was originally filed as a Pt 4A proceeding but a consent order was made by the Supreme Court of Victoria that the proceeding be transferred to the Federal Court: *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd* [2006] FCA 875 at [1], per Jessup J. In the other Vioxx Pt IVA action, the class members were "all personal representatives of the estates of persons who took Vioxx before their passing": *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No.6)* [2013] FCA 447 at [25], per Jessup J.

[117] *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd* [2010] FCA 180 at [4], per Jessup J.

[118] Australian Stock Exchange, *Slater & Gordon 2011–2012 Annual Report to Shareholders (Announcement, 11 May 2012)*, p.6.

[119] *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No.7)* [2015] FCA 123.

[120] The behaviour in question included compulsive gambling, spending and eating; hyper-sexuality and a compulsive fascination with and performance of repetitive, mechanical tasks: see *Collin v Aspen Pharmacare Australia Pty Ltd* [2013] FCA 952 Sch.1.

[121] *Collin v Aspen Pharmacare Australia Pty Ltd* [2013] FCA 1336 at [8], per Davies J. The class representative in one of these class actions "has not worked since 1999 being on a disability support pension since": Revised Fourth Amended Statement of Claim (*Winterford v Pfizer Australia Pty Ltd* 3 October 2012 at [4]. See also K. Hagan, "Parkinson's drug: sex, gambling link", *The Age*, 4 June 2010, p.5 ("among the claimants are people who lost more than $500,000 to gambling. At the other end of the scale are pensioners who gambled all their income and accrued large debts"); R. Viellaris, "Gamblers in Parkinson's drug lawsuit", *Sunday Mail*, 3 April 2011, p.5; and S. Hewitt, "Drugs stole my life", *Sunday Herald-Sun*, 3 April 2011, p.8.

[122] See *Collin v Aspen Pharmacare Australia Pty Ltd* [2013] FCA 1336; *Winterford v Pfizer Australia Pty Ltd* [2015] FCA 426; and K. Hagan, "Parkinson's sufferers win settlement", *The Age*, 9 December 2014, p.2

[123] The alleged harm included hallucinations, vomiting, delirium, disorientation, spasms, blurred or lost vision, loss of balance and personality changes: see Statement of Claim, 9 August 2004, para.16; N. Papps, "Girl, 10, leads class action", *Herald-Sun*, 30 April 2003, 4; N Papps, "Holiday in hospital for young traveller", *Herald-Sun*, 30 April 2003, p.4: D. Hoare and J. Sexton, "Hallucinations on school trip — the vitamin recall", *The Australian*, 30 April 2003, p.6; and T. Noble, P. Hudson and M. Mottram, "A cure's journey to illness", *The Age*, 30 April 2003, p.1.

the drug Roaccutane (for the treatment of acne) and who claimed to "have suffered an extensive range of psychiatric and psychological problems"[124] as a result of such consumption. It was discontinued by the class representatives twelve months after it was filed, following the realisation by their solicitors that they lacked the resources to run a proceeding of this magnitude.[125]

The other unsuccessful proceeding, also run on a no win-no fee basis, was *Crandell v Serviev Laboratories (Aust) Pty Ltd*. In this Pt IVA proceeding damages were sought on behalf of people[126] who allegedly suffered injury[127] from consuming pharmaceutical products (called Adifax and Ponderax Pacaps) intended to assist with weight loss. It was discontinued as a Pt IVA proceeding and transferred to the Supreme Court of NSW by consent.[128]

## *C. Medical devices*

One of the better-known class actions brought with respect to medical devices is *Bright v Femcare Ltd*. This Pt IVA proceeding was brought on behalf of women who had undergone a sterilisation procedure using a Filshie clip to block the fallopian tubes and suffered personal injury or loss as a result of the sterilisation procedure failing because the Filshie clips were not properly adjusted.[129] The class representative was described by the trial judge as "a person of small means".[130] Maurice Blackburn ran this proceeding on a no win-no fee basis. As explained by the most senior member of the team of solicitors running this proceeding, the class representative's

> "wasted costs and disbursements exceeded $1 million. The action was eventually discontinued because the class action mechanism was not providing effective relief … [T]here were two appeals to the Full Court of the Federal Court and two appeals to the High Court — even before the applicant had received a defence."[131]

The other class actions filed during the review period on behalf of the victims of allegedly defective medical devices concerned silicone breast implants,[132]

[124] *Vlamis v Roche Products Pty Ltd* Statement of Claim, 4 December 2003, para.25.

[125] Maurice Blackburn and Slater & Gordon were approached to take over the running of this class action but declined.

[126] It was reported in the media that 1,200 people registered interest in this class action and that most of them were women aged in their 40s to 50s: see S. Milohanic, "Thousands to sue over slimming pills", *Sunday Telegraph*, 11 July 1999, p.37.

[127] The class representative and some of the class members claimed to have suffered heart valve problems and pulmonary hypertension after taking these prescribed pills while others claimed that they contributed to serious medical conditions, including dizziness, disorientation and chest pain: see P. Michael, "Hundreds take lab to court over diet pills", *Adelaide Advertiser*, 23 February 1999, p.3.

[128] *Crandell v Servier Laboratories (Aust) Pty Ltd* [1999] FCA 1461 at [1], per Sackville J.

[129] In the pleadings the loss or damage suffered by the class members was described as comprising "pregnancy, followed either by termination or by childbirth and rearing the child, and 'physical and/or psychiatric/psychological injury' consequent upon the termination or upon bearing the child, childbirth and rearing the child": *Bright v Femcare Ltd* [2000] FCA 742 at [19], per Lehane J.

[130] *Bright v Femcare Ltd* [2000] FCA 742 at [106]. She lived in a housing commission flat and earned a modest salary working on a casual basis packing boxes: Affidavit of David Henry Hirsch (sworn on 2 November 1999), para.2.

[131] B. Murphy and C. Cameron, "Access to Justice and the Evolution of Class Action Litigation in Australia" (2006) 30 *Melbourne University Law Review* 399, 413.

[132] See *Bates v Dow Corning (Australia) Pty Ltd* [2005] FCA 927; A. Catalano, "Breast implant victims will fight battle here", *The Age*, 3 September 1994, p.8; E. Tom, "Breast Implant Settlement now excludes Australians", *Sydney Morning Herald*, 3 September 1994, p.11; and E. Longo, "Women start class action on implants", *The Age*, 22 July 1994, p.2.

pacemakers, pacemaker leads,[133] knee implants,[134] transvaginal mesh[135] and hip implants.[136] To our knowledge, they were all run on a no win-no fee basis. Many of the class members in these federal class actions were elderly, infirm and/or of extremely limited means (often as a result of an inability to work).[137] With the exception of the proceedings brought with respect to the hip implants and transvaginal mesh, which are still running, the class members in the remaining class actions received monetary relief through settlement proceeds.[138] Representative of these product liability Pt IVA proceedings is *Courtney v Medtel Pty Ltd* filed by Maurice Blackburn Cashman, as Maurice Blackburn was then called, in June 2000.[139]

*Courtney* arose out of a "Hazard Alert" issued on 5 June 2000 by the Therapeutic Goods Administration. This alert related to a particular batch of pacemakers which were at increased risk of early battery depletion and a resulting "no output condition".[140] This class action was brought on behalf of all persons who had one of these pacemakers implanted by doctors in Australia; over 1,000 persons matched this description.[141] Over 150 of these patients were deceased.[142] A majority of the surviving class members were elderly (their average age was 79), frail, infirm, suffered from a range of health problems including cardiac conditions,[143] lived

[133] See J. Fife-Yeomans, "Heart patients launch class action", *The Australian*, 10 January 1997, p.3; J. Fife-Yeomans, "Pacemaker suit puts class actions to test", *The Australian*, 13 May 1997, p.4; and S. Oldfield, "PacDun: the human side", *The Age*, 20 January 1997, p.4.

[134] See *Davies v Smith & Nephew Surgical Pty Ltd* (Application 20 May 2004); *Casey v DePuy International Ltd* [2010] FCA 617; and T. Shepherd, "Patients seek payout on injuries from faulty replacement joints", *The Advertiser*, 14 April 2010, p.11.

[135] *Davis v Ethicon Sarl* (Application 15 October 2012). See R. Jancauskas, "Product Liability Class Actions in Australia" (2015) 129 *Precedent* 23, 26.

[136] See B. Slade, "The Future of Class Actions" (paper presented at the Class Actions Seminar; University of NSW; 25 October 2012), paras 2.10–2.11; and V. Morabito, "Clashing Classes Down Under - Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives" (2012) 27 *Connecticut Journal of International Law* 245, 277–278.

[137] See E. Longo, "Women start class action on implants", *The Age*, 22 July 1994, p.2; K. Ashley-Griffiths, "The price of a heartbeat", *Sunday Herald-Sun*, 13 February 2000, p.6; A. Kelly, "Years of pain and waiting", *Newcastle Herald*, 24 November 2004, p.20; T. Shepherd, "More hip patients sue as anger grows", *The Advertiser*, 30 September 2010, p.17; J. Miles, "Faulty hip leads to class action", *Courier Mail*, 4 October 2011, p.17; M. Metherell, "Senate finding little consolation for years of hip agony", *Sydney Morning Herald*, 26 November 2011, p.13; J. Miles, "Implant failures fire class action", *Courier Mail*, 26 April 2012, p.22; J. Medew, "Walking wounded: many unaware of faulty implants", *The Age*, 20 October 2012, p.5; S. Dunlevy, "Implant horror takes toll", *Courier Mail*, 20 October 2012, p.33; J. Miles, "Medical giant in Aussies' sights", *Courier Mail*, 24 November 2013, p.33; P. Bibby, "Hip replacement patients fight medical giants in class action", *The Age*, 3 March 2015, p.10; and B. Crouch, "Fresh hope in dodgy hip replacement class action", *The Advertiser*, 26 November 2013, p.25.

[138] See *Spice v Pacific Dunlop Ltd* (Transcript of Proceedings 7 August 1998); *Walther v Pacific Dunlop Ltd* (Order 19 May 2000 Wilcox J); *Davies v Smith & Nephew Surgical Pty Ltd* (Order 29 April 2005 Tamberlin J); *Casey v DePuy International Ltd* [2010] FCA 617; T. Joynson, "Insurers agree on PacDun payments", *Herald-Sun*, 17 June 1998, p.37; K. Ashley-Griffiths, "The price of a heartbeat", *Sunday Herald-Sun*, 13 February 2000, p.6; Australian Associated Press, "PacDun gets court OK for Australian pacemaker settlement", 19 May 2000; and "Pacemaker fault costs PacDun $2.4m", *The Australian*, 20 May 2000, p.35. With respect to the breast implant actions, the settlement proceeds were generated by US class actions: see *Bates v Dow Corning (Australia) Pty Ltd* [2005] FCA 927.

[139] Another Pt IVA proceeding, *Darcy v Medtel Pty Ltd*, filed by Maurice Blackburn 12 months later was conducted alongside Courtney as both proceedings involved the same defendants, the same causes of actions and the pleadings were virtually identical. The only difference between them was that they involved different models of pacemakers that were alleged to be defective for different reasons: see generally *Darcy v Medtel Pty Ltd* [2001] FCA 1369; *Darcy v Medtel Pty Ltd* [2004] FCA 807; and I Gilchrist, "Lawsuits on pacemaker", *Herald-Sun*, 15 June 2001, p.24.

[140] *Courtney v Medtel Pty Ltd* [2003] FCA 36 at [1], per Sackville J.

[141] *Courtney v Medtel Pty Ltd (No.4)* [2004] FCA 1233 at [6], per Sackville J.

[142] Affidavit of Rebecca Gilsenan (sworn on 2 April 2002), para.4.

[143] The class representative, for instance, suffered "from a number of coronary conditions, including Ischaemic Heart Disease, Impaired Left Ventricular Systolic Function and Second Degree Heart Block": Affidavit of Rebecca Gilsenan (sworn on 2 April 2002), para.3.

alone or with elderly partners and were unlikely to have a sophisticated understanding of their rights or entitlements in the proceeding.[144]

Despite the great vulnerability of the class members highlighted above, Stone J held that no restrictions should be placed on the ability of the defendants' solicitors to conduct settlement negotiations, over the telephone, with class members.[145] The practical effect of this approach was that the defendants "settled approximately 21 per cent of group members' claims shortly before the trial".[146]

The vulnerabilities of the class members were acknowledged by Sackville J who took great care to ensure that the opt out notice was framed so as not to cause unnecessary alarm or distress to the intended recipients, in light of the recognition that "people who are at risk of harm or who are otherwise vulnerable, such as elderly persons, may be particularly susceptible to anxiety or distress".[147] Sackville J also agreed with the lawyers acting for both sides not to order that the settlement notice be advertised in the press for several reasons including the "dangers of an advertisement creating anxiety and distress among pacemaker recipients".[148]

Following a trial, a judgment was entered in favour of the class representative in the sum of $9,988.20 plus interest of $1,304.19.[149] A settlement was subsequently executed in this proceeding[150] and the related proceeding.[151]

## *D. Natural disasters*

In Victoria, Saturday, 7 February 2009 will always be remembered as Black Saturday. On this summer day, fires broke out across the state. As noted by the 2009 Victorian Bushfires Royal Commission, "the most serious consequence of the fires was the death of 173 people".[152] Six Pt 4A proceedings were filed on behalf of the victims of these fires. These proceedings were described by Dixon J of the Supreme Court of Victoria as "important proceedings in which there is a wider public interest".[153] They were all settled resulting in payments from the defendants close to a total of $1 billion.[154]

[144] See *Courtney v Medtel Pty Ltd* [2001] FCA 949 at [8], per Sackville J; *Courtney v Medtel Pty Ltd* [2001] FCA 1037 at [14], per Sackville J; *Courtney v Medtel Pty Ltd* [2002] FCA 957 at [49], per Sackville J; *Courtney v Medtel Pty Ltd (No.4)* [2004] FCA 1233 at [8], per Sackville J; "Application for Separate Determination of Issues — Submissions of the Applicant" (2 April 2002), para.7; Affidavit of Rebecca Gilsenan (sworn on 30 May 2002), paras 5 and 7; and "Outline of Applicant's Submissions on Application by Notice of Motion Dated 31 May 2002", paras 5 and 58.

[145] *Courtney v Medtel Pty Ltd* (2011) 113 FCR 512. Eleven months later a different approach was adopted by Sackville J: see *Courtney v Medtel Pty Ltd* [2002] FCA 957.

[146] "Applicant's submissions for Hearing on 16 February 2004" (12 February 2004), para.3.

[147] *Courtney v Medtel Pty Ltd* [2001] FCA 1037 at [111].

[148] *Courtney v Medtel Pty Ltd (No.4)* [2004] FCA 1233 at [13].

[149] *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219. An appeal to the Full Federal Court was dismissed and an application for special leave to appeal to the High Court was refused: see, respectively, *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182 and [2003] HCA Trans 496.

[150] *Courtney v Medtel Pty Ltd (No.6)* [2004] FCA 1598.

[151] See *Darcy v Medtel Pty Ltd (No.3)* [2004] FCA 807 and *Darcy v Medtel Pty Ltd (No.4)* [2004] FCA 1599.

[152] 2009 Victorian Bushfires Royal Commission, *Final Report* (July 2010), p.1.

[153] *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 6 at [1].

[154] See *Thomas v Powercor Australia Ltd* [2011] VSC 614; *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204; *Perry v Powercor Australia Ltd* [2012] VSC 113; *Place v Powercor Australia Ltd* [2013] VSC 6; *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 232; and K. Towers, "Black Saturday settlement puts payout tally at $1bn", *The Australian*, 7 February 2015, p.2.

### Kilmore East Kinglake Bushfire Class Action

The most significant of these actions was brought on behalf of those who suffered loss or damage as a result of the Kilmore East Kinglake bushfire.[155] It was alleged that a faulty electricity conductor started the fire which killed 119 people and destroyed 1,242 properties.

The class action sought compensation for a large class, many of whom had suffered personal injury and lost loved ones, as well as losing their homes and possessions, and their capacity to work. It was estimated that there were approximately 1,700 personal injury claims, 4,000 claims for uninsured or underinsured property losses and more than 5,000 claims for insured property losses.

The 22 year old son of the class representative, Ms Matthews, died in the bushfire. Ms Matthews lost her home and its entire contents. As a consequence of the circumstances surrounding the death of her son she suffered severe psychiatric injury. She suffered loss of earnings after the bushfire and ceased work because of her injuries a year after the bushfire.

This was a class of people who were injured, grieving, unable to work, and many were homeless. They were a truly vulnerable group who, but for the class action, would not have been able to seek redress from the defendants SPI Electricity, UAM and various state parties. The law firm conducting the action, Maurice Blackburn, did so on a no win-no fee basis, taking on significant risk.[156] The trial ran for almost 16 months and was of such a scale that a new court room needed to be purpose-built.

The nature of the loss and damage suffered by the group meant that communication and keeping track of class members was a challenge, as many people who had lost their homes in the fire had moved numerous times. Maurice Blackburn used technology effectively; for instance, updating class members on the progress of the trial using a website. Claimants were also able to access a live stream of the trial online.

The case settled after trial but before a judgment was handed down, with the defendants paying the sum of $494,666,667.[157] This is the country's largest-ever class action settlement. Maurice Blackburn estimated its fees at $37 million and disbursements at $23 million.

## *E. Medical negligence*

In May 2012 a Pt 4A proceeding was commenced by Slater & Gordon on behalf of over 50 women who were infected with the hepatitis C virus after undergoing termination of pregnancy procedures at the Croydon Day Surgery clinic in Victoria between January 2008 and mid-December 2009, for which Dr James Latham Peters

[155] *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663.

[156] Agreements to contribute to a small proportion of the disbursements incurred by Maurice Blackburn in the proceeding were executed with a number of insurers of the class members: see *Matthews v SPI Electricity Pty Ltd (No.9)* [2013] VSC 671 at [20]–[30], per Derham AsJ.

[157] An editorial which was published in *The Age* newspaper in March 2013 contained the following observation with respect to the significance of this case: "that this case can be heard at all is a measure of the maturity of Australia's class-action regime, which in the past 15 years has generated substantial financial settlements for people and companies affected by negligence, misleading claims or the failure of company officers to properly carry out their duties" (Editorial, *The Age*, 5 March 2013, p.17).

was the anaesthetist. It was reported in the media that the Court was advised by many of the class members of

> "broken relationships, ruined careers and their ever-present fears of passing on the disease to their partners, children and others. They have developed crippling depression, anxiety and stress since learning that they had been … infected. Several have been placed in psychiatric care and many contemplated suicide as a direct result of Peters' actions."[158]

The case was settled in April 2014.[159]

## *F. Legionnaires disease*

Two Pt 4A proceedings were brought by Maurice Blackburn and Slater & Gordon on a no win-no fee basis with respect to the country's largest outbreak of the Legionnaires disease that occurred in Melbourne in April 2000.[160] This outbreak was traced back to the water cooling towers at one of Melbourne's most popular tourist attractions, the Melbourne Aquarium, which had opened only three months earlier in January 2000. Sixteen people (including one of the class representatives) who were exposed to the bacteria died—four as a direct result of contracting the disease whilst another 12 died from conditions related to the disease.[161] Overall, more than 170 people were reported to have been affected.[162] The average age of the class members was 58 and 35 of them were aged over 71.[163] Both class actions were settled.[164]

## *G. Harmful food and beverages*

Sixteen Pt IVA proceedings and three Pt 4A proceedings were filed during the review period with respect to individuals who were the alleged victims of contaminated or harmful food or drinks. Some of the class members (almost invariably individuals with pre-existing medical problems, children and elderly persons) died or risked death[165] whilst many of the remaining class members

[158] M. Russell, "Judge signs off on Hepatitis C class action against anaesthetist James Latham Peters", *The Age*, 5 June 2014, p.5. See also *A v Peters* [2011] VSC 478.

[159] *A v Schulberg (No.2)* [2014] VSC 258.

[160] See L. Johnson, "Disease Victims in Class Action", *The Age*, 6 May 2000, p.3; J. Ferguson, "Pensioner Leads Germ Case", *Herald-Sun*, 6 May 2000, p.4; R. Riley, "Legionella Hits Us Hard", *Sunday Herald-Sun*, 2 December 2001, p.39; W Kuiper and J Ralph, "Troubled Aquarium Scoops Prize Pool", *Herald-Sun*, 1 August 2001, p.15; "Sick Air Towers Torn Out", *Sunday Herald-Sun*, 13 August 2000, p.20; and B Mitchell, "Embattled Aquarium Hooks 500,000th Visitor", *The Australian*, 10 July 2000, p.3.

[161] See P. Gregory, "Tears Flow as Victims of Legionnaires' Disease Win Battle", *The Age*, 3 February 2004, 3; J. Madden, "Payout for Legionella Victims", *The Australian*, 3 February 2004, p.3; N. Ross, "Victims Dying Ahead of Case", *Herald-Sun*, 1 March 2003, p.4; G. Lally, "Deaths as Legal Wait Drags", *Herald-Sun*, 1 February 2002, p.12; and J Kelly, "Death Linked to Aquarium", *Herald-Sun*, 19 May 2000, p.11.

[162] See P. Gregory, "Tears Flow as Victims of Legionnaires' Disease Win Battle", *The Age*, 3 February 2004,. 3.

[163] N. Ross, "Victims Dying Ahead of Case", *Herald-Sun*, 1 March 2003, p.4.

[164] See *Hilton v Melbourne Underwater World Pty Ltd* [2004] VSC 357; *Scicluna v Melbourne Underwater Pty Ltd* unreported 26 November 2004 Gillard J); J. Berry, "Aquarium Legionella Victims Get $450,000", *The Age*, 27 November 2004, p.13; C. Adams, "Illness Victims Settle", *Herald-Sun*, 27 November 2004, p.7; P. Gregory, "Tears Flow as Victims of Legionnaires' Disease Win Battle", *The Age*, 3 February 2004, p.3; and J. Madden, "Payout for Legionella Victims", *The Australian*, 3 February 2004, p.3.

[165] See, for instance, J. Angelo, "Oyster victim sues — Council accused over hepatitis A", *Daily Telegraph*, 13 March 1997, p.20; "SA - Gelati producer to resume sales after poisoning scare", Australian Associated Press, 25 June 1998; and S. Dow and F. Farouque, "Two dead, 30 ill from salmonella", *The Age*, 22 March 1997, p.3.

required hospitalisation and/or suffered significant health problems.[166] In three of these cases a majority of the class members also had a legal disability as they were minors.

To our knowledge, all these proceedings were conducted by the class representatives' solicitors on a no win-no fee basis. In all but four[167] of these class actions, a favourable outcome in the form of a settlement was secured on behalf of the victims in question.

### *H. Chairlift collapse*

In January 2003 "one of Victoria's oldest and most-loved tourist attractions"[168]—a passenger ropeway known as the Arthur Seat Scenic Chairlift in Dromana—collapsed, as a result of a pylon toppling over causing the cable to become loose.[169] The first, and most serious, effect of this collapse was that a number of passenger chairs carrying 18 persons crashed whilst still attached to the cable itself. A dozen of these persons were hospitalised and some of them suffered severe spinal injuries. The second effect was that over 60 passengers were suspended in mid-air for several hours.[170] Many passengers were parents with their children. Four months later a Pt 4A proceeding was filed by Slater & Gordon seeking compensation for those passengers who suffered personal injury and/or developed an anxiety disorder because of the incident.[171] Over two years later, the 26 class members (19 adults and 7 minors) who had not opted out accepted individual settlement offers made by the first defendant.[172]

## IX. Conclusion

This article has provided a review of all the non-investor class actions filed in Australia on or before 3 March 2014 on behalf of persons with legal grievances

[166] See, for instance, *Neil v P & O Cruises Australia Ltd* [2002] FCA 1325 at [4], per Wienberg J; D. Nason, "Minister deals blow to recovery of oyster industry", *The Australian*, 19 March 1997, p.5; "SA — Gelati producer to resume sales after poisoning scare", Australian Associated Press, 25 June 1998; S. Dow, "Class action lodged after outbreak of Hepatitis A", *The Age*, 14 March 1997, p.2; T. Taylor, "Court Bid on Typhoid Cruise", *Herald-Sun*, 12 June 1999, p.2; and L. Hastings, "Sick diners win payout", *Heidelberg Leader*, 19 April 2006, p.1.

[167] Three of these unsuccessful class actions were Pt IVA proceedings and the remaining class action was a Pt 4A proceeding. The Pt 4A proceeding, *McLean v Nicholson*, was terminated as a class action by the trial judge: see *McLean v Nicholson* [2002] VSC 446. The Pt IVA proceedings in *L'Barrow v Hilton Hotels Australia Pty Ltd* and *Lim v Star World Enterprises* were discontinued by the class representatives as a result of the existence of other Part IVA proceedings, filed with respect to the same disputes by different solicitors: see Morabito, "Clashing Classes Down Under - Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives" (2012) 27 *Connecticut Journal of International Law* 245, 259 and 275. The other unsuccessful Pt IVA proceeding, *Hogan v Sydney Water Corp Ltd*, was filed on behalf of Sydney residents who claimed to have become ill in 1998 as a result of excessive levels of parasites in the water supply; the class action was discontinued by the class representative following the difficulty experienced by his lawyers in finding strong scientific evidence to demonstrate the existence of a nexus between the aliments and the quality of the water: see C. Harvey, "Boilover on court action on water", *The Australian*, 19 June 1999, p.5; and M. Hogarth, "Water Damages Case Dropped", *Sydney Morning Herald*, 19 June 1999, p.9.

[168] P. Murphy, "Chairlift collapse — 20 hurt", *The Age*, 4 January 2003, p.1.

[169] Affidavit of Barrie Woollacott (sworn on 25 August 2005), para.11.

[170] See M. Butler, V. Williams and E. Hunt, "Terrifying rise as chairlift collapses", *Herald-Sun*, 4 January 2003, p.2; S. O'Brien and T. Giles, "Pylon blamed in chairlift disaster", *Herald-Sun*, 4 January 2003, p.2; P. Beauchamp, "Salt suspected in chairlift collapse", *Herald-Sun*, 6 January 2003, p.4; and G. Kaszubska and B. Crawford, "Chairlift focus on corrosion", *The Australian*, 6 January 2003, p.4.

[171] *Mardini v Arthurs Seat Scenic Chairlift Pty Ltd*. See also P. Beauchamp, "Family leads claim over chairlift fall", *Herald-Sun*, 26 February 2003, p.15; N. Protyniak and S. O'Brien, "Seat victims seek millions", *Herald-Sun*, 10 April 2003, p.2; and F. Shiel, "Report fails to soothe the pain for victims", *The Age*, 10 April 2003, p.8.

[172] Affidavit of Barrie Woollacott (sworn on 1 December 2005), para.7.

who would have probably not been able to seek legal redress, without the class action device, as a result of one or more vulnerabilities. A Canadian court has noted that "the goal of access to justice addresses the right of a class member to have his or her claim heard. It is a procedural right to access to the justice system".[173] The findings canvassed in this article suggest that this goal is being advanced by Australia's class action regimes, as far as vulnerable claimants are concerned.

In fact, we have identified 87 federal non-investor class actions that were filed on behalf of vulnerable claimants in the first 22 years of the operation of Pt IVA. Over the same period a total of 329 Pt IVA proceedings were filed, 89 of which were brought on behalf of investors.[174] Thus, just over one in every four federal class actions, and just over one in every three non-investor federal class actions, filed during this period were brought on behalf of vulnerable persons. It has also been revealed that 19 Pt 4A proceedings and three Pt 10 proceedings were filed on behalf of vulnerable claimants over the same period in the Supreme Courts of Victoria and NSW, respectively.[175]

We also found that approximately 54 per cent of the proceedings canvassed in this article, which were resolved at the time of writing, produced a beneficial outcome for the class members; almost invariably through settlements. This success rate is slightly higher than the success rate for all completed Pt IVA proceedings filed over the same period.[176] An equally important finding that has emerged from our empirical study is that a majority of these class actions have been funded by the class representatives' solicitors through the no win-no fee funding model. Thus, the following assessment of the class actions brought on behalf of thalidomiders, which appeared in an editorial published in *The Age*, also captures the essence of a significant number of the class actions that have been reviewed in this article:

> "[They highlight] how, rather than being a weapon wielded opportunistically (as embattled corporate leaders contend), the class action regime provides efficient and effective remedies. Staring down powerful corporations, by taking them on in court, can be an expensive, frustrating and lengthy exercise. Thankfully, there are people prepared to fight the good fight to seek recompense for victims of unconscionable actions."[177]

It has been revealed that often trial judges presiding over these class actions have attempted to cater for the vulnerabilities of the class members. Similarly, lawyers

[173] *1176560 Ontario Ltd v The Great Atlantic & Pacific Company of Canada Ltd* (2002) 62 OR (3d) 535 at [56], per Winkler J. See also *Kelly v Willmott Forests Ltd (in Liquidation)* [2012] FCA 1446 at [129], per Murphy J ("[it is important not to] unfairly deprive people of their fundamental right of access to the courts through the Part IVA mechanism"); *Fostif Pty Ltd v Campbells Cash & Carry Ltd* (2006) 229 CLR 386 at [144], per Kirby J; *ALRC 1988 Report*, para.2; *Marks v GIO Australia Holdings Ltd* [1996] FCA 1465 at [60], per Einfeld J; and *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317 at [119], per Finkelstein J.

[174] V. Morabito, *Class Action Facts and Figures — Five Years Later* (An Empirical Study of Australia's Class Action Regimes; Third Report; November 2014), pp.10–11, *http://ssrn.com/abstract=2523275* [Accessed 6 November 2015].

[175] No data is currently available as to the total number of Pt 4A and Pt 10 proceedings that were filed on or before 3 March 2014. It is, however, known that a total of 28 Victorian class actions were filed up to the end of 2009: see V. Morabito, *Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (An Empirical Study of Australia's Class Action Regimes; Second Report; September 2010), p.17, *http://globalclassactions.stanford.edu/empirical* [Accessed 6 November 2015]. Twelve (42 per cent) of these pre-2010 Pt 4A proceedings were brought on behalf of vulnerable non-investor claimants.

[176] See Morabito, *Class Action Facts and Figures — Five Years Later* (An Empirical Study of Australia's Class Action Regimes; Third Report; November 2014), p.13.

[177] Editorial, "Thalidomide's maker still ducks responsibility", *The Age*, 3 December 2013, p.18.

for these classes have had to employ creative methods to make and maintain contact with class members and to communicate often complex legal concepts in a meaningful way. This was assisted, in some cases, by the involvement of specialist community legal centres which had expertise in communicating with certain vulnerable communities.

None of these proceedings were funded by litigation funders. However, the funding by litigation funders of other types of class actions, usually investor class actions, where law firms such as Maurice Blackburn and Slater & Gordon were involved has enabled these firms to devote some of their resources to some of the class actions canvassed in this article.[178]

It has also been shown that some class representatives were either unable to secure legal representation or secured such representation only as a result of the financial support provided by legal aid commissions or similar entities, the class members, donors, or lawyers acting on a pro bono basis. Another, albeit related, problem was that some of the solicitors that acted for class representatives were not equipped to run class actions. This problem, together with self-represented class representatives, was frequently encountered in class actions involving Indigenous persons and migrants and refugees. The vast majority of these two categories of class actions were unsuccessful.

These findings strongly highlight the need for policy makers, commentators and scholars to turn their attention to the crucial issue of what measures need to be introduced to ensure that similarly-situated claimants are able to: (a) have access to the court system through the class action device; and (b) maximise their chances of securing whatever legal remedies, if any, they are entitled to by having competent legal representation and adequate funding.

An obvious strategy to achieve this is the creation of a class action fund, as recommended by the ALRC in 1988.[179] Another measure that ought to be considered is allowing Australian lawyers to receive contingency fees, as recommended by the Productivity Commission in September 2014.[180] Both measures, if adopted by the Commonwealth, State and Territory Parliaments, would lower the financial barriers to running class actions and increase the capacity of the legal system to provide access to justice for vulnerable claimants.

[178] See also A. Watson and M. Donelly, "Funding Access to Justice: Third-Party Litigation Funding and Class Actions in Australia" (2014) 55 *Canadian Business Law Journal* 17, 26.

[179] *ALRC 1988 Report*, paras 308–310.

[180] Productivity Commission, *Access to Justice Arrangements*, Report No.72 (September 2014), Recommendation 18.1.

# Book Review

**Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No Win No Fee Funding,** by John Peysner, (Basingstoke: Palgrave Macmillan, 2014), 200pp., hardback, £68.00, ISBN: 978-1-13739-723-2.

The apportionment of legal costs in an era of ever-diminishing funding for legal aid has vexed successive governments for many years. In July 2015, the Supreme Court delivered judgment in *Coventry v Lawrence*.[1] That judgment considered whether the arrangements for the recoverability of the costs of civil litigation which existed in England and Wales between 2000 and 2013 were inconsistent with art.6 of the European Convention on Human Rights and/or art.1 of the First Protocol to the Convention. The judgment provides a coda to a remarkable period in the history of costs law during which, in an attempt to improve access to justice for low and middle income earners, reforms were introduced which had the unforeseen effect of burdening unsuccessful defendants with costs orders which could have exceeded the plaintiff's legal costs by several times.

Specifically, the cost arrangement challenged in *Coventry v Lawrence* (but ultimately found to be consistent with the Convention norms) was the use by a plaintiff of a conditional fee agreement (CFA), in circumstances where the success fee, and any premium for an after-the-event (ATE) insurance policy, would be recoverable from the defendant in the event of the plaintiff's success. The consequences of such costs arrangements—and the principled and practical arguments for and against that regime—are well-documented. Following Lord Jackson's review of civil litigation costs in 2009,[2] recoverability of the success fee and the ATE premium was abandoned in 2013.

John Peysner's book, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No Win No Fee Funding*, published late in 2014, provides a novel and interesting perspective on this period in English procedural law. Peysner's task is to consider how the policy was developed (and how it was received and implemented in practice) with a view to identifying how a better policy might have been achieved. In particular, he considers the possible alternatives for using evidence-based research in the formulation of policy. His ultimate thesis is that the various stages of cost reforms which led to the policy of CFAs with recoverable success fees and ATE premiums would have benefited from the use of certain "research instruments" that he introduces and discusses in the critical later chapters of the text.

It should be emphasised that Peysner's book is essentially about the formulation of government policy—specifically, policy concerning civil justice—and not about the law. The content of the book might be said to be effectively a case study as to the genesis and development of a particular civil justice policy—recoverability—the response of practitioners and insurers to that policy, the manner in which unintended

[1] *Coventry v Lawrence* [2015] UKSC 50; [2015] 1 W.L.R. 3485.
[2] Lord Justice Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009).