

## THE VICTORIAN LAW REFORM COMMISSION'S CLASS ACTION REFORM STRATEGY

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### I INTRODUCTION

The public release, in May 2008, of the Victorian Law Reform Commission's ('VLRC') final report with respect to Phase 1 of its civil justice review was an important event in the class action arena. The Supreme Court of Victoria is the only Australian superior court, outside of the Federal Court, where a class action proceeding may be instituted. The VLRC's study of several important dimensions of the Victorian regime, which is regulated by Part 4A of the *Supreme Court Act 1986* (Vic), constitutes the first review by an Australian law reform entity of this regime which has been in operation since 2000.

This report also contains the first recommendations by an Australian law reform entity, with respect to class action reform, since January 2000, when the Australian Law Reform Commission ('ALRC') made several recommendations with respect to Part IVA of the *Federal Court of Australia Act 1976* (Cth).<sup>1</sup> Part IVA has been regulating class actions in the Federal Court since March 1992.<sup>2</sup> Part 4A is based on and is thus very similar to Part IVA. Consequently, the fact that the Victorian Government has failed to implement the VLRC's class action recommendations, more than twelve months after the release of the VLRC's report, does not in any way diminish the need to undertake a critical evaluation of the VLRC's Part 4A recommendations.<sup>3</sup> The purpose of this article is to undertake this analysis.

The VLRC made the following recommendations with respect to Part 4A:

- There should be no legal requirement that all class members have individual claims against all defendants in class action proceedings involving multiple defendants. Part 4A should be amended to make it

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1 Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System*, Report No 89 (2000) 477–93 ('ALRC 2000 Report').

2 Part IVA was largely based on the recommendations contained in the ALRC's 1988 report on grouped proceedings: Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) ('ALRC 1988 Report').

3 See Rachael Mulheron, 'Cy-Pres Damages Distributions in England: A New Era for Consumer Redress' (2009) 20 *European Business Law Review* 307, 312.

clear that in cases where there is at least one defendant against whom all class members have individual claims, additional defendants may be joined even if only some members of the class have individual claims against such additional defendants ('the *Philip Morris* recommendation').<sup>4</sup>

- Part 4A should be amended to make it clear that the Part 4A regime is able to be utilised, on behalf of a smaller group of persons than the total number of persons who may have the same, similar or related claims, even where the represented group comprises only those who have consented to the pursuit of proceedings on their behalf ('the limited class recommendation').<sup>5</sup>
- The Supreme Court of Victoria should be empowered to order *cy-près* remedies where: (a) there has been a proven contravention of the law; (b) a financial or other pecuniary advantage has accrued to the person or entity contravening the law as a result of such contravention; (c) the loss suffered by others, or the pecuniary gain by the person contravening the law, is capable of reasonably accurate assessment; and (d) it is not possible, reasonably practicable or cost effective to identify some or all of those who have suffered the loss ('the *cy-près* recommendation').<sup>6</sup>
- The establishment of a new funding body, the Justice Fund, which would: (a) provide financial assistance to parties with meritorious civil claims; (b) provide an indemnity with respect to any adverse costs order; and (c) meet any requirements imposed by the Court in respect of security for costs. The proposed body would, in return, receive an agreed percentage of the amount recovered in successful cases. The body would seek to be self funding through income derived from success fees in funded cases, costs recovered from unsuccessful parties and payments into the funds which the Court would be empowered to order pursuant to the *cy-près* remedies referred to above ('the Justice Fund recommendation').<sup>7</sup>

Before evaluating each of these four recommendations, attention should be drawn to the general recommendations formulated by the VLRC. These recommendations, if implemented, would have a major impact on all legal proceedings including, of course, Part 4A proceedings.<sup>8</sup> For instance, the VLRC recommended the introduction of new statutory standards to govern the conduct

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4 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 559 (recommendation 99) ('VLRC Report').

5 *Ibid* (recommendation 100).

6 *Ibid* 559–60 (recommendation 101).

7 *Ibid* 622–3 (recommendations 133 and 136). The operation of this fund would not be limited to class actions. But, as acknowledged by the VLRC itself, 'the proposed fund is likely to be in demand in class action litigation and likely to derive substantial revenue from class action proceedings': *ibid* 614.

8 Peter Cashman and Ross Abbs, 'Prospects and Problems for Investors in Class Action Proceedings' in the Hon Justice K E Lindgren (ed), *Investor Class Actions*, Ross Parsons Centre of Commercial, Corporate and Taxation Law (2009) 61, 65–6.

of key participants in litigation which were intended to accelerate the disclosure of information between parties, limit the issues that are in dispute, encourage greater cooperation, increase the prospect of alternative dispute resolution and improve standards of conduct in connection with both civil proceedings and ancillary alternative dispute resolution processes.<sup>9</sup> The VLRC also recommended the insertion of an overriding provision to the effect that relevant legislation and procedural rules are to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.<sup>10</sup>

Furthermore, the VLRC concluded that a more proactive judicial management of litigation was desirable. In order to attain this desirable objective, it put forward a number of recommendations including: greater control over interlocutory disputes; a general statutory provision giving a clear judicial power/discretion to make appropriate orders and impose reasonable limits in respect of the conduct of any aspect of a proceeding; more clearly delineated and specific judicial powers to actively manage and impose limits on pre-trial processes and hearings; and reform of the procedures for the earlier determination of disputes, including by summary disposal of unmeritorious claims and defences.<sup>11</sup> The VLRC also recommended the establishment of new mechanisms designed to facilitate earlier and more effective methods of disclosure. These mechanisms include new requirements for the disclosure of the identity of litigation funders and insurers exercising influence or control over the conduct of proceeding and the introduction of a statutory provision to enable confidential non-privileged information to be obtained prior to the trial.<sup>12</sup> It is beyond the scope of this article to consider these 'general' recommendations.

## II THE PHILIP MORRIS PRINCIPLE

Australia's two class action regimes do not impose on potential class representatives the requirement of seeking leave from the court before they may proceed with a class action proceeding; that is, Australia's class action regimes do not employ certification devices. Class action defendants<sup>13</sup> may however seek the intervention of the court if they feel that the proposed litigation does not comply with the three 'threshold' requirements<sup>14</sup> for the institution of a Federal or Victorian class action proceeding.<sup>15</sup> These three requirements, which are set

9 VLRC Report, above n 4, ch 3.

10 Ibid 207.

11 Ibid ch 5.

12 Ibid ch 6.

13 For the sake of convenience, the terms plaintiffs and defendants will be used throughout this article when referring to both Federal and Victorian litigants even though, of course, in the Federal Court they are known as applicants and respondents, respectively.

14 See *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 266–7 (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, 514 (Sackville J).

15 *Federal Court of Australia Act 1976* (Cth) Part IVA, s 33C(1) and *Supreme Court Act 1986* (Vic) Part 4A, s 33C(1).

out in section 33C(1), are that there are seven or more persons who have claims against the same person (the numerosity requirement), the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances (the connectivity requirement) and they give rise to a substantial common issue of law or fact (the commonality requirement).<sup>16</sup>

Section 33C(1) of both regimes does not expressly deal with the following question: can a proceeding against more than one defendant be brought, as a class action, where not all of the class representatives and class members have individual claims against each of the defendants? The Full Federal Court has considered this issue on two occasions, in 2000 and 2003. On the first occasion, the Court unanimously endorsed, in *Philip Morris (Australia) Ltd v Nixon*,<sup>17</sup> the concession made by counsel for the class representative that a multiple defendant proceeding may not be brought under Part IVA unless each class representative and each class member has an individual claim against each of the defendants. As a result of *Philip Morris*, a number of Federal and Victorian proceedings brought against multiple defendants were not allowed to proceed, as class action proceedings.<sup>18</sup>

A differently constituted Full Federal Court considered this issue again in 2003 in *Bray v F Hoffmann-La Roche Ltd*.<sup>19</sup> Justices Carr and Finkelstein rejected the view that compliance with section 33C requires, in litigation involving more than one defendant, each class member making a claim against each defendant. The remaining justice, Branson J, was of the view that *Philip Morris* should be followed unless and until it is overruled by the High Court. Different judicial conclusions have been reached as to whether *Philip Morris*, rather than *Bray*, represents the law<sup>20</sup> governing this issue of great practical significance.<sup>21</sup>

The VLRC felt that it was desirable to end this state of uncertainty, through an amendment to Part 4A's section 33C(1), which would make it clear that no principle similar to the *Philip Morris* principle should apply in Victoria.<sup>22</sup> A number of entities and commentators have opposed this recommendation principally on the basis that non-adherence to the *Philip Morris* principle would

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16 *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 115 (Finkelstein J).

17 (2003) 130 FCR 317 ('*Philip Morris*').

18 See, eg, *Bright v Femcare Ltd* (2000) 175 ALR 50; *Batten v CTMS Ltd* [2000] FCA 915 (Unreported, Kiefel J, 7 July 2000); *Hunter Valley Community Investments Pty Ltd v Bell* [2001] FCA 201 (Unreported, Sackville J, 20 February 2001) and [2001] FCA 1148 (Unreported, Sackville J, 16 August 2001); *Sereika v Cardinal Financial Services Ltd* [2001] FCA 1715 (Unreported, Tamberlin J, 7 December 2001); *Milfull v Terranora Lakes Country Club Limited* [2002] FCA 178 (Unreported, Kiefel J, 1 March 2002); *Cook v Pasmenco Ltd* [2000] VSC 534 (Unreported, Hedigan J, 15 December 2000).

19 (2003) 130 FCR 317 ('*Bray*').

20 See VLRC Report, above n 4, 529.

21 With respect to the frequency of Australian class actions against multiple defendants, see Vince Morabito, 'Group Litigation in Australia – "Desperately Seeking" Effective Class Action Regimes' (National Report for Australia prepared for The Globalisation of Class Actions Conference, Oxford University, 12–14 December 2007) 25; and *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 37 ACSR 326.

22 VLRC Report, above n 4, 524.

produce results that are inconsistent with the aims of Australia's class action regimes.<sup>23</sup> These objectives were summarised, as follows, in Part IVA's Second Reading Speech:

The Bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.

The second purpose of the Bill is 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 new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.<sup>24</sup>

Several pre-*Philip Morris* Part IVA proceedings were allowed to proceed to judgment without producing any inefficient or unjust scenarios, in circumstances where there had been no adherence to the requirements of the *Philip Morris* principle.<sup>25</sup> A similar scenario has been witnessed in British Columbia where a far more liberal approach to this issue has been adopted by judges.<sup>26</sup> Furthermore, as explained by the VLRC, this restrictive judicial principle results in the erection of significant barriers to the employment of class action devices by, among others, aggrieved investors and the victims of defective products.<sup>27</sup> It is therefore clear that attainment of the aims of Parts 4A and IVA requires the abandonment of restrictive principles such as the *Philip Morris* principle.<sup>28</sup>

As noted in Part I above, the VLRC recommended that the *Philip Morris* principle be replaced with the requirement that there must be at least one defendant against whom all class members have individual claims. The VLRC expressed the view that '[t]his "all with claims against one" model is consistent with the views of a number of judges that this is the correct interpretation of the

23 Ibid 530; and 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, 815–17.

24 Second Reading Speech, Federal Court of Australia Amendment Bill 1991 (Cth), House of Representatives, 14 November 1991, 3174 (Michael Duffy – Commonwealth Attorney-General). These aims of the Part IVA regime are commonly referred to as access to justice and judicial economy. Similar reasoning was embraced by the Victorian Attorney-General, Rob Hulls, when he introduced Part 4A in the Legislative Assembly of the Victorian Parliament: Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2000, 1252 (Rob Hulls – Attorney-General of Victoria).

25 See Vince Morabito, 'Class Actions Against Multiple Respondents' (2002) 30 *Federal Law Review* 295, 308–13; and *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, 345 (Carr J).

26 See Vince Morabito, 'Standing to Sue and Multiple Defendant Class Actions in Australia, Canada and the United States' (2003) 41 *Alberta Law Review* 295, 310–19.

27 VLRC Report, above n 4, 529.

28 See Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 163–4; *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 6 (Merkel J); and Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30 *Melbourne University Law Review* 399, 426–27.

present legislative requirement'.<sup>29</sup> Reference was then made by the VLRC to Justice Finkelstein's judgment in *Bray*. But the VLRC's recommendation, if implemented by the Victorian legislature, would entail the application to Part 4A of a principle that is far less liberal than that enunciated by the Full Federal Court in *Bray* with respect to Part IVA.

As recently noted by S Stuart Clark and Christina Harris, in *Bray Carr* and Finkelstein JJ expressed the view 'that there is no need for each group member to have a claim against each respondent provided *at least one* group member has a claim against *each* respondent'.<sup>30</sup> The lack of the VLRC's 'all with claims against one' requirement in *Bray* was confirmed by a recent judgment handed down by Finkelstein J himself.<sup>31</sup> Indeed, even the modified version of the *Philip Morris* principle enunciated by the dissenting justice in *Bray*, Branson J, does not encompass the condition required by the VLRC. In fact, her Honour indicated that, despite *Philip Morris*, 's33C(1) allows an applicant who has a claim against more than one respondent to [commence a Part IVA proceeding] on behalf of more than one group (eg on behalf of two subgroups of members where within each subgroup each member has a claim against the same respondent or respondents)'.<sup>32</sup>

### III THE LIMITED CLASS RECOMMENDATION

Parts 4A and IVA employ an opt out device. Pursuant to this device, claimants that fall within the description of the group represented by the class representative, the represented group, will be bound by the outcome of the litigation unless they take the positive step of excluding themselves from the litigation by filling in, signing and sending to the court an opt out form.<sup>33</sup> At the same time, section 33C(1) of both regimes provides that where there has been compliance with the three threshold requirements, a proceeding may be brought on behalf of 'all or some' of the claimants. Thus, whilst an opt out device has been selected, there is no requirement to the effect that a class action proceeding needs to be brought on behalf of each and every person whose claim satisfies the three commencement prerequisites. On the contrary, there is an express

29 VLRC Report, above n 4, 530.

30 Clark and Harris, above n 23, 791 (emphasis in original).

31 *McBride v Monzie Pty Ltd* (2007) 164 FCR 559. As the VLRC itself acknowledged, Finkelstein J held in *McBride* that 'there is no legal requirement that all group members must have a claim against all respondents and therefore the only issue which required resolution (on this aspect of that case) in relation to the requirements of section 33C(1) was whether the applicant had a claim against each of the respondents': VLRC Report, above n 4, 529.

32 *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, 359. In this example of a multiple defendant class action that may be brought under Part IVA, it cannot be said that all class members had claims against the same defendant as the members of one subgroup do not appear to have claims against the defendant who harmed the members of the other subgroup.

33 See generally Vince Morabito, 'Class Actions and the Right to Opt Out under Part IVA of the *Federal Court of Australia Act 1976* (Cth)' (1994) 19 *Melbourne University Law Review* 615; Rachael Mulheron, 'Framing an Opt-Out Class Action for England' (2007) 70 *Modern Law Review* 550.

legislative conferral, upon class representatives, of the discretion to exclude some of the potential claimants from the ambit of class action proceedings.

Does the regime described in the preceding paragraph permit the commencement of a class action proceeding on behalf of only those victims of the impugned conduct who have executed funding agreements with the commercial litigation funders, which fund the litigation, and/or fee and retainer agreements with the class representative's solicitors?<sup>34</sup> Justice Stone of the Federal Court and Hansen J of the Supreme Court of Victoria have provided a negative answer.<sup>35</sup> An affirmative answer was instead provided by Finkelstein J in the *Multiplex* Part IVA proceeding.<sup>36</sup> Justice Finkelstein's conclusion was affirmed by the Full Federal Court in December 2007.<sup>37</sup> The following comment by Jacobson J captures rather nicely the fact that the ruling of Finkelstein J was upheld by the Full Court in *Multiplex* despite concerns, by the three justices in question, as to the consistency of these limited class mechanisms with the objectives of Part IVA:

Professor Morabito pointed out ... that restricting the ambit of class proceedings to those persons who have taken the step of expressly instructing the class representative's solicitors to act on their behalf constitutes 'a far cry from the class action landscape ... envisaged by the ALRC and by the Federal Parliament when they selected the opt out mechanism'.

34 Commercial litigation funders have funded several class action proceedings in exchange for, in the event of a victory by the plaintiff class, reimbursement of their expenditures as well as the payment of between 20 per cent and 45 per cent of the compensation that the class members will be entitled to receive from the litigation. The restriction of the group represented by the class representative to those claimants who are willing to enter into funding agreements with litigation funders (as well as fee and retainer agreements with the class representative's solicitors) has been an integral part of their involvement in class proceedings: see generally Vicki Wayne and Vince Morabito, 'The Dawning of the Age of the Litigation Entrepreneur' (2009) 28 *Civil Justice Quarterly* 389; Peta Spender, 'After Fostif: Lingering Uncertainties and Controversies about Litigation Funding' (2008) 18 *Journal of Judicial Administration* 101; Robert Baxt, 'Litigation Funding at Another Cross-Roads' (2009) 27 *Company and Securities Law Journal* 255; Rachael Mulheron and Peter Cashman, 'Third-Party Funding of Litigation: A Changing Landscape' (2008) 27 *Civil Justice Quarterly* 312.

35 See *Dorajay Pty Ltd v Aristocrat Leisure Limited* (2005) 147 FCR 394; and *Rod Investments (Vic) Pty Ltd v Clark (No 2)* [2006] VSC 342 (Unreported, Hansen J, 20 September 2006).

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

37 *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* (2007) 164 FCR 275 ('*Multiplex*'). A difference between the mechanism approved in *Multiplex* and those rejected in the previous cases mentioned above was that in *Multiplex* one was required to be a client of the litigation funders at the time the class proceeding was commenced. This difference enabled the Full Federal Court in *Multiplex* to distinguish the contrary judicial findings on the basis that, in those cases, the ability of claimants to become class members *at any time after the start of the proceeding* constituted in effect an opt in device.

The same observations may be made about the ambit of representative proceedings brought on behalf of a group defined by the criterion of the positive step of signing a litigation funding agreement with a named funder. It is difficult to see how this can be reconciled with the goals of enhancing access to justice and judicial efficiency in the form of a common binding decision for the benefit of all aggrieved persons.<sup>38</sup>

The VLRC concluded that it was desirable for the Victorian legislature to end the uncertainty surrounding this important issue and created by the conflicting judicial pronouncements outlined above.<sup>39</sup> As noted in Part I above, the VLRC's preferred strategy was for this legislative intervention to be in the form of an express authorisation of limited class mechanisms. At the same time, the VLRC did not conceal its concern that the employment of such mechanisms 'has a number of undesirable policy consequences given that the class action procedure was designed as a means of obtaining a remedy for "all" of those adversely affected by the conduct giving rise to the litigation'.<sup>40</sup> The VLRC sought to indirectly reduce the use of this strategy through the creation of the Justice Fund considered in Part V below.<sup>41</sup> In light of the sad reality that Australian legislatures have consistently refused to implement recommendations formulated by law reform commissions for the establishment of public funds to provide

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38 *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* (2007) 164 FCR 275, 292 (Jacobson J). In August 2009 the Honourable Murray Wilcox QC made the following comments with respect to these devices: 'Although I deplore that we have arrived at an opt-in system governed by subscription to solicitors' costs agreements, I find it difficult to criticise the solicitors for developing that system. They have had little choice. There is a clear need for an alternative': the Hon Murray Wilcox QC, 'Investor Class Actions' (address given on the occasion of the launch of the book, the Hon Justice K E Lindgren(ed), *Investor Class Actions*, Ross Parsons Centre of Commercial, Corporate and Taxation Law (2009), at the Federal Court in Sydney on 3 August 2009) <[http://www.fedcourt.gov.au/aboutct/oth\\_paper\\_investor\\_class\\_action.html](http://www.fedcourt.gov.au/aboutct/oth_paper_investor_class_action.html)> at 22 October 2009.

39 VLRC Report, above n 4, 524 and 526.

40 *Ibid* 616. The Hon Murray Wilcox QC has recently lamented that 'in virtually all significant commercial cases (at least), we now have an 'opt-in' class action system; the statutory scheme has been subverted': Wilcox, above n 38.

41 Essentially this would be achieved by encouraging the Justice Fund to 'proactively seek to enter into joint venture agreements with commercial litigation funders. ... [T]he fund would be able to obtain a return from the class as a whole, subject to judicial approval, and this advantage would flow on to a commercial litigation funder involved in a joint venture arrangement with the fund': VLRC Report, above n 4, 620. As a result, the commercial reason for the adoption by commercial litigation funders of limited class mechanisms would disappear.



financial assistance to class representatives,<sup>42</sup> it is disappointing that the VLRC did not also evaluate other, more direct, measures for addressing this undesirable scenario.

As adverted to by the VLRC itself, one such measure could be the adoption of a legal mechanism 'to allow a litigation funder to claim a share of the total amount recovered by litigation on behalf of an opt out class, without necessarily requiring each of the group members to enter into separate contractual arrangements with the funder on commencement of the proceeding'.<sup>43</sup> For this purpose, some commentators have called for the legislative adoption of the 'common fund' doctrine enunciated by the US Supreme Court.<sup>44</sup> Others have suggested that a similar result could be secured through the adoption of one of the recommendations made by the ALRC in 1988, concerning judicially supervised and approved fee agreements that enable the contribution, by such class members, to the class representative's legal costs.<sup>45</sup> Calls<sup>46</sup> have also been made for a modified version of Rule 23(g)(2)(C) of the *United States Federal Rules of Civil Procedure*.<sup>47</sup> More recently, the Hon Murray Wilcox QC has

42 These recommendations, made by the ALRC in 1988 and the Law Reform Committee of South Australia in 1977, are summarised in Vince Morabito, 'Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs' (1995) 21 *Monash University Law Review* 231, 267–70. A similar recommendation may be found in a report that was commissioned in 1995 by the Victorian Attorney-General's Law Reform Advisory Council: see Vince Morabito and Judd Epstein, *Class Actions in Victoria – Time for a New Approach*, Report commissioned by the Victorian Attorney-General's Law Reform Advisory Council (1997) 68–70. It is fascinating to note that the former justice of the Federal Court, the Hon Murray Wilcox QC, who was one of the authors of the ALRC's 1988 report on group litigation, which, as noted above, included the recommendation that the Federal Government establish a class action fund, made the following observations in August 2009: 'I doubt that any government will ever be willing to establish a class action fund. In order to cover the possibility of an early expensive loss, it would be necessary for the government to provide capital amounting to tens of millions of dollars. It is unrealistic to believe any government will do that; there are many more pressing needs: Wilcox, above n 38.

43 VLRC Report, above n 4, 616.

44 See Michael Legg, 'Institutional Investors and Shareholder Class Actions: The Law and Economics of Participation' (2007) 81 *Australian Law Journal* 478, 487–8; Clark and Harris, above n 23, 812. In *Boeing Co v Van Gemert*, 444 US 472, 478 (1980), the US Supreme Court revealed that it has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. ... The [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

45 Clark and Harris, above n 23, 812.

46 As explained by the US Civil Rules Advisory Committee, 'attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. [Rule 23(g)(2)(C)] therefore authorises the court to provide directions about attorney fees and costs when appointing class counsel': Advisory Committee on the Federal Rules of Civil Procedure, *Report of the Civil Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure* (May 2002) The US Courts, 111–12 <<http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf>> at 15 August 2009.

47 See Vince Morabito, 'Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29 *Sydney Law Review* 5, 40–1. See also Peter Cashman, 'Class Actions on Behalf of Clients: Is This Permissible?' (2006) 80 *Australian Law Journal* 738, 752.

recommended that Part IVA should provide that the litigation funder is entitled to receive, in addition to any party/party costs ordered to be paid to the applicant by another party, ‘a percentage of the total recovery calculated in accordance with a sliding scale: for example X% of the first \$10 million, Y% of the next \$40 million, Z% of the next \$50 million and so on’.<sup>48</sup>

#### IV THE CY-PRÈS RECOMMENDATION

As recently explained by Rachael Mulheron:

In the group litigation/class actions context, a *cy-près* distribution means that the class is entitled (via either judgment or settlement) to a sum of damages, but distribution of these damages to the class members individually or collectively is impracticable or infeasible. In that case:

the court [can] use *cy-près* principles to distribute unclaimed funds. In such a case, the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.<sup>49</sup>

Parts IVA and 4A do not, unlike Canadian class action regimes,<sup>50</sup> expressly authorise *cy-près* remedies. They instead contain provisions such as sections 33M and 33N(1)(a). Section 33M empowers the court to order the termination of a Part IVA/4A proceeding where the cost to the defendant of identifying the class members and distributing to them the damages won by the representative

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48 Wilcox, above n 38. Pursuant to this proposed regime, these payments would be provided to commercial litigation funders only if they have satisfied the Court of their probity and financial integrity and that there is no financial connection between them and the solicitors they engage to conduct the case. They would also be required to indemnify the representative party against any adverse costs order and to provide any security for the costs of the respondent that might be ordered by the Court.

49 Mulheron, above n 3, 309 citing *Airline Ticket Comm Antitrust Litig Travel Network Ltd v United Air Lines Inc*, 307 F 3d 679, 682 (8<sup>th</sup> Circ 2002). She goes on to explain that the *types* of class actions disputes that have given rise to the prospect or fact of *cy-près* distributions in Canada over the past few years alone have been incredibly wide-ranging, covering claims for: price-fixing; penalty rates of interest on loans or late payments; defective computers; misrepresentations about share price in a company prospectus; and intercepting or diverting prizes intended for consumers at McDonald’s restaurants: *ibid* 310–11 (footnotes omitted).

50 Mulheron explains that [i]t has been judicially acknowledged in Canadian courts that *cy-près* provisions in class action regimes serve the important policy objectives of general and specific deterrence of wrongful conduct, and that “the private class action litigation bar functions as a regulator in the public interest for public policy objectives”. Rachael Mulheron, *The Modern Cy-près Doctrine: Applications and Implications* (2006), 234.

plaintiff would be excessive, having regard to the likely total of those amounts.<sup>51</sup> Section 33N(1)(a) allows the court, on application by the defendant or of its own motion, to order that the proceeding no longer continue as a Part IVA/4A proceeding where it is satisfied that it is in the interests of justice to do so because the costs that would be incurred if the proceeding were to continue as a class action proceeding are likely to exceed the costs that would be incurred if each class member conducted a separate proceeding.<sup>52</sup> This scenario is attributable to the acceptance by the Commonwealth and Victorian legislatures of the following philosophy, embraced by the ALRC in its 1988 report on grouped proceedings:

The grouping procedure is not intended to penalise respondents or to deter behaviour to any greater extent than that provided for under the existing law. Any money ordered to be paid by the respondent should be matched, so far as possible, to an individual who has a right to receive it. If this cannot be done, there is no basis for confiscating the residue to benefit group members indirectly, or for letting it fall into Consolidated Revenue, simply because the procedure used was the grouping procedure. It would be a significant extension of present principles of compensation to require the respondent to meet an assessed liability in full even if there is no person to receive the compensation. Any such change would be in the nature of a penalty, and would go beyond procedural reform.<sup>53</sup>

A number of comments may be made with respect to the ALRC's reasoning, set out above. Law reform bodies around the world have, contrary to the ALRC, embraced the employment of *cy-près* remedies.<sup>54</sup> Mulheron has cogently reasoned that:

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- 51 Section 33M implements a recommendation of the ALRC. The ALRC justified the power to terminate group litigation – where the cost of identifying class members and distributing amounts awarded would be excessive having regard to the likely total of those amounts – on the basis that ‘a primary goal of the proposed procedure is that of achieving legal redress where this can be done efficiently, rather than imposing punishment on a respondent’: ALRC 1988 Report, above n 2, [151]. See also Julian Donnan, ‘Class Actions in Securities Fraud in Australia’ (2000) 18 *Company and Securities Law Journal* 82, 86. This provision bears some similarity to cl 4(b) of the *Draft Bill for a Class Actions Act* prepared by the Law Reform Committee of South Australia in 1977. This proposed regime would have required the Court to consider, in determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy, ‘the difficulties likely to be encountered in administering relief to members of the class by reason of the size of their individual claims and the number of class members’: Law Reform Committee of South Australia, *Report Relating to Class Actions*, Report No 36 (1977) 12.
- 52 See *Bright v Femcare Ltd* (2002) 195 ALR 574, 606 (Finkelstein J); *Australian Competition and Consumer Commission v Golden Sphere International* (1998) 83 FCR 424, 447 (O’Loughlin J); and *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* (1998) 156 ALR 273, 293 (Lindgren J).
- 53 ALRC 1988 Report, above n 2, [239]. It is fascinating to note that the Hon Murray Wilcox QC, who, as noted above, was one of the authors of this report, recently described as follows the ‘two classic aspirations of the class action: *to deter misconduct, generally by corporations*, and to provide redress for all those who suffer damage as a result of misconduct’: Wilcox, above n 38 (emphasis added).
- 54 See Mulheron, above n 50, 231. In November 2008, the Civil Justice Council of England and Wales recommended that ‘unallocated damages from an aggregate award should be distributed by a trustee of the award according to general trust law principles. In appropriate cases, such a *cy-pres* distribution could be made to a Foundation or Trust’: Civil Justice Council, *Improving Access to Justice Through Collective Actions: A Series of Recommendations to the Lord Chancellor* (November 2008), recommendation n 10.

the arguments advanced by the ALRC lack cogency in the modern litigious environment. It is *not* the sole purpose of litigation to merely compensate; there is a legitimate deterrent element to civil litigation, especially where the claimants are numerous, when the defendant's culpable behaviour has harmed all of them, and when the competition regulators in England and Europe, for example, have so explicitly stated that fines imposed upon price-fixing defendants cannot hope to (nor are they intended to) disgorge the overall detriment that society has suffered by reason of such unlawful behaviour.<sup>55</sup>

Furthermore, deterrence of illegal conduct has been recognised internationally as among the aims of class action devices.<sup>56</sup> Indeed, 'many argue that deterrence of corporate misconduct is now the single most important objective of the class action'.<sup>57</sup> This is not surprising when one considers the broader (but frequently ignored) philosophy that underpins the access to justice goal of class actions. This access to justice goal is not solely grounded on a compensatory philosophy.<sup>58</sup> It also stems from the recognition of the unfair and unjust scenarios that arise when the substantive rights and obligations that are *actually conferred and imposed* on the members of our community are vastly inferior to the rights and obligations that are contained in *statutes and judicial pronouncements*.<sup>59</sup> The fact that the access to justice and behaviour modification goals of class action devices go 'hand in hand' (as they both enhance law enforcement) has been recognised by one of the leading class action experts on the Federal Court, Finkelstein J:

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55 Mulheron, above n 3, 314–15.

56 See *Hollick v City of Toronto* (2001) 205 DLR (4th) 19, 28–9 (McLachlin CJ); *Western Canadian Shopping Centres Inc v Bennett Jones Verchere* (2001) 201 DLR (4th) 385, 397 (McLachlin CJ); David A Crerar, 'The Restitutionary Class Action: Canadian Class Proceedings Legislation as a Vehicle for the Restitution of Unlawfully Demanded Payments, Ultra Vires Taxes, and Other Unjust Enrichments' (1998) 56 *University of Toronto Faculty of Law Review* 47, 79; Justin S Emerson, 'Class Actions' (1989) 19 *Victoria University of Wellington Law Review* 183, 187–9; Manitoba Law Reform Commission, *Class Proceedings*, Report No 100 (1999) 23–30; Ontario Law Reform Commission, *Report on Class Actions*, Report No 48 (1982) 117–46 ('OLRC Report'); *Hawaii v Standard Oil Co*, 405 US 251, 266 (1972); *Gottlieb v Wiles*, 11 F3d 1004, 1009 (10<sup>th</sup> Cir 1993); and Scottish Law Commission, *Multi-Party Actions*, Report No 154 (1996), [2.10].

57 Peta Spender, 'The Class Action as Sheriff: Private Law Enforcement and Remedial Roulette' (Research Paper No.08-24, Australian National University College of Law, 2008) 1 <<http://ssrn.com/AuthorID=734493>>.

58 See *ibid* where it is explained that '[t]he compensation principle requires that the plaintiff should as nearly as possible get the sum of money that will place him in the same position as if he had not suffered a wrong'.

59 The following comments, made by Kirby J of the High Court of Australia with respect to the representative action procedure, are equally applicable to the class action device: '[it is] a procedure designed to enable parties with legal claims in the same interest to be organised into one action rather than fobbed off with the theoretical (but practically unavailable) entitlement to bring a multitude of individual actions separately': *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 450.

If each group member is left to assert her rights alone there may be only one or two claimants with the financial capacity to prosecute their claim. Most will be forced to give up. That result is unfair for two reasons. It is unfair for those group members who will not be able to pursue any claim at all. It is also unfair because it would undermine the deterrent effect of the existence of sanctions for contraventions of the law ...<sup>60</sup>

To deny the employment of the class action device – where illegal conduct has been established and the loss that it has provoked may be quantified – solely because it may be impossible, not feasible or too costly to provide compensation<sup>61</sup> to some or all of the victims of the impugned conduct may be said to be both unfair and unjustified. It also entails the inappropriate imposition of individualistic notions, as to the aims of the civil justice system, on group litigation devices.<sup>62</sup>

This unsatisfactory state of affairs may be illustrated with the aid of a simple example. Assume that illegal conduct causes an overall loss of approximately \$5 million to 1000 persons and the individual losses suffered by these claimants are in the order of \$5000. Let us also assume that it is feasible to distribute the proceeds from the litigation to most of its intended beneficiaries. Let us make three minor alterations to this scenario. The victims are now 10 000. Their individual losses are not greater than \$500 and the distribution of the compensation to most or all of the claimants would not be possible or feasible. In both instances illegal conduct has taken place which has caused significant overall losses. But, as Parts 4A and IVA currently stand, only in the former scenario is the employment of the class action device likely or possible. The result is that ‘defendants [have been] permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts’.<sup>63</sup> The unavailability of *cy-près* remedies has also contributed to ‘Australian cartel class actions to date [being

60 *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 124. See also *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, 374 where Finkelstein J described the aims of Part IVA as ‘the reduction of legal costs, the enhancement of access by individuals to legal remedies, the promotion of the efficient use of court resources, ensuring consistency in the determination of common issues, and *making the law more enforceable and effective*’ (emphasis added).

61 Mulheron has pointed out that there may be several reasons as to why distributing damages is impracticable – the precise identity or location of the class members whom the successful representative claimant has represented may not be known, or the costs of distributing the damages may exceed the value of the cheque payable to each class member, or claimants may choose not to come forward, for example’: Mulheron, above n 3, 309.

62 As recently noted by Spender, ‘the subject of remedial law is generally the individual and this conception needs to be adapted to group interests and mass transactions’: Spender, above n 57, 18.

63 *State v Levi Strauss & Co*, 41 Cal 3d 460, 472 (1986). As a consequence, Parts IVA and 4A have failed to ‘serve efficiency and justice by [not] ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public’: *Hollick v City of Toronto* (2001) 205 DLR (4th) 19, 28–9 (McLachlin CJ).

limited] to persons and businesses affected by the cartel at levels above the ultimate “end user”<sup>64</sup>

Any defence of the scenario depicted in the preceding paragraph – based on the fact that the ALRC made it clear that the group litigation regime that it was recommending, and which formed the basis for Parts IVA and 4A, was not intended to be utilised with respect to trivial losses (such as \$500) – would be misconceived.<sup>65</sup> This is because emphasis should instead be placed on the overall loss, which, in the example given above, is anything but trivial and would justify the commencement of a class action proceeding, if a *cy-près* remedy were available. As recently noted by Peta Spender:

[t]herefore, there should be recognition that distribution of loss to large classes will often render the litigation futile due to cost, but that distribution in kind through a *cy-pres* fund recognises the superior value of the class action as one of the few enforcement devices that genuinely disciplines multinational corporations, particularly in a globalised context.<sup>66</sup>

Another objection to the availability of *cy-près* remedies, in the class actions arena, places focus on the fact that, as noted above, the Commonwealth and Victorian legislatures adhered to the reasoning of the ALRC by not including in the relevant Second Reading Speeches behaviour modification/deterrence of illegal conduct among the objectives of Parts IVA and 4A.<sup>67</sup> The fact that pursuit of this goal complements, and indeed reinforces, the access to justice goal has already been highlighted.

The rejection of the VLRC’s *cy-près* recommendation, on the basis that it is inconsistent with the original aims of Parts 4A and IVA, also provides a vivid example of the problems that may be encountered if the application of, and/or changes to, a legislative regime are determined solely within the framework of the original aims of the regime in question. The general dangers that such an approach entails in the class action arena were brilliantly exposed by Michael Tilbury back in 1993:

[i]t is important that the wide meaning of ‘class action’ should not be narrowed by reference to the functions of such an action. Such narrowing carries with it the twin dangers that the future evolution of the law will be inhibited by confining developed principles to established functional categories, and that existing legal procedures which may justify class actions in their widest sense will not be applied in circumstances which they have not traditionally reached.<sup>68</sup>

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64 Kim Parker, ‘Class Actions: The New Era of Cartel Class Actions in Australia’ (Paper presented at the International Class Actions Conference, Maurice Blackburn, Sydney, 25–26 October 2007) 6 <[http://www.mauriceblackburn.com.au/news/newsletters/pdfs/KParker\\_paper.pdf](http://www.mauriceblackburn.com.au/news/newsletters/pdfs/KParker_paper.pdf)> at 15 August 2009. See also Mulheron, above n 3, 307 where it is noted that ‘in the context of private actions arising out of cartel activity ... widespread consumer detriment can, in some cases, *only* be effectively dealt with by means of a functional and proportionate *cy-près* damages doctrine’. See also Mulheron, above n 3, 319–20 with respect to *cy-près*-related recommendations contained in recent documents released by the European Commission.

65 Clark and Harris, above n 23, 802.

66 Spender, above n 57, 20.

67 See Clark and Harris, above n 23, 801–2.

68 Michael Tilbury, ‘The Possibilities for Class Actions in Australian Law’ (Paper presented at the Australian Legal Convention, Hobart, 1993) 3.

Before concluding this discussion of the VLRC's *cy-près* recommendation, it is fascinating to note that the failure of Part IVA to expressly endorse such remedies has not precluded the Federal Court from authorising, in two Part IVA proceedings, the payment of the undistributed remainder of settlement funds, not to the respondents, but instead to entities such as the Australian Shareholders' Association, the Australian Institute of Management (for the purposes of training corporate officers and directors)<sup>69</sup> and the class representative's solicitors.<sup>70</sup>

## V THE JUSTICE FUND RECOMMENDATION

In its 1988 study of grouped proceedings, the ALRC recognised that the general rules governing litigation costs, if applied unaltered to class actions, could constitute 'a disincentive to bringing grouped proceedings, and might in fact create yet another barrier to access to legal remedies of the kind which the recommended procedure itself aims to overcome'.<sup>71</sup> The most fundamental rule concerning costs is the 'costs indemnity rule' pursuant to which costs are generally awarded against the losing party. The costs awarded to the successful party would normally be in the range of two-thirds of the total costs actually incurred by him/her.<sup>72</sup> Consequently, litigants face the prospect, should they lose the case, of being liable for, not only their own legal costs, but also a significant portion of the costs incurred by their adversaries.

The existing costs rules have a far greater detrimental effect upon the pursuit of class action proceedings. Class action proceedings tend to last longer and be more complex than individual suits.<sup>73</sup> Furthermore, a number of procedural

69 This payment regime was set out in the settlement agreement executed by the applicant and the respondents, and approved by Justice Moore, in Australia's first successful shareholder class action, brought against GIO: VLRC Report, above n 4, 545.

70 In *Guglielmin v Trescowthick*, Federal Court of Australia, SAD 153/2002, Mansfield J approved the request, made *ex parte* by the class representative's solicitors, for the application of the undistributed remainder of the settlement fund (\$34 651.28) towards the costs incurred by such solicitors in the litigation. This arrangement was subject to the undertaking provided by the solicitors in question to pay, from the firm's account, those class members that the solicitors had not been able to contact and who subsequently make a legitimate claim for some of the settlement monies: Order made by Mansfield J on 6 March 2008.

71 ALRC 1988 Report, above n 2, [252]. See also OLRC Report, above n 56, 647; Law Reform Committee of South Australia, *Report Relating to Class Actions*, Report No 36 (1977), 6; Lord Woolf, *Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996), 239.

72 See Commonwealth, Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, Canberra (1994) [5.60]; Bruce M DeBelle, 'Class Actions for Australia? Do They Already Exist?' (1980) 54 *Australian Law Journal* 508, 509; Australian Law Reform Commission, *Who Should Pay? A Review of the Litigation Costs Rules*, Issues Paper No 13, (October 1994) [4.31].

73 See *Tienstra v Insurance Corporation of British Columbia* (1996) 22 BCLR (3d) 49, 61 (Esson CJ); Jason Betts, 'Are We Becoming More American? Class Action Litigation: Australia v the United States' (20 August 2004 – Issue 205) *Lawyers Weekly* 14, 17; ALRC 1988 Report, above n 2, [252]; DeBelle, above n 72, 512; Ben Slade, 'Class Actions: Watch Out for the Details' (2002) 16(3) *Commercial Law Quarterly* 3, 5; Emerson, above n 56, 206.

requirements or safeguards are prescribed under Parts IVA and 4A, which are not found in non-representative suits, as they are designed to protect the interests of class members. An example is provided by the requirement that notice be provided to class members of: (a) the commencement of the proceeding; (b) the right of the class members to opt out of the proceeding; (c) an application by the defendant to dismiss the proceeding for want of prosecution; and (d) an application by the class representative seeking leave to withdraw as class representative.<sup>74</sup>

These additional requirements substantially increase the costs incurred by the representative plaintiff<sup>75</sup> and render a class action suit a considerably more expensive form of litigation than individual proceedings.<sup>76</sup> Consequently, as noted by Wilcox J of the Federal Court of Australia, ‘there is little or no incentive for a person to act as a representative party. Unless the person’s potential costs are covered by someone else, there is a positive disincentive to taking that course’.<sup>77</sup>

In light of this scenario, the failure of the Federal and Victorian legislatures to implement the measures proposed by the ALRC in 1988 to address these costs barriers was a serious mistake.<sup>78</sup> As indicated above, the ALRC recommended that, subject to close judicial scrutiny, class representatives be allowed to enter into uplift fee arrangements with the lawyers representing the class.<sup>79</sup> It also recommended that a public fund be established to provide financial assistance to the class representatives.<sup>80</sup> Have circumstances changed since 1988 so as to render a public fund, that may be relied upon by a representative plaintiff, no longer appropriate or desirable?

Some have provided an affirmative answer to the question posed above.<sup>81</sup> In so doing, reliance has been placed on the fact that several State statutes permit

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74 Part IVA, s 33X(1) and Part 4A, s 33X(1). The court may, however, dispense with notice where the relief sought in the proceeding does not include a claim for damages: s 33X(2).

75 See Morabito, above n 21, 38–9.

76 See Adolf Homburger, ‘State Class Actions and the Federal Rule’ (1971) 71 *Columbia Law Review* 609, 649; H Patrick Glenn, ‘Class Actions in Ontario and Quebec’ (1984) 62 *Canadian Bar Review* 247, 264–8; Peta Spender, ‘Securities Class Actions: A View from the Land of the Great White Shareholder’ (2002) 31 *Common Law World Review* 123, 144; Garry D Watson, ‘Class Actions: The Canadian Experience’ (2001) 11 *Duke Journal of Comparative and International Law* 269, 275; Deborah R Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (1999), 22; *In re Corrugated Container Antitrust Litigation*, 643 F2d 195, 217 (5<sup>th</sup> Cir 1981); *Cotton v Hinton*, 559 F2d 1326, 1331 (5<sup>th</sup> Cir 1977).

77 *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139, 145 (Wilcox J). More recently, he revealed that when he learnt that the Federal Government had not implemented the ALRC’s 1988 recommendation, that a class action fund be established, he ‘thought there would be no group proceedings’: Wilcox, above n 38. See also Watson, above n 76, 275; Michael P Abdelkerim, ‘Class Counsel’s Ethical Obligations’ (2004) 18 *Windsor Review of Legal and Social Issues* 105, 110.

78 See Shane Williams, ‘A Class Act? – Representative Proceedings in the Federal Court’ (1992) 66 *Law Institute Journal* 376, 377; and Rabih Alkadamani, ‘The Beginnings of ‘Class Actions’?’ (1992) 8 *Australian Bar Review* 271, 276.

79 ALRC 1988 Report, above n 2, [293].

80 *Ibid* [308].

81 Clark and Harris, above n 23, 814.



plaintiff solicitors to enter into 'no win – no fee' agreements, which enable them to charge an uplift fee in the event of a favourable result secured on behalf of the client. Rejection of the VLRC's Justice Fund proposal has also placed emphasis on the emergence of commercial litigation funders which have funded, since 2005, some of the more significant shareholder class actions that have been instituted in this country. In light of this scenario, the proposed Justice Fund would be employed, according to these critics, to support meritless class action litigation.<sup>82</sup> In light of the fact that only two plaintiff law firms – Slater & Gordon and Maurice Blackburn – and one litigation funder – IMF (Australia) Ltd – have been extensively involved in class action proceedings, it is difficult to accept that there would be few or no meritorious (proposed) class action proceedings towards which public funds could be applied.<sup>83</sup>

## VI CONCLUSION

The net result of [the VLRC's Part 4A] proposals would ... be that one class of scarcely undernourished workers – plaintiff lawyers – will grow rich and fat at the expense of the unemployed. If your child leaves school hoping to get a job at a bright new enterprise started by a new entrepreneur, he or she can forget it – unless he or she is prepared to move interstate. Because no employer who has any choice about where to locate new jobs will contemplate Victoria. Except, of course, law firms.<sup>84</sup>

The comments above provide a good illustration of the response, by some sectors of Australia's print media, to the VLRC's recommendations with respect to class action reform. But the analysis developed in this article has demonstrated that the VLRC's four Part 4A recommendations constitute a rather timid class action reform strategy. As the VLRC itself indicated, the *Philip Morris* and limited class recommendations are essentially changes of a technical nature. It will also be recalled that the former recommendation entails a more restrictive approach to standing issues in multiple defendant class actions than that embraced by the Full Federal Court in *Bray*.

The Justice Fund recommendation may not be described as a radical recommendation given that the creation of a public fund for class action litigation has been an important component of the strategies recommended by Australian law reform agencies, when they have been asked to review class action reform. Furthermore, the VLRC's proposed Justice Fund was intended to operate with respect to all legal proceedings and not just class action litigation. Similarly, the

82 Ibid.

83 The author has been advised that a likely success rate of 80 per cent is required, by one of these two plaintiff law firms, before a class action proceeding may be instituted. See also Vicki Waye, *Trading in Legal Claims – Law, Policy and Future Directions in Australia, UK and US* (2008), 282–3 for an empirical account of the criteria that are applied by Australian commercial litigation funders in determining whether to fund legal proceedings; John Walker, Susanna Khouri and Wayne Attrill, 'Funding Criteria for Class Actions' (2009) 15(2) *University of New South Wales Law Journal Forum* 96 with respect to the approach adopted by IMF (Australia) Ltd.

84 Janet Albrechtsen, 'Get set for class action chaos', *The Australian* (Sydney) 15 July 2007.

cy-près recommendation can hardly be described as revolutionary as it represents a long overdue attempt to ensure that Australian class members have similar remedies to those available in other leading class action jurisdictions.<sup>85</sup> As a result, the following conclusion reached by Mulheron with respect to Part IVA, following her comprehensive study of cy-près remedies and their operation in the class action arena, is equally applicable to the Victorian regime:

given the moderation with which the doctrine has been treated in Canada ..., and the several advantages afforded by such schemes that have been evident in American jurisprudence, it is the author's contention that the Australian legislature would do well to consider amending the class action regime in Pt IVA to expressly permit, but not mandate, cy-pres distributions for that jurisdiction.<sup>86</sup>

Disappointingly, the VLRC did not consider whether the recommendations made by the ALRC, in 2000 with respect to Part IVA, were relevant and applicable to Part 4A today. These recommendations covered issues such as class action settlements, communications between class members and the legal representatives of defendants, criteria for selecting the appropriate class action and representative party amongst competing class actions, the obligations owed by plaintiff lawyers to the class representative and class members, judicial approval of fee agreements executed by the class representative and/or class members with the class representative's lawyers and the choice of the class representative, who should not be chosen primarily as a 'person of straw'.<sup>87</sup>

The VLRC also failed to make recommendations with respect to other unsatisfactory dimensions of the operation of Australia's class action regimes including the problems created by the wide judicial power to terminate, as Part IVA/4A proceedings, proceedings that complied with the three threshold requirements discussed above,<sup>88</sup> the application to such proceedings of the principles and rules governing security for costs<sup>89</sup> and the inability of 'ideological' plaintiffs to institute a class action proceeding on behalf of classes of claimants.<sup>90</sup> But in light of the response of the media and the Victorian Government to the recommendations that the VLRC did put forward, it would be unfair to be too critical of the VLRC's decision to adopt a rather cautious approach, with respect to class action reform, in (what is after all only) phase 1 of its review of Victoria's civil justice system.

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85 As Mulheron pointed out, 'of the leading class actions jurisdictions, Australia is the odd one out [as its class action regimes do] not statutorily reference a cy-pres distribution of all or any part of the judgment that a class may obtain against a defendant': Mulheron, above n 50, 230.

86 Ibid 232.

87 ALRC 2000 Report, above n 1, 492–3.

88 See Morabito and Epstein, above n 42, [6.19]; Cashman and Abbs, above n 8, 65; Vince Morabito, 'The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions' (2004) 42 *Osgoode Hall Law Journal* 473; Murphy and Cameron, above n 28, 416–19.

89 See Vince Morabito, 'Class Actions in the Federal Court of Australia – The Story So Far' (2004) 10 *Canterbury Law Review* 229, 249–57; Murphy and Cameron, above n 28, 420–2.

90 See Vince Morabito, 'Ideological Plaintiffs and Class Actions – An Australian Perspective' (2001) 34 *University of British Columbia Law Review* 459.