25 YEARS OF CLASS ACTIONS IN AUSTRALIA

22 March 2017

'An International Perspective: Some Insights for UK Law Reformers arising from 25 Years of Australian Class Actions Jurisprudence'

Prof. Rachael Mulheron
Department of Law
Queen Mary University of London
r.p.mulheron@qmul.ac.uk

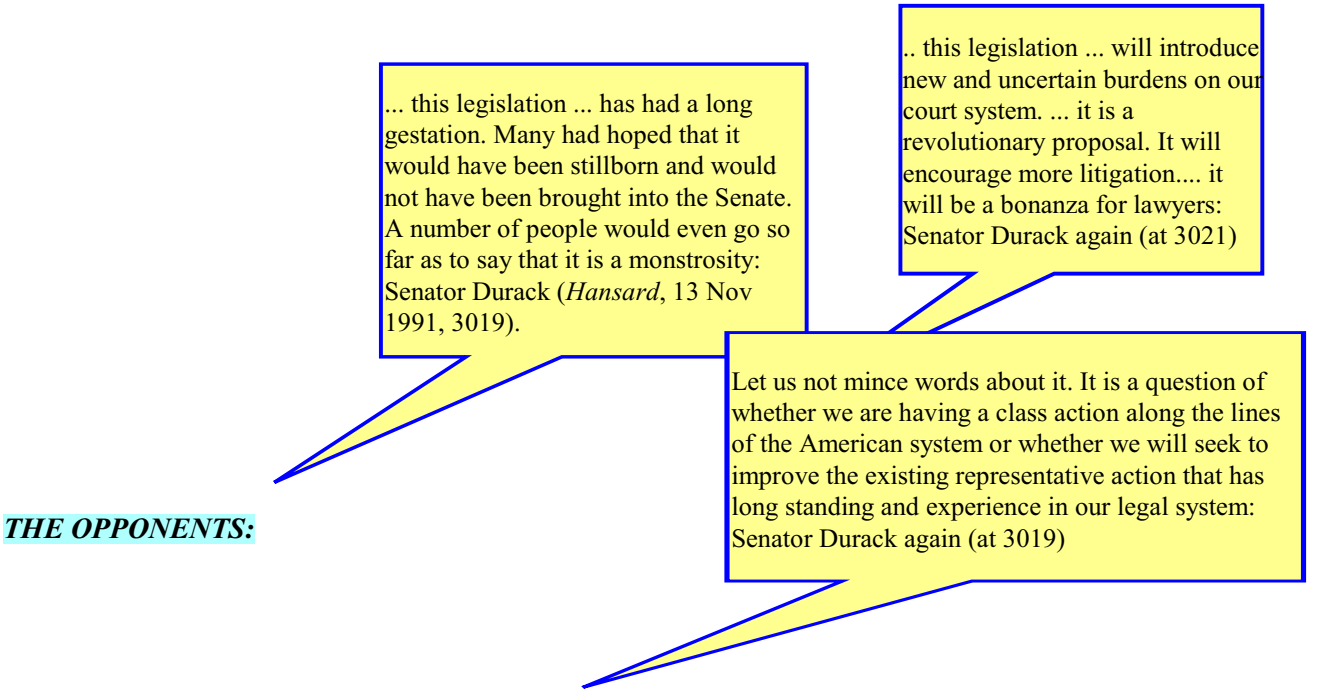
A. Introduction: Class actions reform, a quarter of a century apart

★ **a 'second generation' class actions statute** — interposed between the 'first generation' US federal rule, and the UK's 'third generation' regime

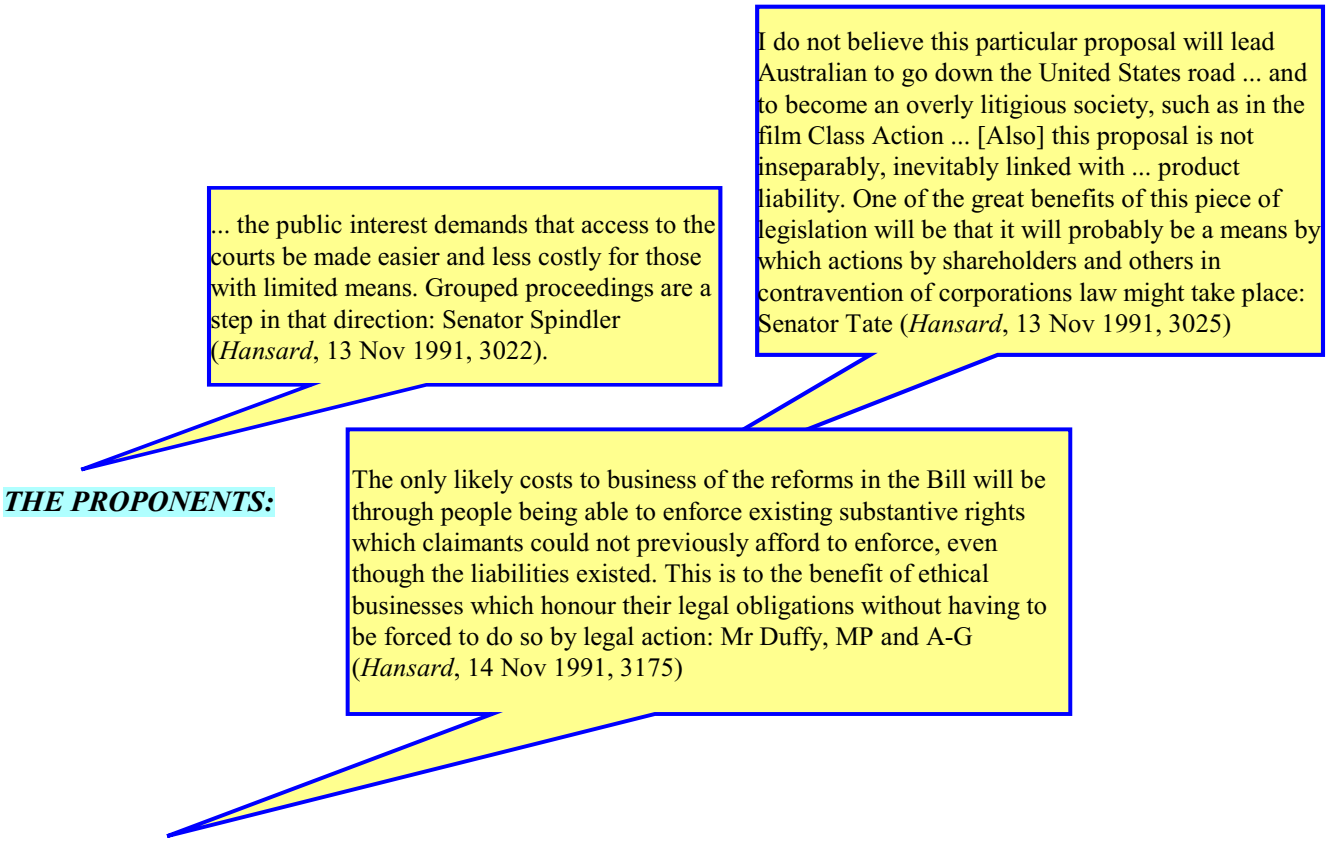
1 Jul 1966	FRCP 23 adopted, by order of the US Supreme Court, acting pursuant to the Rules Enabling Act (Justice Black dissenting), following a draft prepared by the Advisory Committee in March 1964
Feb 1977	Referral by A-G (Aust) to the ALRC, 'to review the laws ... relating to ... class actions ... ; and to report upon (a) the adequacy thereof; (b) any desirable changes to the existing law in relation thereto ... ; and (c) any related matter'
13 Dec 1988	ALRC, *Grouped Proceedings in the Federal Court* (Rep 46), tabled
11 Dec 1989	Federal Court (Grouped Proceedings) Bill 1989 (a private member's Bill) introduced by Senator Haines of the Australian Democrats, which lapsed
12 Sep 1991	Federal Court of Australia Amendment Bill 1991 introduced by Senator Tate, Minister for Justice and Consumer Affairs, for its First Reading
5 Mar 1992	Pt IVA of the Federal Court of Australia Act 1976 took effect, inserted by s 3 of the Federal Court of Australia Amendment Act 1991
1 Oct 2015	Schedule 8 of the Consumer Rights Act 2015 (UK) took effect, inserting various replacement and amending provisions in the Competition Act 1998 and in the Enterprise Act 2002, and supported by rr 73–98 of the Competition Appeal Tribunal Rules 2015

 (Please note that an expanded version of this lecture will be published in 2017).

★ **considerably divided opinion** abounded at the time, in the Australian Parliamentary debates:



versus:



B. The Political and Legal Climate for Class Actions Reform: Insights from the Australian Experience

★ when the breeze of 'law reform' and the wind of 'political will' collide

★ civil justice reform of this scale requires a juxtaposition of circumstances — and the lessons from Australia's political and legal climate, leading up to the 1992 reforms, were replicated, almost eerily, in the UK — much to the attention of UK law reformers!

	The factor: ...	**... in Australia**	**... and in the UK**
1.	A bell-weather case showing what is wrong with the existing legal landscape	***E v Australian Red Cross Socy*** (1991, Fed Ct); and ***Esanda Finance Corp v Carnie*** (1992, NSWCA; 1995, HCA)	***Emerald Supplies Ltd v British Airways plc*** (2009, Ch; 2010, CA)
2.	The 'missing cases', and those issued *en masse* with inevitable inconsistencies and/or duplication	***ALRC Report*** (1988); re cases arising from bushfire loss and damage, asbestos exposure, and educational facilities	CJC, ***Reform of Collective Redress: A Perspective of Need*** (2008); and the bank charges litigation (2006–7)
3.	A leading judicial proponent of the reform	Wilcox J (in ***E***); Kirby J in ***Esanda*** and in the ALRC	Sir Gerald Barling, then-President of the Competition Appeal Tribunal
4.	Being pragmatic – it doesn't all translate to reality – political decisions are made	• grouped proceedings; • contingency fees; • special public assistance fund; • judicial approval of fee agreements	• generic, not sectoral, implementation; • undistributed residue of damages (which is different for settlements and for judgments)
5.	Previous legislative reform has had its limitations	Supreme Court Rules (South Australia) (1987)	Competition Act 1998, s 47B (the Which? action)
6.	The role of public enforcement has its limitations	***ALRC Report*** (1988)	BIS, ***Private Actions in Competition Law: A Consultation*** (2012)
7.	Another 'dish' at the smorgasbord	***ALRC Report*** (1988)	CJC, ***Improving Access to Justice through Collective Actions: Final Report*** (2008)

	The factor: ...	... in Australia	... and in the UK
8.	Looking for assistance in another 'legal backyard'	***Corrigan v Bjork-Shiley Corp*** 182 Cal App 3d 166 (June 9, 1986) (re heart valve); ***In re Silicone Gel Breast Implant Prods Liab Litig*** (MDL 926) Heidi Lindsey v Dow Corning Corp (ND Alabama, 1 Sep 1994)	***In re Vioxx Litig***, 395 NJ Super 358, 928 A 2d 935 (2007), aff'd: 936 A 2d 968 (2007); ***In re Factor VIII or IX Concentrate Blood Prods Liab Litig***, 408 F Supp 2d 569 (ND Ill, 2006), aff'd: 484 F 3d 951 (7th Cir, 2007); ***F Hoffmann-La Roche Ltd v EmpagranSA***, 542 US 155 (2004)
9.	The 'human element' – as to why litigants will not sue individually, or opt in	***ALRC Report*** (1988)	CJC, ***Reform of Collective Redress in England and Wales: A Perspective of Need*** (2008)

★ **what happens to undistributed residues?** A very political decision ...

The possibilities:

- Reversion to D – the Australian statutory preference, per s 33ZA(5)
- *Cy-près* distributions — not under Pt IVA; but allowed under the UK's Sch 8 for settlements
- Escheat distribution to the Government
- Public fund — mandated in the case of judgments, under the UK's Sch 8, s 47C(5) (in favour of the 'Access to Justice Foundation')
- Apply surplus monies to the cost of the class action
- *Pro rata* distribution among the claiming class members

★ **how wide is the regime's operation?**

The possibilities:

- Generic — Australia
- Sectoral — the UK — and against the Civil Justice Council's strong recommendation

> These reforms are a significant part of the Government's equity and access policies embodied in its social justice program. There is considerable community concern about the cost of, and access to, justice ... The measures contained in this Bill will remove at least some of the barriers for persons who seek redress before the courts: Mr Duffy, MP and A-G (*Hansard*, 14 Nov 1991, 3175)

> the Government considers that the only practical way forward is on a sector by sector basis ... (where a sector is a discrete area of economic or social activity, within which particular issues, including specific types of legal claim, may arise): MOJ, *The Govt's Response to the CJC's Report: Improving Access to Justice through Collective Actions* (2009) [12]

C. Specific 'Design Issues' of the Australian Class Action: What was Adopted ... and Avoided

★ **To certify or not to certify?** That was the question ...

The possibilities:

NO — per the Australian regime — a 'de facto'-type certification — the representative C commences the proceeding, per ***s 33C***; and then D may apply for an order that the proceeding no longer continue as a class action, per ***ss 33L***, ***33M*** or ***33N***), or that the requirements of s 33C have not been met

YES — per the UK regime — implemented a strict certification regime, 'with brakes' (below)

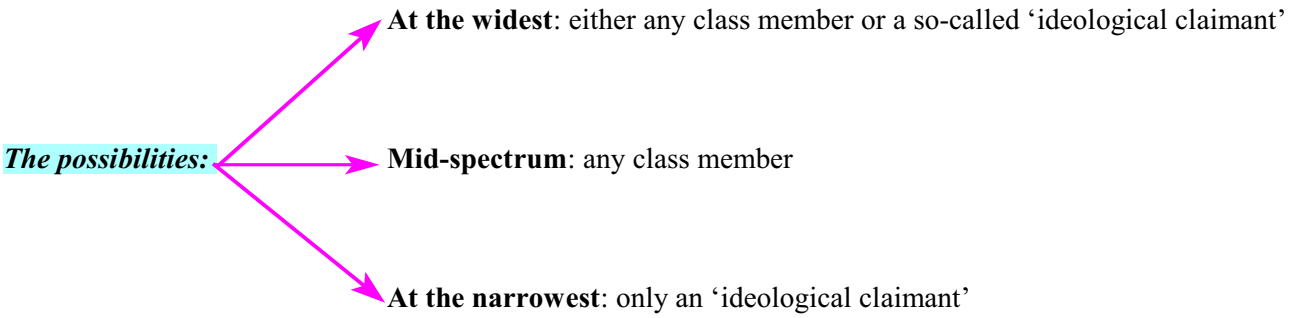
- ❑ the reasons for the UK's departure from the Australian position
- ❑ the two cases 'waiting in the wings':
  - ***Gibson v Pride Mobility Products Ltd*** (2016) – filed 25 May 2016; certification hearing 12–13 Dec 2016
  - ***Merricks v Mastercard Inc*** (2016) – filed 8 Sep 2016; certification hearing 18–20 Jan 2017

★ **Specific certification criteria**

	The UK certification criteria ...	**... and the Australian influence ...**
commonality	class members must have claims that 'raise common issues', where 'common issues' means 'the same, similar or related issues of fact or law'	✔ 'relatedness', per ***s 33C(1)(b)***, and ***Zhang v Minister for Immigration, Local Govt and Ethnic Affairs*** (1993) ✘ no 'substantial' requirement, per ***s 33C(1)(c)***, and ***Wong v Silkfield Pty Ltd*** (1999)
superiority	• it must be 'an appropriate means for the fair and efficient resolution of the common issues'; **and** • the CAT must consider 'the availability of ADR and any other means of resolving the dispute'	✘ the criteria in ***s 33N(1)(a)*** and ***(b)***, and their interpretation in, e.g.: ***Murphy v Overton Investments Pty Ltd*** (1999); ***ACCC v Giraffe World*** (1998); and ***Bright v Femcare Ltd*** (2002) ✔ but ***s 33N(1)(c)*** closely adopted

	The UK certification criteria ...	... and the Australian influence ...
minimum numerosity	• there must be 'an identifiable class of persons'; **and** • the CAT is also required to consider 'the size of the class'	✘ ***Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd*** (1993); and ***Gold Coast CC v Pioneer Concrete (Qld) Pty Ltd*** (1997)
preliminary merits	• the representative C 'believes that the claims ... have a real prospect of success'; **and** • more indirectly, when selecting opt-in or opt-out, the CAT shall consider 'the strength of the claims'	–
costs–benefit analysis	• the CAT will take into account 'the costs and the benefits of continuing the collective proceedings'; **and** • more indirectly, when deciding between opt-in and opt-out, the CAT shall consider 'the estimated amount of damages that individual class members may recover'	✔ the effect of ***s 33M*** and ***s 33N***, having regard to: ***Bray v F Hoffman-La Roche Ltd*** (2002); ***Gold Coast CC v Pioneer Concrete (Qld) Pty Ltd*** (1997); and ***Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq)*** (2015)
an adequate class definition	the claims sought to be included in the collective proceedings 'are brought on behalf of an identifiable class of persons'	✔ ***Bray v F Hoffman-La Roche Ltd*** (2003); and ***Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (sub nom Bray)*** (2006)
need	the CAT must consider 'whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class'	✔ ***Gold Coast CC v Pioneer Concrete*** (1997)
general suitability	• class members' claims must be 'suitable to be brought in collective proceedings'; • the CAT must consider 'whether it is possible to determine for any person whether he is or is not a member of the class'; **and** • the CAT must take into account 'whether the claims are suitable for an aggregate award of damages'	–

★ The representative claimant



❑ the UK legislative response to this conundrum:

Competition Act 1998, s 47B(8):
The Tribunal may authorise a person to act as the representative in collective proceedings — (a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a 'class member'), but (b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.

❑ and descending to the detail of the representative claimant's requirements:

The UK requirements ...	**... and the Australian influence**
• general adequacy, it must be 'just and reasonable' that the person acts as a representative,and that the representative would 'fairly and adequately act in the interests of the class members'; • financial adequacy, the representative must be 'able to pay the defendant's recoverable costs if ordered', or satisfy any undertaking as to damages re injunctive relief; • no conflicts of 'material interests' between the representative and the class members; • if the representative is a class member, his 'suitability to manage the proceedings'; • if the representative is not a class member, then 'whether it is a pre-existing body and the nature and functions of that body'; **and** • having a plan for the collective proceedings which is satisfactory.	♦ early controversy, that 'the representative party is necessarily one of the group of seven or more persons on whose behalf a representative proceeding is commenced': per ***ACCC v Giraffe World Aust Pty Ltd*** (1998); ♦ but early cases of ***ACCC v Golden Sphere International Inc*** (1998); and ***ACCC v Chats House Investment Pty Ltd*** (1996) also showed the use of the 'ideological claimant'; ♦ and the absence of a conflict of interest should be expressly required: in light of ***ACCC v Golden Sphere*** (1998).

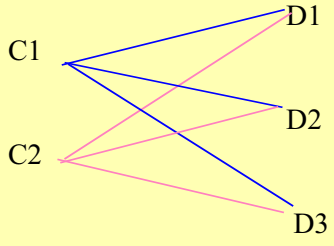
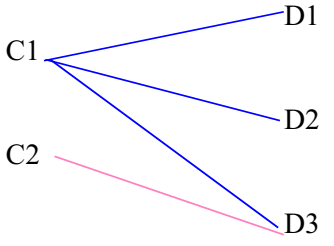
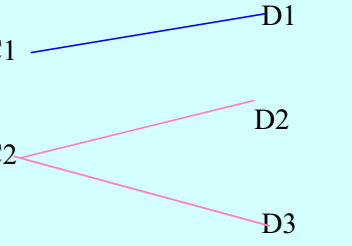
★ Multiple defendants

- ❏ a potential problem in competition law cases — hence, the importance of the point to UK law reformers

- ❏ whether every representative C and every class member has to have a pleadable cause of action against every D sued in the action

> ***Philip Morris (Australia) Ltd v Nixon*** (2000) – and then, of even more significance: ***Bray v Hoffmann-La Roche*** (2003)

The possibilities:

1. Necessary to prove?	2. Necessary to prove?	3. Necessary to prove?
		

- ❏ the view of the Australian Full Federal Court in ***Bray***, by majority (Carr and Finkelstein JJ, Branson J dissenting) — softened by three caveats:

  - not all *class members* had to have a claim against every D
  - a 'claim' in s 33C(1)(a) could include a claim for injunctive relief against every D, it did not necessarily mean a 'cause of action'
  - the effect of collective conduct or a conspiracy

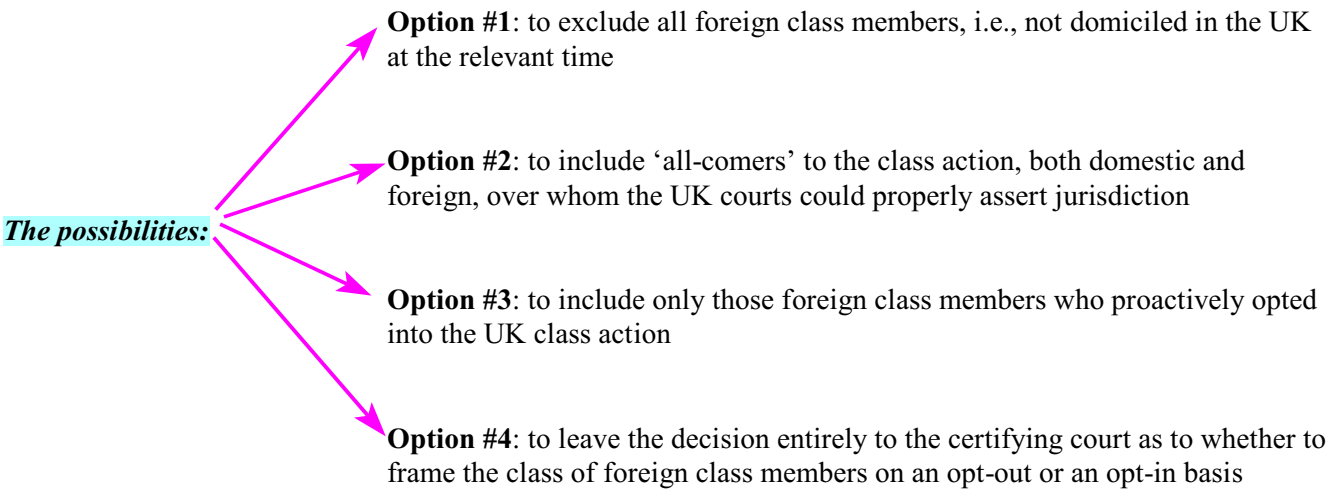
- ❏ leave sought to the HCA: ***BASF Australia Ltd v Bray*** [2004] HCA Trans 206, per Mr Archibald QC (for BASF):

> '*what remains is a monolithic class, still containing the essential vice that not all of the group members of the class are capable of having claims against all respondents, primarily for the reason that some of the respondents were not in existence for the totality of the period to which the claims of the group are directed. Therefore, of necessity, some of the group members are incapable of having claims against some of the respondents, or their activities would be confined to a period during which those respondents did not exist, could not have supplied vitamins during that period, could not have been parties to a cartel, and could not have implemented a cartel.*'

- ❏ the UK legislative response to this conundrum:

Competition Act 1998, s 47B(3)(a):
The following points apply in relation to claims in collective proceedings — (a) it is not a requirement that all of the claims should be against all of the defendants to the proceedings

★ Foreign class members



❑ Pt IVA left the issue open — but some case law arose under the earlier Victorian regimes:

Schutt Flying Academy Australia Pty Ltd v Mobil Oil Australia Ltd (2000, CA)
Dagi v Broken Hill plc; Gagarimabu v Broken Hill plc (2000, SC)
Gagarimabu v BHP and Ok Tedi (2001, SC)

❑ the UK legislative response to this conundrum:

Competition Act 1998, s 47B(11)(b):

"Opt-out collective proceedings" are collective proceedings which are brought on behalf of each class member except —

(a) any class member who opts out ... ; and

(b) any class member who —

(i) is not domiciled in the United Kingdom at a time specified, and

(ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings.

❑ the reasons were complex, e.g.:

- a real prospect that any UK judgment rendered over those foreign class members would not be recognised by the court in the foreign class members' own jurisdiction, and nor would it have preclusive effect there
- the court asserts jurisdiction proactively, with numbers definitively known
- enhances personal autonomy and choice for foreign class members
- due process and adequate representation for foreign class members
- a question of judicial resources

D. Funding the Australian Class Action: Lessons Learnt from the 'Tied Class' Experience

★ **The usual accoutrements of costs and funding, as applied under Australia's federal regime**

- ❑ costs-shifting + security for costs orders may be made against the representative C + class members are 'immunised' from costs, except in respect of the individual issues
- ❑ damages-based agreements are expressly prohibited, for opt-out collective proceedings (per Competition Act 1998, s 47C(8)) — but third party funding is not prohibited

★ **The interplay of class actions and third party funding**

- ❑ third party funding in the UK is governed by a long line of authority, e.g ***Giles v Thompson*** (1994); ***Factortame Ltd v Sec of State (No 8)*** (2002); ***Arkin v Borchard Lines Ltd*** (2005)
- ❑ 'soft regulation' applies, per the ***Code of Conduct for Litigation Funders*** (2011, revised 2014)
- ❑ but how does the Funder recover its 'success fee'?

The possibilities:

The equitable 'common fund' doctrine: i.e., where there is 'the creation, preservation or increase of a fund in which others have an interest' — and considered in: ***Blairgowrie Trading Ltd v Allco Finance Group Ltd (R&M Appointed) (in liq)*** (2015), per Wigney J:

'*There is something to be said for the proposition that some form of common fund approach, similar to the common fund doctrine in the United States, should be adopted in Australia to deal with the reality of commercial litigation funding in representative proceedings . It would, however, perhaps be preferable for that to occur as a result of legislative reform, rather than by way of the piecemeal utilisation by judges of general discretionary powers such as ss 23 and 33ZF*'.

And since – the 'in principle' decision to uphold a 'common fund' order: ***Money Max Int Pty Ltd v QBE Ins Group Ltd*** (26 Oct 2016)

A general judicial supervisory power: vested by virtue of the governing legislation — 'to make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding', per ***s 33ZF(1)*** – ***Earglow Pty Ltd v Newcrest Mining Ltd (Newcrest I)*** (2015), and ***Newcrest II*** (2016)

A contractual entitlement, by virtue of 'tied classes' — and noting the strong division of judicial opinion, e.g.: ***Dorajay Pty Ltd v Aristocrat Leisure Ltd*** (2005, Stone J); ***Rod Investments (Vic) Pty Ltd v Clark*** (2005, VSC); ***Jameson v Professional Investment Services Pty Ltd*** (2007, NSWSC); versus: ***Dawson Nominees Pty Ltd v Multiplex Ltd*** (2007, FCA); ***Jameson*** (2009, NSWCA)

An express statutory provision – analogous (in a loose way) to ***s 33ZJ(2)*** – the concept of the 'statutory charge'

❑ the concern of UK law reformers — per Stone J in ***Dorajay*** (per [111] and [117]):

> '*Parliament has made a clear choice [in Part IVA], and it is not for the courts to hold otherwise. Therefore it is necessary to address whether [a tied class] has the effect of implementing an opt-in procedure or otherwise subverting the process that the legislature has adopted ...*
>
> *[t]he legislature made a clear choice [to adopt an opt-out regime] that was consistent with the recommendation of the Australian Law Reform Commission on this issue. Whatever advantages, real or apparent, may flow from the ability to identify each member of the class at the outset, a decision to apply an opt-in procedure can only be made by the legislature'.*

❑ the UK legislative response to this conundrum:

Competition Act 1998, s 47C(6):
In a case within subsection (5) [where the Competition Appeal Tribunal makes an award of damages in opt-out collective proceedings], the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of ***the costs or expenses incurred by the representative in connection with the proceedings***.

❑ but a recent challenge! Per ***Merricks v Mastercard Inc*** (2016) – filed 8 Sep 2016; certification hearing 18–20 Jan 2017 – decision awaited

- the relevant clause
- 'Third Party Funding and Class Actions Reform' (2015) 131 *Law Quarterly Review* 291
- likely effect of the ***Merricks*** decision

E. Conclusion: The First 25 Years

★ bold and ambitious — having utility, across a range of areas, involving thousands of class members

★ an exercise in pragmatism and compromise

★ problems and conundrums, and judicially-crafted solutions

★ giving rise to design points of great comparative importance — lessons learnt, and to be learnt

Bibliography

Please note: several of the matters dealt with in this presentation are covered, in greater detail, in the author's following selected publications (and in a forthcoming publication based on this conference presentation):

- ❑ 'The United Kingdom's "Third Generation" Statute' [forthcoming]
- ❑ 'Class Actions and Law Reform: Insights from Australia and England, a Quarter of a Century Apart' in D Grave and H Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons, Sydney, 2017), ch 14, 303–323;
- ❑ 'A Spotlight on the Settlement Criteria under the United Kingdom's New Competition Class Action' (2016) 35 *Civil Justice Quarterly* 1–15;
- ❑ 'A Channel Apart: Why the United Kingdom Has Departed from the European Commission's Recommendation on Class Actions' [2015] *Cambridge Yearbook of European Legal Studies* 36–65;
- ❑ 'Third Party Funding and Class Actions Reform' (2015) 131 *Law Quarterly Review* 291–320;
- ❑ 'Recent United Kingdom and French Reforms of Class Actions: An Unfinished Journey', in Fairgrieve and Lein (eds), *Collective Redress in Europe* (BIICL 2015) 97–115;
- ❑ 'Damages-based Agreements' in R Pirozzolo (ed), *Litigation Funding Handbook* (Law Society of England and Wales, London, 2014), ch 7, 105–119
- ❑ 'England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments' (2014) 73 *Cambridge LJ* 570–597;
- ❑ 'In Defence of the Requirement for Foreign Class Members to Opt-in to an English Class Action' in D Fairgrieve and E Lein, *Extraterritoriality and Collective Redress* (OUP, Oxford, 2012), ch 14, 245–266
- ❑ 'The Recognition, and *Res Judicata* Effect, of a United States Class Actions Judgment in England: A Rebuttal of *Vivendi*' (2012) 75 *Modern Law Review* 180–211;
- ❑ 'Recent Milestones in Class Actions Reform in England: A Critique and a Proposal' (2011) 127 *Law Quarterly Rev* 288–315;
- ❑ 'A Missed Gem of an Opportunity for the Representative Rule' [2012] *European Business L Rev* 49–60;
- ❑ *Costs and Funding of Collective Actions: Realities and Possibilities* (commissioned by BEUC, Feb 2011), vii + 133pp
- ❑ 'Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Actions Law-Makers' (2011) 50 *Canadian Business LJ* 376–408;
- ❑ '*Emerald Supplies Ltd v British Airways plc*: A Century Later, The Ghost of *Markt* Lives On' [2009] *Competition LJ* 159–179;
- ❑ 'The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis' (2009) 15 *Columbia Journal of European Law* 419–462;
- ❑ *Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal* (Research Report for the Department of Business, Enterprise and Regulatory Reform, October 2008), ix + 76 pp;
- ❑ 'Building Blocks and Design Points for an Opt-out Class Action' [2008] *J of Personal Injury Law* 308–325;
- ❑ *Reform of Collective Redress in England and Wales: A Perspective of Need* (Research Report for the Civil Justice Council, Feb 2008), ix + 161pp;
- ❑ *The Modern Cy-Près Doctrine: Applications and Implications* (Routledge Cavendish, London, 2006);
- ❑ *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004).

***