Ladies and gentlemen, distinguished guests – welcome to the 2017 Corporate Conduct and Class Actions Symposium. Thank you to our partners Fairfax Media Business day and Monash University (Monash Business School) for working with Maurice Blackburn on what I think promises to be a great event. We have an extraordinary range of speakers and panellists who will provide I think an unparalleled depth and range of insights into how the Australian class actions regime has performed over the last 25 years.

25 years of the class action regime in Australia gives us a chance to reflect, analyse and consider. Reflect on the development of the regime with its distinctive characteristics; analyse performance, results and trends and consider what's been done well, what's been done badly and what could be done better.

But 25 years is a significant birthday, a silver jubilee and we usually associate those things with celebration. So the question arises - should we celebrate the introduction of Part IVA of the Federal Court Act? It's my contention we should, not in some glib or uncritical way, but having reflected, analysed and considered and once we have reflected analysed and considered I think we should thank those who drafted the legislation and thank those practitioners and judges who have overseen its implementation because on the criteria that matter the Australian class actions regime has performed well.

So what are the criteria by which you judge a class actions regime?

I think there are three criteria that matter:

1. Does it increase access to justice?
2. Has it enhanced judicial economy by ensuring the quelling of large numbers of controversies in an efficient manner?
3. Has it created a role for private enforcement in relation to corporate misconduct that complements and supplements the role of public authorities

Throughout the course of the day we'll hear from a distinguished range of speakers who directly and indirectly will inform the discussion and debate on how the regime has performed judged against those 3 criteria but I want to just take a little time to outline why in my view those criteria are satisfied.

First, on access to justice the class actions regime has provided real remedies to literally hundreds of thousands of claimants. The system has been used for approximately 500 class actions across the whole gamut of potential kinds of matters: claims for refugees, consumers, small businesses, employees, shareholders and other investors, product liability cases, cartel cases, cases involving those twin Australian scourges of bushfire and flood and more.

As Justice Murphy and Professor Morabito note in their chapter in the recently released 25 years of Class Actions in Australia over $3.5 billion dollars has been paid by defendants in class action settlements. This estimate of $3.5 billion dollars understates the significance of the class action regime in three ways. First as the authors themselves note it is an understatement of the settlement sums actually paid by defendants because some monetary settlements are confidential, second because it ignores those cases where important non-monetary outcomes were achieved for the class and third because even where a case is unsuccessful or largely unsuccessful access to justice in the sense of the opportunity to pursue legal rights will have often been achieved.

There is a strain of commentary around that suggests that somehow or other the laudable aims of the regime have been hijacked by the growth in shareholder class actions. This proposition doesn't withstand scrutiny as a matter of history, as a matter of practice or as a

matter of policy. It was always conceived as part of the regime that shareholders would be able to make claims. Senator Tate as he then was said so in the second reading debates on the bill. As a matter of practice an examination of the cases run under the regime shows the breadth of the types of claims run. As a matter of public policy, I have never understood why holding companies to account for their wrongdoing to shareholders should be counted as a bad thing.

So the upshot is that on access to justice the regime gets a tick.

How have we fared on judicial economy?

In 2002 in *Bright v Femcare Justice Finkelstein* had this to say:

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

So arguably we got off to a slightly bumpy start on providing an efficient mechanism for the resolution of mass disputes. It is important however to note that whilst not completely absent from the system, the interlocutory warfare which Justice Finkelstein described has been much less a feature of the last 10 to 15 years.

Further and in a sense more importantly the discussion in this respect needs to focus not just on what has occurred but on what would be the counter factual without a class actions regime.

It is I think inconceivable that the nearly 500 disputes which have been run as class actions since 1992 could have been managed as efficiently in any other regime. Those 500 disputes would have represented hundreds of thousands of individual plaintiff actions. Experience shows that absent a functioning representative procedure, multi-plaintiff litigation is cumbersome and expensive and that the obligations which must be undertaken by plaintiffs act as a severe deterrent on the pursuit of legal rights. In short you end up with something which provides both less access to justice, is more expensive and involves more judicial involvement.

So on judicial economy the system gets a tick.

Finally on the issue of private enforcement it is noteworthy that both the ACCC and ASIC have separately supported the role played by class actions as a supplement and complement to the role of public enforcement. In 2012 Greg Medcraft, the Chairman of ASIC noted that "ASIC relied on the fact that in some matters other parties would pursue compensation claims, freeing it from having to do so" and described class actions as "very good at equalling up the tables", remarks which were essentially echoed by the then Chairman of the ACCC Rod Sims in the same year.

So on appropriate private enforcement the system gets a tick.

Of course there are things we can do better:

Substantive law changes like making it easier to seek compensation for victims of overseas cartels; greater protection for whistleblowers; reversing the effects of the High Court's Bank Fees decision.

Doing all that we can consistent with the demands of a just hearing to streamline procedures and reduce costs – this means continuing procedural innovations like the Federal Court Case management judge system and embedding a separate track for mediation at the outset of cases but also looking at things like depositions so that we get to the heart of issues in dispute quicker.

We also need to improve access to justice by expanding funding options – the development of common funds, the introduction of contingency fees, the possibility of a public fund.

I said we had an extraordinary range and depth of speakers Let me expand on that. Today's symposium brings together probably one of the best collections of academics in the field, including our keynote speaker Professor Rachael Mulheron, two serving and one retired Federal Court judges, a former justice Minister, a range of practitioners from both the plaintiffs' and defendants' side, eminent counsel, representatives of the ACCC, ASIC and a third party litigation funder, a lead plaintiff and in house counsel from a major financial institution. All in all a pretty impressive guest list for a very special occasion.