

CLASS ACTIONS AND THE HIGH COURT: A THEMATIC ANALYSIS

VICKI WAYE,* VINCE MORABITO** AND MICHAEL DUFFY***

The introduction of the representative or 'class action' procedure into Australia from the early 1990s has caused a minor revolution in the litigation landscape of the country, as mass claims have become a prominent part of that landscape. The High Court, as the apex court in the land, has inevitably confronted complex questions connected with the nature and efficacy of class action procedure. These have also occasionally touched upon and required determinations on issues that have reached into questions of public policy. This article seeks to briefly review the major High Court jurisprudence on class actions and identify some key themes that have emerged. In so doing, it seeks to understand the approach of the Court as well as the ideas, themes and principles which have illuminated its judging of class action related procedural issues that have come before it.

I INTRODUCTION

Australia's class action regime – first introduced in March 1992 as part IVA of the *Federal Court of Australia Act 1976* (Cth) ('FCA Act') and later adopted by Victoria,¹ New South Wales ('NSW'),² Queensland,³ Tasmania⁴ and Western Australia⁵ – has several overlapping aims. A fundamental aim of the regime is to provide access to justice for persons whose claims might be too small and therefore too expensive to pursue on an individual basis. Bundling small claims together enables compensation to be delivered more efficiently and should also lead to lower litigant legal costs. Allowing claims to be aggregated also provides a deterrent for mass harms that would not otherwise be pursued.⁶

* Professor of Law, College of Business and Law, Adelaide University.

** Professor, Department of Business Law and Taxation, Monash University.

*** Associate Professor, Department of Business Law and Taxation, Monash University.

1 *Supreme Court Act 1986* (Vic) pt 4A ('Victorian Supreme Court Act').

2 *Civil Procedure Act 2005* (NSW) pt 10.

3 *Civil Proceedings Act 2011* (Qld) pt 13A.

4 *Supreme Court Civil Procedure Act 1932* (Tas) pt VII.

5 *Civil Procedure (Representative Proceedings) Act 2022* (WA).

6 Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399, 402–5.

Whether the regime has achieved its aims over the past 34 years is contentious. A 2018 review by the Australian Law Reform Commission ('ALRC') found that the regime had delivered efficient remediation of mass harm across a broad range of commercial and non-commercial causes of action.⁷ By contrast, a 2020 report conducted by the Parliamentary Joint Committee on Corporations and Financial Services found that class action remediation was significantly diminished by litigation funder and class lawyer teams who earned excessive profits and who predominantly chose to pursue inefficient investor class actions.⁸ The waxing and waning of these opposing views has led to oscillation between light touch and more heavy-handed regulation of litigation funding of class actions.⁹ Currently, the light touch regulatory approach has prevailed.

Although interstitial and constrained by the willingness of parties to advance positions related to the singular circumstances of their litigation, judicial decision-making has also significantly impacted the evolution of the Australian class action regime, and, as Australia's apex court, the High Court has played a leading role in the evolving jurisprudence.

This article traces the High Court's jurisprudence – commencing with its first decision on the threshold requirements for initiating class actions in *Wong v Silkfield Pty Ltd* ('*Wong v Silkfield*')¹⁰ and finishing with *Hunt Leather Pty Ltd v Transport for NSW* ('*Hunt Leather*'),¹¹ a decision on whether class action litigation funding fees are recoverable as damages. The focus of this article is on class action law and practice.¹² In undertaking its analysis, this article explores the evolution of the High Court's focus and positioning regarding the regime's aims of access to justice, judicial efficiency and deterrence of harmful conduct, and the Court's implicit use of policy factors when interpreting the scope and application of the regime.

Examining the longitudinal development of High Court jurisprudence in this way identifies trends and shifts in legal thinking regarding the capacity of Australia's class action regime to deliver access to justice, builds understanding of class action law's function and impact and, more generally, advances understanding of the High Court's judicial methodology and reasoning. Previously, there have been several studies which have examined the philosophy and judicial reasoning

7 Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 48 [2.6] ('*Integrity, Fairness and Efficiency*').

8 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation Funding and the Regulation of the Class Action Industry* (Report, December 2020) xiv ('*Litigation Funding Report*'). The Committee also found that the regulatory regime encouraged wasteful multiple, parallel class actions: at 80 [7.62]. It was also of the view that due to the 'circularity problem', shareholder class actions were inefficient because the costs of remediation were passed back to shareholders: at 316–17 [17.7]–[17.8].

9 See Vicki Waye, 'Class Action Wars' (2023) 11(2) *Journal of Civil Litigation and Practice* 34.

10 (1999) 199 CLR 255 ('*Wong*').

11 (2025) 426 ALR 621 ('*Hunt Leather*').

12 This article does not canvass High Court decisions where other areas of the law were addressed by the Court in proceedings which coincidentally happened to be class actions.

of the High Court in relation to other specific areas of the law.¹³ There have also been previous studies comparing the culture and discourse of the High Court of Australia, the Supreme Court of Canada and the Supreme Court of the United States.¹⁴ However, to the authors' knowledge, this is the first study examining the development of the High Court's class action jurisprudence. The authors thereby aim to make an original contribution to understanding of the relationship between the law as expressed by the High Court's judgments on class action matters and the wider environment in which the law operates.¹⁵

This article begins by making general observations regarding the High Court's role in the Australian legal system and its judicial method and reasoning, and then examines 10 decisions made by the Court during the review period. A discussion of the relationship between the Court's decisions and their socio-economic context then follows.

This article concludes by reprising three main themes that were aims of the regime, noting their continuing salience and utility to assist in understanding the actions of the Court. The ultimate impact of socio-economic and policy factors, considered contextually early in this article, is found to be most formative in the simple fact that class actions will have repercussions for significantly greater numbers of people than ordinary litigation. The consequence of this will be that the Court's decisions affect a larger slice of 'society' than is the case in traditional civil litigation – causing greater interest from other more traditional stakeholders in, and makers of, public policy.

II HIGH COURT DECISION-MAKING

As Australia's apex court, the High Court constitutes an important component of Australia's constitutional and political order, mandated with providing interpretation and application of the laws, regulations and legal processes which that order produces.¹⁶ Although its functions and powers are limited to reviewing

13 See, eg, Douglas Brodie, 'The Employment Contract: The Philosophy of the High Court of Australia' (2023) 36(3) *Australian Journal of Labour Law* 213; Eugene Schofield-Georgeson, 'Contract, Labour Law and Reality in the High Court of Australia' (2022) 48(3) *Monash University Law Review* 232; Ryan Catterwell, 'Purposive Contract Interpretation and the High Court' (2020) 49(1) *Australian Bar Review* 54; Luke McNamara and Julia Quilter, 'High Court Constitutional Challenges to Criminal Law and Procedure Legislation in Australia' (2018) 41(4) *University of New South Wales Law Journal* 1047 <<https://doi.org/10.53637/HYDV5504>>; John Sharkey, 'Australian Rules: A Survey of the High Court of Australia on Construction Law 1965–2016' (2017) 91 *Australian Law Journal* 986.

14 See, eg, Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada* (UBC Press, 2006); David L Weiden, 'Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia' (2011) 64(2) *Political Research Quarterly* 335 <<https://doi.org/10.1177/1065912909352775>>; Rebecca Lefler, 'A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia' (2001) 11(1) *Southern California Interdisciplinary Law Journal* 165.

15 See further Phillip Lipton, 'The Utilisation of Evolutionary Concepts in Legal History: Company Law as a Case Study' (2020) 46(1) *Monash University Law Review* 58, 64–5.

16 James Metzger, 'Class Actions in a Democratic Society' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 225, 235.

the constitutional validity of legislation and government action, and providing appellate review of state and federal court decision-making,¹⁷ the High Court significantly impacts the powers of legislatures, governments and the public policies they seek to implement, and the rights and obligations of Australian organisations and citizens.¹⁸ Due to its engagement with questions that touch on policy and the repercussions of its decision-making, the High Court is often cast as an inherently political beast.¹⁹

Nonetheless, despite its capacity to impact the political landscape, traditionally the High Court has not been characterised as a political institution.²⁰ In part, this view of the Court as a purely legal institution was reinforced by the Court's historical discourse of legalism, particularly under the leadership of Latham CJ and Dixon CJ, who vigorously avoided references to policy in their pursuit of 'legal truth'.²¹

However, during the 1980s, legal scholars such as Brian Galligan²² and Richard Lucy²³ – who explored the Court's role in the broader political landscape – began to argue against the notion of ideological neutrality. Shortly thereafter, strict adherence to legalism within the Court began to decline and in cases such as *Cole v Whitfield*,²⁴ *Mabo v Queensland [No 2]*²⁵ and *Dietrich v The Queen*,²⁶ the Court began openly acknowledging that in exercising its powers of legal interpretation it was inevitably making policy choices.²⁷

Empirical studies investigating the links between judicial ideology and the judgments of the Court have followed these developments. Comparing judicial politicisation in the apex courts of the United States ('US'), Canada and Australia, David Weiden found that the political background of Australian High Court judges

17 Katharine Gelber, 'The Courts' in Rodney Smith, Ariadne Vromen and Ian Cook (eds), *Contemporary Politics in Australia: Theories, Practices and Issues* (Cambridge University Press, 2012) 261, 263–7.

18 Ryan Turner, 'The High Court of Australia and Political Science: A Revised Historiography and New Research Agenda' (2015) 50(2) *Australian Journal of Political Science* 347, 358 <<https://doi.org/10.1080/10361146.2015.1006165>>, noting the 'significant political and societal implications' of High Court decision-making.

19 '[A]lthough the Court makes decisions on a legal basis, the High Court must make decisions which affect political issues': Michelle Gordon, 'The Integrity of Courts: Political Culture and a Culture of Politics' (2021) 44(3) *Melbourne University Law Review* 863, 880 (emphasis in original).

20 Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000) 3–4.

21 Fiona Wheeler, 'The Latham Court: Law, War and Politics' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 159, 160, citing Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 429, 429.

22 '[T]he Court's public rhetoric and legalistic technique have disguised judicial power and helped legitimate the Court's controversial decisions': Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 242.

23 Richard Lucy, *The Australian Form of Government* (Macmillan, 1985) 300.

24 (1988) 165 CLR 360.

25 (1992) 175 CLR 1.

26 (1992) 177 CLR 292.

27 Gageler (n 21) 429. See also Ned Hirst, 'Dixonian Legalism and Its Adherents: Assessing the Place for Policy Choices under Strict and Complete Legalism in Theory and Practice' (2020) 94(5) *Australian Law Journal* 352, suggesting that under Dixon CJ's leadership, policy choices were still acknowledged.

was a significant predictor of their voting in cases particularly in matters involving speech, religion or federalism.²⁸ Similar findings were made by Zoë Robinson, Patrick Leslie and Jill Sheppard who examined 1,379 High Court decisions and 7,677 individual justice votes between 1995 and 2019, finding that justices' pre-appointment ideology was a significant predictor of voting behaviour in both rights and non-rights based cases.²⁹

Consequently, most modern scholars agree that it would be naïve to assume that the High Court operates within an independent, hermetic system of law divorced from its political and socio-economic context.³⁰ That said, however, it would be equally misleading to suggest that the High Court has abandoned fidelity to text and precedent, or that it fails to engage in conservative restraint when it comes to interpreting the constitution, statutes and common law principles.³¹ There are fundamental legal principles in common law systems routinely applied by the High Court that are not political in nature or at least do not readily lend themselves to simplistic binary left-wing and right-wing ideologies. Procedural fairness and legality would appear to be two of the main examples.³²

Interestingly, the study conducted by Robinson, Leslie and Sheppard observed that the correlation between judicial ideology and cases that involved civil procedure and evidence was much weaker than the correlation between judicial ideology and voting patterns in cases that involved a substantive allocation of benefits and burdens.³³ In their view, issues of civil procedure and evidence were

28 Weiden (n 14).

29 Zoë Robinson, Patrick Leslie and Jill Sheppard, 'Judicial Ideology in the Absence of Rights: Evidence from Australia' (2022) 10(2) *Journal of Law and Courts* 239, 260 <<https://doi.org/10.1086/716187>>. Other studies examining the link between individual judicial values and decision-making include William M Myers, 'Judging Government Economic Performance' (2022) 55(1) *Australian Journal of Political Science* 38 <<https://doi.org/10.1080/10361146.2019.1625301>>, and Russell Smyth, 'The Role of Attitudinal, Institutional and Environmental Factors in Explaining Variations in the Dissent Rate on the High Court of Australia' (2005) 40(4) *Australian Journal of Political Science* 519 <<https://doi.org/10.1080/10361140500302480>>.

30 There are too many scholars to list all, but some examples include Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 148–9; Kylie Burns, 'The Australian High Court and Social Facts: A Content Analysis Study' (2012) 40(3) *Federal Law Review* 317 <<https://doi.org/10.1177/0067205X1204000302>>; Michael Coper, 'Concern about Judicial Method' (2006) 30(2) *Melbourne University Law Review* 554; Ronald Sackville, 'Courts and Social Change' (2005) 33(3) *Federal Law Review* 373 <<https://doi.org/10.1177/0067205X0503300301>>.

31 See, eg, Adrienne Stone, 'Judicial Reasoning' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 472 <<https://doi.org/10.1093/law/9780198738435.003.0021>>; Jeffrey Goldsworthy, 'Realism about the High Court' (1989) 18(1) *Federal Law Review* 27 <<https://doi.org/10.1177/0067205X8901800102>>, heavily criticising Brian Galligan's work.

32 See, eg, Gabrielle Appleby et al, *Australian Public Law* (Oxford University Press, 4th ed, 2024) 632–4. Any widespread public perception of the Court's work as mainly 'political' might also seemingly connect with the problem of decreasing public trust in courts, especially if the public sees them as politicised or usurping the Parliament's law-making function. See also comments of Gageler CJ in August 2025: Joanna Panagopoulos, 'Judiciary Must "Stick to the Knitting, Do Law and Only Do Law": Chief Justice', *The Australian* (online, 19 August 2025) <<https://www.theaustralian.com.au/business/legal-affairs/judiciary-must-stick-to-the-knitting-do-law-and-only-do-law-chief-justice/news-story/2ebbbb97e31186265b1c5a657d26a46>>.

33 Robinson, Leslie and Sheppard (n 29) 257.

‘ex ante constrained by technical rules’³⁴ and less likely to attract ideological positioning, thus suggesting that the High Court’s class action jurisprudence is more likely to be politically neutral.

However, the authors did not discriminate between individual and aggregated actions that involve large cohorts of the population which are more likely to implicate broad-based socio-economic issues. Moreover, the study coded the outcomes of High Court cases as either liberal or conservative based on variables such as whether a case was: pro-defendant in a criminal case; pro-rights; pro-minorities; pro-federal government; and pro-economic ‘underdog’. These categories do not easily align with legal questions concerning class members’ access to justice and class action governance. Policy issues raised by class action litigation may simply be less salient and more difficult to code than questions involving native title, free speech, and the right to a fair trial.

Prior to examining the Court’s class action decision-making, the next Part of this article therefore seeks to identify the public policy issues that underly class action jurisprudence. We examine the socio-economic context underpinning their introduction and subsequent developments that have helped shaped the Court’s responses to the legal questions raised in appeals brought to them from federal and state courts.

III CLASS ACTIONS: HISTORY AND SOCIO-ECONOMIC CONTEXT

Class actions are the progeny of several intersecting phenomena. These include the massification of production and consumption,³⁵ globalisation, intensifying juridification and adversarial legalism, and a retreat from heavy-handed state control of markets.³⁶

Modern societies like Australia are characterised by strong economic and social interconnectedness.³⁷ Consequently, harm generated by mass production and commerce is unlikely to be restricted to a small number of individuals but will be spread across a large range of people. Single party forms of redress are not adequate to address widely diffused harm, particularly for harms which might be small scale from an individual’s perspective but large scale in terms of the total

34 Ibid.

35 Francisco Valdes, ‘Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective’ (2008) 24(3) *Georgia State University Law Review* 627, 638–40.

36 Andrew Beer, ‘The Economic Geography of Australia and Its Analysis: From Industrial to Post-Industrial Regions’ (2012) 50(3) *Geographical Research* 269, 270–3 <<https://doi.org/10.1111/j.1745-5871.2012.00771.x>>; Christopher Lloyd, ‘Regime Change in Australian Capitalism: Towards a Historical Political Economy of Regulation’ (2002) 42(3) *Australian Economic History Review* 238, 239 <<https://doi.org/10.1111/1467-8446.t01-1-00034>>.

37 Mauro Cappelletti, ‘Vindicating the Public Interest Through the Courts: A Comparativist’s Contribution’ (1976) 25(3) *Buffalo Law Review* 643, 645–8.

damage they generate.³⁸ The global integration of national economies from the 1980s until 2015 has further exacerbated the potential for mass harm. Instead of confining harm to national borders, because of globalisation, harm arising from economic activity can be rapidly spread around the world.

Consistent with this picture, when the ALRC recommended the enactment of a class action regime in 1988, the ability to efficiently address harm engendered by the mass production and distribution of goods and services, enhance access to justice and make the law more enforceable and effective were identified as the proposed regime's primary rationales.³⁹ The same rationales were adopted by the then Labor Government, which introduced legislation enacting part IVA of the *FCA Act*.⁴⁰ Subsequently, similar rationales have been proffered by states enacting mirror regimes.⁴¹

However, at the time of the ALRC's report and the enactment of the federal regime, other forces were also at work. After all, Fordist modes of production and urban concentration had been a feature of Australian society for many decades up until that time.⁴² Economic transformation and growing recourse to law which occurred over the course of the 1980s were also important driving factors.

Post World War II and until the 1980s, Australia experienced a long economic boom where the benefits of growth were more evenly distributed among the population than they are today.⁴³ However, by the early 1980s, growth in Gross Domestic Product had declined and unemployment rose. Australia's terms of trade deteriorated, and its current account deficit grew larger.⁴⁴ Along with the spread of neoliberal ideology, this change in economic fortune catalysed sweeping market reform.⁴⁵ Economic restructuring followed.⁴⁶

It is therefore ironic that during Australia's transformation from a social democracy to a market-based economy favouring small government, the volume

38 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) 24–5 [58]–[59] ('*Grouped Proceedings Report*').

39 Ibid 8–9.

40 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174–6 (Michael Duffy, Attorney-General) ('*Parliamentary Debates*, 14 November 1991'); *Federal Court of Australia Act 1976* (Cth) pt IVA.

41 See, eg, Victoria, *Parliamentary Debates*, Legislative Council, 4 October 2000, 431 (Marsha Thomson, Minister for Small Business); Yvette D'Ath, Queensland Government, 'Queensland to Allow Class Action Law Suits' (Media Statement, 5 August 2016) <<https://statements.qld.gov.au/statements/78508>>.

42 T Brennan, 'The Pattern of Urbanization in Australia' in Nels Anderson (ed), *Urbanism and Urbanization* (Brill, 1964) 52, 52–3 <https://doi.org/10.1163/9789004510012_008>; A Maziels, 'Comparative Productivity in Manufacturing Industry: A Case Study of Australia and Canada' (1958) 34(67) *Economic Record* 67 <<https://doi.org/10.1111/j.1475-4932.1958.tb01315.x>>.

43 AB Atkinson and A Leigh, 'The Distribution of Top Incomes in Australia' in AB Atkinson and T Piketty (eds), *Top Incomes over the 20th Century: A Contrast Between Continental European and English-Speaking Countries* (Oxford University Press, 2007) 309, 323.

44 Laura Berger-Thomson, John Breusch and Louise Lilly, 'Australia's Experience with Economic Reform' (Working Paper, Treasury (Cth), October 2018) 4.

45 Ibid 2–6.

46 Philip Chindamo and Vance L Martin, 'The Dynamics of Structural Transformation in Australia, 1960–2020' (2022) 98(322) *Economic Record* 296, 297 <<https://doi.org/10.1111/1475-4932.12690>>.

and complexity of law and regulation substantially increased.⁴⁷ The growth in law and regulation were necessary to create a competitive environment for business while ensuring that economic, social and environmental externalities were addressed and that markets operated fairly.⁴⁸ Since then the growth in law and regulation has continued unabated.⁴⁹

Simultaneously, Australia's legal system began to turn further toward adversarial legalism. The use of an entrepreneurial instrument like the class action to deal with corporate malfeasance rather than regulatory forms of collective redress dovetailed with that turn. Adversarial legalism is characterised by resort to decentralised private enforcement of the law, resource-intensive litigation, frequent judicial review and significant legal uncertainty and variability.⁵⁰

While Australian litigation rates are much lower⁵¹ than those in the US where adversarial legalism is said to dominate,⁵² as the volume and complexity of laws and regulation in Australia grew during the 1970s and 1980s, so too did the need to provide citizens, business, and civil society with the means to challenge abuse of power and acts of corporate greed.⁵³ Spearheaded by entrepreneurial 'private attorneys-general', class actions provided a means to respond to these growing juridical needs that aligned well with the prevailing valorisation of private enterprise over state regulation. This also sat with the implementing Labor Government's characterisation of class actions as a significant instrument of social justice.⁵⁴

In recommending the enactment of the class action regime, which was eventually implemented at the federal level in 1992, the ALRC was influenced by

47 Darcy WE Allen et al, 'The Political Economy of Australian Regulatory Reform' (2021) 80(1) *Australian Journal of Public Administration* 114, 116 <<https://doi.org/10.1111/1467-8500.12447>>.

48 Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (Cambridge University Press, 2009) 124 <<https://doi.org/10.1017/CBO9780511814617>>.

49 Patrick A McLaughlin, Oliver Sherouse and Jason Potts, 'RegData: Australia' (Working Paper, Mercatus, June 2019) 17 fig 1 <<http://dx.doi.org/10.2139/ssrn.3420352>>.

50 Robert A Kagan, 'How Much Do National Styles of Law Matter?' in Robert A Kagan and Lee Axelrad (eds), *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (University of California Press, 2000) 1, 8–9 <<https://doi.org/10.1525/9780520924697-002>>.

51 In 2023–24, there were 403,184 civil cases lodged in Australia, which is, 1,493 civil cases per 100,000 population based upon an Australian population of some 27 million (as at 30 June 2024): Australian Productivity Commission, 'Courts: Data Tables Contents', *Report on Government Services 2026* (Spreadsheet, 3 February 2026) tbl 7A.2 <<https://www.pc.gov.au/ongoing/report-on-government-services/justice/courts/>> (lodgements, all civil courts Australia wide). Cf 'Federal Judicial Caseload Statistics 2022', *United States Courts* (Web Page, 2022) <<https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2022>>; S Gibson et al, 'Welcome to CSP Stat', *Court Statistics Project* (Web Page, October 2024) <https://www.ncstableauserver.org/t/Research/views/TrialDashboards/Civil?%3Aembed=y&%3AisGuestRedirectFromVizportal=y&%3Aorigin=card_share_link>, which indicate that the total incoming state civil cases filed in the US for 2024 was some 16.49 million, which divided by the US population of some 340.1 million (as at 1 July 2024) equates to some 4,849 civil cases per 100,000 population.

52 See Robert A Kagan, 'American Lawyers, Legal Culture, and Adversarial Legalism' in Lawrence M Friedman and Harry N Schreiber (eds), *Legal Culture and the Legal Profession* (Westview Press, 1996) 7.

53 Michael Molavi, *Collective Access to Justice: Assessing the Potential of Class Actions in England and Wales* (Bristol University Press, 2021) 51–2 <<https://doi.org/10.1332/policypress/9781529210002.001.0001>>.

54 *Parliamentary Debates*, 14 November 1991 (n 40) 3174 (Michael Duffy, Attorney-General).

existing class action procedures operating in the US.⁵⁵ The modern-day US class action was established in 1966 by a revision to rule 23 of the *Federal Rules of Civil Procedure*.⁵⁶ While urbanisation and increasing interconnectedness also provided the backdrop for introducing the modern US class action in 1966, at that time two other rationales were advanced.⁵⁷ Class actions were seen as: (1) a response to regulatory lacunas which would otherwise leave injury unremedied;⁵⁸ and (2) an instrument of judicial efficiency.

The second of the US rationales certainly featured in the ALRC report⁵⁹ and in parliamentary discourse preceding the enactment of class actions at the federal level.⁶⁰ Although representative actions had been available at common law since feudal times, problems associated with demonstrating that claimholders have the same interest in proceedings⁶¹ and the lack of a framework for regulating representation, financing and the protection of represented claimholders made them a difficult vehicle for addressing collective harm. Class actions which are subject to protective judicial scrutiny overcame these difficulties.

On the other hand, regulatory lacunas were not an explicit concern of either the ALRC report or parliamentary debate in 1991, which centred on the potential for US-style class actions to encourage entrepreneurial lawyering and the proliferation of spurious litigation.⁶² The focus of both the ALRC and the then Labor Government was on making court proceedings more accessible rather than on supplementing regulation.⁶³ This likely arose from a traditional preference for using penalties rather than compensation for regulatory enforcement,⁶⁴ the lack of an enforceable undertaking regime at the time of enactment,⁶⁵ and the view that the courts were best placed to vindicate rights.

55 *Grouped Proceedings Report* (n 38) 3.

56 28 USC (2025) app.

57 Molavi (n 53) 30; David Marcus, 'The History of the Modern Class Action: Part I' (2013) 90(3) *Washington University Law Review* 587, 592–4.

58 Owen M Fiss, 'The Political Theory of the Class Action' (1996) 53(1) *Washington and Lee Law Review* 21, 22–3; *Deposit Guaranty National Bank of Jackson, Mississippi v Roper*, 445 US 326, 339 (Burger CJ) (1980).

59 *Grouped Proceedings Report* (n 38) 26 [61], 29 [64].

60 *Parliamentary Debates*, 14 November 1991 (n 40) 3174–5 (Michael Duffy, Attorney-General).

61 See *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021.

62 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1991, 3284–90 (Peter Costello).

63 See, however, Michelle Welsh and Vince Morabito, 'Public v Private Enforcement of Securities Laws: An Australian Empirical Study' (2014) 14(1) *Journal of Corporate Law Studies* 39, 43 <<https://doi.org/10.5235/14735970.14.1.39>>; Michael J Duffy, 'Australian Private Securities Class Actions and Public Interest: Assessing the "Private Attorney-General" by Reference to the Rationales of Public Enforcement' (2017) 32(2) *Australian Journal of Corporate Law* 162, 181–9.

64 Michael Legg, *Public and Private Enforcement of Securities Laws: The Regulator and the Class Action in Australia's Continuous Disclosure Regime* (Hart Publishing, 2023) 110 <<https://doi.org/10.5040/9781509941544>>.

65 Enforceable undertakings empower regulators to seek collective redress as part of settlements with corporate wrongdoers. Section 87B of the *Competition and Consumer Act 2010* (Cth) ('*Competition and Consumer Act*'), which gives the Australian Competition & Consumer Commission power to seek enforceable undertakings, was enacted in 1993. The Australian Securities & Investments Commission

Subsequently, however, the relationship between class actions and regulatory redress has become a more prominent policy issue, particularly as many class actions have been instituted following on from regulatory proceedings and inquiries.⁶⁶ Given the high transaction costs associated with class actions, questions have been raised as to whether it would be quicker and cheaper to promote more regulatory redress⁶⁷ – questions which have become more pressing as litigation funding commissions and fees have been added to high legal fees to run many class actions. As we shall see from the discussion below, notwithstanding a liberal and broadly pragmatic starting point, concerns about high transaction costs, the frequent phenomenon of competing class actions, the potential conflicts posed by combined class law firm and litigation funder teams and the impact of funding arrangements on class member remediation have permeated High Court jurisprudence and led to an oscillation on positions regarding support for matters such as common fund orders.

IV HIGH COURT CLASS ACTION JURISPRUDENCE

High Court class action jurisprudence has adopted a locally focused approach with a strong emphasis on the text and purpose of the federal and state statutes governing class actions. Although US and United Kingdom law has been cited from time to time, the Court has mostly steered away from extensive comparative analysis and global themes. Reflecting general trends in High Court decision-making,⁶⁸ the Court's class action jurisprudence has overwhelmingly cited its own decisions to support its reasoning.

In focusing on statutory text and objective purpose, the High Court has appeared to adopt a legal positivist stance. However, the discussion of High Court case law below, arranged by themes of access to justice, judicial efficiency and the deterrence of harmful conduct, shows that the Court has largely decided its cases to achieve policy outcomes reflected in these themes.

gained a similar power in 1998: see *Managed Investments Act 1998* (Cth) sch 1 s 183, inserting *Australian Securities and Investments Commission Act 1989* (Cth) s 93A.

66 See generally Simon Hochreiter, 'The Increasing Intersection of Class Action and Regulatory Proceedings and Its Implications for the Operation and Utility of Australia's Class Action Regime' (2025) 99 *Australian Law Journal* 132; Jenifer Varzaly, 'The Effectiveness of Disclosure Law Enforcement in Australia' (2021) 21(1) *Journal of Corporate Law Studies* 135 <<https://doi.org/10.1080/14735970.2020.1791534>>; Andrew Eastwood, 'Piggy-Backing off Regulatory Files for Class Actions', *Australian Financial Review* (online, 16 April 2015) <<https://www.afr.com/companies/professional-services/piggy-backing-off-regulatory-files-for-class-actions-20150415-1mld7d>>.

67 *Integrity, Fairness and Efficiency* (n 7) ch 8; Michael Legg, 'A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers' (2016) 38(3) *Sydney Law Review* 311.

68 Russell Smyth and Ingrid Nielsen, 'The Citation Practices of the High Court of Australia, 1905–2015' (2019) 47(4) *Federal Law Review* 655, 668–72 <<https://doi.org/10.1177/0067205X19875030>>.

A Access to Justice

A review of the High Court's decision-making reveals a consistent policy preference for affirming the access to justice rationale of Australia's interlocking class action regimes by providing them as broad a scope as possible and permitting innovative litigation funding to ensure that the regimes are financially sustainable.

As one would expect with the enactment of a new regime for aggregating claims, initially the High Court was called upon to interpret the criteria that need to be satisfied to file a proceeding on behalf of similarly affected claimants. With respect to each of Australia's six class action regimes, there are three criteria, described by the Court as 'threshold requirements'.⁶⁹ For federal class actions, they are contained in one of part IVA's 'pivotal'⁷⁰ provisions, section 33C(1). The first requirement deals with numerosity (seven or more persons have claims against the same person); the second requirement deals with connectivity (these claims are in respect of, or arise out of, the same, similar or related circumstances); and the third requirement governs commonality (these claims give rise to a substantial common issue of law or fact).⁷¹

In *Wong v Silkfield*, the Court was required to construe the term 'substantial'. It did so on the basis that the legislative intention of the regime was to secure access to justice and to overcome the problems posed by traditional representative procedure. This meant avoiding interpretations that would require the common issue to have a major impact on the litigation. If such an interpretation were applied, given that aggregated claims can be quite heterogenous, part IVA would have much more limited scope than it currently enjoys. Due to the need to forecast the degree of impact required to establish a high threshold of significance such an interpretation would also be practically difficult to apply and likely generate costly satellite litigation. Rather, the High Court adopted a broadly liberal, pragmatic approach and held that the term substantial 'does not indicate that which is "large" or of "of special significance" or would "have a major impact on the ... litigation" but, rather, is directed to issues which are "real or of substance"'.⁷²

Uncertainty regarding the scope of jurisdiction and overly narrow interpretations of jurisdictional scope also create barriers to accessing justice. In *Mobil Oil Australia Pty Ltd v Victoria*,⁷³ the High Court was asked to identify the jurisdictional scope of part 4A of the *Supreme Court Act 1986* (Vic) ('*Victorian Supreme Court Act*'). A class action had been commenced relating to loss and damage from alleged defective aviation fuel. Mobil contended that as group members may be persons who were not Victorian residents this allowed part 4A to impermissibly confer a national jurisdiction on the Supreme Court of Victoria,

69 *Wong* (n 10) 267 [28]–[29] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

70 *BHP Group Ltd v Impiombato* (2022) 276 CLR 611, 620 [8] (Kiefel CJ and Gageler J) ('*BHP Group*').

71 *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 115 [14] (Finkelstein J).

72 *Wong* (n 10) 267 [38] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ). Two months after *Wong*, Emmett J of the Federal Court made the subtle criticism that '[i]n one sense, the High Court has simply substituted different words for the words of the statute': *Murphy v Overton Investments Pty Ltd* [1999] FCA 1673, [16].

73 (2002) 211 CLR 1 ('*Mobil Oil Australia*').

contrary to a territorial limitation upon state legislative powers implied from the federal structure of the *Australian Constitution*.

This argument was rejected by the Court, with the Court finding that the proceedings were instituted and served in the state where the defendant was present⁷⁴ and so concluding that a law against a defendant amenable to the jurisdiction of the state of Victoria was a law ‘in and for’ Victoria.⁷⁵ In particular, Gleeson CJ commented that the Supreme Court of Victoria was a natural forum for claims against Mobil arising out of the manufacture in Victoria of contaminated aviation fuel, even though it was supplied to other states.⁷⁶ The Court thus implicitly recognised that confining class members within state borders was contrary to the economic reality of mass production, consumption and widely dispersed harm earlier advanced by the ALRC and relied upon by the Parliament of Victoria for enacting part 4A.⁷⁷ Moreover, the Court noted that limiting class membership to in-state residence would only lead to the wasteful duplication of proceedings in other states. Theoretically, allowing a domestic court with a strong connection to the claim to exercise jurisdiction over non-resident members would likely avoid duplication and bring finality to the litigation.⁷⁸ Interpreting jurisdiction as broadly as possible was therefore not contrary to the federal compact, but consistent with a federated polity where citizens, businesses and governments interact with each other across state borders.

Additionally, Mobil had argued that a judgment by the Victorian Supreme Court under part 4A may decide the claims of group members who do not know of or do not actively pursue the prosecution of a group proceeding, and that this would not be a judgment exercising judicial power. It could not therefore be appealed to the High Court as required under section 73 of the *Australian Constitution*. This argument went to the very heart of Victoria’s class action regime, and raised due process concerns often advanced in opposition to opt out class actions.⁷⁹ That opposition is founded on the notion that a legal claim constitutes personal property protected from extinguishment or unauthorised use.⁸⁰ Accordingly, compelled adjudication of a person’s legal claim without their consent amounts to a taking of their property, and, insofar as part IVA of the *FCA Act* is concerned, could

74 Ibid 36 [55] (Gaudron, Gummow and Hayne JJ).

75 Ibid 38 [61].

76 Ibid 23 [10], 24 [12] (Gleeson CJ).

77 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 November 2000, 1773 (Richard Wynne).

78 *Mobil Oil Australia* (n 73) 24 [12] (Gleeson CJ). Although, as we discuss below, this has not proven to be so. Following the decision in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 (*‘Multiplex’*), multiple parallel class proceedings have proliferated: Vince Morabito, ‘Clashing Classes Down Under: Evaluating Australia’s Competing Class Actions through Empirical and Comparative Perspectives’ (2012) 27(2) *Connecticut Journal of International Law* 245, 314.

79 See, eg, Martin H Redish and Nathan D Larsen, ‘Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process’ (2007) 95 *California Law Review* 1573, 1589–90. Pursuant to an opt out regime, claimants become class members if their claims match the claims outlined in the pleadings filed by the lead plaintiffs.

80 *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297, 303, 305–6 (Mason CJ, Deane and Gaudron JJ), 311–12 (Brennan J).

amount to a breach of section 51(xxxi) of the *Australian Constitution*.⁸¹ Other due process concerns raised relate to litigant autonomy and the democratic right to choose whether to adopt a socio-political position implicit within the proceedings.⁸² Accordingly, opt-out class actions have been characterised by critics as a form of coercive political action.

Consequently, while not directly addressing issues related to loss of proprietary rights and freedom of expression, in reaching its decision the Court spent a considerable amount of time describing how part 4A of the *Victorian Supreme Court Act* operated in relation to class members. First, provision is made for the giving of notice of the proceedings to class members. Second, the Court stated that those who did not want to be bound by any settlement or judgment were able to opt out of the proceedings. Coupled with notification, the ability to opt out was treated as a form of consent to the proceedings and their outcome. To support that position, the Court observed that it was not uncommon for judgments and orders of courts to bind persons who took no active part in the proceedings and who may even have been ignorant of the proceedings.⁸³ By refusing to limit class membership to jurisdictional residents, the Court, taking a purposive approach, thus reinforced the policy choice of a broad, opt out regime reflecting the ALRC's view that requiring class members to positively assert their rights through an opt-in regime would not achieve the objectives of a single determination, reduction in costs and increased efficiency.⁸⁴ This would, in turn, not yield sufficient critical mass required for the financial feasibility of class proceedings, nor result in sufficient remediation because class members with small claims would not likely pursue them if required to opt in.

The width of coverage of the class or group was also considered in *BHP Group Ltd v Impiombato*,⁸⁵ where the Court was called upon to clarify whether part IVA of the *FCA Act* could apply to non-Australian residents.⁸⁶ All five judges held that class members under part IVA could include non-Australian residents.

This class action was brought on behalf of shareholders claiming loss from BHP share purchases during a period of alleged non-disclosure contrary to sections 674(2) and 1041H(1) of the *Corporations Act 2001* (Cth) ('*Corporations Act*') and section 12DA(1) of the *Australian Securities and Investments Commissions Act 2001* (Cth). The non-disclosures related to risks that a dam in Brazil, operated by a BHP subsidiary, could fail and cause significant damage, which subsequently happened, causing the BHP share price to fall.

81 Section 51(xxxi) of the *Australian Constitution* confers on the Commonwealth Parliament the power to make laws for the compulsory acquisition of property but only on 'just terms'.

82 Redish and Larsen (n 79) 1601–3.

83 *Mobil Oil Australia* (n 73) 27 [22] (Gleeson CJ), 37 [59] (Gaudron, Gummow and Hayne JJ), 44 [83] (Kirby J).

84 *Grouped Proceedings Report* (n 38) 8 [13], 50 [108]. See generally Vince Morabito, 'Class Actions: The Right to Opt Out under Part IVA of the *Federal Court of Australia Act 1976* (Cth)' (1994) 19(3) *Melbourne University Law Review* 615, 629–33.

85 *BHP Group* (n 70).

86 See generally Michael Legg, 'Enforcing Australian Class Action Judgments against Non-resident Group Members' (2024) 54(1) *Australian Bar Review* 97.

To mitigate problems associated with overlapping jurisdiction with foreign courts, the Court could have determined that it was appropriate to confine the Federal Court's jurisdiction to Australian residents. BHP had argued that this was required to ensure that principles of extraterritoriality embedded in the common law and section 21(1)(b) of the *Acts Interpretation Act 1901* (Cth) ('*Acts Interpretation Act*') were not eroded. However, the Court's position reflected the reality of globalisation and the growth of more cross-border issues arising from increased international business and communications, requiring it to apply Australian law notwithstanding foreign class membership. Kiefel CJ and Gageler J found that binding persons not resident in Australia would not infringe any principle of international law or international comity,⁸⁷ reasoning that the presumption against extraterritorial operation had to be read in harmony with section 15AA of the *Acts Interpretation Act*, which requires preference to be given to a construction to achieve statutory purpose.⁸⁸ From their perspective, that statutory purpose was achieved by refraining from imposing any geographical limit on class members once personal jurisdiction over the defendant was established.

Gordon, Edelman and Steward JJ also rejected BHP's argument determining that: (1) part IVA is procedural rather than substantive; (2) part IVA does not create the justiciable issue, with the matter and the claims that make it up existing independently of the representative proceeding; (3) the personal jurisdiction of the court over the respondent rather than over the group members was what mattered; and (4) unwilling group members could opt out.⁸⁹

The case thus reinforces the Court's position set out in its first decision, *Wong v Silkfield*, that as a measure which aims to increase access to justice, part IVA should be interpreted liberally.

Having dealt early on with jurisdiction and scope, class action financing also soon became an issue for the High Court's consideration. Lack of financing to underwrite long-running, high stakes expensive class actions has always been recognised as a significant barrier to access to justice. The two measures recommended by the ALRC to address the issue of costs – a public class action fund⁹⁰ and the employment of conditional costs agreements to remunerate plaintiff solicitors⁹¹ – were not included by the drafters of Part IVA.⁹² This funding deficit was addressed by the arrival in Australia's class action landscape of commercial litigation funders.⁹³

However, the advent of litigation funding produced a difficult paradox for the Court to resolve. While litigation funding provides the necessary financing

87 *BHP Group* (n 70) 625 [32].

88 *Ibid* 627 [37].

89 *Ibid* 622–34 [54]–[57].

90 *Grouped Proceedings Report* (n 38) 126–7 [308].

91 *Ibid* 122 [297].

92 See Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3025 (Michael Tate); *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139, 145–6 (Wilcox J).

93 See Vicki Waye, Nikki Chamberlain and Vince Morabito, 'How to Address the Regulation of Third-Party Litigation Funding of Class Actions?' (2025) 141 (January) *Law Quarterly Review* 131, 138–42 <<https://doi.org/10.2139/ssrn.5083425>>.

required to underwrite resource intensive class proceedings that would not otherwise be feasible to pursue, it also reduces class member compensation by a considerable margin and thus can simultaneously hinder access to justice. At the time the Court first considered it in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*,⁹⁴ there were also fears that litigation funding would stir up unmeritorious litigation and exacerbate conflicts of interest by effectively transferring control of the proceedings to the funder. However, the Court was not convinced that these problems could not be successfully addressed by a trial court through the exercise of its powers to control its proceedings. By a 5:2 majority, the Court held that the funding of a traditional representative proceeding in the Supreme Court of New South Wales by a commercial litigation funder did not constitute an abuse of process nor was it against public policy. To that extent, the Court re-affirmed the entrepreneurial nature of class proceedings in securing compensation for class members, while notably declining to review the reasonableness of funder fees and commissions, observing that ‘to ask whether the bargain struck between a funder and intended litigant is “fair” assumes that there is some ascertainable objective standard against which fairness is to be measured’.⁹⁵ Subsequently, of course, this laissez-faire approach to litigation commission and fees now only applies at the outset of proceedings, and as we shall see from the discussion below, Australian courts regularly review litigation funder entitlements at settlement and judgment.

Sixteen months later the Full Court of the Federal Court of Australia held in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (‘*Multiplex*’)⁹⁶ that the use of so-called closed classes in funded class actions – pursuant to which the class action is brought, not on behalf of *all* potential claimants, but only on behalf of those claimants who entered into funding agreements with the funder – was supported by the part IVA regime. Another major judicial pronouncement which further fuelled the growth of the litigation funding industry was the endorsement of common fund orders (‘CFOs’) in the early stages of the litigation by the Full Federal Court in October 2016 in *Money Max Int Pty Ltd (Trustees) v QBE Insurance Group Ltd*.⁹⁷

CFOs specify what proportion of any settlement proceeds or damages secured on behalf of the class members the litigation funder will be entitled to receive. But in 2019, the power to issue CFOs in federal and NSW class actions was challenged before the High Court in *BMW Australia Ltd v Brewster* (‘*Brewster*’).⁹⁸ By a 5:2 majority, the High Court held that the federal and NSW regimes did not empower trial judges to make CFOs.

The ‘access to justice’ goal of class action devices played a vital role in the reasoning of the High Court, but differences existed between the majority and minority Justices as to whether the purpose of class action regimes justified CFOs. The Court’s consideration of this issue took place in the context of a narrow point

94 (2006) 229 CLR 386.

95 Ibid 434–5 [92] (Gummow, Hayne and Crennan JJ).

96 *Multiplex* (n 78).

97 (2016) 245 FCR 191, 225 [168] (Murphy, Gleeson and Beach JJ).

98 (2019) 269 CLR 574 (‘*Brewster*’).

of statutory construction: do the words contained in section 33ZF of part IVA (and its NSW counterpart) – enabling the Court to make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding – empower trial judges to issue CFOs?

Arguably this apparently textualist approach sublimated deeper concerns regarding high transaction costs imposed on class members by litigation funding as well as concerns regarding increases in the volume of shareholder class actions and the entrepreneurial nature of the class action industry that were surfacing around the same time. In December 2016, the Commonwealth Attorney-General requested the ALRC to consider whether and to what extent class action proceedings and third-party litigation funders should be regulated. The ALRC report was issued in December 2018,⁹⁹ but, apart from recommending the introduction of contingency fees, the ALRC did not recommend extensive regulation of litigation funding. Instead, the ALRC recommended: (1) clarifications regarding the courts' powers over funding agreements; (2) mandating that funders indemnify lead plaintiffs against cost orders; and (3) the implementation of a statutory presumption that funders provide security for costs. As the ALRC's report was less critical of litigation funders and class actions than might have been hoped for by their various critics, it was soon followed by a parliamentary inquiry and report in 2020, which recommended more stringent regulation of litigation funders.¹⁰⁰ The implementation of a short-lived licensing requirement for litigation funders and the registration of litigation funding arrangements as managed investment schemes ensued,¹⁰¹ but this was repealed after the election of the Labor Party to government in 2022.¹⁰²

In *Brewster*, the majority drew a distinction between the making of orders as to how an action should proceed to do justice and orders directed as to whether an action can proceed at all. Their conclusion was that CFOs fell within the latter unauthorised sphere.¹⁰³ Crucial to this conclusion was their characterisation of CFOs as orders intended 'to assure a potential funder ... of a sufficient level of return upon its investment to secure support for the proceeding, is beyond the purpose of the legislation'.¹⁰⁴ In other words, for the majority doing justice did not require the giving of financial certainty and comfort to litigation funders.

The majority and dissenting Justices also disagreed about the impact of CFOs on the interests of group members, with the dissenting Justices holding that CFOs advanced the interests of group members by: (a) permitting review of the rate and structure of the proposed remuneration to funders at the outset of litigation; (b) allowing group members to make more informed decisions as to whether they should opt out by knowing their potential returns; and (c) ensuring that the expenses incurred in running the litigation were shared fairly among class members.¹⁰⁵

99 *Integrity, Fairness and Efficiency* (n 7).

100 *Litigation Funding Report* (n 8).

101 *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth).

102 *Ibid.*

103 *Brewster* (n 98) 589 [3] (Kiefel CJ, Bell and Keane JJ).

104 *Ibid.*

105 *Ibid* 620–1 [111], [113]–[114] (Gageler J).

By contrast, the majority found that the goal of ensuring that all class members shared the financial burden of the class action could be attained by a funding equalisation order ('FEO') technique pursuant to which 'unfunded' group members do not receive more compensation than funded group members.¹⁰⁶ Under this method, funders receive less commission because they can only recover from class members who have entered into funding agreements. Confining funder returns to the FEO method thus encourages funders to engage in as much 'book building' activity with class members as possible so that a critical mass can be established to generate a good funder return. In turn, the high cost of book building limits the ability of funders to underwrite a large portfolio of class actions and may also act as a barrier to entry for other funders. Nonetheless, class members often receive a greater amount of compensation as the total cost of funding is lowered.¹⁰⁷ On that basis, the views of the majority signify the importance of the role of the court in ensuring that class member compensation is maximised, particularly considering the conflicting interests that arise between them, the class law firm, and the litigation funder team.

However, possibly reflecting the importance of litigation funding to the viability of class actions instituted outside of Victoria where contingency fees (called group costs orders) are available as a financing mechanism,¹⁰⁸ *Brewster* was quickly neutralised by subsequent Federal Court decisions which confined it to CFOs made at the outset of proceedings.¹⁰⁹ In that light, the Federal Court's post-*Brewster* decision-making might have been seen as a move to maintain its pre-eminence as an Australian class action jurisdiction by continuing to make it less risky for litigation funders to finance class actions. Later, in *Kain v R&B Investments Pty Ltd* ('*Kain*'),¹¹⁰ a differently composed High Court confirmed that CFOs in favour of litigation funders could be validly made at settlement or judgment pursuant to section 33V(2).¹¹¹ As a result of the practice of providing early informal signals during case management hearings regarding the likely CFO at the proceedings' end, Edelman J characterised *Brewster* as reduced almost to a 'dead letter'.¹¹² Nevertheless, it is not clear that there is any necessary substantive right of a plaintiff or their funder to obtain such early 'signals' if a judge, in their discretion, declined to give them. It is also conceivable that a

106 Ibid 637 [167]–[169] (Gordon J).

107 Vicki Waye and Michael Duffy, 'The Fate of Class Action Common Fund Orders: The Policy, Procedural and Constitutional Issues of a Legislative Revival' (2021) 40(2) *University of Queensland Law Journal* 215, 221–3, 225–7 <<https://doi.org/10.38127/uqlj.v40i2.5435>>.

108 *Victorian Supreme Court Act* (n 1) s 33ZDA empowers the Court to make a group costs order where legal fees are payable as a percentage of the class settlement or judgment. See generally Vince Morabito, 'Has Victoria's Class Action Regime Secured Access to Justice for Victims of Mass Harm?' (2026) 45(1) *Civil Justice Quarterly* 22.

109 See, eg, *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd [No 3]* (2020) 385 ALR 625; *Galactic Seven Eleven Litigation Holdings LLC v Davaria* (2024) 302 FCR 493.

110 (2025) 423 ALR 413 ('*Kain*').

111 Section 33V(1) provides that a class action proceeding may not be settled or discontinued without the approval of the Court, while section 33V(2) provides that after giving this approval, the Court may make 'such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court'.

112 *Kain* (n 110) 443–5 [115]–[120] (Edelman J).

different judge could be hearing the matter later and not feel their discretion bound by any such earlier ‘signals’.

Characterisation of this change in attitude toward the facilitation of litigation funding as an about face within a relatively short period of time by the High Court was thus avoided, perhaps not that convincingly, by limiting *Brewster* to exercises of power under section 33ZF rather than section 33V. Nonetheless, despite upholding settlement or judgment CFOs in favour of litigation funders, the Court was not prepared to extend them to class action lawyers, unanimously holding that this would conflict with the prohibition on contingency fees in section 183(1) of the *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (NSW) and thus it would not be just to do so.¹¹³ Extending to class law firm fees the ability to be remunerated on the basis of a percentage of the compensation secured for class members, notwithstanding a clear legislative policy against this remuneration model, would lead to criticism of unwarranted judicial activism, particularly given that their introduction in Victoria had only occurred as a result of legislative amendment presaged by a major law reform review.¹¹⁴

The aversion to judicial activism evident in *Kain*¹¹⁵ mirrors the Court’s subsequent decision in *Hunt Leather*¹¹⁶ where, among other matters, the Court determined that litigation funding fees were not recoverable as part of damages. The lead plaintiffs had argued that in addition to the substantial interference with their businesses caused by Transport for NSW’s light rail works they had also suffered foreseeable and consequential loss by having to secure litigation funding, which they required to advance their claims in nuisance against Transport for NSW.¹¹⁷ In other words, the lead plaintiffs argued that there was a causal link, albeit indirect, between Transport for NSW’s nuisance in failing to complete the light rail works in a minimally disruptive manner, their claims in nuisance and the necessity to acquire litigation funding. The Court rejected the lead plaintiff’s arguments. Consistent with long established principle that legal costs are not recoverable as damages,¹¹⁸ the Court determined that the class action’s litigation funding costs were not a reasonably foreseeable consequence of any nuisance claimed against Transport for NSW, particularly as those costs were not due and payable until after settlement or judgment.¹¹⁹

Certainly, the failure to articulate the steps Transport for NSW could have taken to prevent the loss associated with incurring litigation funding fees supports

113 Ibid 422 [32] (Gageler CJ), 439–41 [96], [104] (Gordon, Steward, Gleeson and Beech-Jones JJ), 452–3 [148] (Edelman J), 469 [211] (Jagot J).

114 Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Report, March 2018).

115 *Kain* (n 110).

116 *Hunt Leather* (n 11).

117 Ibid 670–1 [168] (Gordon and Edelman JJ).

118 *Cockburn v Edwards* (1881) 18 Ch D 449, 459 (Jessel MR), 462 (Brett LJ), 463 (Cotton LJ); *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358, 365–6 (Giles J); *Gray v Sirtex Medical Ltd* (2011) 193 FCR 1, 9 (Bennett, Gilmour and Gordon JJ).

119 *Hunt Leather* (n 11) 671 [170] (Gordon and Edelman JJ, Jagot J agreeing at 677 [193], 695 [257], Beech-Jones J agreeing at 696 [262]).

the Court's finding that preventing this loss lay outside of the scope of Transport for NSW's duty of care. Further, while events surrounding the abolition of the ability to recover After the Event ('ATE') insurance costs in England and Wales in 2013¹²⁰ did not feature in the Court's reasoning, that episode suggests that allowing funding fees to be recoverable as damages requires much more policy investigation and analysis than the Court was able to undertake, limited as it was by doctrinal concerns related to causation and loss.

Between 1999 and 2012 the cost of ATE insurance was recoverable against unsuccessful defendants in England and Wales.¹²¹ At that time, ATE insurance operated in a similar fashion to Australian litigation funding. ATE providers typically underwrote the legal cost of advancing claims for a premium that was expressed as a percentage of recoveries, but which was only due in the event of success.¹²² These arrangements were usually coupled with conditional fee agreements ('CFAs'), where lawyers entered no win no fee agreements with their clients allowing them to charge an uplift in costs.¹²³ Recoverable ATE insurance thus ensured lawyers were rewarded for bringing claims regardless of their clients' risk aversion and the claim outcome, but to also charge an uplift if the claim was successful. Simultaneously, the combination of ATE insurance and CFAs was aggressively marketed to consumers by claims management companies that sprang up to take advantage of what had been intended as a means of improving access to justice.¹²⁴

Unfortunately, unleashing the reins of claim financing led to large increases in claiming, the creation of a 'compensation culture', and significant rises in legal costs.¹²⁵ Making ATE insurance recoverable over-incentivised claiming and largely benefitted lawyers, claims management companies and insurers, while placing considerable inflationary pressure on the civil justice system. Indeed, in his review of civil litigation costs conducted to inquire into these problems, Jackson LJ characterised the recoverability of ATE insurance as unfair to opposing parties and an unsatisfactory means of achieving access to justice.¹²⁶ Jackson LJ, therefore recommended that ATE recoverability be abolished, and it was eventually repealed in 2013.

Although the High Court was not apprised of the details surrounding ATE recoverability and its abolition, the experience in England and Wales provides a salutary backdrop that supports the High Court's unwillingness to overturn well established principles concerning cost recovery in favour of what might appear

120 *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 46.

121 *Access to Justice Act 1999* (UK) s 29.

122 Willem H van Boom, 'Juxtaposing BTE and ATE: The Role of the European Insurance Industry in Funding Civil Litigation' [2010] *Oxford University Comparative Law Forum* <<https://doi.org/10.2139/ssrn.1544145>>.

123 John Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding* (Palgrave Macmillan, 2014) 59.

124 *Ibid.*

125 Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009) 106 [3.26].

126 *Ibid* 88 [4.6].

to be an attractive means of improving access to justice. It therefore reflects the Court's restraint against overtly venturing too far into the realms of public policy.

Nonetheless, despite its conservative approach to attempts to expand the financing of class actions into areas such as contingency fees and the recovery of funding fees as damages, the Court has continually acknowledged the importance of litigation funding as a driver of many class proceedings. For example, the interaction of class action financing and jurisdiction were considered by the High Court in *Bogan v Estate of Smedley*.¹²⁷ In reaching its conclusion that proceedings instituted in Victoria should not be transferred to the Supreme Court of New South Wales, a 6:1 majority of the Court took the pragmatic view that the ability to make a group costs order in Victoria and the absence of such a power in NSW was a relevant consideration on the appropriateness of the transfer. As the proceedings would have to be abandoned if a group costs order was not available, the Court determined that the interests of justice underpinning section 1337H(2) of the *Corporations Act* would not be served by ordering transfer.¹²⁸ Thus, while the Court is not willing to expand the scope of litigation financing of class actions any further, the Court clearly considers that class proceedings should be financed with the best means of maximising class member interests.

B Judicial Efficiency

One of the major benefits of class actions is the efficient disposal of all claims within a single, binding settlement or judgment. Associated with this are the practical benefits and efficiencies for courts, practitioners and litigants of a reduction of multiple or duplicated separate physical proceedings in relation to essentially similar or related controversies.¹²⁹ Meanwhile, the *res judicata* effect of settlement/judgment enables class members to achieve sufficient mass to warrant the initiation of proceedings, while simultaneously advantaging defendants by providing certainty regarding the extent of their obligations to remediate harm. As noted earlier, to minimise due process concerns regarding consent, members can opt out of proceedings. However, that option is only effective if the scope of what may otherwise bind them is clearly identified.

The need to clearly identify the scope of what binds class members underlays the decision in *Timbercorp Finance Pty Ltd v Collins*,¹³⁰ where the High Court considered the nature of privity between lead plaintiffs and class members and the application of *Anshun* estoppel.¹³¹ The case arose following an unsuccessful class proceeding against the Timbercorp group of companies that alleged misleading

127 (2025) 422 ALR 94.

128 Ibid 97 [3], 112 [78] (Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ).

129 See *Hollick v City of Toronto* [2001] 3 SCR 158, 169–70; Ontario Law Reform Commission, *Report on Class Actions* (Report, 1982) 117–46; *Hawaii v Standard Oil Co of California*, 405 US 251, 266 (Douglas J) (1972).

130 (2016) 259 CLR 212 ('*Timbercorp*').

131 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589. As subsequently explained by the High Court, this estoppel

operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the

and deceptive conduct related to managed investment schemes. Some of the class members in the class action had borrowed money from Timbercorp Finance Pty Ltd ('TFPL') to finance their acquisitions and following the failed class action, they were sued by TFPL's liquidator for defaulting on their loans. The investors alleged that the loans should be set aside because they were prompted by misleading and deceptive conduct. They also made arguments regarding the lack of proof of the making of individual loans. In reply, TFPL contended that the investors were estopped from raising these defences because these matters should have been raised in the earlier class proceeding.

TFPL had argued that the connection between the class action proceedings and the defences raised in the loan proceedings was obvious and that the loans would not have been sought in the first place, but for the acquisitions.¹³² Additionally, TFPL argued that class members were privies of the lead plaintiff in the class action proceedings and therefore bound by the judgment dismissing those proceedings.¹³³ The majority, comprised of French CJ, Kiefel, Keane and Nettle JJ, rejected both arguments finding that the lead plaintiff in a class action can only bind class members in relation to claims that are common questions in the proceedings.¹³⁴ This applied despite any *Anshun* estoppel.

Additionally, the majority found no connection between the enforceability of the loan agreements and the alleged misconduct that led to persons acquiring interests in the managed investment schemes.¹³⁵ Consequently, *Anshun* estoppel was not established and for similar reasons there was no abuse of process.¹³⁶

While some may argue that limiting privity to common questions and constraining the application of *Anshun* estoppel may undercut class action settlements by limiting how broadly they can be drawn, the High Court has determined that efficiency cannot be allowed to trump due process.

Competing class actions have also raised important questions for Australian judicial efficiency. Ideally, securing the judicial economy goal of class actions would require having all potential claimants bound by the outcome of a single class action proceeding given that the more claimants opt out of the litigation, the more likely it is that at least some of them would file new proceedings (including class action proceedings) concerning the same legal dispute. However, there is nothing in Australia's class action regimes that expressly prohibits the filing of subsequent class actions before the right to opt out is extended to class members in the first proceeding. These additional class actions may cover all the class members covered by the initial class action,¹³⁷ only some of them or none.¹³⁸ This variety of

context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding'

Ibid 245 [97] (Gordon J).

132 *Timbercorp* (n 130) 229–30 (French CJ, Kiefel, Keane and Nettle JJ).

133 Ibid 231.

134 Ibid 235–6.

135 Ibid 237.

136 Ibid 240–1.

137 See, eg, cases canvassed in *Morabito* (n 78) 267–83.

138 Ibid 284–301.

potential subsequent class actions is also attributable to the Full Court's approval of closed classes in *Multiplex*, mentioned above.

The set of competing class actions that was considered by the High Court in *Wigmans v AMP Ltd*¹³⁹ probably provided the best illustration of the major problems that can be caused by the phenomenon of competing class actions. Five shareholders' class actions were filed against AMP Ltd; one in the Supreme Court of New South Wales and the others in the Federal Court. The NSW class action was filed only a few hours earlier than the first of the federal class actions.¹⁴⁰

A number of anti-suit injunctions were then filed in both courts, with the final application, filed in the Supreme Court of New South Wales by the solicitors acting in the NSW class action, described by Ward CJ in Eq as 'an anti-anti-anti-suit injunction'.¹⁴¹ This saga was brought to an end by the Full Federal Court transferring the four part IVA proceedings to the Supreme Court of New South Wales.¹⁴²

One of the four former part IVA proceedings was allowed to proceed, and the other four proceedings were stayed. While a 'multi-factorial' approach was adopted in making this selection, the most crucial factor was that the Court accepted evidence that the chosen proceeding would produce far better returns for class members given that, unlike the other class actions, it was not supported by a litigation funder; the class representative's solicitors funded it by acting on a no win no fee basis.¹⁴³

The class representative of the NSW proceeding appealed on the basis that, as the first-filed class action, it ought to be the one allowed to proceed. However, the majority rejected any rule or presumption to the effect that the first class action filed should prevail over the subsequent class actions.¹⁴⁴ The majority explained that where the interests of the defendant are not differentially affected, it is necessary for the court to determine which proceeding going ahead would be in the best interests of group members.¹⁴⁵

Efficiency considerations related to the encouragement of settlement also underlay *Lendlease Corporation Ltd v Pallas*.¹⁴⁶ In this case, a defendant had proposed a notice to group members advising its intention to seek an order that, if the proceeding settled, group members who had not opted out, but who had also not registered their interest in the case, should be barred from participating in any settlement proceeds without leave of the court (known as a 'soft class closure').¹⁴⁷ Such group members would therefore have their claims extinguished

139 (2021) 270 CLR 623 ('*Wigmans*').

140 *Wileypark Pty Ltd v AMP Ltd* (2018) 359 ALR 43, 45 [3] (Allsop CJ) ('*Wileypark*').

141 *Wigmans v AMP Ltd* [2018] NSWSC 1118, [16].

142 *Wileypark* (n 140) 61.

143 *Wigmans v AMP Ltd* [2019] NSWSC 603, [55]–[56], [354] (Ward CJ in Eq).

144 *Wigmans* (n 139) 649 [52] (Gageler, Gordon and Edelman JJ).

145 *Ibid.*

146 (2025) 423 ALR 23 ('*Pallas*'). The proceeding involved shareholders seeking damages for alleged market non-disclosure by Lendlease.

147 See Emerson Hynard, "'Class Closure' and the Question of Power in Representative Proceedings" (2022) 96 *Australian Law Journal* 816.

by the settlement.¹⁴⁸ The NSW Court of Appeal had found that the Supreme Court of NSW had no power under the *Civil Procedure Act 2005* (NSW) ('*NSW CPA*') to issue such a notice, given that it would subvert the statutory opt out scheme.¹⁴⁹

In the High Court, Gageler CJ, Gleeson and Jagot JJ held that the Court of Appeal had construed the *NSW CPA* too narrowly and, though there were legitimate concerns, this did not confine the power to give the notice. Rather, it informed the steps the Court might consider necessary to manage an 'inconsistency of interest' of a representative plaintiff giving such a notice.¹⁵⁰ Their Honours considered potential 'inconsistencies' of interest between representative plaintiffs, their lawyers, group members who have neither registered nor opted out, defendants, and their lawyers, but noted that these were inherent in the statutory scheme and were to be managed by the court in the interests of the administration of justice in the circumstances of each case.¹⁵¹

Thus, it might be observed that the High Court tentatively approved so-called 'soft class closure' on a narrow basis of the power to issue such a notice. That basis would seem to leave it open for class closure to be later refused by the Court for individuals who might claim to have been unfairly excluded from a subsequent settlement. Indeed, in a settlement approval judgment handed down in August 2025, Beach J of the Federal Court observed that 'the present state of affairs suggests that potential federal reform may need to be considered along the lines of section 33ZG' of the Victorian regime¹⁵² which expressly empowers Victorian trial judges to implement class closure devices.¹⁵³

C Deterrence of Harmful Conduct

As outlined earlier, the ALRC's 1998 *Grouped Proceedings Report* rejected the punishment of harmful conduct as a primary rationale for implementing class action law reform,¹⁵⁴ and the deterrent impact of class actions remains controversial.¹⁵⁵ Nonetheless, the High Court has not endorsed attempts by large, multinational businesses to immunise themselves from class actions.

To mitigate class action risks, many global organisations use exclusive jurisdiction and class action waiver clauses. However, because these clauses are designed to protect the private interests of the organisations that use them,

148 *Pallas* (n 146) 26 [1] (Gageler CJ, Gleeson and Jagot JJ), 40–1 [47] (Gordon and Steward JJ)

149 *Ibid* 26 [2] (Gageler CJ, Gleeson and Jagot JJ). The opposite conclusion was reached by the Full Federal Court in *Parkin v Boral Ltd* (2022) 291 FCR 116.

150 *Pallas* (n 146) 26–7 [3] (Gageler CJ, Gleeson and Jagot JJ).

151 *Ibid* 31 [22], 39 [44].

152 *J Wisbey & Associates Pty Ltd v USB AG [No 3]* [2025] FCA 1018, [67] (Beach J).

153 For a comprehensive judicial analysis of this unique Victorian provision, which has no counterpart in the country's other five legislative class action regimes, see *Matthews v SPI Electricity Pty Ltd [No 13]* (2013) 39 VR 255, 260 [14]–[15], 262 [23], 265–6 [36]–[39], 268–9 [47]–[51] (Forrest J).

154 *Grouped Proceedings Report* (n 38) 131–2 [321]–[322].

155 Christopher Hodges, 'Evaluating Collective Redress: Models, Evidence, Outcomes and Policy' in Alan Uzela and Stefaan Voet (eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer Cham, 2021) <https://doi.org/10.1007/978-3-030-73036-9_2>; John C Coffee Jr, 'Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation' (2006) 106 *Columbia Law Review* 1534 <<https://doi.org/10.2139/ssrn.893833>>.

they may clash with public policies related to upholding fair business practice and access to justice, and protections under the *Competition and Consumer Act 2010* (Cth) schedule 2 ('*Australian Consumer Law*') such as unfair contract terms. *Karpik v Carnival plc* ('*Karpik*'),¹⁵⁶ a class action arising from COVID-19 cruise ship claims, dealt with this clash head on. The case also addressed issues related to foreign class members.¹⁵⁷

Exclusive jurisdiction clauses require that legal proceedings be commenced in a single, stipulated jurisdiction, generally the jurisdiction most convenient to the party with the greatest bargaining power. Such clauses minimise the likelihood of defending proceedings in multiple jurisdictions and promote the efficient disposition of claims.¹⁵⁸ Consequently, subject to public policy and regulatory constraints, common law courts will generally enforce them by staying or dismissing proceedings commenced in jurisdictions other than the jurisdiction(s) agreed.¹⁵⁹

A class action waiver clause is a provision that prohibits a party from participating in a class action or collective arbitration. Due to the expense and inconvenience of pursuing low value claims on an individual basis, class action waiver clauses can thus effectively deprive employees, consumers and small supply contractors of access to justice.¹⁶⁰

In *Karpik*, the High Court was focused upon a sub-group of foreign passengers whose contracts were governed by terms and conditions that were different from Australian passenger terms and conditions. They included an exclusive jurisdiction clause in favour of the United States District Courts for the Central District of California in Los Angeles as well as a class action waiver clause.¹⁶¹

Several issues were addressed by the Court including: (1) whether the sub-group's contracts were governed by section 23 of the *Australian Consumer Law*,¹⁶² (2) if section 23 did apply, whether the class action waiver class was an unfair contract term and therefore unenforceable; (3) whether the class action waiver

156 (2023) 280 CLR 640 ('*Karpik*').

157 See Victoria Roy, 'The "Ruby Princess" Class Action: A Jewel in the Crown of Australian Consumer Protection' [2024] (182) *Precedent* 26.

158 Mary Keyes and Brooke Adele Marshall, 'Jurisdiction Agreements: Exclusive, Optional and Asymmetrical' (2015) 11(3) *Journal of Private International Law* 345, 348 <<https://doi.org/10.1080/17441048.2015.1106718>>.

159 See, eg, *AIG Europe SA v John Wood Group plc* [2023] 1 All ER (Comm) 381, in which the English Court of Appeal endorsed the issuance of an anti-suit injunction to enforce an exclusive jurisdiction clause in an insurance contract; *Qantas Airways v Rohrlach* (2021) 304 IR 218, in which the NSW Court of Appeal issued a stay of proceedings to enforce an exclusive jurisdiction clause in an employment contract; *Turner v Costa Crociere SPA*, 9 F 4th 1341 (11th Cir, 2021), in which a US court enforced a forum selection clause in favour of courts in Genoa, Italy in relation to a COVID-19 cruise ship claim; *ZI Pompey Industrie v ECU-Line NV* [2003] 1 SCR 450, in which the Supreme Court of Canada enforced a forum selection clause in a bill of lading.

160 Albert H Choi and Kathryn Spier, 'The Economics of Class Action Waivers' (2021) 38(2) *Yale Journal on Regulation* 543, 544; Myriam Gilles, 'The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans' (2018) 86(5) *Fordham Law Review* 2223, 2224–5.

161 *Karpik* (n 156) 657 [3] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).

162 *Competition and Consumer Act* (n 65) sch 2 s 23. This provision renders void unfair terms contained in, among other things, consumer contracts.

class was also rendered unenforceable because of part IVA of the *FCA Act*; and (4) whether the court should refuse to enforce the exclusive jurisdiction clause.

The Court delivered a single judgment. First, as a matter of statutory interpretation, the Court found that the *Australian Consumer Law* applies to corporations carrying on business in Australia and extends to conduct occurring inside or outside of Australia.¹⁶³ Consequently, because Carnival plc (a company incorporated in England and Wales) and Princess Cruise Lines Ltd, a company incorporated in Bermuda (collectively ‘Princess’), which marketed and operated the cruise were carrying on business in Australia, the *Australian Consumer Law* applied to the sub-group’s contracts even though those contracts were made by foreign companies outside Australia with foreign passengers.¹⁶⁴

Second, the Court held that the class action waiver clause was an unfair term, within the meaning of the *Australian Consumer Law*. By limiting the sub-group members’ access to justice, the clause created significant imbalance in the parties’ rights under the contract.¹⁶⁵ Moreover, the deprivation of the right to participate in a class action caused detriment to the sub-group and did not advance Princess’s legitimate interests.¹⁶⁶

Interestingly, the Court found that the class action waiver clause was not contrary to part IVA of the *FCA Act*.¹⁶⁷ According to the Court, part IVA envisaged a framework where class members could contract out of the right to participate in a class action and instigate individual proceedings.

The Court held that the exclusive jurisdiction clause was not an unfair term and was therefore prima facie enforceable. However, the High Court endorsed the trial judge’s exercise of the discretion not to issue a stay of proceedings regarding the sub-group on the grounds that the class action waiver clause was an unfair term, that preventing the sub-group participating in the Australian class action would fracture the litigation, and that public policy favoured an Australian court applying the *Australian Consumer Law*.¹⁶⁸

The High Court’s strong statements regarding the application of exclusive jurisdiction and class action waiver clauses demonstrate that public policy considerations embedded within protective statutory provisions may override private interests associated with limiting litigation risk. Provided foreign jurisdictions refrain from permitting parallel litigation, extending the benefits of these statutory protections to foreign class members also supports global judicial efficiency.

163 *Karpik* (n 156) 668 [40] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).

164 *Ibid* 674–5 [42]–[50].

165 *Ibid* 673–4 [53].

166 *Ibid* 674–5 [55]–[57].

167 *Ibid* 676 [63].

168 *Ibid* 677–8 [68].

V CONCLUSION

Despite over three decades of operation, the High Court jurisprudence on class actions is still limited in quantity and scope. Nevertheless, the cases that have made it to the High Court reveal a focus on several themes including, importantly, three themes that were the initial foci of the regime. These are, firstly and notably, access to justice in terms of litigants' access to civil claim remedies. Secondly, there is the theme of judicial efficiency, including avoidance of a multiplicity or duplication of similar or related actions and the related achievement of *res judicata* across the class. Lastly, and to perhaps a lesser extent, there is a theme of deterrence of harmful conduct, at least where that conduct might become the subject of civil claims.

Insofar as public policy and principle are concerned, the authors find that the High Court has, consistent with a purposive approach and partly illuminated by the formative 1988 ALRC Report, generally erred on the side of greater access to justice for litigants with arguable civil claims. It has also taken a generally broad approach to the *res judicata* objective of the efficiency of settling controversies for as large an affected group as possible, mostly subject only to the right to opt out. In relation to deterrence, the Court's sceptical approach to class action waiver or exclusion clauses is consistent with a focus on accountability of organisations for their actionable conduct and its potential deterrent value, as well partly replicating the achievement of the objective of access to justice.

Though the authors have noted the inevitable public policy dimensions or effects of much of what the High Court is required to do, they have also noted that questions of civil procedure, however complex, may be inherently less ideological than other judicial decision-making. On the other hand, the background of social and political changes and developments over decades which the authors have noted, clearly form a background and partial impetus to the creation of the procedure and these remain part of the context of the regime. Lastly, the aggregate financial magnitude of many of the substantive claims brought as class actions, the means of funding such claims, and their overall significant effects on large cohorts of litigants, have meant that there is inevitably a continuing and justified interest from regulators and lawmakers as well as parliamentarians and the political class in what the High Court has done and continues to do in this space.