Foreword

In 1901, Lord Macnaghten could say that '[t]he old rule in the Court of Chancery [about representative proceedings] was very simple and perfectly well understood'.[1] Under that practice, 'the Court required the presence of all parties interested in the matter in suit, *in order that a final end might be made of the controversy*'.[2]

Concluding a controversy finally, without multiple proceedings, remains an abiding concern of the Australian judicial system. It may be seen as linked with, perhaps even one corollary of, the importance of quelling controversies once and for all. As the High Court has said, 'the importance of finality pervades the law'.[3]

Rules of court (especially those modelled on the 1883 English pattern) made provision for representative proceedings.[4] Those rules permitted joinder of numerous plaintiffs in the one action but were arguably too inflexible to determine all claims that were or could be made by those persons against the defendant.[5]

Now, for more than 30 years, State and federal statutes have provided for class or group actions.[6] It is time to stop, inquire and reflect on what was sought to be done, what has been done and what remains to be done.

The essays collected in this work do just that in relation to many aspects of class actions. They trace their legislative and curial history. They examine how, and to what extent, class action proceedings provide access to justice and compensation. They explore how class action procedures intersect with principles of due process, open justice and finality. And they grapple with many of the issues that arise from, or as a result of, litigation funding. Thus, within this collection of essays there will be found identification and consideration of many of the issues that have emerged in connection with class actions – their funding, their management by the courts, and their resolution, whether by settlement or judgment. As Professor Legg and Dr Metzger remark in the opening chapter, this collection of essays offers a 'gateway into thinking about where class actions have been and where they may be going into the future'.

This is a worthwhile, yet difficult, gateway to construct. What has transpired over the last 30 years offers no sure guide to the future of class actions, if only because of their increasing complexity and the expanding cast of stakeholders. If '[t]he old rule in the Court of Chancery was very simple and perfectly well understood', those days have passed.

1 *Duke of Bedford v Ellis* [1901] AC 1, 8.
2 Ibid (emphasis added).
3 *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1, 17 [35].
4 *Rules of the Supreme Court 1883* (Eng).
5 *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; 211 CLR 1, 30 [34].
6 See eg *Federal Court of Australia Act 1976* (Cth) Pt IVA.

Careful reading of the essays in this work, especially in light of the High Court's decisions in *BMW Australia Ltd v Brewster*[7] and *Wigmans v AMP Ltd*,[8] will show that, even though class actions have been part of the legal landscape for now more than 30 years, questions in connection with class actions and their funding remain unresolved.

If that is right, it is to be doubted that those questions can be resolved by reference only to generally expressed notions like 'access to justice' or 'the interests of justice'. Deeper and wider consideration will be necessary. And the starting point for that consideration must always be the relevant statutory provisions, not resort to all-embracing generalities like finality, the avoidance of multiple actions or the like.

The High Court held, in *BMW Australia Ltd v Brewster*, that generally expressed statutory powers permitting a court to make orders in a class action 'appropriate or necessary to ensure that justice is done in the proceeding'[9] did not empower the court to make a common fund order – an order fixing the litigation funder's remuneration as a proportion of the amount recovered in the proceeding, requiring all group members to bear their proportionate share of that liability, and providing that the liability to pay the remuneration was to be discharged from the amount recovered as a first priority. As the reasons in that case show, the relevant statutory provisions focus on the proceeding, but what the common fund orders sought was to 'have a Court craft a relationship between unfunded group members in [the] class action and a litigation funder who [was] not a party to the proceeding'.[10] Doing that may have put the proceeding on a known and stable foundation in terms of funding, and made it a more profitable venture for the funder (or reduced the funder's risk), but none of those outcomes was appropriate or necessary to ensure that justice was done in the proceeding.[11]

In *Wigmans v AMP Ltd*, the High Court held that, when deciding which of several class actions raising substantially similar issues should proceed and which actions should be stayed, there is no rule or presumption that the proceeding commenced first should prevail. Rather, where the interests of the defendant are not affected differently, according to which action is allowed to proceed, the court must determine which proceedings going ahead would be in the best interests of group members. And that is not a matter of 'mere' case management.[12] It is a larger task of ensuring that justice is done and a task where courts must be astute to protect the interests of all group members. The factors that might be relevant cannot be exhaustively listed. And their identification and assessment may call for different procedural steps including, but not limited to, considering whether it would be right to appoint a special referee to inquire into the different litigation funding proposals associated with each proceeding or appointing a contradictor to represent the interests of common group members.[13] As the Court's reasons show, resolution of the issues that were raised about competing actions required deep and wide consideration, not the application of an untethered

7 [2019] HCA 45; 269 CLR 574.
8 [2021] HCA 7; 270 CLR 623.
9 *Federal Court of Australia Act 1976* (Cth) s 33ZF(1); *Civil Procedure Act 2005* (NSW) s 183.
10 [2019] HCA 45; 269 CLR 574, 632 [149].
11 Ibid 633 [153].
12 [2021] HCA 7; 270 CLR 623 [116].
13 Ibid [119]-[123].

discretion or a single rule, let alone one expressed at the level of generality embraced by reference to access to justice or the interests of justice.

The need for deep and wide consideration is not confined to the resolution of which among competing actions should proceed. As the class action regime continues to evolve it must extend to other issues. This will require critical thinking facilitated by legal reasoning and application of the judicial method, as well as invaluable contributions from the academy. As demonstrated in this collection of essays, the academy offers a bird's-eye view of the legal landscape, one which allows 'a more detached and broader perspective'.[14] This is important. The Australian class action regime is complex, dynamic and evolving. Adoption of a system-wide perspective enables contributions which can enhance the coherence and stability of the law relating to class actions.

This collection of essays illuminates another benefit of academic contributions. Read together, the essays illustrate the utility of intertwining distinct forms of legal scholarship: it is productive of critiques and proposals for reform which are more innovative, practical and informed. As this collection of essays shows, the intertwining of strands of legal scholarship can hold synergistic consequences too. The essays in this collection bring to bear regulatory, political, historical and economic perspectives upon the class action regime, offering insights which often reinforce one another and extend beyond the capabilities of doctrinal analysis alone. Coupled with comparative analysis concerning relevant developments in the United Kingdom and the United States, the essays in this work evidence the merit of drawing together diverse knowledge communities and perspectives on the Australian class action regime. Doing so reveals matters of common difficulty, importance and possibility.

Class actions are a firmly established form of litigation in Australia. What will the next 30 years hold for class actions? Do class actions provide an appropriate form of litigation in Australia in 2022 and for the foreseeable future? Do the serious and complex issues about class actions that remain unresolved require us to revisit the text of State and federal statutes that provide for class or group actions, to reconsider the way in which we conduct such litigation or both? And if so, by what criteria or objectives are those changes to be made? Directly and indirectly, this collection of essays fruitfully addresses many of these questions. But it also poses many more, demarcating new sites of academic inquiry, identifying emergent issues and offering fresh perspectives on a regime with antecedents in English court practice dating back 500 years.

All who have to participate in or think about the conduct of such cases now and in the future (whether as practitioner, scholar, student or the legislature) will benefit from this collection of essays.

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14 Gerard V La Forest, 'Who is Listening to Whom? The Discourse Between the Canadian Judiciary and Academics' in Basil S Markesinis (ed), *Law Making, Law Finding and Law Shaping: The Diverse Influences* (Oxford University Press, 1997) vol 2, 69.