

CURRENT ISSUES RELATING TO MEDIATION IN SHAREHOLDER REPRESENTATIVE PROCEEDINGS IN AUSTRALIA

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I INTRODUCTION

Quelling justiciable controversies takes a variety of forms. Consideration of alternatives to a contested hearing are not only part of a lawyer's ethical obligations¹ but are a regular incident of most civil litigation. It is of especial importance in representative proceedings. In large scale litigation it has become unlikely a matter will proceed to trial without recourse to some form of alternative dispute resolution process: in a representative proceeding, when an initial trial of common issues will not resolve all individual issues, some form of dispute resolution at some stage of the curial process is almost inevitable.

Representative proceedings brought by shareholders against a company or its directors have become an increasing part of the Australian legal landscape since August 1999, when a class action against GIO Australia Holdings Ltd was initiated in the Federal Court under Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('*FCA Act*'). The shift in the nature of class actions in Australia over the past decade from product liability and other mass tort claims² to broader types of claims including investor class actions has occurred in an environment, particularly in recent times, of high profile public company collapses and controversy in the financial services sector. There are several shareholder

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1 See, eg, New South Wales Barristers' Rules, r17A; Law Society of New South Wales Professional Conduct and Practice Rules, r A.17A (Solicitors' Rules).

2 See Peter Cashman, *Class Action Law and Practice* (2007) 466–7.

representative proceedings currently before Australian courts,³ each involving significant legal costs and demands on court time. The trend is likely to continue.

Despite the shifting focus of representative proceedings, very few shareholder representative proceedings commenced in Australia have reached a trial of common issues. Most have been settled, or in some cases discontinued, before an initial trial has commenced. In the representative proceeding brought by shareholders against Aristocrat Leisure Limited, the case settled following a contested trial before Stone J, but before judgment was delivered.⁴ Settlement of representative proceedings often does not follow from a formal mediation process; however, mediation may play a role in providing a confidential forum by which additional information relevant to settlement may be exchanged. Additionally, of course, it may encourage parties to narrow issues and commence informal negotiations toward settlement. Following mediation or otherwise, once parties have reached a 'conditional' settlement, legislative provisions governing representative proceedings, for example Part IVA of the *FCA Act*, place specific constraints on the settlement process that are not present in most other forms of civil litigation. In particular, court approval of any settlement is required.

This paper will examine common issues that recur in large-scale shareholder representative proceedings and comment on what the authors believe to be the appropriate approaches to addressing these issues. The issues analysed include:

1. the use of mediation as a dispute resolution mechanism for representative proceedings;
2. access by applicants to the insurance documents of respondents and by respondents to trading data of applicants;
3. negotiations relating to 'closing off' potential future claims against a respondent after settlement; and
4. settlement of representative proceedings, in particular the constraints imposed upon settlement by Part IVA of the *FCA Act* relating to court approval of proposed settlements.

This paper will consider these issues in the context of shareholder representative proceedings brought pursuant to Part IVA. While considerations in other jurisdictions will be similar to those discussed in relation to the Federal Court, the different legislative frameworks may impact on approaches to mediation and settlement in those jurisdictions.

3 These include actions against AWB Limited; Centro Properties Group and others; Challenger Managed Investments Limited; those associated with Media World Communications Limited; Multiplex; Opes Prime and others; the financial advisors in Westpoint; a director of the collapsed Evans & Tate Limited (proceeding discontinued on 25 September 2009); entities involved in LifeTrack Superannuation Fund (AM Group); and others.

4 Settlement was approved on 21 January 2009: see *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19 (Unreported, Stone J, 21 January 2009) ('*Dorajay*').

II MEDIATION OF SHAREHOLDER REPRESENTATIVE PROCEEDINGS

The Federal Court is empowered to refer proceedings to a mediator pursuant to section 53A of the *FCA Act* and the *Federal Court Rules*.⁵ This may occur with or without the consent of parties. The importance of mediation to the exercise of the Court's jurisdiction has grown in recent times and continues to develop. In 1987, the Court established an Assisted Dispute Resolution program based on the mediation of disputes by registrars.⁶ Later, the *Courts (Mediation and Arbitration) Act 1991* (Cth) amended the *FCA Act* and provided that the Court could, with the consent of the parties, refer proceedings to mediation. Order 72 of the *Federal Court Rules*, which came into effect on 1 January 1992, provided 'a skeletal framework within which mediation ... may be developed'.⁷ Subsequently, in 1995, it was resolved by judges of the Court that power should exist to direct parties to mediate their dispute;⁸ this end was achieved by the introduction of section 53A of the *FCA Act* in April 1997 by the *Law and Justice Legislation Amendment Act 1997* (Cth).

Before turning to the central issues the subject of this paper, it is worth noting some issues that are significant in the mediation of shareholder representative proceedings. First, on one view, the mediation of shareholder representative proceedings may detract from the public benefits of instituting a class action against a respondent. That is, the public interest may be served by the full ventilation of claims against a respondent in the courts, in particular by serving a regulatory or deterrent purpose.⁹ Secondly, and as has been particularly seen in the case of the Aristocrat class action,¹⁰ a successful mediation or settlement prior to trial or before judgment means that public resources are consumed by parties leading up to judgment at an initial trial without the reciprocal benefit of a judgment clarifying the law for the public benefit; however, the obvious benefits for all parties, including group members, of a successful mediation or settlement, including saving of costs, time, and incremental court resources, is a significant counterbalance to these concerns.

There are other more practical difficulties associated with mediating representative proceedings. These may include, in some instances, the number of parties to the proceeding. In the case of the Centro class actions, there are applicants and respondents each represented by different legal advisers and involving differing claims. The inevitability of a funder in shareholder representative proceedings adds another participant in the mediation process.

5 See Order 10 rule 1(2)(g) and Order 72.

6 Australian Law Reform Commission, *Review of Adversarial System of Litigation ADR – Its Role in Federal Dispute Resolution*, Issues Paper 25 (1998) [3.10].

7 Ibid [3.13].

8 Ibid [3.13].

9 This issue has been raised particularly in relation to test cases brought in the public interest. See, eg, Andrea Durbach, 'Test Case Mediation – Privatising the Public Interest' (1995) 6 *Australian Dispute Resolution Journal* 233, 234.

10 *Dorajay* [2009] FCA 19 (Unreported, Stone J, 21 January 2009).

Other considerations in mediation and settlement include the desire, in many cases, for a commercial resolution of the issues in the face of often lengthy and costly delays and interlocutory skirmishes that have to date bedeviled representative proceedings in Australia.¹¹ In the case of shareholder representative actions, there is, at present, a realisation that there remains a lack of certainty regarding the principled approach to calculation of compensation in such actions, and the likelihood of appeals in any action in which quantification of damages has occurred.

III MEDIATION AND ACCESS TO INSURANCE POLICIES

One of the key issues arising in relation to the mediation of representative proceedings is whether participants should be entitled to information about the insurance position of the respondent in preparation for mediation.

For mediation of representative proceedings to be of any value to the parties as a real step towards settlement, beyond merely ventilating issues arising in the proceeding, the decision-makers of key participants need to be apprised of certain information. An applicant will wish to know the approximate amount of money a respondent is able to pay by way of settlement, and in cases where the financial position of the respondent is uncertain and the potential damages are large, the limit of any insurance policy which will respond. In times of financial turmoil it is likely that a number of shareholder representative proceedings will be commenced against a corporate respondent where its financial position is perceived to be less than robust. This is unsurprising as many such claims have as their genesis allegations of non-disclosure or misstatement of poor corporate financial performance.¹²

Without the applicant knowing whether an insurance policy exists, whether that policy responds to the claim, and the level of cover afforded by the policy and on what terms, any mediation of a shareholder representative proceeding where recoverability is an issue is arguably futile, at least in terms of realistically settling the proceeding. The applicant is placed in a position of not knowing whether a sum offered by the respondent in settlement, although potentially very low as a proportion of the damages sought, is likely to be the best offer available given the financial position of a company (or its directors) and the non-responsiveness of an insurance policy.

Applicants may find themselves in a position where the Court has ordered parties to mediate (with or without the parties' consent); and yet the applicant is required to mediate the dispute without knowing whether an offer of settlement is fair or reasonable given the financial standing of the respondent and responsiveness of insurance policies. Although it might be thought this is the

11 See the observations of Finkelstein J in *Bright v Femcare Ltd* (2002) 195 ALR 574, 607–8.

12 For example, pursuant to s 674 of the *Corporations Act 2001* (Cth) and listing rule 3.1 of the ASX Listing Rules.

case in all large scale litigation, where preparation for and participation in mediation is time consuming and costly for all parties, it is of particular concern in representative proceedings as the applicant is not only responsible for negotiating a reasonable commercial settlement for itself (and accepting the inherent risks associated with settlement) but also for group members who will be bound by the terms of any settlement.

Given the recent decision of Ryan J in *Kirby v Centro Properties Limited*,¹³ discussed in detail below, and subject to a re-examination of the principles discussed in that case, applicants in a representative proceeding will in many instances be required to approach mediation without knowing whether any settlement offer is fair and reasonable given the respondent's ability to meet any settlement sum.

It is arguable that there are considerable policy reasons for allowing access to a respondent's insurance documents in representative proceedings, perhaps heralding the need for legislative reform in this area.

As Olney J observed in *Rodolfo Lopez v Star World Enterprises Pty Ltd*:

The traditional reluctance to requiring disclosure of details of insurance coverage has to do with the desirability of keeping that sort of information from a jury which is charged with the responsibility of determining liability and damages.¹⁴

This reluctance appears to have stemmed not only from the perceived need to ensure that a jury was not tempted by notions of distributive 'justice' but also had to do with the common law's formalism in determining norms of legal responsibility. This can be seen in a series of cases¹⁵ and is expressed by comments such as by Viscount Simonds in *Lister v Romford Ice and Cold Storage Co Ltd*,¹⁶ where his Lordship observed:

as a general proposition it has not, I think, been questioned for nearly 200 years that in determining the rights inter se of A and B the fact that one or other of them is insured is to be disregarded...

The primary vice of formalism as a process of legal reasoning is that it maintains the fiction that determining legal responsibility is divorced from economic factors and political ideology.¹⁷ As with formalism in many areas of the law, the development in recent years has been to take account of economic and political reality in identifying the content of duties and standards of care.¹⁸ It

13 [2009] FCA 695 (Unreported, Ryan J, 26 June 2009) ('*Kirby v Centro*').

14 [1997] FCA 454 (Unreported, Olney J, 18 April 1997).

15 Collected by Kirby J in *Imbree v McNeilly* (2008) 236 CLR 510; during the course of his judgment his Honour considered that as compulsory third-party insurance for motor vehicle accidents is required by statute, it is a factor which is relevant to the identification of the content of the duty of care and the standard of care: 542, 544, 551-4, 560-1, 563-4.

16 [1957] AC 555, 576-7.

17 For an extended discussion, see Frank Carrigan, 'A Blast From The Past: The Resurgence Of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163.

18 See, in an admittedly different context, *Travel Compensation Fund v Tambree* (2005) 224 CLR 627. More relevantly for present purposes, Justice Kirby's judgment in *Imbree v McNeilly* (2008) 236 CLR 510 demonstrates the recognition of normative or policy considerations in the area of compulsory insurance; another example can be seen in *Johnson Tiles Pty Limited v Esso Australia Pty Limited* [2003] Aust Torts Reports ¶81-692.

could no longer be regarded as correct to suggest that the existence of insurance is always irrelevant to the determination of rights and responsibilities. As Lord Griffiths noted in *Smith v Bush*:¹⁹

There was once a time when it was considered improper even to mention the possible existence of insurance cover in a lawsuit. But those days are long past. Everyone knows that all prudent, professional men carry insurance, and the availability and cost of insurance must be a relevant factor when considering which of two parties should be required to bear the risk of a loss.

Against the background of the law insisting on a separation of legal reasoning from normative or policy considerations, it is not surprising that the traditional position of Anglo-Australian courts has been to deny access to insurance policies on discovery on the basis that their existence is irrelevant to the dispute.²⁰ Exceptions to this general rule have developed, however, notably where the existence and extent of insurance was relevant to:

- (a) an application or potential application²¹ for leave to proceed against a company in liquidation under section 471B of the *Corporations Act 2001* (Cth) or against a bankrupt under section 58(3)(b) of the *Bankruptcy Act 1966* (Cth);²²
- (b) joinder of insurers to proceedings to obtain a declaration that the insurer is obliged to indemnify the defendant;²³
- (c) applications or possible applications under section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) or cognate legislation,²⁴ which provides that a third party has a priority charge over insurance monies payable in respect of the insured's liability covered by an insurance policy; or
- (d) applications or possible applications under section 117 of the *Bankruptcy Act 1966* (Cth) or section 562 of the *Corporations Act 2001* (Cth), which provide a third party with enforceable rights to ensure that the benefits of a policy of insurance are paid to third party claimants.

To maintain that there is some sort of *a priori* objection to production of policies of insurance is no longer sustainable (if it ever were). If production is

19 [1990] 1 AC 831, 858.

20 See, eg, *Beneficial Finance Corporation Ltd v Price Waterhouse* (1996) 68 SASR 19.

21 See Order 15A rule 6.

22 *Glaister v Banwell Pty Ltd* [2003] WASC 101 (Unreported, Sanderson J, 27 May 2003) [14]; *Re Gordon Grant & Grant Pty Ltd* (1982) 1 ACLC 196, 199; *Pace Tasmania Pty Ltd (in liq) v FAI General Insurance Co Ltd* (2001) 10 Tas R 276; *Company Solutions (Aust) Pty Limited v Keppel Cairncross Shipyard Limited (In Liq)* [2004] QSC 379 (Unreported, Douglas J, 29 October 2004); *Done v Financial Wisdom Limited* [2008] FCA 1706 (Unreported, Perram J, 14 November 2008).

23 For a survey of the cases see Stephen Warne, 'Joining the Fence Sitting Insurer as a Defendant in Liability Proceedings' (1998) 9 *Insurance Law Journal* 209 and Donald Charrett, 'Professional Indemnity Insurance — Do third parties have an interest?' (2003) 14 *Insurance Law Journal* 77; see also *Ashmere Cove Pty Ltd v Beekink (No 2)* (2007) 244 ALR 534 (French J), affirmed by the Full Court sub nom *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398.

24 See, eg, the *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) ss 25–28; *Law Reform (Miscellaneous Provisions) Act* (NT) ss 26–29.

necessary to do justice in the circumstances of an individual case (an enquiry that is usually answered by posing the question as to whether the document is 'relevant'), the document ought to be produced.

However, this was not the view taken in *Kirby v Centro*. In that case, a central issue in an interlocutory dispute between the parties was whether disclosure of details of a party's insurance could be compelled in aid of mediation of those proceedings. The Court had ordered the parties mediate the dispute pursuant to Order 72 rule 1 of the *Federal Court Rules*. In seeking to access the insurance policies of the respondent, the applicant relevantly sought that orders for production of the insurance documents should be made on the following grounds:²⁵

1. a mediation conducted without knowledge of a respondent's insurance cover (if any) would not produce an outcome which could properly be the subject of an application to the Court for approval under either section 33V or section 33ZF of the *FCA Act*. This was so as, if the applicant was unaware of the likely responsiveness of an insurance policy to any proposed settlement sum, the solicitors for the applicant could not be in a position to advise the applicant whether to accept a proposal made at mediation, nor to advise the Court on whether settlement was in the interests of the group members; and
2. a mediation conducted without knowledge of the respondents' insurance cover would not be consistent with the principles underlying case management, a contention said to engage Order 72 rule 7 of the *Federal Court Rules*.

The basis for each of these contentions was that the applicant could not evaluate or agree to any proposal that might have been made at the mediation without access to insurance documentation. An assessment under section 33V of the *FCA Act*, as examined in more detail below, is not a calculus but is an impressionistic estimation: it is difficult to conceive, however, that the Court could ever conscientiously discharge its onerous duty of determining whether any settlement is in the interests of the group members as a whole without being aware of information as to whether there is any prospect of recoverability of group member judgments. The answer to that question necessarily involves those advising the applicant and group members and the Court being cognisant as to whether insurance responds and its limits.

Further, in relation to the principles underlying case management, the applicant submitted that:

it is neither quick nor inexpensive nor efficient to waste time, money and effort on a mediation which the evidence makes plain is likely to be rendered futile in the absence of information regarding insurance limits.²⁶

25 See *Kirby v Centro Properties Limited* (ACN 078 590 682) [2009] FCA 695 (Unreported, Ryan J, 26 June 2009) [6]–[7].

26 Cited in *Kirby v Centro Properties Limited* (ACN 078 590 682) [2009] FCA 695 (Unreported, Ryan J, 26 June 2009) [16].

In declining to order the respondents to make available to the applicant any policy of insurance, Ryan J largely relied on previous authorities relating to compulsory production of documents in civil litigation. Justice Ryan found that those considerations were relevant to an analysis of the compulsory production of documents for the purpose of mediation.²⁷ Justice Ryan also noted, distinguishing the terms of the regulations considered in *Lampson (Australia) Pty Ltd v Ahden Engineering (Aust) Pty Ltd*,²⁸ that Orders 15 and 72 of the *Federal Court Rules* do not permit the Court to make certain orders ‘in special circumstances’ or ‘in the interests of justice’.²⁹

Justice Ryan acknowledged that an insurance policy (or lack of it) may assume significance in a mediation, but noted that the use of such a policy was a matter of commercial judgment or strategy for the parties and not something into which the Court should properly interfere using its coercive powers.³⁰ Further, Ryan J was unconvinced that without access to information about the respondent’s insurance policy, any mediation would be ‘hollow’ or would preclude the applicant’s solicitors from forming an opinion of the reasonableness of any proposed outcome of the mediation.³¹

Given the state of the law following *Kirby v Centro*, applicants in a representative proceeding may attempt to use other means to seek access to insurance documents of respondents, including through an application under section 247A(1) of the *Corporations Act 2001* (Cth). While to date such an approach has not been considered by the courts in the context of a shareholder representative proceeding, the recent decision of Goldberg J in *Merim Pty Ltd v Style Ltd*³² may provide some comfort.

IV MEDIATION AND ACCESS OF RESPONDENTS TO GROUP MEMBER DATA

It is a common approach for the respondents in a representative proceeding to seek discovery of all documents evidencing alleged acquisitions and disposals of securities of each group member in the proceeding. The usual principle upon which this application is made is to ‘verify’ the loss of group members. Any application for such discovery, particularly in light of the recent decision in *Kirby v Centro* in relation to respondents’ insurance documents, should fail. To make such an order for discovery of this nature would be inimical to the orderly preparation of a representative proceeding for mediation and trial, would involve

27 See, eg, *ibid* [15].

28 [1999] 2 Qd R 252.

29 *Kirby v Centro Properties Limited* (ACN 078 590 682) [2009] FCA 695 (Unreported, Ryan J, 26 June 2009) [17]–[19].

30 *Ibid* [23].

31 *Ibid* [25].

32 (2009) 255 ALR 63, in which orders were made under s 247A(1) of the *Corporations Act 2001* (Cth) for the inspection by a shareholder of insurance policies held by a company.

institutional group members ‘discovering’ documents that they would not be required to produce for inspection even if they were giving general discovery, does not satisfy the criterion of ‘necessity’ which governs discovery in the Federal Court, and would involve very significant disruption and expense to non-parties, being group members. Further, it is usually the case that the information sought by the respondent can be supplied in ways that do not involve very significant disruption.

Discovery of documents from group members in representative proceedings should only be granted prior to determination of the common issues in exceptional circumstances.³³ Plainly, issues of quantification relating to individual group members may require resolution at some later stage of the proceeding. If the applicants are successful at the initial trial on all issues (and group members do not opt out) then there could be no rational objection to discovery of documents relating to the acquisition and disposal securities by those group members if they are necessary for the disposition of individual claims. As explained below, however, in the case of institutional group members, such discovery is likely to be far narrower than that often sought by respondents.

That the approach of deferring discovery by class members until after an initial trial is consistent with the efficient disposition of grouped proceedings can be seen by recourse to the accumulated experience of jurisdictions where grouped proceedings are longer established.³⁴ In United States’ federal jurisdiction, ‘generally speaking, an absent class-action plaintiff is not required to do anything’.³⁵ Discovery or interrogation of group members is normally not permitted. To proceed otherwise defeats the purpose of the procedures, converts class actions into exercises of massive joinder, and creates an opt-in requirement inconsistent with the opt-out form of the procedure. Where it has been allowed, it has been for the reason that it is necessary for the trial of the common issues.³⁶

In the context of mediation, the oft-used process adopted by applicants is to provide the respondents with summarised trading data of the applicants and group members sufficient to enable respondents to know the size of the claim against them. Comparing the issue of an applicant’s access to insurance documents and the recent outcome of *Kirby v Centro*, there are far stronger

33 *Western Canadian Shopping Centres Inc v Dutton* [2001] 2 SCR 534, 561–2.

34 In *King v AG Australia Holdings Ltd* (2002) 121 FCR 480, 495, Moore J said:

I should mention that this Court has had recourse to American authorities concerning class actions in giving content to the Pt IVA: see, for example, *Williams v. FAI Home Security Pty Ltd (4)* (2000) 180 ALR 459 especially at [19] notwithstanding significant differences between the scheme in that Part and methods of litigating group or class issues in the United States.

35 *Phillips Petroleum Co v Shutts* 472 US 797, 810 (1985); applied *Collins v International Dairy Queen* 190 FRD 629, 631 (1999).

36 Similarly, in *McCarthy v Paine Webber Group Inc*, 164 FRD 309, 313 (1995), it was held that discovery of absent class members should occur only where the information sought is directly relevant to common questions and unavailable from the representative parties, and is necessary at trial of issues common to the class. See also *Dellums v Powell*, 566 F 2d 167, 187 (1977) *cert denied* 438 US 916; *Cox v American Cast Iron Pipe Co*, 724 F 2d 1546, 1556 (1986); *Transamerican Refining Corp v Dravo Corp*, 139 FRD 619, 621–2 (1991); *Collins v International Dairy Queen*, 190 FRD 629, 631 (1999); see generally Herbert B Newberg and Alba Conte, *Newberg on Class Actions* (3rd ed, 1992) [16.04].

grounds for not invoking the Court's coercive powers in this situation. Unlike the circumstances in *Kirby v Centro*, where no insurance documentation had been provided to the applicant, in most cases the relevant information relating to trading data and loss estimates has been provided to the respondent. It may be alleged that such trading data is insufficiently 'verified' (given the primary documentation has not been discovered), but this can be remedied in the structure of a commercial resolution or factored into a settlement discussion in other ways. Respondents, following this process, are in a significantly stronger position than applicants, in relation to insurance documents.

V MEDIATION AND RESTRICTED GROUP REPRESENTATIVE PROCEEDINGS

The *FCA Act* allows a representative proceeding to be brought by less than the whole class of persons who may have a claim arising from a wrongful act of a potential respondent. A respondent in representative proceedings will almost inevitably be concerned to ensure that it is not vexed with further proceedings by other persons for the same alleged contraventions pleaded in another case. It follows that in mediations of class actions, it is often necessary to consider how to 'close off' the potential for other potential claimants to file claims against it in the future. It has become a commonplace for group members to be limited to those specifically identified, or to those who have signed a funding agreement with a litigation funder by a certain date.³⁷ This, as with access to and knowledge of the terms of any insurance policies of the respondent, is a potential bargaining chip for each party to use for their own purposes. A respondent may demand that the class definition be expanded or altered so as to limit future claims against it; applicants may refuse this or agree to it on condition that some of its own terms are met.

Where it is agreed that the applicant should take steps to limit the possible future claims against the respondent, the issue arises as to the power the applicant has to limit any such claims. The lead applicant itself has no power to prevent those not represented bringing a further claim against the respondent. Therefore, one approach is to open the class to a broader number of claims (reducing the pool of persons from which a future claim may be made), for example by removing the requirement in a group definition that group members must have signed a litigation funding agreement by a certain date. New group members caught by the amended group definition may then be required to take positive steps to provide information to the applicant or its legal representatives in order to allow the size of the group member's claim, for the purpose of mediation and settlement negotiations.

A further approach that may be taken is for the party funding the litigation in question, along with the firm of solicitors running the proceeding, to undertake

37 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

not to fund or commence any further proceedings against the respondent based on the same or similar claims made in the proceeding in question. This will ultimately be a commercial decision for the funders and solicitors, but without which there may be a real hesitancy on the part of the respondent to settle the proceeding.

VI SETTLEMENT OF REPRESENTATIVE PROCEEDINGS

The settlement of representative proceedings raises particular complexities given that it is not only the parties to the dispute who are bound by any settlement, but also group members who have had little or no involvement in the running of the litigation or in the negotiation of the proposed terms of settlement.³⁸ It has been argued that the nature of class actions in Australia may result in strong incentives for the parties and their legal representatives, and increasingly litigation funders, to accept settlements that are sub-optimal for group members.³⁹ However, to some extent this is overcome by legislative protections that require court approval of settlements of representative proceedings. A detailed analysis of the complexities associated with the settlement of representative proceedings is beyond the scope of this paper; however, it is useful to examine briefly the particular constraints that the *FCA Act* places on settlement of such proceedings.

In the Federal Court, section 33V(1) of the *FCA Act* provides that a representative proceeding may not be settled or discontinued without the approval of the Court. That section provides no guidance as to the factors to be considered when deciding whether approval should be given to a proposed settlement of a representative proceeding. However, Australian courts have laid down a general framework for approaching applications for approval of settlements of representative proceedings, based on criteria of whether a settlement is fair, reasonable and adequate in the circumstances of all group members.⁴⁰

Before approving a settlement, the Court should be satisfied that the settlement is on acceptable terms and specifically that the settlement is in the interests of the group members as a whole, and not just in the interests of the applicant and respondent (and arguably, their legal representatives and funders).⁴¹ The Court is required to consider whether settlement is, in all of the

38 See, eg, Cashman, above n 2, 348–9.

39 Vince Morabito, 'An Australian Perspective on Class Action Settlements' (2006) 69 *Modern Law Review* 347.

40 See, eg, the analysis in *Dorajay* [2009] FCA 19 (Unreported, Stone J, 21 January 2009); *Lopez v Starworld Enterprises Pty Ltd* (1999) ATPR ¶41-678, 42,670.

41 *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250, 258; *Dorajay* [2009] FCA 19 (Unreported, Stone J, 21 January 2009) [10].

circumstances, fair and reasonable.⁴² In this way the Court provides a protective role in circumstances where group members, unlike the applicant and respondent, have often had little involvement in settlement discussions and are rarely represented by legal advisers.⁴³

In *Williams v FAI Home Security Pty Ltd (No 4)*⁴⁴ Goldberg J identified a number of factors that should be taken into account by the Court when determining the fairness and reasonableness of any settlement. Justice Goldberg referred to a multi-criteria approach adopted in the United States against which the reasonableness of a proposed settlement should be measured. The factors identified include the cost and duration of the litigation if it continued to judgment; the reaction of the class to the settlement; the likelihood that group members could obtain judgment for an amount significantly above the terms of the proposed settlement agreement; any advice from counsel and from independent experts regarding issues arising in the proceeding; the amount to be offered to each group member; and the prospects of success in the proceeding.

However, a slightly different approach was taken in *Darwalla Milling Co Pty Ltd v F Hoffmann-La Roche Ltd (No. 2)*.⁴⁵ In that case, Jessup J stated that each case should be dealt with on its own merits and with consideration to any particular factors of unfairness that may arise in that case, rather than by reference to a check list of requirements.⁴⁶ Similarly, in *Haslam v Money for Living (Aust) Pty Ltd (Administrators Appointed)*,⁴⁷ Gordon J stated that Justice Goldberg's criteria outlined in *Williams v FAI Home Security Pty Ltd (No 4)* provided a useful guide to determining applications for approvals of settlements under section 33V of the *FCA Act*, but should not be seen as incorporating into the *FCA Act* particular requirements that must be met before a settlement can be approved.⁴⁸

Ultimately, the question the court will be required to answer is whether the proposed settlement is fair, reasonable and adequate in the circumstances of all group members.⁴⁹

A further important element of the settlement regime provided for in Part IVA of the *FCA Act* is that group members have been given an opportunity to opt out prior to the settlement being approved by the Court and binding the remaining group members. This is particularly so given Part IVA does not

42 See, eg, *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19 (Unreported, Stone J, 21 January 2009); *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459; *Darwalla Milling Co Pty Ltd v F Hoffmann-La Roche Ltd (No. 2)* (2007) 236 ALR 322.

43 See for example the observations of Finkelstein J in *Lopez v Starworld Enterprises Pty Ltd* (1999) ATPR ¶41-678, 42,670.

44 (2000) 180 ALR 459.

45 (2007) 236 ALR 322.

46 *Ibid* 333. See also the observations by Stone J in *Dorajay* [2009] FCA 19 (Unreported, Stone J, 21 January 2009) [10].

47 [2007] FCA 897 (Unreported, Gordon J, 8 June 2007).

48 *Ibid* [20].

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

expressly provide for group members to ‘opt out’ of settlements themselves.⁵⁰ In the context of approval of a discontinuance, rather than settlement, sought from the Court, this issue arose recently in a proceeding brought by shareholders against Franklin Tate, a director of the failed company Evans & Tate Limited. There, the applicant sought discontinuance of the proceeding. No opt out date had yet been set by the Court. While it was ultimately agreed by both parties that an opt out notice should be sent to all group members in the closed class prior to discontinuance and the issue did not need to be decided, it seems to follow the language and intention of Part IVA that parties be allowed to opt out before being bound by either settlement or discontinuance.

VII CONCLUSION

The nature of representative proceedings in Australia means parties will face particular complexities when mediating or attempting to settle such disputes. Applicants remain faced with the prospect that they will be required to mediate without any knowledge of whether the respondent is covered by a responsive insurance policy and the approximate amount covered by that policy, and respondents may continue to seek detailed trading data from group members. Parties will continue to negotiate around issues such as how future claims against the respondent for the same causes of action can be limited. While mediation of representative proceedings often does not result in settlement, mediation may set in train discussions – and raise issues between the parties – that ultimately lead towards settlement. Any settlement proposal agreed to by the parties will require the approval of the Court, and thus the interests of all group members will, at least to some extent, be protected.

50 See the analysis by Vince Morabito, ‘Judicial Responses to Class Action Settlements That Provide No Benefits to Some Class Members’ (2006) 32 *Monash University Law Review* 75.