TEN YEARS SINCE *KING V GIO*

THE HON JUSTICE MICHAEL MOORE*

The invitation to write this article arose because I heard the first, so it is said, shareholder class action in Australia: *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)*.[1] I case managed the proceedings over approximately four and a half years commencing in August 1999. The proceedings involved a large number of interlocutory hearings and 14 interlocutory judgments.[2] However the matter settled avoiding the need for a final hearing and judgment.

After some general comments, I focus on two matters which emerged as important issues in the proceedings. The first concerns the extent to which there should be communication by respondents with members of the group. The second concerns the definition of the group in shareholder representative proceedings and the related issue of how such proceedings can be litigated in a statutory scheme which requires parties to opt out. As a serving judge who may come to adjudicate on these issues in future litigation (and having been the trial

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1 Matter N 955 of 1999 ('*King*'). In writing this paper, I have drawn from a number of the judgments I gave in the proceedings.

2 (2000) 100 FCR 209 – whether s 33 satisfied;
[2000] FCA 1869 (Unreported, Moore J, 20 December 2000) – form of opt out notice;
(2001) 184 ALR 500 – pleading of accessorial liability;
[2001] FCA 1487 (Unreported, Moore J, 24 October 2001) – amendment of statement of claim;
(2001) 116 FCR 509 – costs of complying with subpoena;
[2002] FCA 151 (Unreported, Moore J, 25 February 2002) – use of discovered documents – confidentiality;
[2002] FCA 364 (Unreported, Moore J, 25 March 2002) – withdrawal of opt out notice;
(2002) 121 FCR 480 – respondent communicating with unrepresented members of group;
[2002] FCA 1026 (Unreported, Moore J, 16 August 2002) – striking out cross-claim;
[2002] FCA 1560 (Unreported, Moore J, 16 December 2002) – respondent communicating with represented/unrepresented members;
[2003] FCA 212 (Unreported, Moore J, 19 March 2003) – whether individual issues of reliance should be dealt with at hearing;
[2003] FCA 543 (Unreported, Moore J, 3 June 2003) – particulars;
[2003] FCA 980 (Unreported, Moore J, 17 September 2003) – approval of settlement by Court;
[2003] FCA 1420 (Unreported, Moore J, 5 December 2003) – determination of the final membership of the group.

judge) it is necessary to write with some circumspection though the time limits in relation to the causes of action in those proceedings have expired.[3]

Over 17 years ago the *Federal Court of Australia Act 1976* (Cth) ('*FCA Act*') was amended[4] to introduce Part IVA, Representative Proceedings. For the first time in Australia, a procedure was established to enable the prosecution of representative proceedings that broadly mirrored class action procedures in the United States of America. The amendments arose from a report of the Australian Law Reform Commission ('ALRC') which advocated a mechanism which would enable proceedings to be brought on behalf of a potentially large number of individuals where it would be unattractive (mostly because of cost) or impracticable to litigate separately the particular claim of each individual.[5]

Judges of the Federal Court have pioneered, in a number of ways, the many procedural paths this type of proceeding may take. Typically, procedural issues arise about the description of the group and whether, as the legislation requires, they share the necessary attributes of common claims to constitute a group on whose behalf representative proceedings can be maintained.[6] The description of the group can be critical and may ultimately influence whether and when the proceedings can be settled. Issues may then arise about the way the case is pleaded, the legal representation of the claimant group (which is a question which can arise if multiple proceedings are brought by different firms of solicitors on behalf of different nominal applicants where the cause of action arises out of the same factual matrix),[7] costs agreements with the applicant's legal representatives, how notice is given allowing members of the group to opt out of the proceedings,[8] the form of the opt out notice, whether and to what

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3 Six years from, at the latest, August 2003 – see *Trade Practices Act 1974* (Cth) s 82(2); *Australian Securities and Investments Commission Act 1989* (Cth) s 12GF(2).

4 By virtue of the *Federal Court of Australia Amendment Act 1991* (Cth) commencing 4 March 1992.

5 See Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988).

6 See section 33C(1) of the *Federal Court of Australia Act 1976* (Cth) ('*FCA Act*'), which provides:

> (1) Subject to this Part, where:
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> (a) 7 or more persons have claims against the same person; and
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> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
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> (c) the claims of all those persons give rise to a substantial common issue of law or fact;
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> a proceeding may be commenced by one or more of those persons as representing some or all of them.

7 For a novel solution to this problem see the judgment of Finkelstein J in *Kirby v Centro Properties Ltd* (2008) 253 ALR 65 ('*Kirby*') proposing a litigation committee.

8 See section 33J of the *FCA Act*, which provides:

> (1) The Court must fix a date before which a group member may opt out of a representative proceeding.
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> (2) A group member may opt out of the representative proceeding by written notice given under the Rules of Court before the date so fixed.
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> (3) The Court, on the application of a group member, the representative party or the respondent in the proceeding, may fix another date so as to extend the period during which a group member may opt out of the representative proceeding.
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> (4) Except with the leave of the Court, the hearing of a representative proceeding must not commence earlier than the date before which a group member may opt out of the proceeding.

extent the respondents can communicate with members of the group[9] and, ultimately, if the matter is settled, how the settlement is effected.[10] An issue commonly arises about whether the proceedings should continue as representative proceedings: see section 33N. Mainly such applications are unsuccessful and can, on occasions, represent a costly and time consuming diversion.

Generally, each case throws up unique, challenging and difficult legal issues, which must be resolved by the docket judge. Representative proceedings are usually vigorously defended and often very large amounts are involved. There have been at least 200 representative proceedings in the Federal Court. For example, in 2000 there were 20 such proceedings on foot in the Court with a potential claim value of over $3 billion. The subject matter of the claims is diverse. Such proceedings range from claims for economic loss arising out of contract, allegedly defective products, insolvent trading and claims by shareholders, human rights, discrimination and immigration cases, product liability claims for personal injuries, employment and industrial relations matters, consumer claims, other tort and personal injury claims, intellectual property claims, and taxation cases. In practice, they have concerned pesticide contamination of cattle feed, the implantation of defective pacemakers, the failure of defective contraceptive devices, corporate failures involving loss by shareholders, failed investment schemes and price-fixing and other anti-competitive conduct, to provide but a few examples. Until 2000, the Federal Court was the only Australian court with such procedures, though other forms of representative proceedings have long existed in Australian superior courts.[11] Similar procedures are now being been adopted in other jurisdictions.[12]

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9 S Stuart Clark, 'Class Action Defendants Are Free to Communicate with Class Members' (2002) 13(5) *Australian Product Liability Reporter* 33; Brooke Davie, 'Guidelines for Communications with Unrepresented Group Members' (2002) 13(9) *Australian Product Liability Reporter* 89.

10 See section 33V of the *FCA Act*, which provides:

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

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

11 S Stuart Clark and Christina Harris, 'Class Actions in Australia: (Still) a Work in Progress' (2008) 31 *Australian Bar Review* 63, 65–7 (Pt 2) though traditional representative procedures have long been a feature of Australian superior courts; see the discussion in *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, especially at 415 and following.

12 See, eg, *Supreme Court Act 1986* (Vic) pt 4A; *Uniform Civil Procedure Rules 2005* (NSW) r 7.4.

I turn now to consider representative proceedings that might be characterised as 'shareholder class actions'.[13] In *Kirby v Centro Properties Ltd*, Finkelstein J outlined what his Honour perceived as some of the benefits of the class action procedure in relation to this type of case:

> While there are problems with securities class actions, it must, I think, be accepted that they serve a useful function. It is often said that these actions promote investor confidence in the integrity of the securities market. They enable investors to recover past losses caused by the wrongful conduct of companies and deter future securities laws violations. According to the United States Supreme Court, they provide 'a most effective weapon in enforcement' of the securities laws and are a 'necessary supplement to [Securities Exchange] Commission action': *Bateman Eichler, Hill Richards Inc v Berner* 472 US 299 (1985) at 310, quoting *J I Case Co v Borack* 377 US 426 (1964) at 432.[14]

One advantage of class action proceedings for plaintiffs in the United States of America identified by Peter Cashman is the availability of the 'fraud on the market' theory of liability which allows reliance to be established on a class-wide basis, obviating the need to establish reliance by each individual shareholder.[15] Michael Legg explained that theory in the following way:

> The fraud on the market theory is a United States legal application of the efficient market hypothesis and assumes that the price of shares in an open and developed market reflects all publicly available material information about those shares, including misleading statements or omissions. The theory presumes that shareholders rely on the integrity of the market price in making their investment decisions such that a misleading statement or omission affects all shareholders through the share price, meaning that individual reliance does not need to be proved. Fraud on the market theory is in essence a shortcut for causation.[16]

Fraud on the market has not yet received judicial recognition in Australia.[17]

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13 See generally Peta Spender, 'Securities Class Actions: A View from the Land of the Great White Shareholder' (2002) 31 *Common Law World Review* 123; Michael Duffy, 'Shareholder Representative Proceedings: Remedies for the Mums and Dads' (2001) 39(7) *Law Society Journal* 53; Julian Donnan, 'Class Actions in Securities Fraud in Australia' (2000) 18 *Company and Securities Law Journal* 82; Michael Duffy, '"Fraud on the Market": Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia' (2005) 29 *Melbourne University Law Review* 621; Paul von Nessen, 'Australian Shareholders Rejoice: Current Developments in Australian Corporate Litigation' (2008) 31 *Hastings International and Comparative Law Review* 647. There is also an abundance of US literature. See, eg, Stephen J Choi and Robert B Thompson, 'Securities Litigation and Its Lawyers: Changes during the First Decade after the PSLRA' (2006) 106 *Columbia Law Review* 1489; John C Coffee Jr, 'Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation' (2006) 106 *Columbia Law Review* 1534; Baruch Levand and Meiring de Villiers, 'Stock Price Crashes and 10b-5 Damages: A Legal, Economic and Policy Analysis' (1994) 47 *Stanford Law Review* 7; Jeffrey L Oldham, 'Taking "Efficient Markets" out of the Fraud-on-the-Market Doctrine after the *Private Securities Litigation Reform Act*' (2002) 97 *Northwestern University Law Review* 995.

14 *Kirby* (2008) 253 ALR 65, 67–8.

15 Peter Cashman, *Class Action Law and Practice* (2007) 522 fn 266. See also Michael Legg and Ron Schaffer, '*Sons of Gwalia Ltd v Margaretic*: Encouraging Shareholder Claims and the Fraud on the Market Theory' (2007) 35 *Australian Business Law Review* 390; von Nessen, above n 13.

16 Michael J Legg, 'Shareholder Class Actions in Australia – The Perfect Storm?' (2008) 31 *University of New South Wales Law Journal* 669, 682.

17 For a discussion on the possible application of the principle in Australian law see the commentary in Ashley Black, 'Commentary on All Four Papers' in the Hon Justice K E Lindgren (ed), *Investor Class Actions,* Ross Parsons Centre of Commercial, Corporate and Taxation Law (2009) 101, 104–9.

An important feature of corporate regulation in Australia is the requirement for continuous disclosure which is likely to bear up the incidence of shareholder representative proceedings.[18] There may emerge a pattern of prospective plaintiffs delaying the institution of proceedings as potential breaches of the legislative regimes are identified and investigated by regulatory authorities. As Legg has observed, representative proceedings will often flow from Australian Security and Investment Commission ('ASIC') investigations, Royal Commissions and Australian Securities Exchange ('ASX') action.[19] This is because those activities act as a 'divining rod' for corporate misconduct. Investigations undertaken by those bodies potentially make available information which may be of assistance in litigation. The extent to which the results of such investigations might be made available to those pursuing claims against the corporate miscreant is presently a live issue in the courts.[20]

Although a number of shareholder representative proceedings have been commenced in the Federal Court, no judgment has yet been delivered on the merits of the claim.[21] Nonetheless, the Court has supervised settlements.[22]

If a case did proceed to trial one would expect, as the law presently stands, that each shareholder would have to demonstrate that they relied on the conduct and the conduct caused loss. The difficulty in undertaking that task in a case such as *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)*, in which approximately 67 000 shareholders were potentially involved, is readily apparent. It is not a task that Australian courts have to date been required to manage.

That case was commenced on 30 August 1999.[23] It concerned events in late 1998. Mr King was the applicant. As far as I am aware, I never saw Mr King. I recall nothing of him other than that he procured a settlement of $97 million from one of Australia's largest financial institutions together with such contribution as was made by other respondents.

In late 1998, GIO was the subject of a hostile takeover bid from AMP. In August 1998 AMP announced a $4.75 cash offer for GIO shares with an alternative offer of two AMP shares for nine GIO shares. The directors of GIO recommended that the offer be rejected. The offer was embodied in a Part A statement dispatched on 4 December 1998 though a revision of the offer was

18 See Michael Duffy, '"Fraud on the Market": Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia', above n 13, 645–7.

19 Legg, above n 16, 687–8.

20 See, eg, the judgment of Gordon J in *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137 and on appeal *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547; see generally Ben Slade and Richard Ryan, 'Representative Proceedings in Competition Law' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009).

21 Clark and Harris, above n 11, 85–7 (Pt 4.2).

22 See section 33V(1) of the *FCA Act*: 'A representative proceeding may not be settled or discontinued without the approval of the Court'. For a recent summary of applicable principles, see *Taylor v Telstra Corporation Ltd* [2007] FCA 2008 (Unreported, Federal Court of Australia, Jacobson J, 13 December 2007).

23 For a recent academic commentary on the case, see Vince Morabito, 'Revisiting Australia's First Shareholder Class Action' in the Hon Justice K E Lindgren (ed), above n 17, 34.

announced on 9 December 1998 which was an offer of $5.35 per GIO share or one AMP share for four GIO shares. A media release of 9 December 1998 quoted the Chief Executive Officer of GIO, Mr Steffey (the fifth respondent in the proceedings) as continuing to urge shareholders to reject AMP's 'inadequate bid'. That day the board of GIO had resolved unanimously to reject the revised offer and had authorised the chairman of the Board, Mr David Mortimer (the third respondent in the proceedings) and Mr Steffey to sign the Part B statement under section 647 and Part B of section 750 of the then *Corporations Law* (Cth) ('*Corporations Law*'). The Part B statement took the form, in substance, of two booklets. The second booklet was a report of Grant Samuel valuing GIO shares in the range $5.66 to $6.71.

The pleadings contained, in summary, the following claims about the conduct of the respondents:

(i) That GIO and the directors and Grant Samuel engaged in misleading and deceptive conduct by impliedly representing that the Part B statement was accurate, balanced and reasonable and contained all material matters to be taken into account when deciding whether to accept or reject the varied takeover offer.

(ii) That GIO and the directors and Grant Samuel engaged in misleading and deceptive conduct as to a future matter by impliedly representing that the valuation of GIO shares contained in the Part B statement was accurate and reliable and that the profit forecast for GIO for the financial year ending 30 June 1999 contained in the Part B statement was accurate and reliable.

(iii) Each of the respondents engaged in misleading and deceptive conduct by failing to inform the members of the group adequately or at all about the risk factors in circumstances where it was appropriate to inform them, as each owed a duty to the members to exercise reasonable skill, care and diligence.

(iv) GIO, each director and Grant Samuel each breached a duty of care owed to the applicant and each group member by failing to give adequate advice, failing to ensure that the Part B statement was not misleading or deceptive, failing to ensure that the Part B statement was balanced by appropriate discussion of the risk factors and failing to inform the applicant and the group members of the existence and materiality of the risk factors.

(v) GIO, Grant Samuel and each director engaged in conduct in contravention of section 52 of the *Trade Practices Act 1974* (Cth) ('*TPA*') and section 12DA of the *Australian Securities and Investments Commission Act 1989* (Cth) ('*ASIC Act*'), and section 42 of the *Fair Trading Act 1987* (NSW) ('*FTA*') by publishing the Part B statement, making the representations earlier referred to and failing to inform adequately or at all about the risk factors and, as to Grant Samuel, publishing its report, and, as to each of the directors, causing the Part B statement to be sent to the applicant and group members.

(vi) Grant Samuel was by operation of section 75B of the *TPA*, section 79 of the *Corporations Law* and section 61 of the *FTA* involved in the relevant contraventions by GIO by aiding, abetting, counselling or procuring those contraventions, inducing those contraventions or by being directly or indirectly knowingly concerned in or party to them.

(vii) Each of the directors was likewise involved in an accessorial role in the GIO contraventions.

(viii) Each of the directors, Grant Samuel and GIO breached section 995(2) of the *Corporations Law*.

This conduct is alleged to have caused or led to loss or damage.

It was never necessary for the Court to decide what the true facts were or, indeed, whether the applicant could establish liability. It is sufficient to note that having regard to many commentaries on these events, it appears likely that the impugned statements were made against a background where GIO was in a substantially less attractive financial position than represented in the statements to the shareholders. One line of defence in the proceedings, referred to by senior counsel for GIO when I was considering the settlement agreement, was that had the respondents not conducted themselves as they did, the true and parlous financial position of GIO in late 1998 and early 1999 would have been revealed and the takeover by AMP would not have proceeded. No damage would have been suffered. Whether this defence had any substance was never tested.

As mentioned earlier, when the proceedings commenced there were 67 000 shareholders who, potentially, may have had a compensable claim. This and other figures have been rounded out. These 67 000 were the shareholders who owned and retained shares during the period of the hostile takeover bid. Of these shareholders, 22 000 retained Maurice Blackburn Cashman ('MBC') to act on their behalf. MBC was acting for Mr King and funded the litigation. In early 2001, 18 000 potential group members opted out of the proceedings. This left 50 000 shareholders who may have had a compensable claim against the respondents. Some people may not have opted out because they believed they were never in the representative group. Some may have known that they retained shares during the hostile takeover bid for reasons unrelated to the conduct of the respondents.

One issue that can arise in representative proceedings (an issue that arose in *King*) is the extent to which respondents or their lawyers can communicate and even negotiate directly with members of the group. If it is contact by the lawyers, the starting point is the legal professional practice rules, which generally prohibit a practitioner from directly communicating with another person for whom a legal practitioner is acting.[24] However, in *King*, GIO wished to contact members of the group who, for one reason or another, were not clients of MBC though the firm was conducting the litigation on their behalf. It was clear that GIO wanted to take

24 See, eg, rule 31 of the *Professional Conduct and Practice Rules* made pursuant to the *Legal Profession Act 1987* (NSW).

steps to ascertain, as best it could, the number of shareholders who really had and would wish to pursue a claim of the type identified by the applicant in the pleadings. Plainly enough GIO wanted to have some understanding of its potential liability in the proceedings. Its potential liability would be relevant to any discussions directed towards settling the matter. On 11 July 2002, I made orders (which were opposed by the applicant) designed to facilitate communications between GIO and shareholders for the purpose just discussed, although in doing so, I emphasised the need for the Court to exercise control over the communications.[25] As I said:

> MBC [the applicant's solicitors] has an obligation to conduct the representative proceeding on behalf of Mr King in a way consistent with the interests of members of the representative group whether MBC clients or not. However that firm does not have a solicitor client relationship with the unrepresented shareholders and, as a matter of principle, could not resist [GIO's solicitors] communicating with members of that group for legitimate forensic reasons. I accept that those reasons might include asking questions to ascertain whether any particular unrepresented shareholder viewed themselves as satisfying conditions of group membership and asking questions concerning reliance. Mr Murphy, who is a partner of MBC and has been involved in the conduct of the proceeding in this Court on behalf of Mr King, accepted in cross examination that GIO's interest would be better served if it could communicate now with unrepresented group members concerning questions of reliance.
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> However, as a matter of case management given the size of the representative group, it is desirable that, prima facie, the Court be in a position to exercise some control over any communication and it is also in the interests of the administration of justice more generally. As Brennan J observed in *Carnie v Esanda Finance Corporation Ltd* at 408:
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> > ... it is precisely because of the flexible utility of the representative action that judicial control of its conduct is important, to ensure not only that the litigation as between the plaintiff and defendant is efficiently disposed of but also that the interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf.[26]

A similar issue subsequently arose before Sackville J in *Courtney v Medtel Pty Ltd*.[27] In the course of discussing whether the Court had power to restrict settlement communications between a respondent and group members, his Honour said:

> While s 33ZF(1) of the *Federal Court Act* should be given a broad construction, that does not mean it can or should become a vehicle for rewriting the legislation. For example, in my view s 33ZF(1) cannot be read as prohibiting the respondent to a representative proceeding from communicating with a group member unless the Court has given prior approval. The provision itself merely confers power on the Court to make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding; it does not prohibit conduct which is otherwise lawful. Accordingly, neither s 33ZF(1) nor any other provision in Part IVA prevents a respondent communicating with a group member in a manner which is not misleading or otherwise unfair and which does not infringe any other law or ethical constraint (such as a professional conduct rule which requires solicitors to

25 For a discussion see Clark, above n 9; Davie, above n 9.

26 *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 FCR 480, 489.

27 (2002) 122 FCR 168.

> communicate with a represented group member through the latter's own legal representatives). The principle also applies, in my opinion, to an offer made by a respondent to settle the claims of individual group members. This reflects the general policy of the law to encourage out of court settlement of disputes and to promote the individual's right to enter negotiations for settlement without inhibition: *Cutts v Head* [1984] Ch 290 at 306, per Oliver LJ, S McNicol, Law of Privilege (1992), p 438. ...
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> But just as s 33ZF(1) of the *Federal Court Act* does not prohibit communications between the respondent and a group member in a representative proceeding, the provision does empower the Court to impose constraints on such communications if these are considered necessary or appropriate to ensure that justice is done in the proceeding. If, for example, there is evidence that an offer is about to be or has been made to group members in terms that are misleading or in circumstances that are unfair to the group members, the Court may take the view that its intervention is necessary or appropriate to avoid injustice to the group members. Where intervention is considered appropriate, the form of intervention must depend on the circumstances of each case.[28]

On 16 December 2002 I effectively authorised (again over the opposition of the applicant) GIO to send out a questionnaire to ascertain which shareholders viewed themselves as not being a group member and which shareholders did not want to participate in the proceedings (whether or not they were a group member). The questionnaire was also intended to elicit some basic information about the nature of any claim from those shareholders who did not take either of those positions, including information concerning reliance.

Of those who were sent the questionnaire, 5000 responded by indicating they either did not consider themselves to be a group member or they did not wish to participate in the proceedings. This left 22 000 shareholders represented by MBC and 23 000 shareholders who were not represented by that firm but who had neither opted out nor taken a step to indicate they did not wish to be involved in the proceedings. In June 2003 the number in this latter group was 25 000. In addition, only 1688 of those who were sent the questionnaire replied providing the basic information sought including information concerning reliance.

In June 2003, the applicant (supported by GIO) applied for orders intended to crystallise the number of shareholders who wished to continue to participate in the proceedings by asserting a claim of the type alleged by the applicant (on behalf of each member of the representative group) at the commencement of the proceeding and to whom GIO (and other respondents) might be liable. The orders had the effect of redefining the representative group. I made those orders on 19 June 2003. I did so because a point had been reached where I thought it was appropriate and fair to attempt to identify with precision the shareholders (and their identity) on whose behalf the proceedings were being maintained in substance and not merely in form. The central order closed the class by redefining the class in the following terms:

> On 7 August 2003 the Fifth Application and the Seventh Further Amended Statement of Claim be amended to provide that the group members to whom the proceeding relates within the meaning of s 33H of the Act be the identified group

28 Ibid 183–4.

> members [in effect the shareholders who completed and returned a form they were sent] provided that the addition or deletion of persons to or from the said list may be effected at any time by the Court if it is satisfied that the omission or inclusion of the person on the said list was the result of an error by any party, its representative or the Court or otherwise.

As a result of the orders, all shareholders who had not opted out (other than clients of MBC and the 5000 shareholders referred to earlier) were sent a letter to an address in a database maintained by GIO. The letter was headed 'IF YOU WISH TO PARTICIPATE IN THIS REPRESENTATIVE ACTION FOR COMPENSATION YOU MUST COMPLY WITH THIS NOTICE. IF YOU DO NOT DO SO YOUR RIGHTS MAY BE LOST'. The letter was ultimately sent to 25 806 people.

The letter contained a form called 'Form C', which the recipient was told had to be filled out and returned by 24 July 2003 for the recipient to continue as a group member. A reply paid envelope was included with the letter. The letter contained a lengthy explanation about what had to be done and what was occurring. One of the orders made on 19 June 2003 was that the members of the group would be redefined by reference to a list of people who completed and returned Form C. This proved to be an extremely important element in finally resolving the matter. In effect, it enabled the class to be closed. The letter sent with Form C correctly stated the position concerning the effect of not returning the form by 24 July 2003. In addition to the letter, advertisements were placed in both *The Australian* newspaper and a major metropolitan daily newspaper in each capital city advising that these steps had to be taken to remain a member of the representative group. Of those who were sent the letter, 1957 returned Form C within the specified time (what occurred is a little more complex but this description is sufficient for present purposes). They became members of the representative group redefined by the orders made on 19 June 2003. On behalf of its clients, MBC completed Form Cs with the result that a further 21 142 people became members of the representative group, redefined by the orders made on 19 June 2003. By this process the representative group totalled 23 099. This was apparent by early August 2003.

I was then acting on the basis that the combined effect of Part IVA was as follows. Any judgment ultimately given would not bind people who may have initially been members of the representative group but were not one of the 23 099 who had completed Form C and became, in aggregate, the representative group by the orders made on 19 June 2003. Those who did not become part of the redefined representative group had the benefit of a temporary suspension of limitation periods at least until 7 August 2003. At the hearing on 19 June 2003, no party demurred from these propositions (and in particular the effect of the orders on any limitation periods) when they were discussed.

A few days before 8 August 2003, I was asked to list the matter on very short notice. I did so and I was then informed that the matter had settled, at least as between the applicant and GIO, though the settlement was subject to Court approval. I was told by senior counsel for GIO that there were some commercial imperatives of fundamental importance which required the parties to seek and obtain Court approval for the settlement by the end of August. I accepted this

was so and acted on that basis. I then made orders fixing a hearing to consider the settlement for 26 August 2003 and authorising a letter to be sent by MBC informing those who were (by this time) all the members of the representative group of the terms of the proposed settlement which included informing them of the proposed payment to MBC of approximately $15 million for professional costs and disbursements. The letter indicated, as a range, the amount (per share) payable under the settlement if the shares had been compulsorily acquired in December 1999 (the range was $1.16 to $1.32) and also indicated, as a range, the percentage of the net loss payable under the settlement if the shares had been sold on the stock market before December 1999 (the range was approximately 55 per cent to 63 per cent). There was, at the time, a risk that these statements would not prove to be entirely accurate if the number of shareholders participating in the settlement exceeded, by a considerable margin, the numbers then estimated as likely to participate. The letter also contained an invitation to any person who objected to the settlement to either appear (personally or through a solicitor) at the hearing on 26 August 2003 or send a letter setting out their reasons for objecting to a nominated post office box by 22 August 2003. Ultimately, no written objections were received and no one appeared at the hearing to object.

The final settlement was reflected in two documents. The first was an agreement between the applicant and GIO. The second was a scheme of settlement. Prior to the hearing on 26 August 2003 I was provided, as evidence, an opinion from MBC and an opinion from senior and junior counsel for the applicant dealing with the question of whether the settlement was fair, proper and appropriate. Their opinions supported the settlement and, for my part, I had little difficulty in accepting that the amounts for which the case was being settled were appropriate in all the circumstances.

The gist of the settlement was this. During the hostile takeover bid, AMP offered to purchase GIO shares at $5.35 each during a period concluding 4 January 1999. By May 1999, GIO shares were trading on the stock exchange for $3.90, by August 1999 for $2.64 and by December 1999 for $2.30. AMP compulsorily acquired any GIO shares not acquired during the takeover for $2.75 in December 1999. In February 1999, shareholders were paid a total of 50 cents by way of capital return and interim dividend. The difference between the takeover offer price and the compulsory acquisition price was $2.60 though an adjustment had to be made for the 50 cents paid in the interim. The total theoretical loss suffered crystallised in December 1999 at $2.10 for those shares compulsorily acquired. For those sold on the market between January and December 1999 the amount of the total theoretical loss suffered would depend on the sale price of the shares and whether the 50 cents had been received.

As part of the settlement, GIO paid $97 million into a fund. That was to be paid rateably to group members depending on the number of shares held, whether the shares were sold on market or compulsorily acquired and whether they were paid the 50 cents in February 1999. The best estimate then of the total theoretical loss of all group members was approximately $151 million. If that broadly remained the position when all issues of shareholding and final group membership were resolved then an individual group member would receive, as a

generalisation, approximately 60 per cent of the total theoretical loss they suffered.

At the time, there was a risk that the members of the group would receive less than this amount if the total number participating in the settlement exceeded the projected numbers. It was a risk I was prepared to countenance. In a curious way, the risk arose because the numbers participating in the settlement had not been determined at an earlier time by the closing of the class. For my part, there is a lot to be said for defining the class with precision towards the outset of the litigation rather than at the time of settlement.

To give final effect to the settlement it was necessary to go through the process of considering the individual circumstances of shareholders who, in a variety of ways, had failed to follow the course contemplated by this scheme. To that end, a hearing was held in which the interests of those shareholders were represented by independent counsel acting as contradictor. Generally, he argued for the inclusion of as many as possible in the group which would participate in the settlement as did (not unsurprisingly) counsel for GIO. Counsel for the applicant generally sought to exclude from participating in the settlement those shareholders. The principles I applied are set out in a judgment published on 5 December 2003, in which I said:

> Before considering individual categories it is, I think, important to emphasise one matter. The settlement reached between the parties involved (with one qualification that is not now relevant) the creation of a fund of a fixed amount of $97 million to be distributed among people who constituted the group members following the 'Form C' process. Basically the group membership who would receive payments from the fund would only be those who completed a 'Form C'. It would be open to anyone who was no longer a group member as a result of this process to consider bringing their own legal proceedings. From what I have been told by the parties, the rationale for the settlement achieved in this way appears to be that the people who would enjoy the benefit of the settlement were those who had been prepared to look after their own interests either by retaining MBC (who would attend to 'Form C' on their behalf) or, if they had not retained MBC, by completing a 'Form C' themselves.
>
> The 'Form C' process appears to have been critical to settlement being achieved. However, at the time of the settlement, the parties to the settlement recognised that the 'Form C' process may require further review and refinement as more details emerged about its effect. The hearings on the 25, 26 and 27 November 2003 took place to refine the 'Form C' process and ensure its equitable application. That is, my task has been to complete and perfect the settlement agreed between the parties having regard to the way the settlement was structured and the terms upon which the settlement was reached. My task has not been to exclude or include individuals on some general basis of what is fair or unfair or to exclude or include individuals for reasons that involve the application of some technical rule. No doubt some people who are not included may feel aggrieved and consider the process unfair. But it is important for those individuals to understand that their exclusion resulted from the way in which the parties decided to settle the proceeding as well as the way in which those individuals responded to the 'Form C' which was sent to them.
>
> It is also important for those that may feel aggrieved to understand that the settlement fund available for distribution is a fixed amount. The settlement fund available for distribution would not increase if they were added to the group. The inclusion of each complainant in the final representative group (the FLIGM) will result in payment to them of a proportion of the settlement fund which will

> necessarily result in the reduction of the amount available to be paid to each and every other member of the group. For each complainant included, the amount paid to all others in the group will be reduced. Obviously the inclusion (as a group member) of one complainant who had a small shareholding in GIO and who is later paid out of a settlement fund of $97 million will have a very limited impact on the payments made to other group members by reducing those payments. However the inclusion of large numbers of additional former shareholders could have a significant impact, because the cumulative effect of their inclusion could result in a material reduction in the payments made to other members of the group who, by and large, have looked after and protected their own interests in the proceeding.[29]

A more recent example of the management of this process in shareholder representative proceedings is found in the scheme of settlement adopted in the *Dorajay Pty Ltd v Aristocrat Leisure Ltd* litigation discussed by Stone J in a judgment of 26 August 2008[30] and a later judgment of 21 January 2009[31]. It appears that in that matter greater attention was paid, in the settlement terms, to ensuring the settlement fund was adequate and distributed appropriately amongst participating members.

This leads to the more general question of how the group might be defined. Section 33C of the *FCA Act* deals with the commencement of proceedings. One issue addressed by section 33C which has been contested in a number of proceedings relates to the 'opt out' mechanism adopted in the *FCA Act*. As I have endeavoured to illustrate, a procedure was adopted in the GIO litigation which ultimately limited the class of people for whom the proceedings were, in that case, settled. However, I assume partly as a result of the involvement of funding litigators there has more recently been greater focus on limiting the group at the beginning rather than at the end of the proceedings.[32] As already mentioned, the representative proceedings model adopted in the *FCA Act*[33] is an 'opt out' model, reflecting the recommendation of the ALRC in its report *Grouped Proceedings in the Federal Court*. As the ALRC saw it:[34]

> To commence proceedings without the consent of those affected is not necessarily a limitation on the claimant's freedom of choice. There is no difference in principle between exercising freedom of choice about whether to commence a proceeding and exercising freedom of choice about whether to continue one. The circumstances covered by the Commission's recommendations include cases where persons are ignorant of their legal rights or precluded from taking remedial action by cost or other barriers. A fair balance will be struck between the interests of group members and respondents if proceedings can be commenced without the consent of group members as long as notice is given to group members and they have an opportunity to withdraw from the proceedings or litigate individually. The

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29 *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 1420 (Unreported, Moore J, 5 December 2003) [16]–[18].

30 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2008) 67 ACSR 569 ('*Dorajay*').

31 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 (Unreported, Stone J, 21 January 2009).

32 See especially Vince Morabito, 'Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29 *Sydney Law Review* 5.

33 Vince Morabito, 'Class Actions: The Right to Opt Out under Part IVA of the *Federal Court of Australia Act 1976*' (1994) 19 *Melbourne University Law Review* 615.

34 Australian Law Reform Commission, above n 5, [126]–[127].

> respondent's ultimate liability should not, generally speaking, extend beyond those group members who can be identified and prove their claims.
>
> Recommendation. Subject to the provision of appropriate protection, it should be possible to commence a group member's proceeding without first obtaining the consent of that group member. Provision should be made to ensure that group members are notified of the proceedings and that a group member can discontinue his or her proceeding or continue it independently. The rights of persons should not be prejudiced by the commencement of proceedings without consent.

The starting point in defining the represented group in proceedings under Part IVA are the requirements of numerosity (seven or more: see section 33C(1)(a)) and commonality (see sections 33C(1)(b) and (c)). Section 33C also permits a narrowing of the group so that a 'proceeding may be commenced by one or more … persons as representing some or all of them'.[35] The operation of these provisions has come into sharp focus in the Federal Court when attempts have been made to close the represented class by reference to the retention of a firm of solicitors. This is also commonly linked to support by a litigation funder.[36] The benefit of these arrangements for the law firm and litigation funder are patent. As Finkelstein J recently observed the effect of this class definition is to exclude the 'free riders, that is persons who make no direct or indirect contribution toward the costs of the action'.[37]

In *Dorajay*, Stone J held that the criterion restricting the group to clients of a specific firm of solicitors was an 'abuse of the Court's processes as established by Pt IVA'[38] and 'repugnant to the policy of the Act'.[39] Her Honour concluded that 'the proceeding [could not] continue as a representative proceeding while retaining a particular firm of solicitors [as] a criterion of membership of the representative group'.[40] Stone J held that a criterion limiting the class to persons represented by a named law firm (Maurice Blackburn Cashman or the MBC criterion in that instance) 'subvert[ed] the opt out process' envisaged by Part IVA of the Act.[41]

This view was not embraced by Finkelstein J in *P Dawson Nominees Pty Ltd v Multiplex Ltd* who reached a different conclusion. The issue was then considered by a Full Court in an appeal from Finkelstein J in *Multiplex Funds*

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35 Set out in full in footnote 6.

36 See *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 where the majority of the High Court indicated that there is nothing inherent in litigation funding arrangements that is contrary to public policy. There is an abundance of literature of the role of litigation funders. See, eg, Peta Spender, 'After *Fostif*: Lingering Uncertainties and Controversies about Litigation Funding' (2008) 18 *Journal of Judicial Administration* 101; Robert Richards, 'Some practical funding cases' (2006) 44(9) *Law Society Journal* 56; Damien McAloon, 'Liquidators and Funded Litigation – Is Court Approval Necessary?' (2008) 8(8) *Insolvency Law Bulletin* 127; Alwyn Narayan, ''Litigation funding' (2007) 15 *Insolvency Law Journal* 128; Lisa Aitken, 'Before the High Court: "Litigation Lending" after *Fostif*: An Advance in Consumer Protection, or a Licence to "Bottomfeeders"?' (2006) 28 *Sydney Law Review* 171. See also the commentary in Black, above n 17, 108–9.

37 *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 123 ('*Multiplex*').

38 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394, 431.

39 Ibid.

40 Ibid 433.

41 Ibid 431.

Management Ltd v P Dawson Nominees Pty Ltd.[42] In the appeal, the Full Court dealt with Multiplex's challenge to the continuation of the proceedings as representative proceedings. The Full Court (French, Lindgren and Jacobson JJ) dismissed the appeal. Justice Jacobson summarised the matter before the Court in the following terms:

> The essential question which arises on these appeals is whether Finkelstein J erred in refusing to make an order, sought by Multiplex and MFM under s 33N(1) of the Act, that the proceeding no longer continue as a representative proceeding under Pt IVA.
>
> The principal contention of the Multiplex parties was that his Honour ought to have been satisfied that it was in the interests of justice to make an order under s 33N(1)(d) because it was 'otherwise inappropriate' that Dawson's claims be pursued by means of a representative proceeding.[43]

The respondents argued that the representative proceeding was inappropriate in the circumstances because the class defined by Dawson included the requirement that 'at the commencement of the representative proceeding, [the investor] entered into a litigation funding agreement with International Litigation Funding Partners Inc ('ILF')'.[44] This requirement, Multiplex contended, created an opt in mechanism, which was contrary to the opt out nature of the representative proceedings established by the Act.[45] Multiplex further argued that the nature of the litigation funding agreement, entered into between ILF and the investor, would fetter the investor's ability to opt out of the proceedings such that it would be contrary to section 33J of the *FCA Act*.

As Finkelstein J noted in his decision as primary judge, nothing in the Act dictates the conclusion that the class must be exhaustively identified: 'An interesting feature of the Australian legislation is that it is not necessary for the represented group to include every person who has a claim against the defendant that arises out of the same or related circumstances'.[46] This, his Honour continued, was a 'surprising omission' on the part of the legislature.

On appeal, Jacobson J also noted this omission. His Honour discussed the background to Part IVA of the Act:

> Part IVA was enacted in response to Report No 46 of the Australian Law Reform Commission, entitled Grouped proceedings in the Federal Court (1988). However, Parliament did not adopt all the recommendations made by the ALRC.
>
> One of the recommendations of the ALRC which was not adopted in Pt IVA was that grouped proceedings would be brought on behalf of all members of the group who were alleged to have suffered harm by the conduct of the respondent. Clause 14 of the ALRC's draft Bill provided for the Court to be able to order a stay of proceedings where the group was incomplete. Indeed, the heading to the ALRC's cl 14 was 'Addition of further group members: incomplete groups'.

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42 (2007) 164 FCR 275 ('*Multiplex*').

43 Ibid 283–4.

44 Ibid 284 (Jacobson J).

45 Note that in the *Multiplex* proceedings the challenge was to a funding criterion as a class closing mechanism (as opposed to a representation criterion as in *Dorajay*). See *Multiplex* (2007) 242 ALR 111, 120.

46 Ibid 115.

> The rejection of this recommendation is to be found in the words of s 33C(1). That subsection permits a representative party to commence a proceeding by one or more of the persons who satisfies the threshold requirements of paras (a) to (c) 'as representing some or all of them'.
>
> These words expressly permit the representative party to commence a proceeding on behalf of less than all of the potential members of the group. This construction, though sufficiently clear from the wording of s 33C(1), is reinforced by the fact that in enacting s 33C, Parliament rejected the ALRC's recommendation.[47]

Justice Jacobson concluded that the 'mere fact that the group does not include the entirety of the class of persons with claims against the respondent cannot provide an answer to the question [that it would be inappropriate to continue the proceedings as representative proceedings]'.[48]

There are arguably good reasons supporting this model of representative proceedings in preference to the basic and unrefined model recommended by the ALRC. If Part IVA permits the class, on whose behalf the representative action is brought, to be limited to a subclass by some criteria, the Act does not appear to preclude that criteria being representation by a specific firm or entry into a litigation funding agreement. As Finkelstein J noted in *P Dawson Nominees Pty Ltd v Multiplex Ltd*, '[t]he basis for the selection seems to be irrelevant'.[49]

On the balance of present authority, some class closing mechanisms will be acceptable, even encouraged, as a way to manage the litigation. Indeed, permitting such a class criterion does not appear to derogate from the policy objectives identified by the Attorney-General of 'equity and efficiency' in representative proceedings.[50] As is evident from the *Multiplex* proceedings (at first instance and before the Full Court) a representation or funding criterion will not offend Part IVA insofar as its effect is not ambulatory. That is, at the commencement of the proceedings the group must be closed. Open ended definitions that permit changes in the represented group may not be consistent with Part IVA, subject to the exception contemplated by section 33K which permits the description of the group to be altered so as to change group membership with leave of the Court.

Justice French suggested in *Multiplex* that '[t]here may be policy questions, for consideration by the legislature, relating to the role of litigation funders in representative proceedings'.[51] Allied to this question is the broader question of whether the simple 'opt out' model remains appropriate. In the short term, litigation flowing from the current financial crisis is likely to present an opportunity to the courts to further consider some of the provisions of Part IVA and, in particular, questions concerning communication with group members and

47 *Multiplex* (2007) 164 FCR 275, 291.
48 Ibid 293.
49 (2007) 242 ALR 111, 123.
50 Commonwealth, *Parliamentary Debates,* House of Representatives, 14 November 1991, 3175 (Mr Michael Duffy, Attorney-General). See also Morabito, above n 32, 41.
51 *Multiplex* (2007) 164 FCR 275, 277 (French J, in agreement with reasons of Jacobson J). Justice Jacobson expressed a similar sentiment at 292.

the definition of the group. Perhaps another article awaits: 'Twenty Years Since *King v GIO*'.