CLASS ACTIONS: THE RIGHT TO OPT OUT UNDER PART IVA OF THE FEDERAL COURT OF AUSTRALIA ACT 1976 (CTH)

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[This article contains an analysis of two fundamental issues concerning class actions. The first issue is whether potential class members should be required to give their express consent to the commencement of the class suit in order to be bound by the judgment handed down at the conclusion of the class action. The second issue that is explored is whether any restriction should be placed on the ability of class members to exclude themselves from the class action. In canvassing these issues, the provisions of the recently enacted Part IVA of the Federal Court of Australia Act 1976 (Cth) and the experience in the United States and Canada are extensively examined.]

I INTRODUCTION

> The real reason for the opt in procedure is quite clear. It is to permit defendants to escape large proportions of deserved liabilities for actual harms inflicted. This is to be accomplished by exploiting the predictable nonresponses to legalese opt in notices often incomprehensible to the average layman, who is offered no immediate and tangible benefit for undertaking the burden of responding affirmatively.[1]
>
> Allowing all plaintiffs the absolute right to opt out ignores the adverse effects that opting out imposes upon the due process rights of remainder plaintiffs. An effective way to account adequately for all of the competing due process interests would be to place limits on plaintiffs' opt-out rights.[2]

One of the most controversial issues in the design of a class action[3] procedure is whether to implement an 'opt out' model or an 'opt in' model. Pursuant to an opt out model a class suit can be commenced without the express consent of the

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1 'Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules' (1978) 5 *Class Action Reports* 3, 22 ('Rule 23 Questionnaire').

2 Steve Baughman, 'Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out' (1991) 70 *Texas Law Review* 211, 233.

3 The Australian Law Reform Commission defined a class action as 'a procedure whereby the claims of many individuals against the same defendant can be brought or conducted by a single representative': Australian Law Reform Commission, Report No 46, *Grouped Proceedings in the Federal Court* (1988), para 2 ('ALRC'). For a brief critique of this definition, see Current Topics, 'Report of Law Reform Commission (Cth) on Grouped Proceedings' (1989) 63 *Australian Law Journal* 458, 459. In this article the terms 'class action' and 'representative proceeding' are used interchangeably.

'absent' class members. However, an opportunity is offered to the class members to exclude themselves from the class action; that is, to opt out. Under an opt in model only those who take positive action, by giving their express consent to the commencement of the class suit, will be covered by the judgment on the common questions.[4]

This dilemma has recently come to the fore in Australia as a result of the enactment of Part IVA of the Federal Court of Australia Act 1976 (Cth) ('the Act')[5] which, on 5 March 1992,[6] introduced the most extensive framework regulating class actions ever seen in Australia.[7] An equally significant issue which needs to be addressed once a decision is made to implement the opt out model (which was the model chosen by the Commonwealth Parliament in relation to the Federal Court), is whether the right to opt out should be absolute or whether it should be regulated in some way, such as by requiring the approval of the court presiding over the class action before a class member can exclude himself or herself from the class.[8]

Part II of this article contains an outline of the provisions of some of the opt out models currently in place in Australia, Canada and the United States. In Part III the opt in/opt out dilemma will be considered, while the issue of the desirability of restrictions on the right to opt out will be evaluated in Part IV. A

[4] In the United States, Frankel J described the opt out scheme as being 'patterned after the highly successful procedures of the Book-of-the-Month Club': Justice Frankel 'Some Preliminary Observations Concerning Civil Rule 23' (1967) 43 *Federal Rules Decisions* 39, 44. Similarly, a member of the Federal Opposition, during parliamentary discussion of Part IVA of the Federal Court of Australia Act 1976 (Cth), drew an analogy between the opt out model and 'a book club which was run in such a way that, unless I sent back the monthly form to indicate a lack of interest in the book of the month, I received the book with a bill forthwith': see Kevin Andrews, Commonwealth, *Hansard*, House of Representatives, 26 November 1991, 3292. The book club analogy has, however, been attacked on the grounds that the

> Book-of-the-Month Club purchase obligations at least arise from prior consent. By contrast, the essence of the ... class action is that the members have had no prior relationship with the plaintiff and his lawyer, and that ... the necessity for the class member to act is imposed without prior consent.

John Kennedy, 'Class Actions: The Right to Opt Out' (1983) 25 *Arizona Law Review* 3, 18. See also Earl Pollock, 'Class Actions Reconsidered: Theory and Practice Under Amended Rule 23' (1973) 28 *Business Lawyer* 741.

[5] See Federal Court of Australia Amendment Act 1991(Cth).

[6] Section 2(2).

[7] '[I]t represents the first attempt to provide a detailed legislative framework supporting class actions in their modern functional context': Michael Tilbury, 'The Possibilities for Class Actions in Australian Law', paper delivered at the 1993 Australian Legal Convention in Hobart, 5.

[8] It is interesting to note that Australian commentators have so far directed their attention to the opt out/opt in dilemma and have ignored the equally vital issue of whether the right to opt out should be absolute. In the United States, however, the consensus appears to be that the opt out scheme is preferable to the opt in scheme; therefore, the attention of US commentators has turned to the dangers which are inherent in the conferral of an unrestricted right to opt out. For exceptions to this 'consensus', see American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure* (1972) ('American Lawyers'); American Bar Association, Committee on Class Actions of the Section of Corporation, Banking and Business Law, 'Recommendation Regarding Consumer Class Actions for Monetary Relief' (1974) 29 *Business Lawyer* 957 ('ABA Committee') and the results of a survey conducted in 1977 which revealed that 67% of the Circuit judges questioned and 66% of the District judges questioned, were in favour of the replacement, at the federal level, of the opt out model with an opt in model: see Rule 23 Questionnaire, above n 1, 19. However, this survey also indicated that 74% of the teachers/scholars questioned opposed the introduction of an opt in scheme.

summary of the writer's conclusions is contained in Part V.

II THE COMMONWEALTH FOLLOWS SOUTH AUSTRALIA, ONTARIO, QUEBEC AND THE UNITED STATES IN CHOOSING AN OPT OUT SCHEME

As noted in Part I, the Commonwealth Parliament, acting on the recommendations of the Australian Law Reform Commission ('ALRC'),[9] 'opted' for an opt out scheme in relation to class actions initiated in the Federal Court.

Section 33E of the Act provides that 'the consent of a person to be a group member in a representative proceeding is not required' unless that person is the Commonwealth, a State or Territory, or a Minister, officer or certain agencies of the Commonwealth, a State or a Territory.[10] In order to accommodate the opt out model, it is provided that an application commencing a representative proceeding, in describing or otherwise identifying group members to whom the suit relates, need not 'name, or specify the number of, the group members'.[11] The other crucial provision is s 33J which governs the manner in which the right to opt out can be exercised. It provides that:

> (1) The Court must fix a date before which a group member[12] may opt out of a representative proceeding.

[9] ALRC, above n 3. The background to Part IVA is quite fascinating. In February 1977 the then Liberal Attorney-General, R J Ellicott QC, asked the ALRC to report on class actions in Federal Courts and other courts whilst exercising federal jurisdiction or in courts exercising jurisdiction under any law of any Territory: see ALRC, above n 3, para 1. It was not until December 1988 that the ALRC's report was tabled in Parliament. In December 1989, Senator Janine Haines, the then Leader of the Australian Democrats, adopted the ALRC's proposed legislation and introduced it into the Senate as a private member's Bill entitled the Federal Court (Grouped Proceedings) Bill 1989: see Commonwealth, *Hansard*, Senate, 11 December 1989, 4233. The Labor government took no action in relation to the ALRC's proposals until 12 September 1991 when the Federal Court of Australia Amendment Bill 1991 was introduced into the Senate. The government refused to implement any of the amendments proposed by the Opposition and the Democrats and the legislation received the royal assent on 4 December 1991, attracting the criticism that 'the fact that general proposals have been around for some time does not excuse the need for specific legislation to be able to be examined in greater detail': see Robert Baxt, 'Class Action Legislation — A Mirage for the Consumer?' (1992) 66 *Australian Law Journal* 223, 224. Given that the series of events leading to the enactment of Part IVA was initiated by the Liberal Party, through the reference to the ALRC on class actions, it was somewhat ironic that Part IVA, and in particular the provisions concerning the opt out scheme, were heavily criticised by the Liberal MPs with Senator Durack going as far as saying that 'it really is one of those rather loony proposals that come up from time to time from commissions like the Law Reform Commission': Commonwealth, *Hansard*, Senate, 13 November 1991, 3019.

[10] This exception is justified in the Explanatory Memorandum on the ground that 'the activities of governments, government agencies, Ministers and officials may be subject to legislative and other restraints which make inappropriate the inclusion of such persons in a representative proceeding without consent': Explanatory Memorandum to the Federal Court of Australia (Amendment) Bill 1991 (Cth), para 14. A similar rationale has been put forward by the ALRC: ALRC, above n 3, para 128.

[11] Section 33H(2).

[12] 'Group member' is defined in s 33A as 'a member of a group of persons on whose behalf a representative proceeding has been commenced'. As was indicated by Professor Tilbury, above n 7, 2:

> the Australian Law Reform Commission envisaged that all members of the class would be parties, but this recommendation was, rightly, not adopted in Pt IVA of the Federal Court of Australia Act 1976 (Cth), since the effect of its adoption would have been to set at nought one of the essential characteristics and advantages of representative proceedings.

(2) A group member may opt out of the representative proceeding by written notice given under the Rules of Court[13] before the date so fixed.
(3) The Court, on the application of a group member, the representative party or the respondent in the proceeding, may fix another date so as to extend the period during which a group member may opt out of the representative proceeding.
(4) Except with the leave of the Court, the hearing of a representative proceeding must not commence earlier than the date before which a group member may opt out of the proceeding.

A judgment given in a representative proceeding 'binds all such persons [described or otherwise identified in the judgment] other than any person who has opted out of the proceeding under section 33J'.[14]

It is not the first time that an opt out scheme has been implemented or proposed in Australia. In 1977 the South Australian Law Reform Committee ('SALRC') recommended the implementation of an opt out scheme similar to that which was subsequently introduced by the Act.[15] In January 1987 the Rules of the Supreme Court of South Australia[16] were amended to introduce what has been regarded by some commentators as an opt out model.[17]

Looking at overseas models, in Quebec (since January 1979)[18] and in Ontario (since January 1993)[19] class actions have been commenced without the consent

[13] Federal Court of Australia, Order 73 rule 5 provides that an application for an order involving notice must be made by notice of motion. This notice must:
(a) have attached a supporting affidavit that sets out to the best information, knowledge and belief of the applicant:
(i) the identity or description of the group members; and
(ii) the whereabouts of the group members; and
(iii) the means by which a notice ordered by the Court is most likely to come to the attention of the group members; and
(b) be served on all other parties.

Order 73 rule 6 provides that an opt out notice 'may be in accordance with Form 131'.

[14] Section 33ZB. Williams has persuasively argued that:

> the merit of the class action procedure lies in the *res judicata* effect of the judgment that will be pronounced at its conclusion. Judgment in a class action binds not only the plaintiff and the defendant but also those whom the plaintiff represents, the class members. It is this characteristic that makes the class action such a convenient method of determining the claims of a large number of individuals who are essentially in the same legal situation as regards the defendant.

Neil Williams, 'Consumer Class Actions in Canada — Some Proposals for Reform' (1975) 13 *Osgoode Hall Law Journal* 1, 13.

[15] See Law Reform Committee of South Australia, 'Draft Bill for a Class Actions Act', Report No 36, *Report Relating to Class Actions* (1977) ss 3(7)(d) and 7(1).

[16] See Rules of the Supreme Court of South Australia, rule 34.01.

[17] See ALRC, above n 3, para 104 and Mr Justice Donnell Ryan, 'The Development of Representative Proceedings in the Federal Court' (1993) 11 *Australian Bar Review* 131, 138. The uncertainty as to the true nature of the South Australian model stems from the failure of the Rules to deal with the issues of whether class members can opt out of the class suit and whether class suits can be commenced without the consent of class members. In relation to the second issue, Professor Tilbury has concluded that, 'except in so far as it is subsumed in the discretion of the court to allow the action to proceed as a class action, there is no specific provision dealing with consent in the ... model in South Australia, where the position is, accordingly, the same as in the traditional representative action': Tilbury, above n 7, 20.

[18] An Act respecting the class action 1978 c 8 (Quebec) art 1006.

[19] Class Proceedings Act 1992 (Ontario) ss 2(1), 8(1)(f) and 9. An opt out model had been proposed 10 years earlier, in 1982, by the Ontario Law Reform Commission. See Ontario Law Reform Commission, Report No 48, *Report on Class Actions* (1982), 467-92 ('OLRC').

of the class members and an automatic right to opt out of the proceedings has been provided to them.

But the opt out procedure was not 'created' in Canada. Instead, it was the creation of the Advisory Committee on Civil Rules, the Committee that in 1966 redrafted United States Federal Rules of Civil Procedure rule 23. This rule governs class litigation in American Federal courts. As a result of the 1966 revision, rule 23(b) creates three different types of class actions.[20]

The first type is regulated by rule 23(b)(1) and deals with situations where, in the absence of a class action, separate proceedings would either establish incompatible standards of conduct for the party opposing the class, or would practically prejudice the interests of class members not made parties.

The second category of class actions is regulated by rule 23(b)(2) and deals with cases where

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The final group of class actions is controlled by rule 23(b)(3) and concerns cases where common questions predominate and the class action is superior to other available methods for the fair and efficient adjudication of the controversy. Class actions seeking injunctive or declaratory relief are usually prosecuted under rule 23(b)(1) and rule 23(b)(2) while rule 23(b)(3) is the subdivision under which class actions seeking damages are usually initiated.

The right to opt out is automatically available to all class members in class actions brought under rule 23(b)(3).[21] In relation to the other two categories there is no right to opt out but American courts have sometimes, although infrequently, utilised the wide discretion conferred on them by rule 23(d)(2)[22] to afford putative class members the option of opting out.[23]

III OPT IN OR OPT OUT: A CLASS DILEMMA

As was recently indicated by a Federal Court judge '[p]erhaps the most controversial provision of the new class action procedure [established by the Act] is

[20] Advisory Committee on Civil Rules, 'Proposed Amendments to the Rules of Civil Procedure for the United States District Courts' (1966) 39 *Federal Rules Decisions* 69 ('Advisory Committee').

[21] In relation to class actions maintained under United States Federal Rules of Civil Procedure, rule 23(b)(3), rule 23(c)(2) provides that notice must be given to the class member that (A) the court will exclude him or her if he or she so requests by a specified date; (B) the judgment whether favourable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he or she desires, enter an appearance through his or her counsel.

[22] Rule 23(d)(2) provides that:

> In the conduct of actions to which this rule applies the court may make the appropriate orders: ... (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defences, or otherwise to come into the action.

[23] See, Baughman, above n 2, 217.

s 33E',[24] the provision which allows the commencement of class suits in the Federal Court without the consent of the putative class members.

The most frequent criticism of opt out schemes is that they cannot co-exist with the principle of freedom of choice. It has been said of the opt out scheme in the Act that:

> Our court system is based on the fact that individuals make their own decisions to initiate proceedings; it is done by the conscious decisions of individuals. That is what ought to happen; people ought to take responsibility for whether they want to start proceedings. But under this Bill they become part of a system without knowing, or perhaps even caring. It really goes against the philosophical basis of our legal system and affects the individual rights of people to make those decisions.[25]

This criticism of opt out models can thus be said to stem from the notion or principle of 'individualism' which provides the philosophical underpinning of our adversary system. This notion was elegantly described by the Ontario Law Reform Commission ('OLRC'):

> [I]ndividualism, the belief in the free and independent action of individuals, is a concept that has deep roots in Western society ... the notion that one can, and indeed must, be the architect of one's own destiny is reflected in the traditional manner in which people have related to the social, economic, political, and other institutions in our society.
>
> In the past, we generally have accepted as fair and reasonable the often heavy burden of ultimately vindicating our rights by the commencement of individual legal proceedings.[26]

A major benefit perceived as flowing from this principle arises from the belief that the dignity of an individual is impaired when the legal system fails to provide him or her with the freedom to decide whether to pursue legal proceedings in relation to matters permanently affecting his or her life. Furthermore, once proceedings are initiated, protection of an individual's dignity necessitates providing that individual with a sufficient degree of participation in, and control over, those proceedings.[27]

However, to conclude that 'the adversary system leads to fairness presupposes that each side will have the same resources and the same quality of advocate.

[24] Ryan, above n 17, 137.

[25] Senator Peter Durack as quoted in Commonwealth, *Hansard* ,Senate, 13 November 1991, 3022. See also American Lawyers, above n 8, 2-3; William Simon, 'Class Actions — Useful Tool or Engine of Destruction' (1972) 55 *Federal Rules Decisions* 365, 379; ABA Committee, above n 8, 968; Steve Plunkett, 'Legislation Lacks Class' (1992) 14 *Law Society Bulletin* 40; Neil Francey, 'Stay in and Miss Out?' (1992) 27 *Australian Law News* 10, 13; and Commonwealth, *Hansard*, House of Representatives, 14 November 1991, 3287. One commentator colourfully portrayed this argument as inferring that 'the established opt out procedure is Big Brother in disguise, in that self-appointed class representatives force silent class members to participate in litigation against their will', Beverley Moore, 'The ABA, the Congress and Class Actions: A Report' (1973) 3 *Class Action Reports* 36, 53.

[26] OLRC, above n 19, 2-3.

[27] See, eg, Harvey Rochman, 'Due Process: Accuracy or Opportunity?' (1992) 65 *Southern California Law Review* 2705, 2735-41.

Unfortunately, those presumptions are rarely accurate'[28] as 'ordinary' individuals find it difficult, if not impossible, to 'take on' powerful entities such as multinationals[29] and governments.[30] Therefore the vindication of rights through the commencement of individual proceedings may not be 'fair and reasonable' as it will deny access to the courts, and hence legal remedies, for those individuals who do not have sufficient resources to initiate such proceedings.[31] It was the recognition of the existence of these problems, created by the practical application of the principle of unconstrained individualism, that has led to the creation of class actions.[32] It is, therefore, highly ironic and disappointing that this principle should be put forward as the major reason for the implementation of an important feature of class action procedures themselves! This party autonomy argument in favour of opt in systems fails to acknowledge that unfettered individualism cannot co-exist with the most fundamental feature of class actions, namely that one individual should be able to commence and conduct legal proceedings on behalf of other individuals whose only connection with the representative plaintiff is that their legal claims are similar to those of the representative plaintiff.

Given these considerations, it is reasonable to conclude that reliance on the principle of freedom of choice to support opt in mechanisms displays, on a conceptual level, an unwillingness to embrace the notion of class proceedings and, on a practical level, an attempt to curtail as much as possible the ability of class actions to disturb the *status quo*.[33] The regressive nature of this approach was highlighted by Nelthorpe when he lamented that:

28 Joan Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures' (1991) 20 *Federal Law Review* 252, 257. See also Peter Connolly, 'The Adversary System — Is It Any Longer Appropriate?' (1975) 49 *Australian Law Journal* 439; Sir Richard Eggleston, 'What is Wrong with the Adversary System?' (1975) 49 *Australian Law Journal* 428 and Bernard Cairns, 'Management of Litigation and the Adversary System' (1992) 12 *The Queensland Lawyer* 143.

29 For examples of such occurrences in Australia, see ALRC, above n 3, para 63.

30 See Owen Fiss, 'The Supreme Court 1978 Term — Foreword: The Forms of Justice' (1979) 93 *Harvard Law Review* 1, 36; William Bogart, 'Questioning Litigation's Role — Courts and Class Actions in Canada' (1987) 62 *Indiana Law Journal* 665, 690; Adolf Homburger, 'State Class Actions and the Federal Rule' (1971) 71 *Columbia Law Review* 609, 641; J Vernon Patrick and Marvin Cherner, 'Rule 23 and the Class Action for Damages: A Reply to the Report of the American College of Trial Lawyers' (1973) 28 *Business Lawyer* 1097, 1100; OLRC, above n 19, 3 and Williams, above n 14, 50.

31 Burger CJ of the US Supreme Court in *Deposit Guaranty National Bank v Roper* 445 US 329 (1980), 339 pointed out that:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

32 Weinstein J in *Dolgow v Anderson* (1968) 43 *Federal Rules Decisions* 472, 484-5, has described the issue as follows:

> It is the duty of the federal courts to render private enforcement practicable. Other than the class action, the procedures available for handling proliferated litigation — joinder, intervention, consolidation, and the test case — cannot serve this function in a situation like the one presented here. These alternative devices presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention'.

33 It is, therefore, no coincidence that usually those commentators who oppose class actions also oppose opt out mechanisms!

> class actions are a vehicle of this century and the next, and should not be hindered or restricted by conservative fears of the unknown or pig-headed reliance on mechanisms which have failed in the past.[34]

It is also important to note that protection of the dignity and interests of individuals does not require that their express approval or consent be obtained before proceedings concerning them can be initiated. Strong support for this proposition can be found in the judicial interpretation of the 'due process' provisions of the US Constitution, which require that deprivation of life, limb or property be preceded by compliance 'with due process of law'.[35] The US Supreme Court, in *Phillips Petroleum Co v Irl Shutts*, held that due process did not require the implementation of an opt in requirement. It also drew attention to 'the obvious advantages in judicial efficiency resulting from the "opt out" approach'.[36]

The attempt to portray the right to initiate legal proceedings as sacrosanct is misplaced as 'there is no difference in principle between exercising freedom of choice about whether to commence a proceeding and exercising freedom of choice about whether to continue one.'[37] Since the Act places no substantive restrictions on the ability of absent members to exit from the class suit, it does not derogate from the principle of freedom of choice. But, as will be argued below, protection of the interests and dignity of class members does not warrant the conferral of an absolute and unrestricted right to opt out.

Those desirable goals can be fulfilled as long as the following requirements are satisfied:

(a) the prerequisites which need to be complied with for the commencement of the class proceedings do not generate unfairness as a result of bringing together in the one action excessively diverse claims;
(b) absent group members have a sufficient degree of participation in, and control over, the class action;
(c) absent group members are adequately represented by the representative plaintiff;
(d) the court presiding over the class litigation plays an active role in order to

34 Denis Nelthorpe, 'Class Actions: the Real Solution' (1988) 13 *Legal Service Bulletin* 26, 28.

35 US Constitution, amendments V and XIV.

36 472 US 797 (1985), 814.

37 ALRC, above n 3, para 126. This conclusion is even stronger where opting out does not attract cost penalties. As a result of the enactment, in December 1992, of s 43(1A) of the Act (subject to a couple of exceptions not relevant to this discussion) costs cannot be awarded against class members other than the representative plaintiff. It provides that 'in a representative proceeding ... the Court or Judge may not award costs against a person on whose behalf the proceeding has been commenced.' It is interesting to note that the ALRC had recommended the establishment of contingency fees for class actions: ALRC, Part 8, especially para 286. Senator Tate, the then Minister for Justice and Consumer Affairs, rejected the ALRC's proposal on the ground that 'we have set our face firmly against some features of the American legal system, such as contingency fees, which appear ... to drive the American legal system rather than the merits of the issues themselves': Commonwealth, *Hansard*, Senate, 13 November 1991, 3025. However, it is not difficult to see that 'by not taking up this proposal Parliament has left untouched the barriers to legal redress arising where an individual is deterred from instituting legal proceedings due only to fear of facing substantial legal costs if she or he loses': R Alkadamani, 'The Beginnings of 'Class Actions'?' (1992) 8 *Australian Bar Review* 271, 276.

protect the interests of absent group members; and

(e) an opportunity is conferred on group members to persuade the court that they should be allowed to opt out.

The provisions of the Act will now be considered to demonstrate that it satisfies the first four requirements. Requirement (e) will be considered in Part IV.

(a) *Connecting Links*

Section 33C(1) allows class suits to be commenced if the following three requirements are complied with:

(a) 7 or more persons have claims against the same person; and
(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
(c) the claims of all those persons give rise to a substantial common issue of law or fact.[38]

The view of the ALRC, that the requirements that the claims of the class members arise from common or related circumstances and have an issue of law or fact in common should ensure that no unfairness is created as a result of the 'diversity and unmanageability of the issues'[39] while advancing 'the goal of economy in use of resources',[40] does not appear to be without merit. Unfortunately, the Commonwealth Parliament added the requirement that the common issue of law or fact must be 'substantial'. The use of an ambiguous requirement such as 'substantial' adds uncertainty, as it confers upon courts excessive discretion, and it is not necessary as the requirement that there be a 'common issue of law or fact' is more than adequate to prevent disparate matters from being brought together. The reason for the amendment can only be surmised, as it was not debated in Parliament nor explained in the Explanatory Memorandum.

In relation to the minimum number requirement,[41] while, as conceded by the

[38] More guidelines are provided by s 33C(2), pursuant to which a representative proceeding may be commenced:

(a) whether or not the relief sought:-
  (i) is, or includes, equitable relief; or
  (ii) consists of, or includes, damages; or
  (iii) includes claims for damages that would require individual assessment; or
  (iv) is the same for each person represented; and
(b) whether or not the proceeding:-
  (i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or
  (ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

[39] ALRC, above n 3, para 136.

[40] Ibid para 137. Further factors to consider were provided by Professor Tilbury, above n 7, 19, who indicated that the number of class members must be:

> of sufficient magnitude to justify the action as a representative proceeding rather, than, for example, requiring a joinder of the parties. At the same time, the class must not be so widely defined that, bearing in mind the relief which is sought, the effect of allowing a representative action would be to confer a right of action upon a member of the class who would not possess that right in an individual capacity.

[41] The provisions concerning the minimum number requirement were found by Wilcox J in *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1994) 118 ALR 510, 514 to be potentially irreconcilable with other provisions of the Act:

ALRC itself, 'the choice of any figure in these circumstances is arbitrary',[42] a figure is preferable to the excessively flexible and therefore imprecise criterion of 'numerous persons' which has been used frequently in Australia[43] and overseas.[44]

The few cases which have been brought under Part IVA[45] of the Act so far tend to indicate that when doubts are raised as to whether there has been compliance with the three prerequisites for the *commencement* of class suits, judges will turn their attention to the additional power which has been conferred upon them by s 33N to determine whether the proceedings should *continue* as representative proceedings.[46] As this power is dependent on judicial satisfaction 'that it is in the interests of justice' to order that a proceeding no longer continue under Part IVA, it constitutes an additional safeguard for absent class members.[47]

(b) *Individual Participation*

The Federal Court is given the power, in the case of issues common to the claims of some of the group members, to establish a sub-group and appoint a person to be the sub-group representative party on behalf of the sub-group members.[48] Individual group members may be permitted by the court to appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member.[49] They also have the right to apply to the court for the substitution of the representative party whenever they feel that he or she is not adequately representing their interests.[50] Another right conferred on class members is the right to receive notice concerning important aspects of the class

> What is the effect of this addition [the '7 or more persons' requirement contained in s 33C(1)(a)]? It cannot have been intended to require that the application commencing the proceeding demonstrate that at least seven members have associated claims against the respondents. Such a requirement would conflict with s 33H(2), which expressly states that it is not necessary for that document to specify the number of group members.

42 ALRC, above n 3, para 140.

43 See, eg, Rules of the High Court, Order 16 rule 12 and Rules of the Supreme Court of Tasmania, Order 18 rule 9.

44 See, eg, United States Federal Rules of Civil Procedure, rule 23(a)(1).

45 See *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 118 ALR 165; *Soverina Pty Ltd v Natwest Australia Bank Ltd* (1993) 40 FCR 452; and *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd.* (1994) 118 ALR 510.

46 This judicial approach had been anticipated by Justice Ryan of the Federal Court in a paper he delivered in October 1992: see Ryan, above n 17, 137.

47 The specific reasons outlined in s 33N(1) for the discontinuance of the class action are:

> (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding: or
> (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
> (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
> (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.'

See also ss 33L and 33M.

48 Section 33Q(2).

49 Section 33R.

50 Section 33T(1).

suit such as a respondent's application 'for the dismissal of the proceeding on the ground of want of prosecution'[51] and a representative party's application to seek leave to withdraw as representative party.[52] Section 33W(4)(a) requires the court to be satisfied, among other things, 'that notice of the application has been given to group members ... and in sufficient time for them to apply to have another person substituted as the representative party', before granting a person leave to withdraw as a representative party.

(c) *Adequate Representation*

But perhaps the most important safeguard of class members' rights and interests is provided by s 33T(1) which provides that:

> if, on an application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and may make such orders as it thinks fit.[53]

As was noted by Williams, the risk of prejudice to an absent class member

> will be minimized, if not eliminated altogether, if the representative parties and their lawyers exercise the same vigour and competence in presenting his [the class member's] claim as could be expected if he were to sue himself. Hence the requirement that the court be satisfied that the representative parties will fairly and adequately protect class interests.[54]

However, there are a number of ways in which the Act's provisions concerning adequate representation could be improved. Greater protection of the interests of class members would have been provided if the Commonwealth Parliament had implemented the ALRC's recommendation that 'a principal applicant should not be able to conduct a group member's proceeding otherwise than by a solicitor or barrister who is not a group member except with the Court's leave.'[55]

Another unsatisfactory feature is the conferral upon the representative applicant of:

> a sufficient interest:
> (a) to continue that proceeding; and
> (b) to bring an appeal from a judgment in that proceeding;

51 Section 33X(1)(b).

52 Section 33X(1)(c). See also s 33X(4) pursuant to which 'unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 33V must not be determined unless notice has been given to group members.'

53 For an extensive discussion of the cardinal importance of adequate representation in class suits, see William Weiner, 'The Class Action, the Federal Court and the Upper Class: Is Notice, and its Consequent Costs, Really Necessary?' (1985) 22 *California Western Law Review* 31.

54 Williams, above n 14, 75.

55 ALRC, above n 3, para 201. In the US a class action cannot commence unless the Court is satisfied that 'the representative parties will fairly and adequately protect the interests of the class': United States Federal Rules of Civil Procedure, rule 23(a)(4). In applying this requirement 'United States courts have considered the competency of the lawyer representing the class': Williams, above n 14, 75.

> even though the person ceases to have a claim against the respondent.[56]

A fear that cessation of a representative party's personal interest in the litigation will severely weaken the commitment of such a representative to the class suit is not irrational. Given the crucial role played by representative parties in class actions, this would constitute an undesirable state of affairs. Presumably, it was recognition of this potential problem that prompted the ALRC to recommend that 'the conclusion of a principal applicant's proceeding should prevent him or her from continuing to conduct group members' proceedings.'[57]

(d) *Court Management*

The need for the courts to take an interventionist role in class litigation stems from the need

> to ensure that justice is achieved for both parties as quickly and inexpensively as possible ... [W]ithout active court management, the interests of unidentified parties may not be taken properly into account.[58]

The provisions of the Act have incorporated the recommendations of the ALRC, which stem from the above mentioned principle, as the Federal Court is empowered to take an active role in protecting the interests of parties not before the Court. As has already been pointed out, the court is given extensive discretion to order the discontinuance of a class proceeding,[59] to substitute a representative applicant who is not adequately representing the interests of the class members[60] and to appoint sub-groups.[61] The court needs to give its approval before a class action can be settled or discontinued[62] and before settlement of the representative party's individual claim can take place.[63]

Further examples of the interventionist role which the Federal Court is expected to assume are provided by s 33X(5) which allows the court 'at any stage, [to] order that notice of any matter be given' to group members and the court's direct involvement in 'administering and distributing monetary relief.'[64] But perhaps the most important provision is s 33ZF(1) which empowers the Federal Court to make 'any order ... [it] thinks appropriate or necessary to

[56] Section 33D(2).

[57] ALRC, above n 3, para 175. It simply indicated that '[a]s the principal applicant no longer has a personal interest, it would generally be in group members' interests for a group member whose claim was still on foot to be appointed as principal applicant': para 174.

[58] Ibid para 157. Another benefit flowing from active court management is that it can deal with the concern, expressed by Brooking J, that the general rules of procedure do not fit satisfactorily with the class action provisions: see *Zentahope Pty Ltd & Ors v Bellotti & Ors* (Supreme Court of Victoria, Appeal Division, Brooking, Fullagar and Tadgell JJ, 2 March 1992) 9-10 (Brooking J) and Greg Reinhardt, 'Class Actions — Quo Vadis?' (1993) 67 *Law Institute Journal* 61, 62. I am indebted to the referee of this article for drawing this issue to my attention.

[59] Sections 33L, 33M, 33N and 33P.

[60] Section 33T.

[61] Section 33Q.

[62] Section 33V(1).

[63] Sections 33W(1).

[64] ALRC, above n 3, para 158.

ensure that justice is done in the proceeding.'

Before leaving this discussion on freedom of choice, it is necessary to make two additional points. Firstly, it is not correct to assert that the opt out mechanism established by the Act does not require that class members take positive action to demonstrate their approval of, or consent to, the class action. In fact, when the court orders the establishment of a fund consisting of the money to be distributed to the class members, a class member is required, within six months or more of the establishment of the fund, to 'make a claim for payment out of the fund and establish his or her entitlement to the payment.'[65]

Secondly, 'the power to opt out, while conceived as an only child, was born into a large family of procedural relatives'.[66] The most obvious analogy is with default judgments where the failure of the defendant to act imposes the result.[67]

The fundamental issue of which of the two mechanisms will be more effective in enabling class actions to attain the desirable policy goals which they were created to accomplish can now be considered.

Policy Goals of Class Actions

To facilitate full comprehension of the following discussion, it is necessary to distinguish between three types of individual claims: non-viable claims, individually non-recoverable claims and individually recoverable claims.

> A claim is nonviable if the expenses an individual would incur in asserting a right to a share of a class judgment would be greater than his expected share of the recovery. A claim is individually nonrecoverable if it would not justify the expense to an individual of independent litigation but would justify the lesser expenditure required to obtain a share of a class judgment. A claim is individually recoverable if it warrants the costs of separate litigation; that is, if an action to recover the claim would be economically rational regardless of the availability of class action procedures.[68]

Three major benefits are expected to flow from the implementation of class actions.[69] In the first place, it would reduce costs, increase efficiency and not

[65] See s 33ZA. One commentator has cogently argued that, '[w]hatever the merits of the philosophical position that class members should be required to show "active aggrievement" or to take some affirmative action in order to recover, there is no basis for requiring that they do so twice': Rule 23 Questionnaire, above n 1, 22.

[66] Kennedy, above n 4, 47.

[67] Ibid 18. See, eg, Rules of the Supreme Court of Victoria, Order 21 which allows judgments in default of appearance or defence. Such judgments entered or given in default of appearance or defence may, however, be set aside by the Court: rule 21.07.

[68] Note, 'Developments in the Law — Class Actions' (1976) 89 *Harvard Law Review* 1318, 1356 ('Harvard Note').

[69] See ALRC, above n 3, paras 62-9; OLRC, above n 19, 117-46; Federal Courts Committee of the Bar of the City of New York, Majority Report, 'Class Actions — Recommendations Regarding Absent Class Members and Proposed Opt-In Requirements' (1973) 2 *Class Action Reports* 89, 92-3 ('Majority Report of NY Bar'); Linda Mullenix, 'Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act' (1986) 64 *Texas Law Review* 1039, 1060-1; Justin Emerson, 'Class Actions' (1989) 19 *Victoria University of Wellington Law Review* 183, 187-9; Kenneth Dam, 'Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest' (1975) 4 *Journal of Legal Studies* 48; David Rosenberg, 'The Casual Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System' (1984) 97 *Harvard Law Review* 849, 908-16;

expose defendants to conflicting judgments by enabling a single determination of issues which are common to members of a group. In fact, without class actions some of the individuals with individually recoverable claims would start their own proceedings (the 'judicial economy' goal). Secondly, it enhances access to justice by opening the 'doors' of our courts to those individuals with individually non-recoverable claims or whose claims would not have led to individual proceedings because of social or psychological barriers (the 'access to justice' goal).[70] Thirdly, the knowledge by potential defendants that numerous persons can, through the device of class actions, pursue legal remedies which were otherwise not available to them should provide potential defendants with a greater incentive not to break the law (the 'behaviour modification' goal).

In this writer's view, the most important goal of class actions is the 'access to justice' goal. However a number of commentators have argued that increased access to the courts is undesirable as it will lead to proceedings which should not have been initiated.[71] As an American court once noted, '[o]ur scarce judicial resources cannot be allocated on the vindication of every individual wrong however slight.'[72]

This argument is another manifestation of the refusal to accept class actions by advocating whatever measures or philosophy will be effective in nullifying the potential that class actions have to upset the *status quo* in our legal system. It is also symptomatic of our 'money dominated' society in which the importance of most matters, including legal claims, is gauged by the amount of money at stake.[73] Whatever practical or philosophical merits this approach might have in general, it is submitted that as far as legal claims are concerned, 'the viability of an individual claim ... [does not give] an accurate assessment of its legitimacy and importance.'[74]

It is also important to keep in mind that the preservation of scarce judicial resources, the main benefit put forward by those who advocate the maintenance of the *status quo*, has to be balanced against the painfully obvious 'substantive' effect which this approach entails.[75]

Williams, above n 14, 2-3; Patrick and Cherner, above n 30, 1098-102; Michael Owen, Australian Industries Development Association, *The Extended Class Action in the Australian Context* (1979) 40-56; and Note, 'The Cost-Internalisation Case for Class Actions' (1969) 21 *Stanford Law Review* 383.

70 Gleeson CJ of the NSW Supreme Court, in 'Access to Justice' (1992) 66 *Australian Law Journal* 270, has commented that '[t]he phrase "access to justice" is used to express a value so widely acknowledged that even to pause to examine its meaning and its implications may be taken as a sign of ideological unsoundness'.

71 See, eg, Pollock, above n 4, 741-3; American Lawyers, above n 8, 5-6 and Federal Courts Committee of the Bar of the City of New York, Minority Report, 'Class Actions — Recommendations Regarding Absent Class Members and Proposed Opt-in Requirements' (1973) 2 *Class Action Reports* 94 ('Minority Report of NY Bar').

72 *Hackett v General Host Corp* 455 F 2d 618 (1972)(US Third Circuit Court of Appeals) as quoted in Minority Report of NY Bar, above n 71, 95.

73 An example of this simplistic approach is provided by the way the jurisdiction of our courts is predominantly determined by the monetary value of the claims which lead to legal proceedings.

74 Emerson, above n 69, 187. See also ALRC, above n 3, para 123 and OLRC, above n 19, 120-1.

75 This point was brilliantly made by an American judge, Justice Weinstein:

Empirical Evidence[76]

Empirical evidence available from the United States demonstrates that the implementation of an opt in requirement dramatically reduces the size of the class. A study commissioned by the Committee on Commerce of the United States Senate found that in three cases requiring an affirmative opt in procedure, class sizes were reduced by 39, 61 and 73 per cent, while in two-thirds of the cases applying the standard opt out procedure, reductions in class size were less than 10 per cent.[77]

This finding, together with the reasons for it, provides support for the ALRC's view that

> [a] requirement of consent will effectively exclude some people from obtaining a legal remedy. It may also undermine the goals of efficiency and avoidance of a multiplicity of proceedings. *All* these policies can only be served by enabling proceedings to be commenced in respect of all persons who have related claims arising from the same wrong without requiring their consent.[78]

> The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens ... or we are not .... When the organization of a modern society, such as ours, affords the possibility of illegal behaviour accompanied by widespread, diffuse consequences, some procedural means must exist to remedy — or at least to deter — that conduct.

As quoted in Weiner, above n 53, 32. See also Mark Friedman, 'Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action' (1990) 100 *Yale Law Journal* 745, 756.

[76] The writer agrees wholeheartedly with the OLRC that

> [w]hat is most unfortunate is the exaggerated rhetoric and imagery with which both proponents and opponents of class actions often have carried on their debate. Moreover, much of the debate has degenerated into a standardized repetition of stock clichés, without any attempt to test the merits of the various assumptions against available empirical evidence.

OLRC, above n 19, 102-3. See also Bogart, above n 30, 689: 'any view of class actions which fails to sift through the many relevant studies is open to serious question'; Harvard Note, above n 68, 1325 and Jonathon Landers, 'Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma' (1974) 47 *Southern California Law Review* 842, 843-4.

[77] This study consisted of a comprehensive examination of all class actions filed in the United States District Court for the District of Columbia between 1 July 1966 and 31 December 1972. It also involved a national survey based upon questionnaires completed by class action practitioners.

In the Columbia component of the study, in a suit involving claims of discrimination, employees were divided into two sub-classes. The members of one sub-class were required to opt in, while the members of the other sub-class were given the choice to opt out. Only 8% opted out of the second sub-class. By contrast, the first sub-class was reduced by 39% because only 1,100 of the 1,800 potential class members opted in. In the words of the study:

> Each sub-class was made up of the same type of employees and the claims of both classes arose from the same complaint; yet there was a difference of 31 per cent in class reduction.
>
> This study also [examined] two consumer fraud class actions filed the same day against the same defendant, both based upon alleged fraud committed against home owners. One action employed the opt out procedure, reducing the class by 17%, while the other case required opting in and the class was reduced by 73%.

Bruce Bertelsen, Mary Calfee and Gerald Connor, 'The Rule 23(b)(3) Class Action: An Empirical Study' (1974) 62 *Georgetown Law Journal* 1123, 1150 (the 'Senate Study').

[78] ALRC, above n 3, para 108. See also Tilbury, above n 7, 20. In the US, less than 1% of class members have requested exclusion in most cases: Williams, above n 14, 79. When the Act was debated in Parliament, Senator Tate, the then Minister for Justice and Consumer Affairs, revealed that

> [t]he United States experience, based on a paper provided to me, although written some decade ago, indicates that perhaps one per cent of group members might opt out ... Our legal officer in the

Supporters of the opt in device argue that these empirical findings, far from damaging their case for opt in schemes, actually enhance it. This stand is based on the belief that an opt in scheme will result in the exclusion from the class of those members who 'are totally devoid of interest and have no desire to participate.'[79]

Conversely, supporters of opt out mechanisms have relied on the results of such empirical studies to argue, persuasively, that the failure to opt in is attributable to a number of reasons other than lack of interest in the class suit.

The most obvious reason for inaction by potential class members in an opt in action is that they have not received the notice 'either because they cannot be identified individually or because they have moved their residences.'[80] The results of empirical studies conducted in the United States substantiate this view.[81] More often than not, the identities of the potential class members may be within the knowledge of the defendant[82] and, under an opt in system where the representative plaintiff locates potential plaintiffs before the commencement of the class action, 'it is most unlikely that the [defendant] company would co-operate and disclose those names and addresses.'[83]

In relation to those who cannot initiate individual proceedings, because of economic, social or psychological barriers, the end result is denial of access to justice. Those who can commence individual proceedings, and who have not received notice of the class action, will not receive the benefits flowing from a single adjudication of similar claims such as the availability of greater resources.[84]

> Washington Embassy ... has made extensive inquiries and has been able to find nothing that really refutes the experience reflected in that paper.
>
> Commonwealth, *Hansard*, Senate, 13 November 1991, 3027.

79 ABA Committee, above n 8, 968; see also Simon, above n 25, 379; American Lawyers, above n 8, 15 and Senate Study, above n 77, 1149.

80 Moore, above n 25, 54.

81 One study involved a detailed examination of an exceptionally large and complex class action, commonly known as the 'second antibiotics settlement'. Over $800,000 was spent in postage alone to distribute the first two notices in the early stages of the litigation; yet nearly one half of the potential class members who were surveyed could not remember receiving, or stated that they did not receive, either of the two notices: see Thomas Bartsh, Francis Boddy, Benjamin King and Peter Thompson, *A Class-Action Suit That Worked: The Consumer Refund in the Antibiotic Antitrust Litigation* (1978) 101-16 (the 'Antibiotics Study') as described in OLRC, above n 19, 132.

The authors of the Senate Study revealed that in several cases a substantial number of class members did not receive notice:

> In one action one-third of a class numbering over 1,200 did not receive notice because no addresses were available. Moreover, 300 of the 870 notices actually sent were returned undelivered. In another ... action out of 2,880 individual notices mailed, 300 were returned for lack of a proper address.
>
> Senate Study, above n 77, 1146-7. See also James Lipschultz, 'The Class Action Suit Under the Age Discrimination in Employment Act: Current Status, Controversies, and Suggested Clarifications' (1981) 32 *Hastings Law Journal* 1377, 1382-3, 1390-1.

82 The authors of the Senate Study noted 'the relative ease with which the class members were identified from records within the defendant's possession. In several cases the names and addresses of class members were ascertained easily from computer print-outs.': Senate Study, above n 77, 1146.

83 Nelthorpe, above n 34, 27.

84 See Mullenix, above n 69, 1072 and John Coffee, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action' (1987) 54 *University of Chicago Law*

The second reason for the failure to opt in was aptly put forward by Professor Kaplan, the reporter for the Advisory Committee when rule 23 was revised. He contended that:

> requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people — especially small claims held by small people — who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable.[85]

To this list the OLRC[86] added fear of sanctions from employers[87] or others in a position to take reprisals[88] and fear of involvement in the legal process.[89] Thus, it can be said that 'the operation of the same social and psychological factors that discourage persons from bringing their own civil actions will prevent them from taking other forms of affirmative action', such as opting in.[90]

Yet again the result of the opt in requirement is the maintenance of the *status quo* as those who are unable to initiate their own legal proceedings for non-financial reasons will also be unable to take the positive step of opting in and will thus be deprived of potential redress.

A third problem was revealed by the authors of the Senate Study who noted that class members were often 'uneducated, unknowledgeable or fearful' and 'lacked the education and understanding to respond properly to legal notice

Review 877, 904.

85 Benjamin Kaplan, 'Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)' (1967) 81 *Harvard Law Review* 356, 397-8. Judge Frankel described his conversation with Professor Kaplan:

> I wrote down what he said — of the class action's 'historic mission of taking care of the smaller guy'. As he and the committee saw it, the likelihood is that this guy will routinely ignore, or at least fail to respond to, the notices contemplated under (c)(2). On that premise, the vote went the way we see, to the effect that a non-response means inclusion rather than exclusion.'

Marvin Frankel, 'Amended Rule 23 from a Judge's Point of View' (1966) 32 *Antitrust Law Journal* 295, 299.

86 OLRC, above n 19, 132.

87 In the US it has been noted that private actions for back pay under the opt in provisions of the Fair Labor Standards Act tend to be brought by ex-employees rather than employees who are still employed: Janet Bowermaster, 'Two (Federal) Wrongs Make a (State) Right: State Class-Action Procedures as an Alternative to the Opt-in Class-Action Provision of the ADEA' (1991) 25 *University of Michigan Journal of Law Reform* 7, 29.

88 See Australian Government Commission of Inquiry into Poverty, *Law and Poverty in Australia* (1975) 60-1:

> Substantial evidence is building up in Australia and overseas to show that tenants ... are extremely reluctant to take steps to enforce their strict legal rights in the face of an obstinate landlord .... The *Legal Needs of the Poor* survey ... showed that only one of the 50 tenants experiencing various kinds of trouble with their landlords sought legal advice.

89 For a convenient summary of the results of empirical studies conducted in the US and Australia, see OLRC, above n 19, 128-9.

90 Ibid 480. Mr Michael Duffy, the then Commonwealth Attorney-General, revealed in Parliament, during the Second Reading of the Act, that an opt out procedure is preferable because it 'ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings': Commonwealth, *Hansard,* House of Representatives, 14 November 1991, 3175. Similar reasoning had been adopted by the ALRC: ALRC, above n 3, para 107. For a brief critique of this rationale see Baxt, above n 9, 224.

requiring opting in.'[91] Similarly, it has been demonstrated that many persons who opt out do so for lack of understanding.[92] Such uncertainty and confusion would not simply relate to the effect of the notice, but would also extend to the frequently difficult question of whether the claims on which the class suit is based encompass the grievance of the class member in question.[93]

These problems are exacerbated by the cost which is sometimes involved in finding the answers to the questions posed above. As noted by Moore, 'the cost of making an affirmative showing of interest ... [is] sufficiently high to destroy for many class members the remedy of collecting damages when they are subsequently established.'[94] What incentive is offered to potential class members to undertake the onerous tasks adverted to above? The distant[95] possibility that, if the class suit is successful, he or she will be able to collect a share of the 'fruits' of the litigation.

A fourth reason for the reduction of the class through the implementation of the opt in system is that under an opt out scheme the operation of the statute of limitations is suspended for potential class members as soon as the class action is filed, while under an opt in procedure time stops running only after each plaintiff files his or her consent.[96] Once again the preference for one procedural device, the opt in device, over another procedural device, the opt out device, has serious repercussions of a substantive nature as the claims of some potential

[91] Senate Study, above n 77, 1149:

> In one consumer class action brought on behalf of inner city home owners, the judge required an affirmative reply in order for a recipient of the notice to become a class member. Notice was sent to 114 individuals who were instructed to tick the appropriate box — one indicating an intention to join and the other an intention not to participate in the action. Ninety-one people returned the form, 18 of whom failed to mark either box, while one individual marked both boxes indicating an intention to both opt in and opt out.

[92] In the Antibiotics Study expressions of confusion were reported in response to an opt out notice in the second group of antibiotics cases, with one respondent enclosing a selective service notice, while others 'did not want to attend the class', and a number of opt outs included statements that the writers 'had not, nor had they ever been on welfare'!: OLRC, above n 19, 132. See also David Shapiro, 'Processing the Consumers' Claim' (1972) 41 *Antitrust Law Journal* 257, 267.

[93] OLRC, above n 19, 123; Majority Report of NY Bar, above n 69, 93 and Moore, above n 25, 54.

[94] Moore, above n 25, 54. See also David Biek, 'The Scourge of Age Discrimination in the Workplace: Fighting Back With a Liberalized Class Action Vehicle and Notice Provision' (1986) 37 *Case Western Reserve Law Review* 103, 104-5.

[95] The importance of this factor, the remoteness of any potential benefit at the time of opting in, is highlighted by the fact that many class members do take action to claim their shares of monetary relief following the successful completion of the class suit: OLRC, above n 19, 133-4.

[96] Bowermaster, above n 87, 29; Kennedy, above n 4, 30-1; and Francey, above n 25, 12. In the US the suspension of the limitation period that applies to the claim of a class member on the commencement of a rule 23 class action arises as a result of principles formulated by judges: see Kathleen Cerveny, 'Limitation Tolling When Class Status Denied: *Chardon v Fumero Soto* and Alice in Wonderland' (1985) 60 *Notre Dame Law Review* 686 and William Jonason, 'The *American Pipe* Dream: Class Actions and Statutes of Limitations' (1982) 67 *Iowa Law Review* 743.

> For class actions commenced in Australia's Federal Court the provisions of s 33ZE suspend the running of the limitation period from the date the representative proceeding is commenced. Pursuant to this section, the suspension is lifted if the member opts out or the proceeding is determined without finally disposing of the class member's claim. The Explanatory Memorandum to the Act, para 49, explains the role of this provision as removing 'any need for a group member to commence an individual proceeding to protect himself or herself from expiry of the relevant limitation period in the event that the representative action is dismissed on a procedural basis without judgment being given on the merits'.

class members may be statute barred by the time they are identified by the representative plaintiff and give their express consent to the initiation of the class action.[97]

The unequivocal finding that many of the potential class members who fail to opt in do so because of reasons such as ignorance leads to the crucial conclusion that an opt in scheme would deprive those most in need of the benefits of class actions, that is those who cannot initiate individual proceedings (such as those with individually non-recoverable claims), from obtaining the benefits of such an action.[98] This is done in the name of protecting the freedom of choice of potential class members — a freedom which is illusory in relation to, for instance, those with individually non-recoverable claims as, by definition, they would not have been able to sue the defendant in any event!

Another advantage of opt out schemes is that they do not attract certain problems which are inherent in the opt in model and which were exposed by the Appeal Division of the Victorian Supreme Court in the context of the Supreme Court Act 1986 (Vic) ss 34 and 35.[99] The effect of the Court's interpretation of these opt in provisions was aptly summarised by Reinhardt:

> the fact that s 35 requires a represented person to consent to being represented in the proceeding means, in effect, that the proceeding is set in stone from the outset. The represented persons are confined by the cause or causes of action referred to in the consent. Moreover, the proceeding cannot be amended to add other defendants to those referred to in the consent.[100]

Since the most fundamental feature of the opt out model is that the representative plaintiff need not obtain the consent of the class members to the class suit before initiating such proceedings, the problems set out above are avoided.[101]

Supporters of opt in mechanisms purport to nullify the empirical findings

97 But not all commentators regard suspension of the operation of the statute of limitations under the opt out scheme as desirable because it

> goes beyond permitting an individual to pursue private relief, by giving class members more time in which to sue than they would enjoy if the class action had never been filed. Thus considerations of fairness do not support tolling [suspending, extending or reviving] the limitations period for opt-out plaintiffs.

Notes, 'Statutes of Limitations and Opting Out of Class Actions' (1982) 81 *Michigan Law Review* 399, 427. The American Law Institute has raised the possibility of denying plaintiffs who opt out the benefit of the suspension of the statute of limitations for their claims as of the date of the consolidated action's filing: see Edward Sherman, 'Class Actions and Duplicative Litigation' (1987) 62 *Indiana Law Journal* 507, 557.

98 See Majority Report of NY Bar, above n 69, 93.

99 *Zentahope Pty Ltd & Ors v Bellotti & Ors* (Supreme Court of Victoria, Appeal Division, Brooking, Fullagar and Tadgell JJ, 2 March 1992). I am indebted to the referee of this article for drawing to my attention the relevance of this case to the arguments contained in this article.

100 Reinhardt, above n 58, 62.

101 However, Reinhardt (ibid 63) has pointed out how 'once an opt-out date has been reached the problem of amendment may be just as acute. Should those who have opted out have an opportunity to come back in on the faith of the amendment? Should a fresh opt-out date be fixed?' It is submitted that the conferral upon the Federal Court of the power to 'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding' (s 33ZF(1)) represents an acceptable way of dealing with the problems adverted to above as the court will be able to consider the particular circumstances of each case and to then formulate the most appropriate solution.

above through a number of additional arguments. One argument is that under an opt out mechanism a person may find himself or herself 'bound by litigation of which he [or she] has never been aware'.[102] Before considering the adverse consequences of this scenario, two important considerations need to be outlined. The first is that individuals with individually recoverable claims may be 'more readily identifiable because their claims are more substantial.'[103] Furthermore, under the system created by the Act, the opt out notice is not the only notice received by putative class members; with more than one notice being dispatched, the chances of such members becoming aware of the class proceedings increase.[104]

In any event, the failure to receive notice of the class action should not lead to unfairness because of the operation of the safeguards which have been outlined in Part III such as active supervision by the court, adequate representation by the representative plaintiff[105] and the requirement that any settlement be approved by the court. Moreover, class members who do not receive notice of the class action will nevertheless receive the considerable benefits of a class suit.[106]

It is also argued that an opt in requirement is necessary in order to give defendants a more accurate view of their potential liability and thus promote earlier settlements.[107] Even if one accepted the accuracy of this argument — a concession which need not be made as '[d]efendants can no better predict the proportion of opt in class members who will ultimately assert their damage claims than the proportion of opt out class members who will do so'[108] — this greater certainty has an unacceptable price as it is attained by depriving those individuals who fail to opt in, because of 'ignorance, timidity, unfamiliarity with business or legal matters',[109] of 'membership' in the class action and thus access to the courts.[110]

102 Warren Pengilley, 'Class Actions — A Legislative Hammer to Crack a Nut?' (1988) 26 (October) *Law Society of New South Wales Journal* 28, 32; Also see Baxt, above n 9, 224; Plunkett, above n 25, 40; Francey, above n 25, 13 and Commonwealth, *Hansard*, House of Representatives, 26 November 1991, 3287.

103 ALRC, above n 3, para 121.

104 See s 33X.

105 See Weiner, above n 53, 36 where he states that 'adequate representation of absent class members, rather than pendency notice to absent class members, satisfies the due process clause', and Williams, above n 14, 77-9.

106 Williams, above n 14, 15:

> For members of the class, the class action procedure gives an advantage that neither the representative plaintiff nor the defendant enjoys. Class members are strictly not parties and so they are saved the burdens and anxieties that usually trouble the actual participants in litigation: yet the *res judicata* effect of a judgment gives them the benefit of the proceeding should they succeed. In the event of victory, class members can emerge from the shelter afforded by the representative plaintiff and share in the outcome just as if they were named as parties.

107 See, eg, American Lawyers, above n 8, 15; Minority Report of NY Bar, above n 71, 95; Owen, above n 69, 22.

108 Rule 23 Questionnaire, above n 1, 20.

109 Kaplan, above n 85, 397-8.

110 See Moore, above n 25, 53; OLRC, above n 19, 481; ALRC, above n 3, para 115; Majority Report of NY Bar, above n 69, 94. Another argument that is commonly put forward in favour of opt in devices is that they would render class actions more manageable: Owen, above n 69, 22; Pollock,

The final point that needs to be made is that the analysis contained in this part of the article has been undertaken with a 'traditional' or 'genuine' opt in model in mind. An example of such a model is provided by the Supreme Court Act 1986 (Vic) ss 34 and 35, pursuant to which the persons represented must consent in writing before the commencement of the proceedings. There are other types of opt in models, the main examples of which are the '*de facto*' opt in model and the 'discretionary' opt in model. An example of the former model is provided by the procedure which has occasionally been employed in rule 23(b)(3) class actions by several courts in the United States. These courts have required class members to file a 'proof of claim' form or other document by a specified date prior to the trial of the common issues as a prerequisite to a later claim for monetary relief.[111] The second model involves the notion that in each class action a decision has to be made as to whether the opt in requirement will apply to all members, to some members only or not apply at all.[112] However, as the analysis contained in this part is equally applicable to these other models,[113] they do not warrant separate treatment.

IV RESTRICTING THE RIGHT TO OPT OUT

It can safely be said that those supporters of the notion of 'individualism' who find the opt out model offensive are outraged by any opt out system which restricts in any way or form the right of class members to opt out. Representative of this approach is the following comment of the Chairman of the OLRC that 'no person should, by compulsion of law, be required to participate in litigation, even as an absent class member ... a class member should be entitled as of right ... to opt out of a class action.'[114]

above n 4, 750; Pengilley, above n 102, 32 and American Lawyers, above n 8, 33-4. The best response to this argument has been provided by the authors of the Senate Study, above n 77, 1150:

> There is little doubt that the opt in procedure is an effective device for reducing class size. If, however, this reduction is accomplished at the expense of denying people a legal remedy simply because they fail to comprehend their affirmative duty or are fearful of taking action, then such a procedure must be questioned.

111 For more details see OLRC, above n 19, 474-8.

112 Two different types of this model have been proposed; one is where the decision as to the implementation of the opt in requirement is made by the judge and the other is where the decision is made by the class members themselves. An example of the former is furnished by the two Bills proposed in the late 1970s by the US Office for Improvements in the Administration of Justice which provided that, in a class compensatory action, the court should be given a discretion to decide whether some or all of the members of the class should be required to opt in or should be allowed to opt out. For more details, see 'The Justice Department Class Action Legislative Proposals' (1980) 6 *Class Action Reports* 2, 32 and Patricia Wells, 'Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal' (1979) 16 *Harvard Journal on Legislation* 543.

An example of the second type is contained in the Federal Mass Tort Procedure Act proposed by Mullenix in 1986. Under her proposed legislation, all potential class members are required to elect either inclusion or exclusion from the class. Those persons who do not make an election are deemed to have consented to the jurisdiction of the court and shall be included in the class: see Mullenix, above n 69, 1072 and 1093-4.

113 The 'proof of claim' model has an additional problem for it is 'much harsher than a simple opt-in requirement in that a judgment would be binding upon the entire class ... but only those who had filed the requisite statements would be entitled to participate in the judgment.': Majority Report of NY Bar, above n 69, 89.

114 OLRC, above n 19, 852. See also Thomas Cromwell, 'An Examination of the Ontario Law Reform

The theory underlying this stand is that group litigation should not be allowed to interfere with the 'deep-rooted historic tradition that everyone should have his [her] own day in court.'[115]

These arguments are inadequate as they ignore the existence of other significant and competing interests which are involved in the modern class action. They also display an unacceptable reluctance to embrace the theory supporting opt out schemes, namely that a class suit can be initiated without the express consent of the individuals concerned.

One relevant consideration is the 'judicial economy' goal of class actions.

> To the extent that class members exercised their right to exclude themselves from the class for the purpose of prosecuting their individual suits, the desired economies would suffer and the possibility of inconsistent judicial holdings would increase.[116]

But probably the most important consideration that needs to be canvassed is the effect that opt outs will have on the interests of the other parties to a class suit, that is, the plaintiffs who do not opt out and the defendant.

Opting out can impede the ability of the class members who remain in the class to obtain legal redress. In fact, unregulated opting out reduces opportunities for settlement by reducing the willingness of defendants to settle.[117] The reasons for this undesirable state of affairs were articulated by an American court:

> if defendants anticipate significant opting out, they ... will reduce the amounts they offer in settlement, which may in turn make it worthwhile for more parties to opt out. The more attractive it is to opt out ... the fewer settlements there will be.[118]

Another potential problem occurs when the class members who opt out commence individual proceedings before the completion of the class action and the costs and the outcome of the individual suits consume most, if not all, of the

Commission Report on Class Actions' (1983) 15 *Ottawa Law Review* 587, 595: 'so fundamentally at odds with the assumptions underlying the adversarial system that it is unsupportable'. The amendment to rule 23(b)(3) that was originally proposed in 1966 would have empowered American courts to deny the opportunity of withdrawal to any class member whose presence was thought 'essential to the fair and efficient adjudication of the controversy': Advisory Committee on Civil Rules, 'Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts' (1964) 34 *Federal Rules Decisions* 325, 386. The rejection of this approach in favour of the existing provision was justified on the basis that 'the interests of the individuals in pursuing their own litigation may be so strong here as to warrant denial of a class action altogether ...[to ensure that such] individual interest is respected': Advisory Committee, above n 20, 104-5.

115 US Supreme Court in *Martin v Wilks* 490 US 755 (1989), 762 citing Charles Wright, Arthur Miller and Edward Cooper, *Federal Practice and Procedure* (1981) 417. See also ALRC, above n 3, para 127, supporting the right of members to 'opt out': 'the rights of persons should not be prejudiced by the commencement of proceedings without consent'.

116 OLRC, above n 19, 471.

117 Friedman, above n 75, 755; Coffee, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action', above n 84, 910; Baughman, above n 2, 225 and Edward Sherman, 'Aggregate Disposition of Related Cases: The Policy Issues' (1991) 10 *The Review of Litigation* 231, 249-50.

118 *Premier Elec Const Co v National Elec Contrac Assoc* 814 F 2d (1987), 358, 365-6 as cited in Friedman, above n 75, 755.

defendant's resources. In these circumstances, a victory in a class suit seeking monetary compensation becomes, from a practical perspective, useless.[119] A less dramatic, but nevertheless unsatisfactory, consequence of class members opting out is that fear that the defendant's assets might not cover the amount sought by the class, as a result of the action taken by former class members, may induce the current class members to settle for an excessively low amount.[120]

In the United States, another problem caused by the unregulated right to opt out is the practice of 'free-riderism', which entails taking advantage of class adjudication on an individual basis. This practice is attributable to the doctrine of 'non-mutual collateral estoppel'.[121]

There are two major differences between this doctrine[122] and the *res judicata* doctrine[123] with which non-American common law countries are more familiar:

> First, the doctrine of non-mutual collateral estoppel permits a person to invoke a decision of the court in a particular case, even though he [or she] himself [or herself] was not a party to the earlier litigation. Secondly, the doctrine may be invoked only against a person who was a party to the earlier litigation and who, it can be said, has had 'his [or her] day in court'.[124] A party to the earlier litigation cannot rely upon the doctrine to preclude a non-party to that litigation from having his [or her] day in court.[125]

This doctrine places opt out plaintiffs in a strong position. In fact, if the judgment in the class action goes against the defendant, the former class members can use this result to win their individual suits as the defendant is prevented from recontesting his or her liability. If the class judgment is in favour of the defendant, the former class members are not bound by this result

119 Sherman, 'Class Actions and Duplicative Litigation', above n 97, 554-5; Coffee, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action', above n 84, 910, 926; and Friedman, above n 75, 754.

120 Coffee, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action', above n 84, 916.

121 See Garry Watson, 'Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality' (1990) 69 *The Canadian Bar Review* 623; Notes, 'Proposed Rule 23: Class Actions Reclassified' (1965) 51 *Virginia Law Review* 629, 652-3; Herbert Semmel, 'Collateral Estoppel, Mutuality and Joinder of Parties' (1968) 68 *Columbia Law Review* 1457; William Fisch, 'Notice, Costs, and the Effect of Judgment in Missouri's New Common-Question Class Action' (1973) 38 *Missouri Law Review* 173, 215; Mullenix, above n 69, 1079-82; Kennedy, above n 4, 31-3 and Douglas Gunn, 'The Offensive Use of Collateral Estoppel in Mass Tort Cases' (1982) 52 *Mississippi Law Journal* 765.

122 The writer agrees with Watson that 'few Commonwealth academics seem to know about the doctrine': Watson, above n 121, 625.

123 David Byrne and John Heydon, *Cross on Evidence* (4th Australian ed, 1991) 132:

> The rule is that the record binds both the parties and their privies. The record binds them in two ways. They are bound by the state of affairs established by the judgment, that A has been adjudged liable to B in the sum of $1,000, or [that] X is divorced. This may be described as estoppel by *res judicata*. Secondly they are bound by the court's findings as to the grounds on which the judgment was based: that A breached a contract with B, or that X committed adultery. This is called issue estoppel. These two doctrines have a number of common features. There must be a final judgment before a competent tribunal between the same parties litigating in the same capacity or their privies.

124 However, it has been noted that recently 'there has been a movement towards extending issue estoppel to permit its use against *non-parties*': Watson, above n 121, 652.

125 OLRC, above n 19, 81-2.

as the defendant is not allowed to invoke the doctrine against them.[126] As the US Supreme Court itself conceded,

> [s]ince a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favourable judgment.[127]

Not surprisingly, a majority of US commentators consider 'free riderism' to be an undesirable practice as the members of the class bear a large proportion of the costs, and all of the risk, of litigation.[128]

In a strongly argued paper, Watson[129] submits that while the House of Lords in *Hunter v Chief Constable of West Midlands*[130] dismissed the plaintiff's action as an 'abuse of process', what the court was, in effect, doing was to embrace 'the doctrine of "defensive non-mutual issue estoppel" but with a different name tag.'[131] Watson placed reliance on the following passage from Lord Diplock's judgment:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.[132]

It is easy to see, upon reading the passage above, that Watson's argument is

126 An example of the practical application of this doctrine was provided by Watson, above n 121, 631: 'assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. [The doctrine] ... permits P2 through P20, *etc*, now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence.'

127 *Parklane Hosiery Co v Shore* 439 US 322 (1979), 330.

128 See, eg, Jack Ratliff, 'Offensive Collateral Estoppel and the Option Effect' (1988) 67 *Texas Law Review* 63, 76; Friedman, above n 75, 753; Note, 'Offensive Collateral Estoppel by Persons Opting Out of a Class Action' (1980) 31 *Hastings Law Journal* 1189; Gunn, above n 121, 782; Lawrence George, 'Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action' (1980) 32 *Stanford Law Review* 655 and Note, 'Mass Accident Class Actions' (1972) 60 *California Law Review* 1615, 1628. The American Law Institute has suggested denying the benefits of offensive collateral estoppel to those who opt out and allowing defensive use of collateral estoppel against those who opt out from a class that ultimately loses: Sherman, 'Class Actions and Duplicative Litigation', above n 97, 557.

129 Watson, above n 121, 638-9.

130 [1982] AC 529. The police arrested the plaintiff together with five others following the death of 21 people in bomb explosions in two Birmingham public houses. At their trial for murder the accused claimed they had been beaten up by the police to make them confess and that therefore their confessions were inadmissible. The Judge accepted the evidence of the police officers and held that the confessions were admissible. The accused were found guilty, and an appeal to the Criminal Division of the Court of Appeal, at which no complaint was made of the trial Judge's ruling that the confessions were admissible, was dismissed. The cause of action before the House of Lords was brought by the accused against the Chief Constable in charge of the police officers claiming damages for assault by the police.

131 Watson, above n 121, 638-9. See also 631: 'The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action.'

132 [1982] AC 529, 541. See also *North West Water Authority v Binnie & Partners* [1990] 3 All E R 547.

not without merit.[133] But even if one were able to dismiss Watson's hypothesis as erroneous or as inconsistent with the principles formulated by Australian courts, some aspects of the problem of 'free riderism' experienced in the United States could nevertheless occur in Australia.

It is not unreasonable to state that courts presiding over individual suits may place some reliance on the conclusions reached by the court presiding over the class action.[134] This possibility may induce some class members to opt out, hoping that they can use a favourable class judgment to facilitate the attainment of a favourable result in their individual suits. Of course, in the case of a defendant's victory in the class proceeding, the advantage flows to the defendant. But even in this scenario the opt out plaintiff 'is still ahead because he escapes the risk of an adverse decision in Action #1 [the class action] and he [or she] may have learned a great deal — in terms of proving his [or her] claim — from "observing" the earlier litigation.'[135]

But regardless of the outcome of the representative proceeding, the uncertainty concerning precisely how much reliance the court will place on the conclusions arrived at by the court presiding over the class suit, together with the costs that the defendant has already incurred in defending the class action[136] (including payment of damages when the defendant is on the losing side), may induce, or force, the defendant to settle. Thus, 'opt out' plaintiffs achieve a monetary benefit largely as a result of the efforts of those members who have not abandoned the class suit. Furthermore, in these circumstances, class members can threaten to opt out as a way to receive a larger proportion of the recovery than their claims merit.[137]

The conclusions above also demonstrate that an unregulated right to opt out can result in unfairness not only for 'faithful' class members but also for defendants. A single adjudication of all claims against the defendant has obvious cost advantages and avoids the possibility of defendants being 'exposed to incompatible standards of conduct which several determinations of the same issue in different proceedings could lead to.'[138]

Another disadvantage flowing from the conferral of an unqualified right to

[133] The other possible interpretation of this passage is that it was the purpose of the party in question which represented an 'abuse of process':

> the statement of principle enunciated by the Law Lords leans very heavily on the purpose for which the civil proceedings were brought .... Without this emphasis on purpose, the acceptance of the quoted principle without qualification would permit the jettison of much, if not all, of the traditional learning on estoppels.

Byrne and Heydon, above n 123, 156.

[134] Watson has noted how in Canada, 'a form of offensive non-mutual "preclusion" has been achieved through using prior adjudications as "*prima facie* evidence subject to rebuttal"': Watson, above n 121, 644.

[135] Ibid 663.

[136] A recent US study of asbestos individual litigation expenses found that of each asbestos litigation dollar, 61 cents had been consumed in transaction costs, 37 cents of which represents the defendant's litigation expenses: Rochman, above n 27, 2706.

[137] Weiner, above n 53, 97-9; Friedman, above n 75, 752 and Coffee, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action', above n 84, 926.

[138] ALRC, above n 3, para 109.

opt out is the detrimental effect it will have on the legally unsophisticated class members who opt out because of lack of understanding.[139] Examples of this problem were provided in Part III.[140] The experience with class actions in the United States indicates that legally unsophisticated class members also need to be protected from their legal representatives. American lawyers have been accused of placing their own economic interest in receiving the largest possible fee award over the interests of the class members they represent.[141]

Given that an absolute right to opt out is 'wasteful of scarce judicial resources and affords unnecessary opportunities for abuse',[142] it is clear that another alternative must be found. To deal with these problems, a number of commentators in the United States have recommended the introduction of mandatory class actions from which plaintiffs cannot opt out.[143] The traditional representative procedures used in Australia, such as the one regulated by the Federal Court Rules Order 6 rule 13,[144] can be regarded as mandatory class actions. As it was noted by the ALRC, 'the only option open to a person who does not want to be part of the group is to challenge the representative form of the proceedings or apply to become a defendant in the proceedings.'[145] It is submitted that the philosophy underlying mandatory representative proceedings is somewhat draconian as it places no importance on the fact that class members may have legitimate reasons for excluding themselves from the class suit. For instance, the experience in the United States shows that bargaining within the class action's team tends to disfavour class members whose monetary claims are

139 Fisch, above n 121, 200; Baughman, above n 2, 239; Friedman above n 75, 751 and Moore, above n 25, 53-4.

140 In a settled class action the notice of class determination was mailed and published simultaneously with the notice of the settlement of the action. Ninety-nine persons had opted out of the class. Of the 3,000 claims filed, 27 were by persons who had opted out; it is reasonable to 'infer that at least 25% of the opt outs simply did not know what they were doing': Majority Report of NY Bar, above n 69, 93.

The only instance, of which the present writer is aware, of class members opting out of a class action initiated under the Act occurred in *Lek v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100. The judgment reveals (105) that between the institution of the proceeding and the commencement of the hearing, 'six of the original group members dropped out, presumably either because their applications [for refugee status] were granted or they decided to return voluntarily to Cambodia.'

141 One problem appears to stem from the availability of fees for attorneys in individual proceedings which are higher than those they can expect to receive in class actions. In this scenario, there are strong incentives for attorneys to advise their clients to exit from the class suit and initiate separate proceedings whether or not this strategy is, in fact, beneficial to the client: see Coffee, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action', above n 84, 881. See also John Coffee, 'Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions' (1986) 86 *Columbia Law Review* 669, 684-90; Jonathon Macey and Geoffrey Miller, 'The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform' (1991) 58 *University of Chicago Law Review* 1, 41-61 and Deborah Rhode, 'Class Conflicts in Class Actions' (1982) 34 *Stanford Law Review* 1183, 1204-10.

142 American Bar Association, Section of Litigation, 'Report and Recommendations of the Special Committee on Class Action Improvements' (1966) 110 *Federal Rules Decisions* 195, 207 ('ABA Litigation Section').

143 See, eg, Rosenberg, above n 69, 913.

144 The prerequisites are 'numerous persons have the same interest'.

145 ALRC, above n 3, para 100.

substantially larger than those of the other class members.[146]

While legitimate reasons for leaving the representative proceeding should not lead to an automatic right to opt out, they should certainly be recognised and balanced against other significant and conflicting interests. As was succinctly argued by Friedman, 'the solution to this problem is regulation/constraint — not prohibition.'[147]

One way in which the ALRC proposed to deal with the potential abuse of the right to opt out was 'to empower the Court to fix a date after which leave would be required to opt out. A group member could discontinue without leave up to the date specified by the Court.'[148] With all due respect, this proposal can be easily dismissed by pointing out that in the United States, the imposition by courts of time limits for the exercise of the right to opt out,[149] has not been effective at all in dealing with the abuses outlined in the discussion above. This is because a time limit does not deal with the reluctance of defendants to settle the class suit when other claims are pending. It also fails to acknowledge that abuse of the right to opt out is most likely to come from the 'legally sophisticated' class members, that is those who have some familiarity with our legal system and who can easily obtain legal advice. These members would not have too many problems in opting out before the court-imposed deadline, thereby evading the proposed safeguard.[150]

The other solution put forward by the ALRC was to confer on the court the 'power to stay a group member's proceeding, either generally or pending the outcome of the principal applicant's proceeding.'[151] This alternative, however, suffers from two fundamental weaknesses. One shortcoming of this solution is that it does not deal with the unwillingness of defendants to settle the class suit when other claims are pending.[152] A second problem is that 'the class action might deplete the defendants' resources to the extent that nothing will be left for the opt-out plaintiffs.'[153] In any event, there is no provision in Part IVA of the Act which specifically authorises the court to stay individual proceedings initiated by former class members. The only possible source of power is

146 For a discussion of the reasons for this state of affairs see Coffee, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action', above n 84, 916-7.

147 Friedman, above n 75, 763.

148 ALRC, above n 3, para 183.

149 For an account of the flexible approach of US courts see OLRC, above n 19, 473-4. In Australia, in *Lek v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100, 105 at a directions hearing on 16 April 1993, Justice Wilcox made an order fixing 31 May 1993 (the proposed hearing date) as the date by which any group member might file an opt out notice. As there was unexpected delay in service, the deadline was changed to 2 June 1993. See also *Poignand v NZI Securities Australia Ltd* (1992) 37 FCR 363.

150 It has been argued, in Harvard Note, above n 68, 1488, that:

> [c]lass members who would take the initiative to exclude themselves from a suit may be the individuals who would be most likely to participate actively in the suit, in order to protect their divergent interests, were no opt-outs allowed. Departure of these individuals from the litigation would deprive the court of an important source of information about the class, and may therefore handicap the court's efforts to protect absentees.

151 ALRC, above n 3, para 185.

152 Baughman, above n 2, 234.

153 Ibid.

s 33ZF(1) which provides that

> in any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

At first glance, this provision appears wide enough to authorise virtually anything. On closer analysis, however, it is possible to argue that it does not vest power in the court to stay the individual proceedings of former class members as such proceedings cannot be regarded as 'any proceeding ... conducted under this Part.'[154]

The best solution is to allocate to judges presiding over class actions the task of weighing the complex interests which have been canvassed above. There is no shortage of proposed or implemented discretionary opt out schemes in Canada and the United States. On a practical level, those models can be divided into two broad categories. One category involves models which require judges to give class members an opportunity to request exclusion from the class and to then adjudicate on the merits of each application. The other category differs from the above described category in that there is no *prima facie* right to request exclusion from the class. It is up to the court to decide whether some or all class members will be allowed to either opt out or argue that they should be allowed to opt out.

An example of the former category is provided by the Kansas class action rules pursuant to which:

> the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor.[155]

An example of the other category is provided by the 1986 proposal of the American Bar Association's Special Committee on Class Action Improvements. The proposal would have empowered courts to:

> determine by order whether members of the class will be excluded from the class if a request for exclusion is made by a date specified in the order, whether members of the class will be excluded from the class only upon a showing of good cause, or whether exclusion will not be permitted.[156]

The first type of discretionary opt out mechanism is to be preferred as it is only by considering the individual circumstances and the merits of the applica-

[154] If the interpretation above is correct, then the Federal Court would need to rely on Order 20 rule 2(1) pursuant to which it can 'order that the proceeding be stayed' if it appears to the Court that:
(a) no reasonable cause of action is disclosed;
(b) the proceeding is frivolous or vexatious; or
(c) the proceeding is an abuse of the process of the Court.

[155] See Kansas State Annual 1983, s 60-223(c)(2). For other examples of this type of discretionary opt out regime see the proposals of Mullenix, above n 69, 1072 and Friedman, above n 75, 757.

[156] ABA Litigation Section, above n 142, 202. See also OLRC, above n 19, 491. Class actions brought under rule 23(b)(1) and rule 23(b)(2) can also be said to be examples of this category of regulated opt out regimes.

tion of each class member wishing to opt out, that the court can be best placed to undertake the difficult task of weighing all relevant interests. Carrying out this task only on the basis of the general information provided by the representative plaintiff may result in the court not being aware of circumstances peculiar to one or more class members, circumstances which, if known to the court, may persuade the court to allow those persons to opt out. Allowing absent class members to file a request for exclusion and requiring the court to consider the merits of each request also adheres to what the United States Supreme Court described as the 'deep-rooted historic tradition that everyone should have his own day in court.'[157]

Another issue to be determined is whether the discretion of the court should be left 'at large' or whether the Act should set out the specific factors or criteria that the court should consider in making a determination. Friedman has argued for the use of the undefined term of 'good cause' as 'an overly specific description of the proposed rule would be too rigid to stand the test of time. Such flexibility is the advantage of the common law method.'[158] With all due respect, providing a list of relevant factors to be taken into account by the court will not impinge on the 'flexibility' of the common law and will provide much-needed guidance to judges, litigants and practitioners alike.

Some of the more obvious criteria that should be taken into account by the court include:

(a) 'whether as a practical matter members of the class who exclude themselves would be affected by the judgment';[159]
(b) the size of the claims of the members who wish to opt out;[160]
(c) whether there are any psychological and emotional considerations favouring separate proceedings;[161]
(d) whether there are any 'strategical and tactical considerations requiring individual control';[162]
(e) the effect of opt outs on the ability of the remaining class members to vindicate their legal rights;

157 *Martin v Wilks* 490 US 755 (1989), 762.

158 Friedman, above n 75, 757.

159 OLRC, above n 19, 491. See Harvard Note, above n 68, 1487-8:

> The grant of opt-out rights makes sense only if the individuals removed from the class can truly be insulated from the effect of the class judgment. Thus, the distinction Rule 23 draws between (b)(1) and (b)(2) classes, whose members have no right to exclude themselves, and (b)(3) classes, whose members may opt out, has at least some practical justification. Most (b)(1) and (b)(2) classes are suing for relief which cannot be readily limited to only some class members. For example, all individuals who seek to claim from a common fund are affected by a court's allocation of the fund regardless of whether they have excluded themselves from the suit.

160 As one commentator recently noted: 'If the claims of the class members are too small to justify separate representation or the class members lack the resources to obtain such representation, opting out only protects the technical right to sue. Relief depends instead on remaining in the class.': Nancy Morawetz, 'Bargaining, Class Representation, and Fairness' (1993) 54 *Ohio State Law Journal* 1, 19. See also OLRC, above n 19, 486; Homburger, above n 30, 637 and Weiner, above n 53, 98-100.

161 This consideration would be particularly relevant in litigation involving either personal injury or wrongful death: Mullenix, above n 69, 1070-2.

162 Ibid 1072.

(f) the effect of opt outs on the interests of the party opposing the class; and
(g) the effect of opt outs on the 'desirability of achieving judicial economy, consistent decisions, and a broad binding effect of the judgment on the questions common to the class.'[163]

Evaluation of the Proposal

The criteria listed above would allow the court to look at the issue of exclusion from the class suit from the point of view of: (1) those class members who wish to opt out; (2) those class members who wish to be members of the class suit; (3) the defendant; (4) the judicial system; and (5) the public at large.

It cannot be said that this system is unjust for the individuals whose request for exclusion is rejected by the court. In fact, the proposed scheme allows those individuals to put forward their case before the court and thus have their 'day in court'. If the reason for the request to opt out is attributable to a desire to bring separate proceedings against the respondent, then the safeguards contained in the system implemented under the Act and outlined in Part III should minimise the possibility that the class suit will jeopardise the interests of such class members. As was aptly pointed out by Friedman, '*limiting* individual control of a lawsuit does not completely *eliminate* such control'.[164] Furthermore, he or she receives the substantial benefits of a single adjudication of similar claims against the defendant.[165]

The other reason for wishing to opt out is because the class member does not wish to sue the respondent at all. This wish can be fulfilled easily in class actions for monetary relief as the reluctant plaintiff in question can simply refrain from collecting his or her share of the damages awarded against the defendant.[166]

Judicial regulation of the right to opt out can also have beneficial effects for those legally unsophisticated persons who do not request exclusion from the class suit. These benefits would accrue because

> [l]itigants who, with the aid of counsel, do elect to come forward and opt out will stand as representatives for those who cannot enlist legal assistance and are incapable *pro se*. Properly treated, opters out making the good cause showing will make 'helpful suggestion[s]' about the definition of the class itself.[167]

163 OLRC, above n 19, 491.

164 Friedman, above n 75, 758.

165 Coffee, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action', above n 84, 904, sees three major benefits of a class action for those with individually recoverable claims:

> (1) it economizes on transactions or permits greater financial or other resources to be assembled to counteract the typically greater resources of the defendants, (2) it threatens risk averse defendants with greater liability and so deters them from going to trial, and (3) it avoids a 'race to judgment' among competing plaintiffs who fear either the impact of precedents in other related cases or that defendants' assets may be insufficient to fund the aggregate recoveries.

166 See Weiner, above n 53, 98; OLRC, above n 19, 486 and Fisch, above n 121, 200. Cf Harvard Note, above n 68, 1488: 'But at least for those class members whose disagreement with class representatives manifests itself in a desire not to sue, the right to leave the lawsuit may be of value.'

167 Friedman, above n 75, 760.

The extent to which the right to opt out is restricted or regulated will also be highly relevant to the question of what notice, if any, should be given to class members of the commencement of the class suit and their right to opt out. It is not unreasonable to conclude that the more fundamental the right to opt out is regarded, the greater is the pressure to require that notice be given (and the best possible notice at that).[168] This is clearly demonstrated by the provisions of the Act and rule 23. Under the former, the right to opt out is absolute and notice is compulsory[169] although the Federal Court may dispense with notice 'where the relief sought in a proceeding does not include any claim for damages.'[170] Similarly, in relation to class actions brought under rule 23(b)(3), class members have an unrestricted right to opt out, and the court is required to 'direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'[171]

Where the cost of complying with the notice requirements is too great for the representative plaintiff to bear, the end result is the abandonment of the class suit. Thus, 'the cost of celebrating the individualism that unqualified opting out is supposed to enhance would be a barrier to procedures which, in many circumstances, may be the only way any individual or group will have access to relief.'[172]

The best illustration of this problem is provided by the facts of the landmark decision of the United States Supreme Court in *Eisen v Carlisle & Jacquelin*.[173] The representative plaintiff, whose personal claim was for $70, filed a class action suit on behalf of himself and six million[174] securities purchasers. The cost of requiring that individual notice be provided was calculated to be approximately $300,000 for postage alone. The Supreme Court held that:

> each class member who can be identified through reasonable effort must be notified that he [or she] may request exclusion from the action .... There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocket-book of particular plaintiffs.[175]

168 This point was effectively articulated by Bogart, above n 30, 694: 'If it is asserted that opting out is so basic a right, ... we are led ineluctably to the conclusion that steps must be taken to allow everyone involved an opportunity to exercise it; the pressure to order costly individual notice could be irresistible.'

169 Section 33X(1)(a). It should be noted, however, that s 33Y(5) does not permit the Court to 'order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so'.

170 Section 33X(2).

171 Rule 23(c)(2). An exception to this 'logical connection' is provided by Ontario's Class Proceedings Act 1992, pursuant to which an absolute right to opt out is conferred on class members and the court is empowered to dispense altogether with the notice requirement: see respectively, s 9 and s 17(2).

172 Bogart, above n 30, 694.

173 417 US 156 (1974) (Eisen).

174 An even larger class was recently seen in a class action against the manufacturer of Nintendos which included twenty-one million persons: see *New York v Nintendo of America Inc* 775 F Supp 676 (1991), 681.

175 417 US 156 (1974), 176. The Court also ruled (178-9) that '[t]he usual rule is that a plaintiff must initially bear the cost of notice to the class .... Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of

The effect of the decision was that, although without the class action device no class member could proceed with his or her claim,[176] the cost involved in providing notice caused the abandonment of what had been found to be a valid suit.[177] As one commentator wisely pointed out, in a slightly different context, '[i]t is a landmark in judicial sophistry to use the due process concept, in the name of protecting the interests of class members, to reject the only litigation procedure capable of doing so'.[178]

On the other hand, the implementation of a discretionary opt out scheme will facilitate the use of a discretionary notice regime. Such a regime, although it may result in some members not being aware of the existence of the representative proceeding, is clearly superior to any other model as it is the most effective vehicle for the attainment of the access to justice goal. An admirable precedent for such a regime is provided by the provisions of Ontario's Class Proceedings Act 1992 which has been in force since January 1993. It provides that the court 'may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so'.[179] The factors to be considered by the court are the cost of giving notice, the nature of the relief sought, the size of the individual claims of the class members, the number of class members, the places of residence of class members, and any other relevant matter.[180] Furthermore, once a decision is made to require notice, the court has been vested with the discretion to choose between the following methods of notice:

(a) personally or by mail;
(b) by posting, advertising, publishing or leafleting;
(c) by individual notice to a sample group within the class; or
(d) by any means or combination of means that the court considers appropriate.[181]

Finally, s 22(1) provides that 'the court may make any order it considers appropriate as to the costs of any notice ... including an order apportioning costs among parties'.[182]

financing his [or her] own suit.'

176 As the Supreme Court itself conceded (ibid 161): '[e]conomic reality dictates that [the plaintiff's] suit proceed as a class action or not at all'.

177 In fact, after conducting a preliminary hearing on the merits, the Federal District Court Judge found that the class would 'more than likely' prevail at trial: Weiner, above n 53, 34.

178 Kenneth Scott, 'Two Models of the Civil Process' (1975) 27 *Stanford Law Review* 937, 944. See also the comment of Becker CJ of the US District Court: 'This 1974 Eisen decision by the Supreme Court was a major disaster for the advocates of maintenance of small claim federal question class actions': quoted in Owen, above n 69, 23-4. The massive detrimental effect which the *Eisen* decision has had on the ability of class members to seek legal redress can best be gauged by considering statistics concerning the post-*Eisen* use of the class action procedure. The number of class actions commenced in US federal courts in 1973 was 3,654. In 1976, 3,584 class actions were filed. The post-1976 period saw the number declining steadily, with only 1,568 class actions filed in 1980. By 1990, the number of class actions had dropped to 922!

179 Section 17(2).

180 Section 17(3).

181 Section 17(4). The Court is allowed, under s 21, to order the defendant to deliver the notice 'where that is more practical'.

182 A similar provision had been proposed by the ALRC. Unfortunately, it was not included in the Act: ALRC, above n 3, paras 191-2. It is interesting to note that in the US, in a number of cases decided before the *Eisen* decision, the burden in relation to the cost of notice to class members, had been

The present writer's proposal will probably attract the criticism that it will lead to an increase in the use of judicial resources. But such an increase is not likely to be any greater than the increased burden that results from allowing class members to opt out, without good reasons, and then initiate individual proceedings.[183]

It should also be remembered that the power to prevent exclusion from the class suit is no greater than that currently exercised by the Federal Court under its Rules.[184] Order 29 rule 55 vests power in the Federal Court to consolidate trials involving, *inter alia*, common questions of law or fact. Order 6 rule 2 grants the court power to require joinder of the claims of a number of plaintiffs where there are common questions of law or fact and where all rights to relief claimed in the proceedings are 'in respect of or arise out of the same transaction or series of transactions.'

V CONCLUSION

The choice between an opt out device and opt in device does not simply involve a decision as to which procedural device is more convenient. Just as a class action cannot simply be regarded as 'a tool of procedural convenience',[185] the decision as to whether the consent of class members should be required before the commencement of a class suit, involves substantive issues of fundamental importance such as ordinary individuals' access to courts and, thus, legal remedies.[186]

Few would disagree with the following statement of Douglas J of the US Supreme Court: 'I would strengthen ... [the] hand [of the small claimant] with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.'[187]

Despite this consensus, a majority of commentators have vigorously criticised the Commonwealth Parliament for adopting a mechanism, the opt out mechanism, which facilitates 'the vindication of claims that would otherwise not be compensated due to their small size and the unsophisticated nature of the class

placed at least in part on the defendants: Fisch, above n 121, 207 and Emerson, above n 69, 210.

183 As one commentator has aptly pointed out:

> In opposition to a uniform discretionary exclusion rule, it might be argued that the burden on the trial judge would be unduly increased if he had to consider the merits of a large number of class members' claims for withdrawal. However, this ignores the fact that many class members, without valid reasons for excluding themselves, may subsequently become involved in litigation, all of which might have been prevented had the trial judge in the first instance had the power to keep these members in the class action.

Note, 'Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment' (1967) 52 *Minnesota Law Review* 509, 527.

For other persuasive arguments see Friedman, above n 75, 761.

184 *Minnesota Law Review* Note, above n 183, 526.

185 Homburger, above n 30, 640. See also the comment of Justice Kirby that the debate about class actions should be regarded 'as a serious question for all those concerned about the effective delivery of justice': quoted in Owen, above n 69, 5.

186 Kennedy, above n 4, 20.

187 *Eisen* 417 US 156 (1974), 186.

members.'[188] It is true that the opt out scheme 'goes against the philosophical basis of our legal system.'[189] But it is also true that 'our legal system' has denied substantive justice to those who, because of economic or social barriers, have been unable to seek access to our courts. Douglas J again expressed the point most eloquently:

> I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures *who would go begging for justice without the class action* but who could with all regard to due process be protected by it.[190] (Emphasis added.)

Ensuring justice for *all parties* to a class suit also requires judicial supervision and authorisation of class members' requests for exclusion from the class. Such a regime

> does not impinge upon individual rights so much as it defines the scope of competing individualist ideals within the class action context. Conceptualized in this way, individualism and group litigation need not be locked in a continual battle for supremacy; rather, they are mutually vital components of a system which seeks to vindicate rights contemporaneously enjoyed by many.[191]

188 OLRC, above n 19, 477-8.
189 Commonwealth, *Hansard*, Senate, 13 November 1991, 3022 (Senator Durack).
190 *Eisen* 417 US 156 (1974), 185.
191 Friedman, above n 75, 763.