EMPLOYMENT CLASS ACTIONS: PAST USE AND PRESENT UTILITY

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I INTRODUCTION

Before 1992, representative proceedings, in which a party conducts the claims of many individuals against a defendant,[1] were brought pursuant to court rules modelled on Chancery Court procedures.[2] But courts interpreted these rules as only enabling representative proceedings in a narrow set of circumstances, and they 'fell into disuse'.[3] The introduction of Part IVA into the *Federal Court of Australia Act 1976* (Cth) ('*FCA Act*') in 1992,[4] and similar regimes subsequently introduced in Victoria,[5] New South Wales,[6] Queensland,[7] and Tasmania,[8] resulted in a more significant role for representative proceedings, or 'class actions', in Australia. Part IVA is designed to enable persons who have suffered from mass harms to 'obtain redress and do so more cheaply and efficiently' than they otherwise could.[9]

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1 This reflects the generic definition in the Australian Law Reform Commission's report: Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) ('ALRC Report 46') 1 [2].

2 Ibid 3 [5]. These rules still exist in the *Federal Court Rules 2011* (Cth) division 9.2, and all states and territory court rules, except New South Wales.

3 Justice Bernard Murphy, 'The Operation of the Australian Class Action Regime' (Speech, Bar Association of Queensland: The Changing Face of Practice Conference, 8–10 March 2013). However, after 1992, the High Court adopted a broader approach to the proceedings which could be commenced under these rules: *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398. Some proceedings are still brought pursuant to these rules: see, eg, *O'Donnell v Commonwealth of Australia* [2021] FCA 1223; *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No 2)* [2021] FCA 774.

4 *Federal Court of Australia Amendment Act 1991* (Cth).

5 *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic) s 2(2); *Supreme Court Act 1986* (Vic) pt 4A.

6 *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) sch 6; *Civil Procedure Act 2005* (NSW) pt 10.

7 *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld) s 10; *Civil Proceedings Act 2011* (Qld) pt 13A.

8 *Supreme Court Civil Procedure Amendment Act 2019* (Tas) s 10; *Supreme Court Civil Procedure Act 1932* (Tas) pt VII.

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174–5 (Michael John Duffy, Attorney-General).

Although the enforcement of employment laws did not appear to motivate the Parliament to introduce Part IVA,[10] around 10% of class actions since 1992 have been employment law disputes.[11] Recent high-profile employment underpayments have resulted in an increased number of employment class actions,[12] but concerns have also been raised about some of these proceedings' efficacy. For example, the Shop, Distributive and Allied Employees Association ('SDA'), an employee organisation (a 'registered union' under the *Fair Work (Registered Organisations) Act 2009* (Cth))[13] made public statements suggesting non-class action civil proceedings it commenced were more cost effective than class action proceedings promoted by Retail and Fast Food Workers Union ('RAFFWU'), an unregistered union, to address the same (alleged) underpayment issue.[14]

Accordingly, it is timely to reflect on how class actions have been used, and their current utility, in enforcing employees' common law and statutory rights ('employee rights'). This article addresses this by, first, outlining key features of Part IVA, under which almost all employment class actions are commenced,[15] and case law affecting the utility of these procedures for employees; second, identifying trends and themes in employment class actions commenced since 1992; and, third, discussing, in light of the other procedures available, when class actions are the most effective means of enforcing (and seeking remedies for breaches of) employee rights. It concludes that class actions have played a reasonably small, but not insignificant, role in enforcing a broad range of employee rights. Other available procedures to address 'mass harms' mean there are only limited circumstances where class actions are the preferred course for the affected employees. Alternatives to class actions include, if the Fair Work Ombudsman ('FWO') commences civil penalty proceedings under the *Fair Work Act 2009* (Cth) ('*FW Act*'), taking no further action;[16] civil penalty proceedings commenced by an employee organisation; raising a dispute under a dispute resolution clause in an enterprise agreement or modern award; and running a test case. If the views in this article are accepted, the *FW Act* (without class actions) is demonstrated to be reasonably effective by itself at addressing mass breaches of employee rights; and class actions are left with a largely 'gap filling' role, particularly (but not exclusively) in relation to mass contraventions/proposed contraventions of (1)

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[10] See ibid 3174–6; ALRC Report 46 (n 1).

[11] 55 of the 592 class actions identified by Peter Cashman and Amelia Simpson regarded employment laws: Peter Cashman and Amelia Simpson, 'Research Paper #4 and Annexure: The Problem of Delay in Class Actions' (Research Paper No 4, University of New South Wales Law Research Series 86, 11 December 2020). For more recent statistics, see Part III below.

[12] See Part II below.

[13] *Fair Work Act 2009* (Cth) s 12 (definition of 'employee organisation') ('*FW Act*').

[14] 'McDonald's Workers Fed "C-ck and Bull Story" about Breaks: SDA', *Workplace Express* (online, 31 January 2022).

[15] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: The First Twenty-Five Years of Class Actions in Australia* (Report No 5, July 2017) 27 <https://dx.doi.org/10.2139/ssrn.3005901>. States and territories also have different class action regimes: for a summary, see Parliamentary Joint Committee on Corporations and Financial Services, *Litigation Funding and the Regulation of the Class Action Industry* (Report, December 2020) 12–14 [2.14]–[2.24] ('Joint Committee Report').

[16] *FW Act* (n 13) ss 539, 545.

statutory employee rights, when the FWO does not take action and registered union representation is unavailable, and (2) contractual employee rights.

II PART IVA: KEY FEATURES FOR EMPLOYMENT LAW

A Undemanding Gateway Criteria

The 'gateway criteria', which must be met to commence Part IVA proceedings, are 'deliberately undemanding',[17] allowing for the grouping of factually diverse proceedings. An employee may only commence Part IVA proceedings against an employer if seven or more employees have claims against the employer that 'are in respect of, or arise out of, the same, similar or related circumstances', and that 'give rise to a substantial common issue of fact or law'.[18] In *ISG Management Pty Ltd v Mutch* ('*Mutch*'),[19] Mr Mutch alleged group members (whom the representative party represents) were employees of ISG Management Pty Ltd ('ISGM'), rather than contractors of corporations providing services to it. ISGM argued that a multi-factorial test applied to determine if an employment relationship exists, that these factors would apply differently to different group members, and, accordingly, no substantive common issue of fact or law existed.[20] However, the Full Court held that an issue over whether *one* of the factors going to whether group members were employees could be a 'substantial common issue' under the gateway criteria.[21] It did not matter that this common issue would not determine the ultimate issue of whether the group members were ISGM employees.[22] The gateway criteria were met in this case. In this way, Part IVA proceedings can be commenced even when significant factual differences exist between group members.

Further, courts have been reluctant to use their discretionary power to 'declass' proceedings, at least in the early stages of proceedings and where the applicant is legally represented.[23] The Court may order that the proceedings not continue as representative proceedings if it is satisfied it is in the interest of justice to do so because of one of the reasons recorded in section 33N(1)(d) of the *FCA Act* – one of which is that 'it is otherwise inappropriate that the claims be pursued by means of a representative proceeding'. In *Mutch*, ISGM also relied on the variety of circumstances applicable to group members to argue the Court should exercise its

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17 *ISG Management Pty Ltd v Mutch* (2020) 385 ALR 146, 149 [12] ('*Mutch*').

18 *Federal Court of Australia Act 1976* (Cth) s 33C(1) ('*FCA Act*').

19 *Mutch* (n 17).

20 Ibid 148 [4], [7]. The High Court's approach in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89 ('*CFMMEU v Personnel Contracting*') would affect the way this analysis is now performed by focussing attention solely on the terms of the contract.

21 *Mutch* (n 17) 149 [10]–[11].

22 Justice Bromberg, at first instance, also found this ultimate issue could also be a common question, even though employees' circumstances varied: *Mutch v ISG Management Pty Ltd* [2020] FCA 362, [77]–[78].

23 For when the representative party is not represented, see *Wilkinson v Wilson Security Pty Ltd* [2022] FCA 756.

powers under this section to dismiss the proceedings. However, the Court dismissed this application, stating:

> [Part] IVA accommodates diverse claims provided they give rise to a substantial common issue; this flexibility is a strength of the class action regime and is not necessarily to be seen as a reason why a proceeding brought under it is inapt even where real differences in group member characteristics and the apparent merit of subsets of claims can be identified.[24]

In this way, although diversity of facts might be relevant to whether to declass proceedings,[25] the Court found that such diversity of facts alone will not be sufficient for it to exercise its declassing power.

B Additional Procedures

Part IVA includes detailed powers and procedures, designed to ensure the class action system works effectively for group members,[26] but which may also add to the time and expense of proceedings. Perhaps most notably:

- The group members will ordinarily need to be notified of the proceeding and their opportunity to 'opt out' of them.[27]
- Group members may be composed of a *closed group* (a limited or identified number of persons), or an *open group* (all persons who meet defined criteria for a 'group member' set out the pleadings).[28]
- The court may, and often will, determine separate questions of law or fact, prior to determining the ultimate outcome of the proceedings.[29]
- The court may also determine the applicant's case and/or sample group members' cases as a whole, and where that gives rise to the determination of common issues, they will bind group members.
- The court may determine individual issues or issues that relate only to sub-groups.[30]
- The court may replace a representative party with another group member if it considers the representative party is not able to adequately represent the interests of the group members.[31]
- Notice of proposed settlement must be given to group members (unless the court considers it just to approve settlement without such notice).[32]

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[24] *Mutch* (n 17) 153 [28].

[25] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 268 [33] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

[26] Justice Lee has described the courts as having a 'supervisory and protective role in relation to group members': *Perera v GetSwift Ltd* (2018) 263 FCR 1, 7 [3].

[27] *FCA Act* (n 18) ss 33J(2), 33X(1)(a).

[28] *Matthews v SPI Electricity Pty Ltd (Ruling No 13)* (2013) 39 VR 255, 261 [20] (Forrest J).

[29] See *FCA Act* (n 18) section 33Z on the court's powers.

[30] Ibid ss 33Q, 33R.

[31] Ibid s 33T.

[32] Ibid ss 33V(1), 33X(4).

- Settlement of the proceedings (or the lead applicant's claim), or discontinuance of proceedings, must be approved by the court,[33] which must be satisfied the settlement is 'fair and reasonable and in the interest of the group members bound by the settlement, considered as a whole'.[34]
- A judgment binds any group member affected by it, unless the group member opted out of the proceedings.[35]

There are various other rules applicable, which are unnecessary to traverse for this article's purposes.[36] On the one hand, these provide protections for group members from a representative party undermining their interests, especially because judgment in a class action can bind group members.[37] But the additional time and costs these procedures impose may be a factor against pursuing Part IVA proceedings (and in favour of alternatives).

C Litigation Funders and Costs

It is worth briefly mentioning that, although the Federal Court ordinarily requires litigation funders to provide security for costs in favour of respondents in Part IVA proceedings,[38] the courts are more reluctant to order security for costs in proceedings relating to a matter arising under the *FW Act*.[39] Section 570 provides that a party to proceedings in a court in relation to a matter arising under the *FW Act* may only be ordered by the court to pay costs in limited and specified circumstances. Although section 570 does not apply in relation to litigation funders (who are not parties to the proceedings) being ordered to pay costs (or security for costs), section 570 and its policy objectives are relevant considerations for courts in determining whether to make an order for costs or security for costs against a litigation funder, and generally weigh against such orders being made.[40] Accordingly, although the requirement to provide security for cost may act as a hindrance for commencing class actions backed by litigation funders, this is less relevant in *FW Act* matters.[41]

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33 Ibid s 33V(1).

34 *Newstart 123 Pty Ltd v Billabong International Ltd* (2016) 343 ALR 662, 664 [9] (Beach J).

35 *FCA Act* (n 18) s 33ZB.

36 For a discussion of the case law, see Michael Legg and Ross McInnes, *Annotated Class Actions Legislation* (LexisNexis Butterworths, 2nd ed, 2018). Vince Morabito's publications provide important empirical information on the use of class actions, as well as other analysis – his lengthy list of publications is available here: Monash University, 'Vince Morabito: Research Output' (Website) <https://research.monash.edu/en/persons/vince-morabito/publications/>.

37 *FCA Act* (n 18) s 33ZB.

38 Joint Committee Report (n 15) 129 [10.11].

39 See *Augusta Ventures Ltd v Mt Arthur Coal Pty Ltd* (2020) 283 FCR 123, 160–1 [126]–[135] (White J).

40 See ibid. For further consideration of the application of section 570 in relation to litigation funders, see *Duck v Airservices Australia (No 3)* [2021] FCA 304. For an example of where costs have been awarded against a party in an employment class action despite the application of section 570, see *Bywater v Appco Group Australia Pty Ltd* [2019] FCA 799.

41 Ibid.

III EMPLOYMENT CLASS ACTIONS: THE STORY SO FAR

A Number of Employment Law Class Actions by Year

The table below sets out the number of employment law representative cases commenced in Australia between 1992 and 2021.[42]

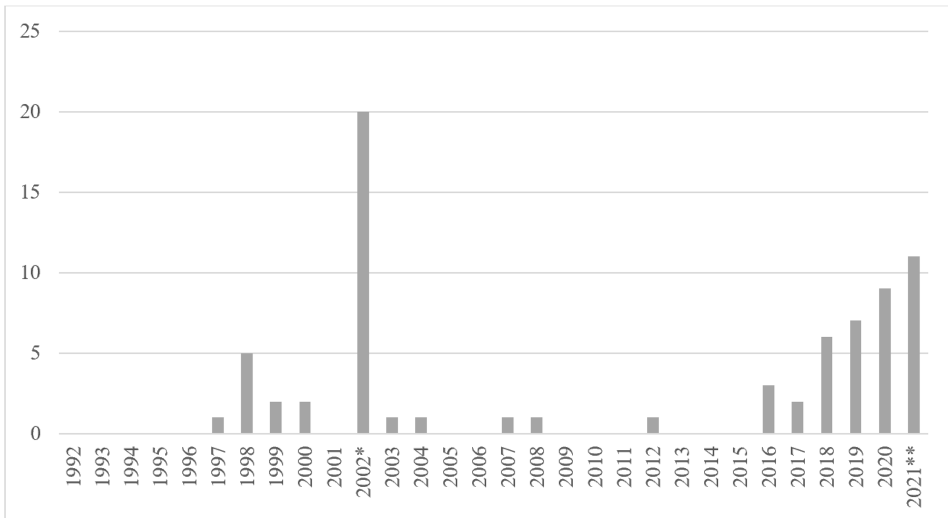

Figure 1: Employment class actions by calendar year

* Includes 19 proceedings brought on behalf of psychiatric nurses against Victorian hospitals.

** Includes 7 proceedings brought on behalf of junior doctors against Victorian health services.

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42 This chart primarily relies on the cases identified in a 2020 article by Cashman and Simpson (n 11). 2020 and 2021 have been supplemented by searches of the Federal Court website, which records ongoing Federal Court litigation; key word searches on AustLii; and key word searches on Workplace Express. The additional cases were *Fakhouri v Secretary for the NSW Ministry of Health* (Supreme Court of New South Wales, 2020/356588, commenced 16 December 2020); *Askari v Life Without Barriers* (Federal Court of Australia, VID568/2020, commenced 24 August 2020); *Amory v RMS Engineering & Construction Pty Ltd* (Federal Court of Australia, QUD30/2021, commenced 7 February 2021); *Australian Salaried Medical Officers' Federation v Peninsula Health* (Federal Court of Australia, VID115/2021, commenced 12 March 2021); *Australian Salaried Medical Officers' Federation v Monash Health* (Federal Court of Australia, VID210/2021, commenced 26 April 2021); *Australian Salaried Medical Officers' Federation v Western Health* (Federal Court of Australia, VID419/2021, commenced 29 July 2021); *White v UGL Operations and Maintenance Pty Ltd* (Federal Court of Australia, WAD41/2021, commenced 2 March 2021); *Tristan Burt v Commonwealth of Australia* (Federal Court of Australia, NSD987/2021, commenced 22 September 2021); *Australian Salaried Medical Officers' Federation v Eastern Health* (Federal Court of Australia, VID611/2021, commenced 22 October 2021); *The Australian Salaried Medical Officers' Federation v Northern Health* (Federal Court of Australia, VID760/2021, commenced 29 November 2021); *The Australian Salaried Medical Officers' Federation v Alfred Health* (Federal Court of Australia, VID700/2021, commenced 29 November 2021); *The Australian Salaried Medical Officers' Federation v Bendigo Health* (Federal Court of Australia, VID774/2021, commenced 23 December 2021); *Jade Elliott-Carde v McDonald's Australia Limited* (Federal Court of Australia, VID726/2021, commenced 29 November 2021).

B Trends in the Number of Cases

If the 19 related proceedings commenced in 2002 on behalf of psychiatric nurses in Victorian hospitals are treated as one proceeding and the 7 proceedings brought on behalf of Victorian junior doctors in 2021 are also treated as one proceeding, there were significantly less cases per year on average from 1992–2015 (17 cases, at 0.81 per year) than from 2016–21 (31 cases, at 5.17 per year). This increase may be attributed, first, to a 'maturing' in the class action economy, given there has also been a significant increase in class actions generally from around 2017.[43] Second, the increase is also likely attributable to a heightened attention to employee underpayments since in or around 2015, when public allegations of underpayments by 7-Eleven were made.[44] Since then, there has been a stream of high profile underpayment cases.[45] All employment class actions since 2016 have involved underpayment allegations.

C Trends in Subject Matter and Urgency

While the employment class actions from 2016 onwards have all been underpayment cases without special urgency, the cases before 2016 varied significantly in subject matter and urgency. The cases prior to 2016 included:

- *Underpayment claims* – including:
  - a claim by employees that a company incurred debts to its employees (by underpaying them) when it had reasonable grounds for suspecting the company was insolvent;[46]
  - an unsuccessful claim in relation to a failure to terminate employees' employment and pay redundancy pay;[47]
  - a successful claim that annual leave loading was not being paid in accordance with an award and certified agreement;[48]

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[43] See Allens, *Class Action Risk 2021* (Report, 30 March 2021); Vince Morabito, Submission No 6 to the Parliamentary Joint Committee on Corporations and Financial Services, *Litigation Funding and the Regulation of the Class Action Industry* (10 June 2020). See Joint Committee Report (n 15), 28–30 [4.7]–[4.12] (on increase in shareholder class actions), 30–2 [4.13] (on maturing economy, and other possible factors).

[44] For information, see Fair Work Ombudsman, Australian Government, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network* (Report, 8 April 2016).

[45] Stephen Clibborn, 'Australian Industrial Relation in 2019: The Year Wage Theft Went Mainstream' (2020) 62(3) *Journal of Industrial Relations* 331 <http://dx.doi.org/10.1177/0022185620913889>.

[46] *Woodhouse v McPhee* (1997) 80 FCR 529.

[47] *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 89 FCR 417; *Finance Sector Union of Australia v Commonwealth Bank of Australia* [1999] FCA 824; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179; *Finance Sector Union of Australia v Commonwealth Bank of Australia Ltd* [2000] FCA 1389; *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2001] FCA 1613; *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2002] FCA 1166.

[48] *Australian Liquor, Hospitality and Miscellaneous Workers Union v Metropolitan Ambulance Service* [2002] FCA 1321.

  - a successful claim that pilots were entitled to redundancy pay under a more generous plan than the plan they were paid under;[49]
  - a claim which centred on contractual redundancy entitlements;[50] and
  - a claim alleging underpayments of shift loadings and superannuation, and breaches of victimisation provisions of the *Workplace Relations Act 1996* (Cth) ('*WR Act*').[51]
- *Claims of victimisation, and/or application of duress to employees, in breach of the WR Act* – including:
  - a claim that an employer unlawfully applied duress to employees in connection with Australian Workplace Agreements;[52]
  - a claim in *Australasian Meat Industry Employees' Union v Aziz* ('*Aziz*') that an employer terminated around 120 group members' employment for unlawful reasons in breach of section 298J of the *WR Act*;[53] and
  - a precedent setting successful claim, in *Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council* ('*Greater Dandenong*'), that a Council's decision against accepting an in-house tender bid from Council employees for work, and to dismiss the employees, breached victimisation provisions of the *WR Act*.[54]
- *Urgent applications* – including:
  - a successful application for an interim injunction in *Aziz* preventing engagement of employees in place of the 120 employees whose employment was terminated (referred to above);[55]
  - an unsuccessful claim for an interim injunction preventing termination of employment in *Greater Dandenong*;[56] and
  - an unsuccessful application for an injunction preventing termination of employees' employment in circumstances where generous undertakings were given.[57]
- *Claims of misrepresentations with respect to offers of employment* – including two cases arising from the Waterfront industrial dispute, alleging

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[49] *Clark v Korda* [2005] FCA 56.

[50] *Fowler v Airservices Australia* [2009] FCA 1189.

[51] *Construction, Forestry, Mining and Energy Union v Contract Blinds Pty Ltd* [2009] FCA 572.

[52] *Schanka v Employment National (Administration) Pty Ltd* (2001) 112 FCR 101.

[53] *Australasian Meat Industry Employees' Union v Aziz* [1998] FCA 925 ('*Aziz Judgment 1*'). Orders were varied in *Australasian Meat Industry Employees' Union v Aziz* [1998] FCA 1149 ('*Aziz Judgment 2*').

[54] *Australian Municipal Administrative Clerical Services Union v Greater Dandenong City Council* [1999] FCA 928; *Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council* [2000] FCA 1231; *Australian Municipal Administrative Clerical Services Union v Greater Dandenong City Council* [2000] FCA 1638.

[55] *Aziz Judgment 1* (n 53); orders were varied in *Aziz Judgment 2* (n 53).

[56] *Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council* [2000] FCA 1231.

[57] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Age Co Ltd* [2004] FCA 299.

various misrepresentations in connection with offers of employment to non-union employees.[58]

- A case alleging *wrongful collection, use and disclosure of confidential information*.[59]

These earlier cases demonstrate the greater variety of proceedings that may be brought as class actions than merely underpayments cases.

The underpayments cases commenced since 2016 have reflected high-profile underpayment issues in this period, including with respect to:

- *Casual employees*[60] – nine applications alleging an employer misclassified employees as casuals, presumably relying on the Full Federal Court's reasons in *WorkPac Pty Ltd v Skene*,[61] which was overturned by *WorkPac Pty Ltd v Rossato*.[62]
- *Misclassification of employees as contractors/non-employees* – three applications alleging a respondent misclassified employees as contractors, and one application alleging the respondent misclassified employees as students.[63] (These cases are likely to be significantly more difficult to make out following the High Court's decisions in *ZG Operations Australia Pty*

58 *Batten v CTMS Ltd* [1999] FCA 1576; *Batten v CTMS Ltd* [2000] FCA 915; *Batten v Container Terminal Management Services Ltd* [2001] FCA 374; *Grahame v Lang Corporation Ltd* [2001] FCA 916; *Grahame v Lang Corporation Ltd* [2001] FCA 1308; *Grahame v Lang Corporation Ltd* [2001] FCA 373.

59 *Brannaghan v Thiess Pty Ltd* [2013] FCA 790; *Brannaghan v Australian Security and Investigations (Tas) Pty Ltd* [2015] FCA 415.

60 *Shorey v One Key Resources Pty Ltd* (Federal Court of Australia, NSD448/2020, commenced 17 April 2020); *Hill v Skilled Workforce Solutions (NSW) Pty Ltd* (Federal Court of Australia, VID1209/2019, commenced 31 October 2019); *Renyard v WorkPac Pty Ltd* (Federal Court of Australia, VID897/2019, commenced 20 August 2019); *Petersen v WorkPac Pty Ltd* (Federal Court of Australia, VID89/2019, commenced 4 February 2019); *Barker v Santos Ltd* (Federal Court of Australia, NSD520/2019, commenced 3 April 2019); *Kelehear v Stellar Personnel Brisbane Pty Ltd* (Federal Court of Australia, VID1662/2018, commenced 21 December 2018); *Ridge v Hays Specialist Recruitment (Australia) Pty Ltd* (Federal Court of Australia, VID1661/2018, commenced 21 December 2018); [*Turner v Tesa Mining (NSW) Pty Ltd* (Federal Court of Australia, ACD46/2018, commenced 27 June 2018), *Turner v Ready Workforce (A Division of Chandler Macleod) Pty Ltd* (Federal Court of Australia, ACD47/2018, commenced 27 June 2018) (treated as one proceeding)]; [*Augusta Ventures Ltd v Mt Arthur Coal Pty Ltd* (Federal Court of Australia, NSD1851/2019, commenced 8 November 2019), *Augusta Ventures Ltd v Mt Arthur Coal Pty Ltd* (Federal Court of Australia, NSD1852/2019, commenced 8 November 2019) (treated as one proceeding)].

61 (2018) 264 FCR 536. Although some proceedings also relied on provisions of a modern award: David Marin-Guzman, 'Hays, Stellar Recruitment Hit with $50 Million Class Actions over Casuals', *Australian Financial Review* (online, 8 January 2019) <https://www.afr.com/policy/economy/hays-stellar-recruitment-hit-with-60-million-class-actions-over-casuals-20190108-h19u2p>.

62 (2021) 271 CLR 456.

63 *Burt v Commonwealth of Australia* (Federal Court of Australia, NSD987/2021, commenced 22 September 2021); *Bradshaw v BSA Ltd* (Federal Court of Australia, VID488/2020, commenced 23 July 2020); *Mutch v ISG Management Pty Ltd* (Federal Court of Australia, VID1492/2018, commenced 21 November 2018); *Bywater v Appco Group Australia Pty Ltd* (Federal Court of Australia, NSD1857/2016, commenced 20 October 2016).

Ltd v Jamsek[64] and *Construction, Forestry, Maritime, Mining And Energy Union v Personnel Contracting Pty Ltd*[65]).

- *Indigenous Stolen Wages* – a case, which settled[66] on behalf of 300 claimants, in which the applicant alleged the Queensland Government breached its duty as trustee to Indigenous workers, the majority of whom were paid wages held on trust under the *Aboriginals Preservation and Protection Act 1939* (Qld), and that wages were stolen from them (eg, through unauthorised withdrawals).
- *International labour hire* – a case on behalf of workers from Papua New Guinea alleging a labour hire company breached three-year employment contracts through termination of the contracts and underpayments, and misleading and deceptive conduct in offering the contracts.[67]
- *Contractual set-off* – two applications alleging that major retailers did not pay salaried managers sufficiently to cover their modern award entitlements.[68]

The underpayment issues in these cases reflected many of the major underpayment issues arising at the time.

It is not clear what caused the apparent decline in diversity of proceedings in the latter period. The change in 2009 from the *WR Act* to the *FW Act* is unlikely to explain it, because the alternative options to class actions (civil penalty proceedings, dispute resolution and test cases) were all available under both legislative regimes.[69] The trend might be mere coincidence, especially given the small sample size of cases and year; might reflect changes in approach of practitioners; or be a combination of these things.

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64 (2022) 96 ALJR 144.

65 *CFMMEU v Personnel Contracting* (n 20).

66 *Pearson v State of Queensland (No 2)* [2020] FCA 619 ('*Pearson*').

67 *Jack v CoreStaff NT Pty Ltd* [2020] FCA 973; Anna Patty, 'Tami Was Lured to Australia for a $120k Job. Three Months Later He Was Left with Nothing' *Sydney Morning Herald* (online, 26 April 2019) <https://www.smh.com.au/business/workplace/tami-was-lured-to-australia-for-a-120k-job-three-months-later-he-was-left-with-nothing-20190410-p51cxa.html>.

68 *Pabalan v Coles Supermarkets Australia Pty Ltd* (Federal Court of Australia, NSD542/2020, commenced 15 May 2020); *Baker v Woolworths Ltd* (Federal Court of Australia, NSD2004/2019, commenced 29 November 2019).

69 Although the description as to which employees a registered union could commence civil penalty proceedings in relation to changed, this is unlikely to be significant as to persuading a larger number of persons to commence civil penalty proceedings as opposed to class actions. The *FW Act* (n 13) expressly allows employee organisations to pursue civil penalty proceedings against an employer if they are entitled to represent the industrial interests of the employee affected by the contravention, or who will be affected by the contravention: s 540(2). The *Workplace Relations Act 1996* (Cth) effectively allowed a registered union to seek orders with respect to union and non-union employees, where at least one affected employee was a union member: *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2005) 224 ALR 467, 472–4 [16]–[21] (Merkel J).

D Trends in Union Involvement

Union involvement in class actions has generally been low, and has lessened as a proportion of cases over time. From 1992–2015, 10 out of 17 proceedings[70] included a union as a party (59%, at about 0.42 per year); whereas from 2016, only 1 out of 31[71] have included a union as a party (3% at about 0.17 per year). It appears that unions in general prefer to utilise civil penalty provisions in the *FW Act* over class actions,[72] which will be discussed further in the next Part.

IV PRESENT UTILITY OF EMPLOYMENT CLASS ACTIONS

This Part compares the option of commencing an employment class action under Part IVA against four alternatives to enforce employee rights: FWO civil penalty proceedings, union civil penalty proceedings, disputes under industrial instruments, and test cases. Each of these proceedings may address mass harms with respect to multiple employees. Consideration is given to when each is the most effective means of enforcing (and seeking remedies for breaches of) employee rights.

A Fair Work Ombudsman: Civil Penalty Proceedings

Under civil penalty proceedings commenced by the FWO, a court may impose civil penalties, and make preventative, remedial and compensatory orders for the benefit of employees. Under section 539 of the *FW Act*, the FWO may seek orders in relation to the contravention or proposed contravention of civil penalty provisions, which cover most important statutory employee rights, including under the National Employment Standards ('NES'), modern awards, enterprise agreements, payment of wage requirements, prohibitions on deductions from wages, and general protections provisions (there is also a small extension of the FWO's powers to enforce some contractual provisions when conducting civil penalty proceedings).[73] If satisfied that a person has contravened, or proposes to contravene, a civil penalty provision, the Federal Court or Federal Circuit Court 'may make any order the court considers appropriate'.[74] The High Court has held this power empowers the court to make 'preventative, remedial and

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[70] Treating the 19 class actions commenced in 2002 on behalf of psychiatric nurses against Victorian hospitals as one proceeding.

[71] Treating the seven proceedings brought on behalf of Victorian junior doctors in 2021 as one proceeding.

[72] See *FW Act* (n 13) sections 539(2), (5) for when a union can commence civil penalty proceedings.

[73] If the Fair Work Ombudsman ('FWO') commences proceedings for breach of certain specified civil penalty provisions, it may also apply 'on behalf of [an] employee' for orders in relation to an employer's contravention, or proposed contravention, of a 'safety net contractual entitlement', being, in general terms, a contractual entitlement related to matters in the National Employment Standards or that may be addressed in modern awards: *FW Act* (n 13) ss 12 (definition of 'safety net contractual entitlement'), 541.

[74] Ibid s 545(1).

compensatory', but not penal, orders.[75] In this way, the FWO may address a broad range of contraventions, or proposed contraventions, of employee rights, including by seeking orders to prevent and remedy breaches of these rights.

Further, to resolve proceedings involving multiple employees, the court (and FWO) may use procedural devices similar to those used in class actions. For example, the court may determine separate questions, or determine issues with respect to a sample of employees, which may then effectively determine the claims or parts of claims for a group (or sub-group) of employees. In FWO proceedings against Woolworths, in which the FWO alleges the underpayment of approximately 19,000 employees, the FWO seeks to demonstrate the underpayment of 32 'Calculation Employees', and that the principles determined through this process be applied to other employees.[76] Similarly, in other civil penalty proceedings, Bromberg J determined, with the parties consent, 'to utilise techniques familiar to class action proceedings';[77] by determining claims of a sample group and common questions at an initial trial.[78] Another important device the courts (and FWO) have implemented, to assist distribution of funds, is to order compensation be paid to the FWO, and the money be repaid if the FWO cannot locate affected employees.[79] In this way, just as courts have found ways to manage Chancery style representative proceedings, without the 'detailed legislative prescription' of Part IVA,[80] courts have developed procedural devices to manage civil penalty proceedings affecting multiple employees.

Nonetheless, where the FWO has or is considering commencing civil penalty proceedings there may still occasionally be advantages in commencing a class action. Potential disadvantages of FWO civil penalty proceedings for employees compared to other proceedings include, if FWO delays commencement of proceedings, time limits may limit the compensation payable;[81] the employees have no control over how FWO conducts the proceedings, including whether it withdraws or settles proceedings; and penalties are ordinarily paid to the Commonwealth, instead of an employee applicant (to whom penalties are usually paid in civil penalty proceedings). A recent example demonstrates these considerations. Ms Baker commenced class action proceedings against Woolworths, and FWO then commenced civil penalty proceedings in relation to

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75 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157, 193 [110] (Keane, Nettle and Gordon JJ).

76 *Fair Work Ombudsman v Woolworths Group Ltd (Calculation Employees)* [2022] FCA 203. See also Fair Work Ombudsman, 'FWO Takes Action against Woolworths' (Media Release, 18 June 2021) <https://www.fairwork.gov.au/newsroom/media-releases/2021-media-releases/june-2021/20210618-woolworths-litigation-media-release>.

77 *Australian Education Union v Victoria (Department of Education and Early Childhood Development)* (2015) 239 FCR 461, 471–2 [13]. These were brought by a union, but there is no reason the same approach cannot be taken for FWO proceedings.

78 Ibid 472 [14].

79 *Fair Work Ombudsman v Northcoast Security Services Group Pty Ltd (No 3)* [2020] FCCA 521, [131]–[132] (Manousaridis J) ('*FWO v Northcoast*').

80 See *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 404–5 (Mason CJ, Deane and Dawson JJ). See also *Carnie v Esanda Finance Corporation Ltd* (1996) 38 NSWLR 465, 473 (Young J) (regarding requiring opt-out notices in Chancery style proceedings).

81 See *FW Act* (n 13) ss 544, 545(5).

the same matter. Ms Baker subsequently reached an in-principle settlement, under which, in the forthcoming FWO proceedings, Woolworths agreed to pay compensation consistently with calculation methods in the Federal Court's forthcoming judgment in FWO proceedings, for a longer time period than the time limit in those proceedings,[82] and Ms Baker would submit to the Court that penalties in the FWO proceedings should be paid to class members.[83] Although the Federal Court indicated the settlement may need improvement before it could be approved,[84] it nonetheless demonstrates how commencing a class action before the FWO commences civil penalty proceedings may limit or eliminate the adverse impact of time limits, and provide a firmer basis to intervene in FWO proceedings, including to seek penalties be paid to employees (whether this will occur is a different matter). Nonetheless, there would seem to be good policy reasons, in terms of promoting the efficient administration of justice, for a court to not order civil penalties be paid to employees where they have commenced a class action merely to have them paid to them, where the other remedies are being sought by the FWO.[85] Accordingly, absent some concern as to how the FWO has, or might, conduct proceedings (including delay in bringing proceedings), where the FWO is conducting the proceedings, there is unlikely to be a good case to commence a class action with respect to the same matter that the FWO is pursuing.

B Unions: Civil Penalty Proceedings

Registered unions have similar powers to the FWO to pursue civil penalty proceedings, providing another alternative to class action proceedings. Under section 539, registered unions may also apply to a court for orders in relation to a contravention or proposed contravention of most civil penalty provisions, including those provisions most directly affecting employees (the NES, modern awards, enterprise agreements, payment of wage requirements, prohibitions on deductions from wages, and general protections provisions).[86] A registered union may apply for an order under section 539 only if the organisation is *entitled to represent* the industrial interests of the employee affected by the contravention, or

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[82] 'Woolworths Salaried Employee Underpayment Class Action: *Baker v Woolworths Group Ltd* (NSD 2004 of 2019, Federal Court of Australia)' (Settlement Notice) <https://www.aderolaw.com.au/wp-content/uploads/2021/11/211123-Class-Information-Notice-Correction-1.pdf>.

[83] 'Woolies Underpayment Cases Rumble on Despite $50m Payment', *Workplace Express* (online, 11 October 2021).

[84] Alex Druce, 'Federal Court Says Class Action Settlement between Woolies and Former Employees "Needs Work"', *news.com.au* (online, 15 December 2021) <https://www.news.com.au/finance/business/retail/federal-court-says-class-action-settlement-between-woolies-and-former-employees-needs-work/news-story/4da348a74f1e13dd4442f70b63e2d0e7>.

[85] For commentary on when civil penalties will not be ordered to the applicant, see *Sayed v Construction, Forestry, Mining and Energy Union* (2016) 239 FCR 336, 353 [96], quoting *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357, 371 [44] (Gray J). On the purposes of civil remedies, see *Australian Building and Construction Commissioner v Pattinson* (2022) 96 ALJR 426.

[86] Unregistered unions, as 'industrial associations' under the *FW Act* (n 13) (see section 12), may also seek civil penalties with respect to general protections, unlawful termination, and breach bullying or sexual harassment at work orders; but this has less utility.

who will be affected by the proposed contravention.[87] This merely requires that the affected, or potentially affected, employees are eligible for membership of an industrial association in accordance with its eligibility rules.[88] The ability to bring civil penalty proceedings as an alternative to a class action was highlighted recently when the SDA, a registered union, commenced civil penalty proceedings against McDonald's for the same conduct the subject of a class action commenced by Shine lawyers in partnership with the RAFFWU, an unregistered union. Workplace Express reported that '[b]ecause it is directly running the case rather than pursuing it as a class action, the [SDA] says it will not need to use the money to fund it or to pay litigation funders.'[89] (Of course, a class action does not necessarily require a litigation funder, but this necessity may be more likely given the additional procedures involved and especially when union resources are not available).

In conducting civil proceedings relating to employees not actively participating in the proceedings, however, the court will be wary to make orders that may not be desired by the employees. In Part IVA proceedings, group members are provided opportunities to protect and advance their own interests, including by, amongst other things, opt-out procedures, notices to group members, and their capacity to make submissions with respect to settlement. A court is unlikely to have *the same* level of interest in the views of employees affected by civil penalty proceedings as the concern the court would have in class action group members' views, because, unlike is ordinarily the case in class actions, the judgment will not bind (non-party) employees.[90] Nonetheless, the Federal Court and Federal Circuit Court will still need to be satisfied the orders are 'appropriate',[91] and, in considering this, may 'take into account the interests of the persons on behalf of whom' the proceedings are conducted.[92] Registered unions in non-class action civil penalty proceedings may, therefore, need to carefully craft orders to not adversely affect employees, or adduce evidence of employees' attitudes to orders sought. For example, in *Transport Workers' Union of Australia v Qantas Airways Ltd (No 4)*,[93] in support of the view that orders for reinstatement of employees were appropriate, the Transport Workers' Union submitted survey evidence. The survey evidence was deficient in various respects,[94] and the Federal Court found the reinstatement order sought should be refused for various reasons.[95]

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87 Ibid s 540(2).

88 *Transport Workers' Union of Australia v Qantas Airways Ltd (No 4)* (2021) 398 ALR 124, 127–8 [14] (Lee J), citing *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456, 461 [1], 467–9 [25]–[28], 472 [36] (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ).

89 'McDonald's Workers Fed "C-ck and Bull Story" about Breaks: SDA', *Workplace Express* (online, 31 January 2022).

90 See *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 (regarding civil penalty proceedings under the *FW Act* (n 13)); *FCA Act* (n 18) s 33ZB (regarding Part IVA).

91 *FW Act* (n 13) s 545(1).

92 See *FWO v Northcoast* (n 79) [115] (Manousaridis J). Although this observation is made with respect to FWO proceedings, it applies equally where the applicant is a union.

93 (2021) 398 ALR 124.

94 Ibid 132–41 [29]–[65] (Lee J).

95 Ibid 167–8 [161]. Justice Lee also raised in this case the prospect that unions may have obligations in equity to employees when conducting civil penalty proceedings: at 129 [21]. It is beyond the scope of this

Putting the facts of this case aside, however, this is the type of evidence courts may desire before deciding certain remedies, such as reinstatement and injunctive remedies, are 'appropriate'.

Arguably, concerns about establishing the appropriateness of orders without class action procedures may lead a registered union to prefer commencing a class action to ordinary civil penalty proceedings. Nonetheless, the low rates of registered unions bringing class actions since 2016 (discussed above), and the recent examples of registered unions bringing civil proceedings as an alternative to class actions,[96] suggests there is a growing consensus within registered unions that non-class action civil penalty proceedings, where available, are ordinarily more efficient at addressing mass wrongs. Indeed, the High Court, in Chancery style representative proceedings, found that the lack of detailed legislative prescription on procedures is not a sound reason to refuse to grant relief,[97] and courts have demonstrated capacity to use class action-like procedures in ordinary civil penalty proceedings to address concerns arising with respect to the lack of procedures in that particular case. Accordingly, subject to any change in approach to these cases by the courts, the additional time and costs often involved in class actions means, when ordinary registered union civil penalty proceedings are available, these will ordinarily (but perhaps not always) be the preferable procedure to class actions to address mass breaches of employee rights.

C Dispute Resolution Clauses

Dispute resolution clauses in modern awards and enterprise agreements may provide an option for employees and unions to address contraventions, or prospective contraventions, of employee rights. All modern awards contain a standard dispute resolution clause under which the Fair Work Commission ('FWC') may deal with a dispute arising about a matter under the award or in relation to the NES in a way that it considers appropriate (eg, mediation or

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article to fully consider this question. But it is noted that the parties in this dispute accepted no fiduciary duty applied (at 129 [20]) and the lack of such an obligation may seem less unusual when considered in light of the privileged role and extensive powers parliaments have historically bestowed on unions: see Richard Naughton, *The Shaping of Labour Law Legislation: Underlying Elements of Australia's Workplace Relations System* (LexisNexis Butterworths, 2017) 4 [1.3], 248–52 [7.81]–[7.86]; Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22(3) *Australian Journal of Labour Law* 306, 306–7. For the argument that fiduciary duties do not apply to unions when bargaining on behalf of employees, see: Jill Murray, 'In Whose Interests? Fiduciary Obligations of Union Officials in Bargaining' (2018) 40(1) *Sydney Law Review* 123; Peter Punch, 'Union Representatives in Enterprise Bargaining: The Debate over Fiduciary Duty' (2021) 33(3) *Australian Journal of Labour Law* 229. At this stage, no clear case has been made out that such an obligation exists.

96 For another example, see the Finance Sector Union's claims that unpaid tea breaks were not provided: 'CBA Staff Demand Millions in Backpay over Tea Breaks', *Finance Sector Union* (Web Page, 21 January 2022) <https://www.fsunion.org.au/cba-staff-demand-millions-in-backpay-over-tea-breaks/>.

97 See *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 404–5 (Mason CJ, Deane and Dawson JJ). Although made in reference to Chancery-style procedures, they are equally applicable to *FW Act* procedures.

conciliation), but under which it may only arbitrate with the parties' consent.[98] Meanwhile, enterprise agreements must include a procedure requiring or allowing the FWC or an independent person to settle disputes about any matter under the agreement, or in relation to the NES.[99] Enterprise agreements can, however, be drafted to allow an even broader range of disputes to be determined under them, and to allow broader rights of standing and representation (eg, for unions). The enterprise agreement clause may also grant the FWC/arbitrator broad powers, including for compensation of an amount greater than the benefits entitled to under an enterprise agreement.[100] There are limited appeal rights from decisions under these clauses.[101] Civil penalties, however, are unavailable under these clauses.[102]

Given the multiple ways these clauses can be drafted, it is difficult to draw any hard rules about when they are the most appropriate avenue to enforce employee rights. Generally, however, a clause will be more effective in enforcing employee rights if:

- it allows a person to bring a dispute with respect to multiple employees without needing their active consent;
- compulsory arbitration is available under it (or parties agree to arbitrate);
- the less formal procedures in the FWC/before the arbitrator (including lack of rules of evidence) are seen as advantageous; and
- civil penalties are not sought or viewed as particularly important.

Generally, as these clauses are only required to allow for the FWC/arbitrator to deal with disputes of matters under the award/enterprise agreement or in relation to the NES, civil penalty proceedings (alleging a contravention or proposed contravention of the award/enterprise agreement or NES) will commonly be an available alternative to dispute resolution procedures. Given ordinary civil penalty proceedings are commonly preferable to class actions (according to the above argument), the choice will often be between the dispute resolution clause and civil penalty proceedings rather than a class action.

D Test Cases

While another alternative to a class action is a 'test case', being 'proceedings brought by a single applicant in circumstances where many other people may have the same or similar claims',[103] time limits, expense considerations, and the need to

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98 *FW Act* (n 13) s 739(4).

99 Ibid s 186(6).

100 *Australian Municipal, Administrative, Clerical and Services Union v Sydney Trains* [2021] FWCFB 6010, [38] (Hatcher VP, Hamilton DP, Gostencnik DP).

101 See *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* (2015) 235 FCR 305, 338 [85].

102 Theoretically, drafting a clause to allow for 'penalties' to be imposed may raise interesting questions as to its consistency with the FWC/arbitrator's role in the arbitration process. However, this author is unaware of any such example and there is certainly no statutory grant of power to award civil penalties. For practical purposes, currently, civil penalties are unavailable.

103 ALRC Report 46 (n 1) 22 [52].

establish the issues in the test case to determine the outcome of other cases, mean test cases will often not be appropriate.[104] First, if different facts apply between the test case and other employees' cases, the test case may not determine the outcome of other claims. Second, if the test case settles, the relevant issues may not be determined.[105] Third, finding an applicant can be difficult for small value claims, given the costs of running proceedings and the prospect of costs being awarded against the employee (although unlikely in *FW Act* proceedings)[106] may outweigh the value of potential claims. Accordingly, practically, a third party (eg, a union) may need to fund a test case for a small value. Fourth, time limits may restrict liability of the defendant in relation to cases brought after the determination of the test case – meaning all cases may need to be commenced around the same time, and the court asked to stay all proceedings but the test case, which may be costly and not practicable. Accordingly, a test case will generally only be appropriate to address a mass breach/prospective breach of employee rights where (1) funding is available, or it is valuable enough to run the test case alone; (2) the outcome of the test case definitely determines other employees' cases (eg, when relevant facts in all cases are not disputed, but there is a dispute as to the meaning of a provision); (3) time limits will not deny the non-test-case employees' enforcement of their entitlements; and (4) settlement of the individual case is unlikely.

E So When Is a Class Action Appropriate?

Drawing on the above, it is dangerous to set out hard rules on when different proceedings are the most appropriate, given the variety of circumstances which may arise. Nonetheless, some general observations can be made:

1. If the FWO commences or proposes to commence civil penalty proceedings with respect to the same matter, absent concern as to the conduct, or potential conduct, of the case by the FWO (including delay), this will commonly provide employees good reason not to pursue a class action.
2. Where a union is willing and able to commence civil penalty proceedings with respect to the issue, this will often be preferable to bringing a class action due to the simpler procedures. But procedural devices used in class actions may still be required, consideration should be given to whether all employees will in fact desire the orders sought, and evidence may be required as to employees' desired outcomes.
3. Dispute resolution clauses should be considered on a case-by-case basis, especially where a less formal alternative without civil penalties is appropriate, but will ordinarily be an alternative to ordinary civil penalty proceedings rather than a class action.

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[104] For general commentary on their limits, see ibid 22–3 [54].
[105] Ibid.
[106] See *FW Act* (n 13) s 570.

4. Even when civil penalty proceedings and dispute resolution clauses are not available or suitable, test cases might be appropriate. But time limits, expense considerations, and the need to establish whether issues are, in fact, 'common' to employees means test cases are commonly not appropriate.

In summary, class actions are left with a rather limited, but nonetheless real, role in the enforcement framework, mostly enforcing (1) statutory employee rights when the FWO does not take action and registered union representation is unavailable, and (2) contractual employee rights.

V CONCLUSION

In 2020, in settlement of a Part IVA proceeding, 300 Indigenous Australians recovered wages that were stolen from them decades prior. Neither *FW Act* civil penalty proceedings, nor dispute resolution under an industrial agreement were available, and a test case would have been inappropriate given the different facts applying to group members. Justice Murphy stated:

> [This case] shows, yet again, that when class actions are properly conducted and appropriately managed by the courts, many affected persons can recover compensation for civil wrongs which they would not otherwise have been able to obtain, including people suffering from substantial disadvantages in terms of economic capacity, education, geographic location and cultural issues, which otherwise present significant barriers to their access to justice.[107]

Indeed, there can be no doubt that, since 1992, class actions have assisted in enforcing employee rights. But consideration of the alternative procedures available suggests class actions play a largely gap-filling role in the enforcement framework. In recognising this, the central role of the civil penalty regime in the *FW Act*, and the importance of ensuring both registered unions and the FWO may bring civil penalty proceedings in relation to multiple employees, is reinforced.

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107 *Pearson* (n 66) [297].