

## THE PAST, PRESENT AND FUTURE OF PRODUCT LIABILITY AND OTHER MASS TORT CLASS ACTIONS IN AUSTRALIA

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### I INTRODUCTION

The most contentious arena for class actions today involves tort law, including mass accidents (like plane or railway crashes or collapse of a building), environmental disasters (like the escape of toxic chemicals into the air or water), and defective products (like asbestos, prescription drugs, appliances, vehicles or computer hardware/software).<sup>1</sup>

Indeed, in both Australia and the United States of America, no other type of class action has generated more judicial and scholarly debate, centring on whether product liability and other mass tort cases are, in fact, suited to class treatment.<sup>2</sup> Product liability claims have been common and have involved heart pacemakers, tobacco products, pharmaceuticals including Fen-Phen and Vioxx and a variety of foodstuffs ranging from oysters to peanut butter. Tort claims involving many thousands of class members have also been commenced against, for example, major public utilities including the suppliers of Sydney's drinking water and Melbourne's gas.<sup>3</sup>

This article examines Australia's experience with mass tort class actions since the simultaneous introduction in 1992 of federal statutory regimes for class

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1 Edward F Sherman, 'Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions' (2002) 52 *DePaul Law Review* 401, 407.

2 See, eg, in Australia, Barry Lipp, 'Mass Tort Class Actions Under the Federal Court of Australia Act: Justice For All or Justice Denied?' (2002) 28 *Monash University Law Review* 361, especially at 365; and in the US, Robert H Klonoff, *Class Actions and Other Multi-Party Litigation* (3<sup>rd</sup> ed, 2007) 295–7.

3 One or both of the authors have acted in many of these actions including those involving a number of pharmaceutical products, medical devices including pacemakers, heart valves, IUDs, breast implants and orthopaedic products, and infrastructure failure including Longford gas and Sydney Water. The observations made in this article are based on their experience in conducting those matters.

actions on the one hand and strict product liability on the other.<sup>4</sup> The authors have elsewhere detailed the now quite substantial (at least by Australian standards) body of class actions case law that has developed, and have considered whether Australian class actions are fulfilling their purpose in the product liability and mass tort context.<sup>5</sup> In light of the other topics examined in this Forum, the focus here is on issues unique – or of particular importance – to product liability and other mass tort class actions.

Part II of this article considers the scope of claims embraced by the term ‘mass tort’ and summarises the legislative framework for bringing such claims by way of class action. Part III then examines the Australian experience with these class actions and considers the suitability of various types of mass tort claims to prosecution in class form. The article concludes, in Part IV, with a discussion of the likely future of mass tort and product liability class actions in Australia.

## II LEGAL FRAMEWORK

### A Terminological clarification

At the outset, it should be noted that the phrase ‘mass tort’ is not a formal legal designation but a term of art that has come to describe a large number of tort claims arising out of the same or similar factual circumstances and alleging the same or similar personal injuries and/or property damage.<sup>6</sup> A mass tort is defined by both the *nature* and *number* of claims: the claims must arise out of an identifiable event or product, affecting a very large number of people and causing a large number of lawsuits asserting personal injury or property damage to be filed.<sup>7</sup>

By the 1980s in the United States – more than a decade after the modern class action was introduced in that country<sup>8</sup> – mass torts commonly encompassed claims arising out of exposure to specific products, notably asbestos, Agent Orange and the Dalkon Shield IUD – giving rise to the term ‘mass toxic tort’.<sup>9</sup> This term also distinguishes the broader term ‘mass tort’ which, in America, is

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4 See, respectively, Part IVA of the *Federal Court of Australia Act 1976* (Cth) (inserted by the *Federal Court of Australia Amendment Act 1991* (Cth), No 181 s 3, operative 4 March 1992) and Part VA of the *Trade Practices Act 1974* (Cth) (inserted by the *Trade Practices Amendment Act 1992* (Cth), No 106 s 4, operative 9 July 1992).

5 See Jocelyn Kellam, S Stuart Clark and Christina Harris, ‘Representative actions: A Review of 15 years of product liability class action litigation in Australia – Parts 1 and 2’ (2008) 16 *Trade Practices Law Journal* 166, 239.

6 Deborah Hensler, ‘Has the Fat Lady Sung? The Future of Mass Toxic Torts’ (2007) 26 *Review of Litigation* 883, 890; and David Rosenberg, ‘Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t’ (2000) 37 *Harvard Journal on Legislation* 393, 393.

7 Federal Judicial Center, *Manual for Complex Litigation* (4<sup>th</sup> ed, 2004) §22.1, 343.

8 In the form of Rule 23 of the *Federal Rules of Civil Procedure*, revised in 1966.

9 See, eg, *Jenkins v Raymark Industries*, 782 F 2d 468 (5<sup>th</sup> Cir 1986) (asbestos); *In re ‘Agent Orange’ Products Liability Litigation*, 818 F 2d 145 (2<sup>nd</sup> Cir 1987), cert. denied, 484 US 1004 (1988) (Agent Orange); and *In re A.H. Robins Co.*, 880 F 2d 709 (4<sup>th</sup> Cir 1989) (Dalkon Shield).

sometimes used to embrace cases alleging financial harm for tort-like damages, even securities class actions.<sup>10</sup>

For simplicity, as well as to reflect Australian usage, ‘mass tort’ is used here in its traditional, more limited sense to refer to product liability and other tort-based claims for alleged personal injuries and/or property damage. This approach also reflects the mainstream view in the United States.<sup>11</sup>

## B Statutory overview

Class actions – properly called ‘representative (or group) proceedings’ in Australia – were introduced as part of a package of reforms that was intended by the then federal government to increase the level of product liability litigation in Australia.<sup>12</sup> The package also included a strict liability regime for product liability claims, contained in Part VA of the *Trade Practices Act 1974* (Cth), a modified form of contingency fees<sup>13</sup> and the removal of certain historical restrictions on the right of solicitors to advertise.

Class actions may be commenced in the Federal Court of Australia and the Supreme Court of the Victoria (under equivalent procedures contained in Part IVA of the *Federal Court of Australia Act 1976* (Cth) and Part 4A of the *Supreme Court Act 1986* (Vic)),<sup>14</sup> but not in the courts of other States or Territories.

Section 33C(1) of the Federal and Victorian class action procedures sets out three conditions that must be satisfied for a class action to commence, namely:<sup>15</sup>

- numerosity: seven or more persons must have a claim or claims against the same person;
- connectivity: the claims of all those persons must arise out of the same, similar or related circumstances; and
- commonality: the claims of those persons must give rise to a substantial common issue of law or fact.

A fourth requirement also exists, that is for the originating process to include certain information. The originating process must describe or otherwise identify the class members, and specify the nature of the claims made on behalf of class

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10 Hensler, above n 6, 890–1.

11 See, eg, Advisory Committee on Civil Rules and Working Group on Mass Torts, *Report on Mass Tort Litigation*, 10 (15 February 1999), reprinted without appendices in 187 FRD 293, 300: ‘Mass tort litigation emerges when an event or series of related events allegedly injure a large number of people or damage their property, giving rise to a large number of cases.’

12 See, eg, Senator the Hon Michael Tate, ‘Keynote Address’ (Speech delivered at the AIC Product Liability Conference, 11 November 1991).

13 See, eg, the former *Legal Profession Act 1987* (NSW) s 187. While some States have since prohibited modified contingency fees (eg, NSW: see *Legal Profession Act 2004* s 324(1)) other States still allow such fees: see, eg, *Legal Profession Act 2004* (Vic) s 3.4.28.

14 The Victorian procedure commenced in 2000 and is near identical to the Federal procedure, with minor differences not presently relevant. References in this article are to the Federal and Victorian class action legislation unless otherwise specified.

15 *P Dawson Nominees Pty Ltd v Multiplex Limited* (2007) 242 ALR 111, 115.

members and the relief claimed, and the questions of law or fact common to the claims.<sup>16</sup>

Together, these requirements comprise the cornerstones of a properly constituted class action. Each of these four requirements is an important safeguard ensuring that class actions are structured appropriately, and that defendants do not face a class action unlimited in its scope.

For present purposes, it suffices to note that, in addition to the commencement requirements mentioned above, the key features of the Australian class action procedure are:

- its lack of any requirement that the court first adjudicate whether the proceeding is appropriate to proceed in class form – instead, placing the onus on the defendant to seek to terminate the class action in certain limited circumstances, primarily pursuant to section 33N;<sup>17</sup>
- its express allowance for determination of sub-group and even individual issues as part of a class action;<sup>18</sup> and
- the ‘opt-out’ nature of the procedure which does not require claimants’ consent to be included in the class<sup>19</sup> but, rather, binds all persons falling within the class description who have not actively excluded themselves.<sup>20</sup>

The Australian class action procedure is, in some significant respects, more plaintiff-friendly than that in the United States. Critically, in the context of product liability and mass tort class actions:

- unlike the US there is no requirement that the common issues predominate over individual ones; and
- as already noted, there is no certification procedure.<sup>21</sup>

Indeed, one visiting American class action scholar recently remarked that, ‘Australia has one of the most liberal class action rules in the world’ – such that

16 Section 33H (Originating Process).

17 Section 33N(1) provides that:

The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:

- (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding;
- (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part;
- (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
- (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

18 See s 33Q (Determination of Issues Where Not All Issues are Common) and s 33R (Individual Issues).

19 Section 33E(1) (Is Consent Required to be a Group Member?).

20 Sections 33J (Right of Group member to Opt Out) and 33ZB(b) (Effect of Judgment).

21 See Damian Grave and Ken Adams, *Class Actions in Australia* (2005) Chs 4 and 12 (discussing the requirements for commencement and continuation of class actions in Australia) and Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) Chs 2 and 6 (analysing, inter alia, the different requirements for certification and commonality in Australia, America and Canada).

‘an American class action lawyer from the plaintiff’s side might think that he or she had died and gone to heaven.’<sup>22</sup>

As a consequence product liability claims involving pharmaceutical products or medical devices can be, indeed have been, run to verdict as class actions, something that would virtually be impossible in the US.<sup>23</sup>

### III TYPES OF MASS TORT CLASS ACTIONS

In the Australian experience there are two broad kinds of situations, considered in turn below, in which mass tort class actions have been commenced: disaster or ‘single event’ claims; and product liability or ‘dispersed’ claims.<sup>24</sup> This also reflects the experience under the longer-standing class action procedure in the United States.<sup>25</sup> As the terms imply, a single event mass tort involves a single accident or disaster such as the crash of commercial aircraft or a major chemical discharge or explosion; whereas a ‘dispersed’ mass tort typically arises from widespread use of, or exposure to, products or substances, often over an extended time in different jurisdictions.

#### A Disaster or ‘single event’ claims

It is unsurprising that disaster or single event claims, particularly those stemming from the failure of major infrastructure and utilities, have spawned some of the most significant and largest class actions in Australia. Examples include the Longford gas explosion litigation in Melbourne, which encompassed a potential class of 1.4 million people<sup>26</sup> and the class actions involving the alleged contamination of the drinking water of Sydney, whose population was

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22 Geoffrey Miller, ‘Some Thoughts on Australian Class Actions in Light of the American Experience’ in the Hon Justice K E Lindgren (ed), *Investor Class Actions*, Ross Parsons Centre of Commercial, Corporate and Taxation Law (2009) 4.

23 Eg, heart pacemakers and Vioxx (judgment reserved). Cf the US position, summarised in *In re American Medical Systems, Inc*, 75 F 3d 1069, 1089 (6<sup>th</sup> Cir 1996) (citing the ‘national trend to deny class certification in drug or medical product liability/personal injury cases’). Such cases usually only proceed in America as ‘settlement class actions’ in which the judge conditionally approves a class solely for settlement purposes: John C Coffee, ‘Class Wars: The Dilemma of the Mass Tort Class Action’ (1995) 95 *Columbia Law Review* 1343, 1345.

24 See Ross Perrett and Andrew Morrison, ‘Mass Tort Litigation in Australia’ (Pacific Rim Advisory Council Conference, Tokyo, 8 October – 1 November 2000) 3–5 <[http://www.prac.org/materials/2000\\_Tokyo/ECommerce\\_Aus.html](http://www.prac.org/materials/2000_Tokyo/ECommerce_Aus.html)> at 15 October 2009. See also Peter Cashman, *Class Action Law and Practice* (2007) 467–92.

25 See, eg, Deborah R Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gains* (2000) 23–5; Klonoff, above n 2, 296–7.

26 *Johnson Tiles v Esso Australia* (2003) ATR ¶81-692, 63,604. These proceedings were initially commenced in the Federal Court: see *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167; and subsequently transferred to the Victorian Supreme Court: see *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2001] VSC 284 (Unreported, Gillard J, 17 August 2001).

then over 3.5 million people.<sup>27</sup> Other disaster cases have involved more contained classes, for example, where there has been an airplane crash, local flooding or bushfires.<sup>28</sup> There is now a common public expectation that when such crises occur, one or more of the prominent plaintiffs' firms will start generating media intensity and gathering class members immediately.

In these actions the greatest utility has been seen in the management of liquidated claims including claims for property damage and consequential business interruption. In settling the Sydney Water business-related claims,<sup>29</sup> for example, the benefits of court overview, the opt-out procedure and claims assessment protocols were used to great effect to secure both prompt resolution and finality for the defendant in the ensuing settlement.

By the same token, claims for personal injury arising out of the Sydney Water alerts created significant problems in terms of the alleged causative mechanism in each case. Ultimately, that class action<sup>30</sup> was abandoned on the basis that individuals could not substantiate their own or any grouped claim in that regard.

Another difficulty faced in several 'disaster' mass tort cases is where multiple class actions are filed by different law firms in respect of the same events. This phenomenon was first seen in mass tort class actions brought on behalf of identical or substantially overlapping unlimited or open classes.<sup>31</sup> The court then held that 'it was incumbent upon [it] to determine which of those proceedings should be permitted to proceed as representative proceedings under Part IVA'.<sup>32</sup> However, limited or closed classes have recently been sanctioned by the courts on the basis that section 33C expressly allows an action to be brought

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27 *Schokman v Sydney Water Corporation Limited*, Federal Court of Australia, Proceeding No NG 794 of 1998 (alleging property damage and economic loss); and *Hogan v Sydney Water Corporation Limited*, Federal Court of Australia, Proceeding No NG 1118 of 1998, (alleging personal injury).

28 Eg, class action brought on behalf of 14 persons injured following a plane crash (*Magnus v South Pacific Air Motive Pty Ltd* (1997) 78 FCR 456); class action regarding failure of sluice gates causing flood damage to 30 homes in Adelaide (see Duncan Basheer Hannon Lawyers, *Class Actions* (2009) <[http://www.dbh.com.au/pa\\_class\\_actions.htm](http://www.dbh.com.au/pa_class_actions.htm)> at 25 August 2009); and class action regarding bushfires in Victoria killing about 100 people and damaging about 1000 homes (see Cameron Houston and Michael Bachelard, 'Huge fire class action launched' *The Age* (Melbourne), 15 February 2009 <<http://www.theage.com.au/national/huge-fire-class-action-launched-20090214-87pg.html>> at 25 August 2009).

29 *Schokman v Sydney Water Corporation Limited*, Federal Court of Australia, Proceeding No NG 794 of 1998.

30 *Hogan v Sydney Water Corporation Limited*, Federal Court of Australia, Proceeding No NG 1118 of 1998.

31 See *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 (Unreported, Merkel J, 5 February 1999) (three class actions regarding explosion at gas plant interrupting Melbourne's gas supply). See also *Nixon v Phillip Morris (Australia) Ltd*, Federal Court of Australia, Proceeding No NG 326 of 1999 (two tobacco class actions); both cases discussed in Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [7.96]–[7.98].

32 *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 (Unreported, Merkel J, 5 February 1999) [14].

on behalf of ‘some or all’ class members.<sup>33</sup> This has led to near-identical class actions being allowed to proceed against the same defendant by self-aggregated classes differently represented.<sup>34</sup> It remains to be seen how the courts will manage and determine these concurrent class actions in a way that is both efficient and fair to defendants.

## B Product liability or ‘dispersed’ claims

The greatest difficulties in Australian (and American)<sup>35</sup> class actions have emerged in respect of product liability claims, particularly for alleged personal injury. The concern is that the degree of individuation required to determine any one claim is often antithetical to the appropriate utilisation of the class action procedure. Of course, there have been some dispersed claims where the nature of the alleged loss has been traced through a common legal cause to an identifiable defendant(s). Some examples follow.

In *Butler v Kraft Foods Ltd*,<sup>36</sup> claimants who had consumed the affected peanut butter and experienced symptoms or suffered demonstrable physical injury were able to recover in the resultant settlement notwithstanding the very individual nature of their reaction to consumption of the product.<sup>37</sup>

In *Ryan v Great Lakes Council*,<sup>38</sup> the prolonged release of effluent from septic tanks into an estuary system was traced to food poisoning caused by the consumption of oysters farmed from that system. In turn, legal liability was sheeted home, in general terms, to a failure at the local government level to ensure proper maintenance of individual septic systems in the area.

In *McMullin v ICI Australia Operations Pty Ltd*,<sup>39</sup> the presence of a pesticide in cotton trash fed to cattle as a feed substitute resulted in the rejection of that

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33 See *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 295, 297 (French, Lindgren and Jacobsen JJ). In that case, the Court allowed the action to proceed on behalf of a class limited to claimants who had agreed (or effectively ‘opted in’) to the promoters’ retainer and funding agreements prior to commencement of the action.

34 See *Kirby v Centro Properties Ltd*, Federal Court of Australia, Proceeding No VID326/2008; *Kirby v Centro Retail Ltd*, Federal Court of Australia, Proceeding No VID327/2008; and *Vlachos v Centro Properties Ltd*, Federal Court of Australia, Proceeding No VID366/2008 (securities class actions). Multiple class actions have also recently been foreshadowed in the mass tort context, in respect of bushfires in Victoria. Slidders Lawyers commenced a class action on 13 February 2009 and Maurice Blackburn is also instructed to commence a class action relating to the same events: see Houston and Bachelard, above n 28 and Maurice Blackburn Lawyers, *Class Action* (2009) <[http://www.mauriceblackburn.com.au/areas/class\\_actions/current/Bushfire%20Class%20Action.asp](http://www.mauriceblackburn.com.au/areas/class_actions/current/Bushfire%20Class%20Action.asp)> at 25 August 2009.

35 See Coffee, above n 23, 1345.

36 Federal Court of Australia, Proceeding No VG 393 of 1996.

37 S Brown, ‘Kraft pays price for sickly peanuts’, *Sunday Age* (Melbourne), 30 August 1998, 5. There does not appear to be a published judgment regarding the Federal Court’s approval of the settlement; however, the Court conducted a final directions hearing in this matter on 4 December 1998: see Commonwealth Courts Portal, *Applications* (2009) <<https://www.comcourts.gov.au/file/Federal/P/VID393/1996/actions>> at 12 October 2009.

38 (1999) ATPR (Digest) 46-191; *Graham Barclay Oysters v Ryan* (2000) ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* (2002) 211 CLR 591.

39 (1997) 72 FCR 1.

product for export due to unacceptable contamination of the meat. The manufacturer of the chemical was held liable to cattle producers for that loss notwithstanding the indirect nature of the contamination and the individual circumstances of the affected cattle.

However, many product liability class actions create as many, if not more, legal difficulties than efficiencies. In such cases, the common use of a product may be said to be the foundation for each and every claim, until it is observed that the circumstances and experience of every user differs depending on truly individual characteristics. This has been acknowledged in numerous product liability class actions<sup>40</sup> including those involving tobacco,<sup>41</sup> Fen-Phen<sup>42</sup> and Filshie clip medical devices.<sup>43</sup> Whereas the food poisoning and other cases discussed earlier – and conceivably manufacturing defects in products, even medical devices – may constitute a single cause which is applicable to all users, the potentially vastly different reactions of users to other products, notably pharmaceutical products, will usually render grouped adjudication of such claims impossible.

A number of Australian class actions involving product liability have not proceeded beyond the initial pleading stage simply because the individual aspects of each claim overwhelm the asserted common aspect(s). At that point each separate claim must proceed to trial, or be abandoned, on their own merits. The high watermark for this issue is the appeal decision in the tobacco class action, *Philip Morris (Australia) Ltd v Nixon*.<sup>44</sup> In that case the Full Federal Court unanimously held that the pleadings did not allege facts which would establish that each class member had a claim against each defendant. Thus, the Court held that, even if the alleged facts were proven, it could not be said that every class member suffered loss as a result of the misleading or deceptive conduct or negligence of every defendant.<sup>45</sup> Rather, the claims were of alleged disparate instances of deception or negligence caused by different statements made by the defendant companies, and which were therefore not properly described as arising out of the same, similar or related circumstances (involving three defendants, a time period of 39 years, 182 different brands of cigarettes and different advertisements in different media and other statements).<sup>46</sup> Indeed, the Court stated that, leaving the question of substantiality to one side, it was doubtful

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40 Usually in the context of an application under s 33N seeking to strike out the class action.

41 *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453 (dismissing s 33N application), reversed by the Full Court in *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487.

42 *Crandell v Servier Laboratories (Aust) Pty Ltd* [1999] FCA 1461 (Unreported, Sackville J, 25 October 1999) (s 33N order made by consent).

43 *Bright v Femcare Ltd* (2001) 188 ALR 633 (allowing s 33N application), reversed by the Full Court in *Bright v Femcare Ltd* (2002) 195 ALR 574; and eventually dismissed by consent, with some claimants pursuing individual actions against their health care providers.

44 (2000) 170 ALR 487; special leave refused by the High Court in *Nixon v Philip Morris (Australia) Ltd* (2000) 21(12) Leg Class SL4b.

45 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, 520–1.

46 *Ibid* 522–4.



whether there were actually *any* questions of law or fact common to all the class members' claims.<sup>47</sup>

Another potentially difficult policy issue that arises in dispersed claims involves so-called 'future claimants'.<sup>48</sup> Injuries caused by some products can take many years to develop and a class action may be determined before the injuries become known to a claimant. Yet, depending upon how the class is defined, future claimants may fall within the class description and potentially be bound by any judgment or settlement.<sup>49</sup> Even if they are aware of the class action, future claimants may fail to opt in to a settlement scheme in circumstances where they were not aware that they had suffered an injury. They may, however, be aware that they had taken a certain medication or had been exposed to a chemical.

It may be a legal answer to say that an individual's claim cannot be barred before personal injury has occurred and a cause of action has accrued. However, the judicial debate concerning when injury occurs, for example, in the context of asbestos-related diseases,<sup>50</sup> shows that this can be a vexed question. Interestingly, asbestos litigation in Australia has been overwhelmingly conducted on an individual basis, at least in part, because the quantum of damages that may be awarded to a claimant is often significant and therefore class action procedures are not justified on a cost-benefit basis.<sup>51</sup> Also, from the perspective of desiring finality, it is perhaps not unreasonable to want class members with a certain threshold level of knowledge about use of a product to opt out of, or to prove, a claim within the context of a class action.

### C Suitability to class treatment

An analysis of Australian mass tort class actions reveals that claimants have only really fared well in cases where the alleged injuries to class members stem from a single cause at a distinct point in time, whether this is the result of a classic disaster or 'single event' claim or certain 'dispersed' claims, for example, the food poisoning cases discussed above. It is suggested that this is because in such cases, issues relating to a defendant's liability do not differ significantly

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47 Ibid 524. Two of the three judges refused the plaintiffs leave to re-plead on the basis that, no matter what amendments were made to the pleadings, the proceeding could not be properly brought as a class action: 489 (Spender J); 492 (Hill J).

48 While this issue has not yet come before Australian courts in the context of a class action, it has in the United States: see Federal Judicial Center, above n 7, §22.1, 344–6 for a discussion of the key cases. See also Lipp, above n 2, 386–7 regarding conflicts of interest which have arisen in the settlement of American mass tort cases where future claimants are involved.

49 F G Hawke, 'Class Actions: The Negative View' (1998) 6 *Torts Law Journal* 1, 12.

50 *American Home Assurance Co v Saunders* (1987) 11 NSWLR 363; *GRE Insurance Ltd v Bristle Ltd* (1991) 5 WAR 440; *Orica Ltd v CGU Insurance Ltd* (2003) 59 NSWLR 14.

51 Peta Spender, 'Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability' (2003) 25 *Sydney Law Review* 223, 240.

from one class member to the next and that, as a consequence, the class action mechanism is, at least arguably, suitable to the determination of such cases.<sup>52</sup>

However, unlike an action arising out of a single accident or single course of conduct, product liability – especially pharmaceutical products and medical device – litigation generally involves individual factual and legal issues. It is the authors' experience, and the experience of courts in the United States, that it is usual in product liability and other dispersed class actions for individual rather than common issues to predominate.<sup>53</sup> Indeed, the Advisory Committee which drafted the American class action rule noted that such cases are

ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.<sup>54</sup>

There will inevitably be a number of very significant differences between the cases of the representative plaintiff and other class members including:

- the individuals' medical history;
- the injuries allegedly suffered by class members;
- changes in design or formulation of the product;
- varying representations and/or warnings made by the manufacturer or other defendants to consumers;
- the degree of reliance (if any) of class members on representations;
- the intervention of 'learned intermediaries' such as physicians;
- variances in the law of product liability across relevant jurisdictions;<sup>55</sup> and/or
- a wide array of affirmative defences.

Problems are created in that causation must be considered on an individual basis,<sup>56</sup> which is impractical or even impossible in proceedings conducted in class form. Indeed, this problem is usually the reason why certification has been

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52 Conversely, some *single* incidents, such as accidental discharges of pollutants, can lead to claims that are widely *dispersed* over time and place; the crucial point being not whether the underlying tort itself is a single event, but whether its *consequences* are dispersed: see Federal Judicial Center, above n 7, §22.1, 346 and cases cited there.

53 See, eg, *Amchem v Windsor*, 521 US 591, 622–5 (1997); *Zinser v Accufix Research Institute, Inc*, 253 F 3d 1180, 1189–90 (9<sup>th</sup> Cir 2001); *In re American Medical Systems, Inc*, 75 F 3d 1069, 1084–5 (6<sup>th</sup> Cir 1996); *Castano v American Tobacco*, 84 F 3d 734, 744–5 (5<sup>th</sup> Cir 1996); and *Georgine v Amchem Products, Inc*, 83 F 2d 610, 626 (3<sup>rd</sup> Cir 1996).

54 Rules Advisory Committee, *Notes to 1966 Amendments to Rule 23*, 39 FRD 69, 103 (1966) (citations omitted).

55 See Cashman, above n 24, 484–92 for consideration of some of the issues arising in this regard.

56 See, eg, Kiefel J in *Bright v Femcare Ltd* (2002) 195 ALR 574, 603, acknowledging that proof of causation might involve a considerable part of the evidence and substantial argument in each individual case.

denied in the United States.<sup>57</sup> It has certainly been the Australian experience, despite more liberal class action rules, that it is these claims which have the most tortuous interlocutory path and which have the greatest chance of being struck out or discontinued.

To date there has only been one instance of a class action involving a pharmaceutical or medical device that has been pursued to judgment.<sup>58</sup> In that case, the pacemaker class action, the representative plaintiff was awarded \$9988 in compensation following a hearing.<sup>59</sup> At the conclusion of the appeal process, the parties faced the prospect of resolving the balance of the claims, both in terms of liability and quantum, of a further 1047 class members (this was reduced to 615 after opt outs and individual settlements, and to 480 by the time of settlement), albeit with some common issues of fact and law having been determined. While the parties in that class action ultimately reached a global settlement which resolved all outstanding claims,<sup>60</sup> the prospect remains that, sooner or later, a court will be confronted with the prospect of having to determine a significant number of individual claims involving complex issues. It remains to be seen how that can be done efficiently.

#### IV WHERE TO FROM HERE?

As the authors have previously observed, class actions have become an entrenched feature of the Australian legal landscape – both in the courts and in the mind of the Australian public. They have become, in what is a very short period of time in legal terms, part of the Australian way of life. However, a question remains as to the future of class actions involving product liability and other mass tort claims. Will they continue to be a prominent feature of the Australian legal landscape or have recent developments in practice and procedure placed their future in jeopardy? In the authors' view, this question will be determined by reference to a number of factors, some of which have already been touched upon. Specifically:

1. *The impact of the civil liability legislation introduced in Australian States and Territories from 2002.* This legislation gives effect to a broad policy

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57 See Hensler, above n 6, 892–3: 'through most of the last half-century [American] courts have held that class certification is generally not appropriate for mass personal injury claims in which individual differences among claimants arguably outweigh factual and legal commonalities' (citation omitted). Eg, in *Amchem Products Inc v Windsor*, 521 US 591, 609 (1997), the commonality/predominance test was not met, inter alia, because 'class members ... were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time ...'.

58 *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219. A class action concerning Vioxx has also proceeded to trial but judgment was reserved at the time of writing: *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd*, Federal Court of Australia, Proceeding No VID 451 of 2006.

59 *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219, 280.

60 See Leonie Lamont, 'Victims Get Slim Pickings as Lawyers take \$2m', *Sydney Morning Herald* (Sydney), 10 November 2004, 3. The settlement was approved in *Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311.

objective of eliminating lower value claims through the use of cost-driven thresholds.<sup>61</sup> The authors have suggested that the effect of this legislation may be to render a range of product liability claims, where the quantum of the loss suffered by individual class members falls below the threshold, unviable.<sup>62</sup> At this stage it is still not possible to tell whether the legislation has had this effect. In any event, the authors are of the view that the pendulum will inevitably swing back towards the plaintiffs – no doubt nudged from time to time by the judiciary, some of whom have taken the view that the legislation has moved the pendulum too far in favour of defendants.<sup>63</sup>

2. *The priorities of plaintiffs' lawyers and litigation funders.* The focus of litigation funders and major plaintiffs' firms appears to have moved to securities and other non-product liability based class actions.<sup>64</sup> The shift away from product liability cases is probably the consequence of two factors. First, defendants appear far more willing to defend product liability class actions to verdict as compared to securities and other more 'commercially' orientated actions. As a consequence, plaintiffs' lawyers, and those who fund the claims, are less likely to see a quick return on their investment. There have also been a number of significant claims which have failed in Australia, albeit in circumstances where defendants have settled similar claims in other parts of the world.<sup>65</sup>

Second, there is a recognition on the part of those who have both prosecuted and defended product liability class actions that the very fact that they are dispersed class actions means that, even where a court has determined the claims of the representative plaintiff, there will be very real problems in achieving a so-called 'global settlement'. As has already been observed, the pacemaker class action<sup>66</sup> is the only Australian class action involving a pharmaceutical product or medical device that has been pursued to judgment. In that case a global settlement was achieved, although that was made easier by virtue of the fact that the determination of the common issues had resolved most of the fundamental questions

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61 For a discussion of the legislation see: Desmond Butler, 'A Comparison of the Adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms' (2005) 13 *Torts Law Journal* 201; Joachim Dietrich, 'Duty of Care under the 'Civil Liability Acts'' (2005) 13 *Torts Law Journal* 17; and S Stuart Clark and Ross McInnes, 'Unprecedented Reform: The new tort law' (2004) 15(2) *Insurance Law Journal* 99.

62 Kellam, Clark and Harris Pt 2, above n 5, 266–8.

63 See, eg, the Hon Justice David Ipp, *The Metamorphosis of Slip and Fall*, Address given at New South Wales State Conference of the Australian Lawyers Alliance (30 March 2007).

64 The factors driving the recent increase in securities and cartel class actions are considered in S Stuart Clark and Christina Harris, 'Class actions in Australia: (Still) a work in progress' (2008) 31 *Australian Bar Review* 63, 85–8.

65 Eg, the Fen-Phen litigation in the United States. Cf the Australian class action, *Crandell v Servier Laboratories (Aust) Pty Ltd*, which was struck out: [1999] FCA 1461 (Unreported, Sackville J, 25 October 1999).

66 *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219.

associated with liability while the individual issues were relatively simple to address. It is unlikely that a global settlement will be reached as easily in a class action involving a pharmaceutical product where it is likely that individual issues will overwhelm the common issues of fact.

3. *The future of the 'opt-out' class action model.* The emergence of the litigation funding industry as the predominant source of funding for class actions is driving the push for opt-in class actions as the preferred model on the part of those who represent plaintiffs.<sup>67</sup> This is largely an attempt on the part of litigation funders to mould class action practice and procedure to best suit their business model.<sup>68</sup> However, while it may be relatively easy for those representing plaintiffs to build an opt-in class book in a securities case, it will inevitably be more difficult in most product liability cases. As a general rule, there is no well-defined class of potential claimants. It is unlikely that there will be a list or database of potential class members similar to a register of shareholders.<sup>69</sup> Finally, many potential class members will never become aware of the proceedings. Of course, some may learn of the proceedings as a consequence of publicity associated with a trial but by then it will be too late. As a consequence, adopting an opt-in class action model will inevitably lead to a denial of access to justice for the most vulnerable members of the community – the very people who the introduction of a class action system was meant to assist.<sup>70</sup>
4. *The emergence of other funding options.* Australian practitioners have suggested funding alternatives aimed at overcoming some of these difficulties – namely, a US-style common fund model (allowing class lawyers to recover reasonable fees from any award) and allowing contingency fees for lawyers, not just litigation funders.<sup>71</sup> These reforms could drive a significant increase in mass tort class actions. Their introduction would also create competition in relation to funding options and superior access to justice for those who most need the assistance of the legal system.<sup>72</sup>

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67 See, eg, Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30 *Melbourne University Law Review* 399, 418–20.

68 See, eg, Peter Cashman, 'Questions and comments from participants in Sydney and Melbourne' in the Hon Justice K E Lindgren (ed), *Investor Class Actions*, Ross Parsons Centre of Commercial, Corporate and Taxation Law (2009) 115, opining the 'undesirable trend with litigation funding' of 'selectivity' in defining the class, specifically 'limit[ing] the class not only to defined individuals but to try to maximise those with the largest value claims ...'.

69 *Corporations Act 2001* (Cth) s 173 allows public access to a company's share register; see also s 177.

70 S Stuart Clark and Christina Harris, 'The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?' (2008) 32 *Melbourne University Law Review* 775, 794–5.

71 See, eg, Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 616; Cashman, above n 68, 115; and Michael Legg, 'Institutional Investors and Shareholder Class Actions: The Law and Economics of Participation' (2007) 81 *Australian Law Journal* 478, 488–9.

72 Victorian Law Reform Commission, above n 71, 616, 676; and Clark and Harris, above n 70, 810, 812–13.

5. *Taking action outside Australia.* Finally, we are again seeing moves by some plaintiffs' lawyers to take advantage of the seemingly insatiable jurisdiction of the US courts by attempting to prosecute the claims of Australian residents arising out of events that occurred in Australia in the US courts. The most recent example of this is a class action commenced in the US against Alcoa in relation to events that occurred in Western Australia.<sup>73</sup>

Notwithstanding these challenges, the authors are of the view that plaintiffs' lawyers will continue to pursue product liability and mass tort class actions in the Australian courts. First, it appears likely that mass tort class actions arising out of infrastructure failure or other disasters will continue in Australia – as evidenced by cases recently commenced in relation to the methane gas leak in Cranbourne and the Victorian bushfires.

Second, so long as class actions and regulatory proceedings in the United States continue to be perceived as generating significant returns for US plaintiffs, lawyers in other parts of the world will attempt to emulate those successes. In the case of product liability claims in Australia these will most likely take the form of follow-on or copycat actions based on proceedings that have been commenced in the United States. As has been seen in the past, Australian plaintiffs' lawyers and funders will continue to be both encouraged by the quantum of US settlements<sup>74</sup> and assisted by the ready availability of documents, expert evidence and other material that has been generated in the US proceedings.<sup>75</sup>

Taking all of these factors into account, the authors are confident that product liability and mass tort class actions will continue to feature in the Australian courts and media in the coming years.

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73 Class action filed in Philadelphia, Pennsylvania, Alcoa's operational headquarters, on behalf of more than 200 Australian residents suffering illnesses allegedly caused by emissions from Alcoa's Wagerup refinery in Western Australia: see Shine Lawyers, *Brokovich launches Wagerup class actions* (2009) <<http://www.shine.com.au/article.aspx?a=14>> at 3 September 2009.

74 Eg, the recent US\$2.3 billion settlement by Pfizer of claims alleging illegal marketing of four of its pharmaceutical products: see The Wall Street Journal, *Pfizer To Pay \$2.3B To Settle Case on Drug Marketing* (2009) <<http://online.wsj.com/article/BT-CO-20090902-707834.html>> at 3 September 2009.

75 US lawyers are not bound by the implied undertaking in relation to documents produced in the course of litigation articulated in *Home Office v Harman* [1981] 2 WLR 310 and adopted by Australian courts.