# The *Class*

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"Mass Tort Litigation" exists for the very reason that most of us practice law – to provide access to justice, through the courts, to those who otherwise could not afford it. Class actions should allow claimants to recover compensation where the cost of doing so would otherwise be prohibitive. But this sort of litigation is often difficult, costly and of uncertain outcome, and it draws a divided and often critical response, even among plaintiff lawyers. Why?

It has been suggested that "massive publicity" generated by some lawyers in attempting to reach a class of claimants is problematic, as it creates a combative environment in which resolution of sizeable class actions by high profile and costly litigation is the only way forward.[1] We disagree with this view put forward by Michael McGarvie. It is hardly surprising that in the Esso Longford litigation for example, the largest class action currently before the

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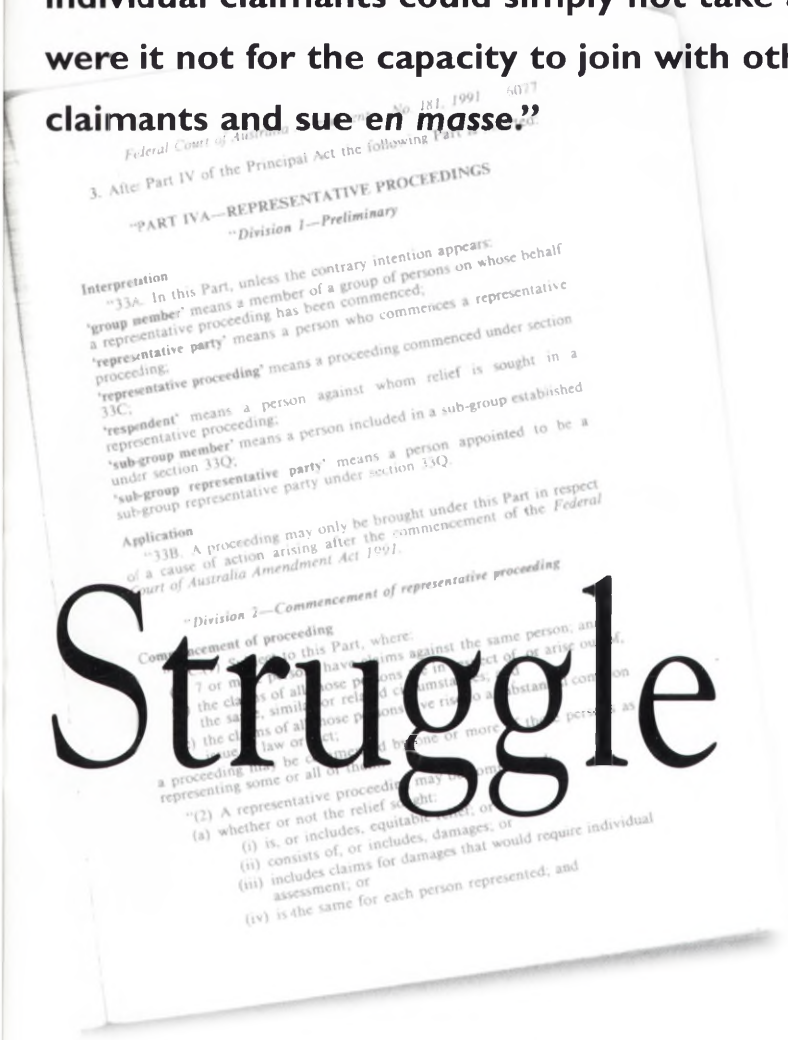
**"... there are some cases... where individual claimants could simply not take action were it not for the capacity to join with other claimants and sue *en masse*."**



3. After Part IV of the Principal Act the following Part is inserted:

"PART IVA—REPRESENTATIVE PROCEEDINGS

"*Division 1—Preliminary*

Interpretation

"33A. In this Part, unless the contrary intention appears:

'**group member**' means a member of a group of persons on whose behalf a representative proceeding has been commenced;

'**representative party**' means a person who commences a representative proceeding;

'**representative proceeding**' means a proceeding commenced under section 33C;

'**respondent**' means a person against whom relief is sought in a representative proceeding;

'**sub-group member**' means a person included in a sub-group established under section 33Q;

'**sub-group representative party**' means a person appointed to be a sub-group representative party under section 33Q.

Application

"33B. A proceeding may only be brought under this Part in respect of a cause of action arising after the commencement of the *Federal Court of Australia Amendment Act 1991*.

"*Division 2—Commencement of representative proceeding*

Commencement of proceeding

(a) whether or not the relief sought includes, or is limited to,

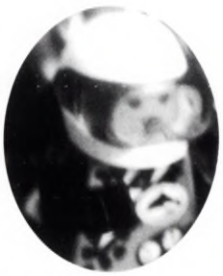
(i) is, or includes, equitable relief; or

(ii) consists of, or includes, damages; or

(iii) includes claims for damages that would require individual assessment; or

(iv) is the same for each person represented; and

# Struggle



Australian courts, Esso, a subsidiary of the world's largest corporation, has not been a candidate for McGarvie's "Third Way", but has instead chosen to litigate every point available to it and may continue to do so for some years to come. A loss for Esso may involve hundreds of thousands of claimants and hundreds of millions of dollars in damages. It is similarly unremarkable that the landmark settlement achieved with BHP and OTML, on behalf of the 30,000 landowners affected by the pollution of the Ok Tedi River in PNG, was reached only after substantial, costly and, well-publicised litigation. We have been told that some of the starker television footage of grey toxic sludge oozing down the Ok Tedi, and of landowners looking uncomfortable in suits outside the Melbourne Supreme Court made life pretty uncomfortable for a time, for the directors of BHP at social gatherings in Malvern and Vaucluse. We are not disappointed by this.

If the "Third Way" were capable of producing a different result, we would have seen evidence of it. We have seen no such evidence.

Class actions or group litigation are not appropriate in every case, far from it. In some of the initial mass tort litigation our firm has been involved with (Wittenoom asbestos and medically acquired HIV) the initial individual cases were lost. There are lessons to be learned from these cases. Sometimes experience from the first case(s) enables plaintiffs' lawyers to refine and develop the most appropriate liability theory, and the most appropriate evidence. Likewise, sometimes it takes the court and the system some time to gather some experience to come to terms with new and/or large liability decisions.

However, there are some cases, including cases where the stakes are high and which are fought to the end by companies with seemingly limitless resources, where individual claimants could simply not take action were it not for the capacity to join with other claimants and sue *en masse*.

In Australia today, the outlook for any group of claimants contemplating a group action of some kind is quite uncertain. And their lawyers may have to commit substantial resources to a prospective action that may take years to resolve. As a result, lawyers experienced in mass tort litigation now approach the prospect of litigating class actions with some trepidation. In our view (one that is informed by our firm's engagement in mass tort litigation for over 15 years) the outcome and experience for plaintiffs who seek assistance from this aspect of the legal system is influenced by each of the players in that system: the courts, the lawyers and the defendants from whom compensation is sought. We look at some of the responses from each of those participants to the current challenges in mass tort litigation.

## Part IVA and The Federal Court

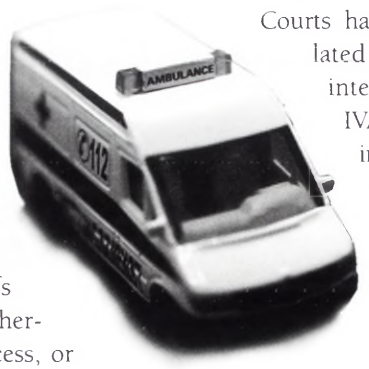
Part IVA of the *Federal Court of Australia Act* 1976, which commenced ▶

in 1992, was until recently the only detailed regime in Australia for the conduct of class actions.[2] In February 2000, the Australian Law Reform Commission estimated that there were approximately 20 representative actions before the Federal Court, under Part IVA. Just over 100 class actions had been commenced in the Federal Court since the commencement of Part IVA in 1992. "Mass tort" or group litigation can take several forms, but the existing jurisprudence on Part IVA makes an interesting study of the varied responses of the judiciary to reformist legislation.

As was stated in the Second Reading Speech introducing the *Federal Court of Australia Amendment Bill 1991*, this legislation was introduced to give the Federal Court "an efficient and effective procedure to deal with multiple claims...to provide a real remedy where although many people are affected ... each person's loss is small and not economically viable to recover in individual actions. ... [to] give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action [and to] deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the Respondent." The reforms introduced by the Bill were described as a "significant part of the Government's equity and access policies embodied in its social justice program...in an area where there is a recognized and pressing need for reform." Bluntly put, this legislation is and was intended to be pro-plaintiff, in that it was intended to facilitate access to the courts and thereby to allow plaintiffs to obtain redress where they otherwise would not have such access, or to allow groups of plaintiffs to do so more cheaply. The second reading of the Bill provoked a stinging response from Peter Costello who described it as "an attack on the way legal rights have been traditionally exercised under our system of law". Costello articulated two further fears, namely that Australia would be made more litigious and that the availability of class actions would encourage legal entrepreneurialism. Such outcomes were said to be wrong because in Costello's view "the time has come in Australia where we ought to be encouraging business, not increasing opportunities for organised litigation against it". Interestingly, Costello did not address the benefits that class actions may afford businesses themselves – either as litigants suing for business losses, or in crystallising their liabilities.

The fears articulated in Costello's political speech have found their way to the courts (sometimes expressed in words bearing striking similarity to Costello's speech) in the form of submissions made on behalf of defendants seeking to ward off that great social evil – the class action. For example, in *Shutt Flying Academy v Mobil Oil Australia Limited*, Mobil sought to support its application for the abolition of the then current Order 18A of the Victorian Rules on the grounds that it abolished in effect "the right of an individual to bring their own action in their own time with their own solicitors".

And how have courts responded? In our view, two things have occurred. First, in statements articulating "how" Part IVA should work and should be construed, the Federal and High Courts have clearly articulated the legislative intent behind Part IVA. For example, in the case of *Wong & Ors v Silkfield Pty Ltd*[3] (1999) 199 CLR 255 the High Court stated unambiguously that Part IVA was to read by reference to the fact that the statutory purpose for its enactment was not to narrow access to the new form of proceedings beyond that which applied under previous regimes, and that it was intended to resolve the defects and uncertainties in previous procedures developed by courts, particularly the Courts of Equity. Similarly, in considering a constitutional challenge to Part IVA in *Femcare Limited v Bright*[4] the Full Court of the Federal Court construed the scheme in light of the fact that "the historical developments reflect the fact that courts have been concerned to develop procedures designed to do justice. The representative procedure was designed to vindicate rights that otherwise could not be pursued or could be pursued only with great inconvenience and expense...the price of providing a mechanism for the vindication of rights held in common with others may be a departure to some extent from the procedures ordinarily applicable in litigation inter partes".[5]

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However, despite clear identification by the courts of the appropriate principles of interpretation, the application of those principles has been varied between courts and has in our view, included an overly-rigorous reading of the threshold requirements allowing representative proceedings to be commenced, resulting in an outcome inconsistent with the legislative intent. As a

result, class actions are, particularly at the commencement stage, extremely complex, expensive and labour-intensive before even getting to the stage where the merits of the substantive case are considered by a court.

Some of the characteristics of the application by the courts of the broad principles of interpretation are as follows.


**Which Actions should be Class Actions?**

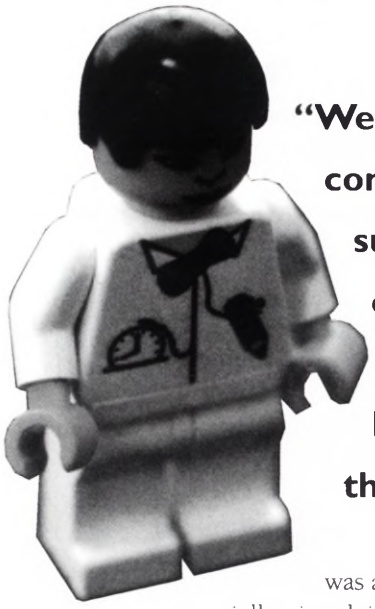
In June 2001 the High Court refused an application for special leave by the applicants in *Nixon & Ors v Phillip Morris Australia & Ors,* to appeal from a judgement of the Full Court of the Federal Court, striking out a representative action under Part IVA brought on behalf of certain cigarette smokers who had suffered smoking related diseases.[6] That claim was brought on behalf of potentially a large number of smokers against the three major Australian cigarette manufacturers. The Full Court of the Federal Court had ordered that the action no longer continue as a class action and had refused leave to the applicants to re-plead their Statement of Claim. There was a strong divergence of views between the majority of the High Court (Gleeson CJ & Callinan J) and the dissenting Judge, Kirby J.

Gleeson C J characterised the action as a pleadings summons and considered that there was no basis for doubting the correctness of the Full Court in striking out the Statement of Claim.

When considering the fate of group members who would be left without any action protecting their interests, Gleeson CJ referred to the availability of case management of large groups of individual cases. The Chief Justice relied upon his experience in the NSW Supreme Court in the handling of thousands of individual breast implant claims. Sadly, deeper inquiry would have disclosed to His Honour that the management of those writs; and more succinctly, the absence of a viable class action mechanism, has left those claims in a state of high farce. Almost none were served. The plaintiffs were marooned in a sea of interlocutory hearings seeking deferral for years while test case issues and US parallel litigation was sorted out. Every single one of over 4,500 individual claimants was put at risk of adverse costs and filing fee costs, while at the same time running the gauntlet of Statute of Limitation issues. Attempts made to protect the position by issuing a Part IVA proceeding now face extraordinary legal difficulties, because of the Nixon ruling and the inapplicability of Part IVA to causes of action arising before 1992. Whatever the Chief Justice's view of the legal and social utility of class actions may be, the breast implant litigation in the NSW Supreme Court does not vindicate it.

Kirby J on the other hand (dissenting), said that "the unreality of thinking that they (group members) can recommence individually against the Respondents and therefore the effective decision which is made by this full court opinion that puts them out of court on a pleading point is a matter of general public importance... we are not talking about a field of litigation, we are talking about particular citizens of our country who have come to the court system. If Part IVA does not work in this case, as it may well not, then that is a very important question and this court should pass it on... if it does not work in a case like this then Parliament ought to know about it... the answer that the court system offers in this case is not to expedite proceedings or to lay down strict requirements on re-pleading, it is to put them out of court on a claim under Part IVA for a representative proceeding... they are put out of court under the provisions that are reformatory provisions which, at least on my understanding were enacted precisely for cases such as this".

Whether Kirby J would have allowed the proceedings to continue under Part IVA had the application for leave to appeal been allowed, we will never know. However, the divergence of view between the members of the court is interesting because the *Nixon* case may have tested the limits of Part IVA. It ▶



**"We may well see an evolution in the consciousness of our judicial system, such that in a number of years, class actions and the role that they afford plaintiffs' lawyers will be uncontroversial, but currently that is not the case."**

was a case potentially involving a large number of claimants against three major corporations in relation to their conduct extending over a long period of time. One of the common issues alleged in the case was whether smoking caused disease. For the purposes of the action, none of the tobacco companies admitted as much, notwithstanding a wealth of evidence that smoking causes a range of diseases and is responsible for nearly 20,000 Australian deaths per year. That one very senior Judge viewed the capacity of Part IVA to encompass such an action as a matter of public importance and that two others saw it as a question of pleadings is in our view, symbolic of the philosophical divide confronting courts when responding to class actions, particularly those that are potentially large and complex and overtly engage the reformist nature of the provisions.

In the *Nixon* case, Sackville J (sitting on the Full Court of the Federal Court) effectively read down Part IVA in light of his own view about the type of proceeding intended to be encompassed by it. His analysis arose from his reading of the report of the Law Reform Commission[7] which proceeded the introduction of Part IVA and which in Sackville's view could be construed as intending that only certain types of proceedings fall within the purview of Part IVA.

Sackville J considered the *Nixon* case to be "a far cry from the kind of case envisaged by the LRC as falling within the purview of the representative procedure" and considered that Part IVA was "designed to accommodate cases where for example, the Applicants and group members rely on a series of related but not identical transactions or where the group was very large and for example a catastrophic event had caused a loss of services to many thousands of people." With respect, the text of Part IVA itself, which provides that once the threshold requirements are met, an action may be brought, does not require and is in fact inconsistent with the use Sackville J sought to make of the LRC report. The reasoning of Sackville J in *Nixon* should be contrasted with the majority of the Full Court of the Federal Court in *Silkfield Pty Ltd v Wong & Ors*[8] in which their Honours, having regard to Section 33C(2) which provides that a representative proceeding may be commenced whether or not it is concerned with separate transactions or acts involving each group member, rejected the appellants' argument that the action did not satisfy the threshold requirements of Part IVA because it was not a "classic" representative action in which the representative party would be able to call evidence on behalf of all group members.[9]

Similarly, Hill J considered that where conduct was alleged to have occurred over a number of decades, the practical requirements of discovery would create a "disproportionate burden" on the respondents leading to the conclusion that the interests of justice required that the applicants who had a "genuine case" to bring individual proceedings in which interlocutory processes can be limited. In our view, there was an assumption implicit in Hill J's reasoning that "genuine" cases are those which are individually particularised and articulated from the beginning and that cases involving large number of claimants could not necessarily be assumed genuine, and are almost necessarily inclined to produce a disproportionate burden on the respondents.

Hill J did not in his reasons consider the situation that would have arisen had dozens, hundreds, or even thousands of individual claims been brought, each requiring discovery. Let us also be bold enough to assert that there are many in the community, lawyers and non-lawyers, who would weigh "the discovery burden" on the defendants against the fact that they have manufactured and marketed a product which is killing 20,000 Australians a year (none of whom have the legal resources to take individual proceedings) and reach quite a different conclusion from His Honour, as to whether that burden was "disproportionate."


On one reading of the approach by some Judges of the Federal Court[10] to complex cases involving more than one respondent, particularly where the conduct in question involves a complicated or lengthy series of transactions, those cases should simply not be brought as class actions. If that reading is correct, then to put it bluntly, defendants are more likely to escape liability if by their conduct they cause harm or loss to more people over a greater period of time, and if they do so in concert with others.

### Views about Plaintiffs and their Lawyers

During the hearing of the *Nixon* case before the Full Court of the Federal Court, Spender J referred to the representative proceeding in *Nixon* as "the Ben Hur of Ambulance Chasing." His Honour stated, "This really is the Ben Hur of ambulance chasing, this is the sort of 60,000 claimants and billions of dollars and so on and press reports by plaintiffs' solicitors and so on, it doesn't seem to matter that (the Applicant) and a few other people might cark the big


Ben Hur extravaganza roles on".[11]

While the "ambulance chaser" description has acquired some familiarity on talkback radio and in the PR machinations of corporate Australia, we believe it ought to have no place in the judicial lexicon.

The fact that in representative actions, group members are by and large not present in court and are often not known to the applicant or his or her solicitors, necessitates that the applicant or plaintiff's lawyers speak on behalf of those group members often in circumstances where they do not have instructions from those group members but rather take instructions from the applicants or plaintiffs in their representative capacity. That fact is a necessary concomitant of the scheme; it is not a creation of legal entrepreneurialism. However, apparently it is nonetheless distasteful to some courts. We may well see an evolution in the consciousness of our judicial system, such that in a number of years, class actions and the role that they afford plaintiffs' lawyers will be uncontroversial, but currently that is not the case.

## Pragmatism

Despite the issues mentioned above, the courts have in a number of cases managed to deal successfully and pragmatically with representative actions. For example in *Tropical Shine Holdings Pty Ltd v Lake Gesture*[12], one of the first reported decisions under Part IVA, the court successfully laid down principles for understanding and practically analysing the commonality requirement within Part IVA. Wilcox J continued that approach in *Grant Ryan v Great Lakes Council & Ors*[13] and *McMullin v ICI Australia Operations Pty Ltd*[14], both of which have proceeded to judgment. The fact that some matters have proceeded to judgment (even those including numerous defendants) demonstrates that Part IVA cases are capable of delivering what they were intended to deliver: determination of common issues in an economic manner. As Gillard J recently observed, in the course of a judgment relating to the case management of the Esso Longford litigation, currently fixed for trial in May 2002, that "determining the various issues in the proceeding and in particular how it should be conducted, what questions should be decided and any other procedural matters, it is important that the court gives effect to the purpose of the group proceeding procedure, which is to enable the proceeding to be brought by a substantial number of victims by an alleged wrong committed by the same wrong doer, thereby pooling their resources, and to ensure that the court's resources are used efficiently and expeditiously. ... it is important that the court approach the group proceeding litigation in a practical manner and ensure that as many questions of law and fact, that have a degree of commonality are decided..." (*Johnson Tiles Pty Ltd & Anor v Esso Australia Pty Ltd & Anor*).[15]

## Defendants - Some Standard Tactics

The tactics of defendants in representative actions are familiar to plaintiff lawyers who practice in this area and are worth noting. First, defendants in class actions routinely make numerous interlocutory applications connected with pleadings in an effort to generate a raft of amendments, including: encouraging amendments to minor matters to which they may consent, and issuing applications that do not deal with all pleading issues at once. The effective result is that when the matter goes before an Appeal Court, the defendant can cite the number of amendments made, even if the amendments were insubstantial or did not relate to the complaint in question. Efforts should be made to alert the courts to this concern and to suggest that attacks on the pleadings ought to be consolidated into ***one*** application rather than being an opportunity for selective periodic ambush.

Further, the more important point that ought to be stressed is that pleadings are a vehicle to allow the issues in the case to be understood and ventilated. They are not an end in themselves and should not become a battleground in which pedantry and endless etymological exposition become a priority over the efficient and fair adjudication of the real issues in a case.

Second, defendants have managed, with some degree of success, to advance arguments with the objective of either making class action litigation extremely complex and expensive or at having the mechanism struck out all together, under the guise of protecting "unrepresented" group members. Similarly, in some cases, courts have held several hearings and considered lengthy submissions on opt out notification by defendants whose ultimate aim is to have the court conclude that the action cannot be properly notified.

Finally, defendants, whose own lawyers' practices have generated significant business in the course of mounting complex defences of class actions, like nothing more than to continually remind courts of the role of plaintiff lawyers in the litigation. Plaintiff lawyers are accused of being "ambulance chasers" and of having significant commercial interest in drum-

ming up litigation. We were recently told by a New York-based representative of a major pharmaceutical company that when litigation was foreshadowed in Australia over one of its products; it was inundated by marketing pitches and paraphernalia by three Australian defendants' law firms; all shamelessly touting for the work and all representing to be "the best product liability lawyers" in Australia. However commercially minded plaintiffs' lawyers in Australia may be, we are confident that the Collins Street and Pitt Street firms have little to learn from us. It is, of course, important to press upon courts the irrelevance of such matters from the actual merits of class actions themselves.

### Some Challenges for Plaintiff Lawyers

As we said at the beginning of this article, not every case will be suitable for a class action. An unmeritorious case does not become any more meritorious because it is a class action. However, where representative or grouped proceedings are appropriate, as things currently stand, conduct of those actions is in the interlocutory stages is likely to consume a disproportionate amount of time and resources. Representative proceedings are expensive to run and in most cases neither the applicants nor the group members can make any substantial contribution to the funding of the action.

Class actions were intended to, and may have the effect of, dramatically affecting the balance of rights between individual Australians and the ever larger and more powerful corporations and governments which so dominate Australia today. This more than explains the massive resources that have been put into obstructing and limiting them by corporate Australia. Perhaps it also contributes to the judicial conservatism that has been applied to the implementation of them. But this has come at a price; a price paid by ordinary people including victims of the tobacco companies, victims of company rorting of shareholders, and small business people battling interruption to their businesses. Actions which protect companies against a class action may be denying or delaying a just and expeditious outcome for a much larger group. That is the real tragedy of what has befallen class actions in Australia. PL

### Footnotes:

1. McGarvie, "Product Liability - Another Way", (2001) 46 Plaintiff 6-10 at 9.
2. In 2000 the Victorian Parliament enacted equivalent legislation for the conduct of class actions in the Victorian Supreme Court. That legislation, Part 4A of the *Victorian Supreme Court Act* is currently subject to a constitutional challenge in *Mobil Oil Australia Pty Ltd v The State of Victoria and Tasfast Air Freight Pty Ltd.* The defendants' application has not yet been listed in the High Court but is likely to be heard early in 2002.
3. (1999) 199 CLR 255
4. [2000] FCA 512
5. An appeal from the Full Court of the Federal Court is expected to be heard by the High court in November 2001.
6. Slater & Gordon brought the claim on behalf of a potentially large number of smokers against three major Australian cigarette manufacturers. See page 40 for a case note on *Philip Morris (Australia) & Ors v Nixon & Ors* [2000] FCA 229
7. *Grouped Proceedings in the Federal Court (Report no. 46 1988).*
8. (1998) 90 FCL 152
9. O'Loughlin & Drummond JJ. Their Honours allowed the appeal on other grounds.
10. The reasoning in *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 37 ASCR 326 and in *Phillip Morris (Australia) Ltd & Ors v Nixon & Ors* [2000] FCA 229; should be contrasted with that in *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209 and the Full Court of the Federal Court in *Finance Sector Union of Australia & Anor v Commonwealth Bank of Australia* (1999) 166 ALR 141.
11. *Philip Morris v Nixon* FCA N 326 of 1999, Transcript of Proceedings 10 November 1999 at 258
12. (1993) 45 FCR 457
13. (1997) 149 ALR 45. Subsequently appealed to the Full Court of the Federal Court and now to be heard by the High Court.
14. Unreported, 18 November 1996
15. [2001] VSC 372