



Discovery and particulars of group members in class actions

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Particulars and discovery are both valuable methods for obtaining information from an opponent. However, the obtaining of discovery from, and particulars of, group members in class actions has been a rarity. This has followed from the representative nature of a class action where group members are generally not considered to be parties and may not even be identified. The rarity of such applications has changed with the adoption of the closed class group definition where group members are known. This article discusses how the Federal Court of Australia and Supreme Court of Victoria have responded to respondents/defendants seeking discovery from, and particulars of, group members.

Introduction

The provision of discovery from, and particulars of, group members in class actions (also known as representative or group proceedings) has been a rarity. This has followed from the representative nature of a class action where group members are generally not considered to be parties and may not even be identified. However, a number of recent applications for particulars or discovery have been made by respondents/defendants where applicants/plaintiffs have adopted a closed class group definition where group members are known.¹

This article examines five significant decisions addressing applications for discovery or particulars in the Federal and Victorian courts.² The first is *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)*³ which ordered the discovery of litigation funding agreements but declined to order discovery of trading information to assist in ascertaining the quantum of the group members' claims for a mediation. Second is *Thomas v Powercor Australia Ltd (Ruling No 1)*⁴ which declined to make orders for discovery but sought to address the defendant's desire for knowledge of the quantum of claims so as to participate in a mediation through a case management solution. The third is

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1 In the state courts of Victoria and New South Wales the traditional terminology of plaintiff and defendant is used, but in the Federal Court of Australia the terminology is applicant and respondent. The plaintiff/applicant also performs the role of representative party in class actions.

2 Although the decisions are from different jurisdictions, the Federal Court and Victoria, the class action legislation in these jurisdictions, Pt IVA of the Federal Court of Australia Act 1976 (Cth) and Pt 4A of the Supreme Court Act 1986 (Vic) respectively, are almost identical. Further, the class action procedure adopted in New South Wales in Pt 10 of the Civil Procedure Act 2005 (NSW) is also very similar to the Federal Court and Victorian provisions.

3 [2010] FCA 176; BC201001064.

4 [2010] VSC 489; BC201007990.

*Meaden v Bell Potter Securities Ltd*⁵ which has attracted significant attention amongst class action practitioners as particulars were ordered in relation to all group members. The fourth and fifth cases, *National Australia Bank Ltd v Pathway Investments Pty Ltd*⁶ and *Regent Holdings Pty Ltd v State of Victoria*,⁷ were both decided by the Victorian Court of Appeal. In the former a request for particulars and discovery to assist with expert evidence was refused, while in the latter, particulars and discovery from a sample of group members were permitted so as to assist in the conduct of a mediation and settlement discussions.

Background

Particulars and discovery

Particulars and discovery are both methods of obtaining information from an opponent. Particulars are usually provided prior to discovery as a way to supplement or clarify a pleading. The function of particulars includes informing the other party of the nature of the case it has to meet, preventing surprise and defining the issues to be tried.⁸ The main function of discovery is to allow the parties to civil litigation to obtain relevant documents before trial to assist them in preparing for trial or in determining whether or not to settle: ‘discovery promotes the ascertainment of truth in litigation and is therefore an essential part of the proper administration of justice.’⁹ This is highlighted by some courts’ rules which specify that a party must disclose ‘the documents [that] adversely affect the party’s own case’.¹⁰ Compulsory disclosure of information is particularly critical where the dispute is of such a nature that it cannot be resolved until information uniquely in the possession of one party is made available to the other party — a levelling of the playing field. These functions are equally applicable to class action litigation as to other forms of litigation.

At the same time as defendants/respondents are looking to obtain discovery from group members it should be noted that there is a general trend towards restricting the availability of discovery. The Australian Law Reform Commission has emphasised the need to ensure judges have the power to restrict discovery and are encouraged to take an active role in managing and minimising discovery.¹¹ In the Federal Court new court rules with effect from 1 August 2011 provide that discovery must be pursuant to a court order and

5 [2011] FCA 136; BC201100684.

6 [2012] VSCA 168; BC201205619.

7 [2012] VSCA 221; BC201207244.

8 *Dare v Pulham* (1982) 148 CLR 658 at 664; 44 ALR 117; 57 ALJR 80; BC8200139; *Bailey v FCT* (1977) 136 CLR 214 at 221; 13 ALR 41; 51 ALJR 429; BC7700020 and *Gunns Ltd v Marr* [2005] VSC 251; BC200505042 at [16]–[18].

9 *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316 at 321; BC9802072 per Ipp J. See also Australian Law Reform Commission (ALRC), *Managing Discovery: Discovery of Documents in Federal Courts*, Report 115, 2011, pp 48–9, 101 (‘Discovery is an important part of the litigation process as it provides access to information required to resolve or determine the issues in dispute’).

10 See, eg, Federal Court Rules 2011 (Cth) r 20.14(2)(b); Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 29.01.1(3)(b).

11 ALRC, above n 9, at [5.23]–[5.24].

will only be provided when necessary for the just resolution of the proceedings as quickly, inexpensively and efficiently as possible.¹² Victoria adopted new requirements for discovery with effect from 1 January 2011 which abandon the traditional ‘train of inquiry’ test and narrows the documents that must be discovered.¹³ In New South Wales the Equity Division of the Supreme Court has gone further.¹⁴ Like the Federal Court, there will be no order for disclosure in any proceedings unless it is necessary for the resolution of the real issues in dispute in the proceedings. However, disclosure will not be permitted prior to the filing of evidence unless there are exceptional circumstances necessitating disclosure. Where disclosure is sought a party must demonstrate through an affidavit the reason why disclosure is necessary for the resolution of the real issues in dispute in the proceedings.¹⁵

Status of group members

A person who commences a representative proceeding under Pt IVA of the Federal Court of Australia Act 1976 (Cth) is a party to the proceeding and represents members of the group of persons on whose behalf the proceeding has been commenced.¹⁶ They are referred to as both the applicant and the representative party. Group members must be described or defined by the pleadings.¹⁷ A group member’s consent to being a group member is usually not required,¹⁸ but they must receive an opportunity to opt out of the proceedings.¹⁹ The running of any limitation period applicable to the claim of a group member is suspended upon the commencement of proceedings and does not run again unless they opt out.²⁰ Group members who do not exercise the right to opt out of the proceeding are bound by the judgment given in the representative proceeding.²¹ Section 43(1A) in the Federal Court of Australia Act 1976 (Cth) provides that the court or a judge may not award costs against a person on whose behalf a representative proceeding has commenced. However, ss 33Q and 33R empower the court to give directions permitting an

12 Federal Court Rules 2011 (Cth) rr 20.11 and 20.12. See also *Alanco Australia Pty Ltd v Higgins (No 2)* [2011] FCA 1063; BC201107053 at [7]. See also *Coca-Cola Co v Pepsico Inc* [2011] FCA 1069; BC201107233 at [34].

13 Supreme Court (Chapter I Amendment No 18) Rules 2010 (Vic) inserted r 29.01.1 into the Supreme Court (General Civil Procedure) Rules 2005 (Vic).

14 Supreme Court of NSW, *Practice Note SC Eq II — Disclosure in the Equity Division*, 22 March 2012.

15 *Armstrong Strategic Management & Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393; BC201202767 at [64]–[66] and *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2012] NSWSC 913; BC201206359.

16 Federal Court of Australia Act 1976 (Cth) ss 33A and 33C.

17 Federal Court of Australia Act 1976 (Cth) s 33H(1)(a).

18 Federal Court of Australia Act 1976 (Cth) s 33E(1) but with exceptions to the requirement, such as government bodies, set out in s 33E(2).

19 Federal Court of Australia Act 1976 (Cth) s 33J. The opportunity to opt out must be communicated to group members through a notice, unless the relief sought does not include a claim for damages: Federal Court of Australia Act 1976 (Cth) s 33X(1), (2).

20 Federal Court of Australia Act 1976 (Cth) s 33ZE.

21 Federal Court of Australia Act 1976 (Cth) s 33ZB; *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167; 166 ALR 731; [1999] FCA 1363; BC9906343 at [10]; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168; [2002] FCA 957; BC200204457 at [36].

individual group member to appear in the proceeding for the purpose of determining an issue that relates only to a subset of group members, or to the claims of that member only. In such a case, the nominated group member, and not the representative party, is liable for the costs associated with the determination of the issue.²² This led Merkel J to observe that '[i]n the usual course group members are entitled to have the group proceeding conducted by the representative party on their behalf without being liable for legal costs merely because they are a group member'.²³

In the Victorian context, Gaudron, Gummow and Hayne JJ in *Mobil Oil Australia Pty Ltd v Victoria* summarised the differences between the plaintiff/representative party and the group members as follows:

The persons who commence the proceeding are the plaintiffs . . . Obviously, those who are named as plaintiffs in a group proceeding must know of and require the commencement of the proceeding. In general, it is they who may appeal²⁴ and who are liable in costs. They stand to gain from any benefit obtained by the proceeding but they are at risk of bearing the burden of costs.

The position of the plaintiffs in the proceeding may be contrasted with those whom they represent — the group members. Subject to some exceptions that do not matter for present purposes, the consent of a person to be a group member is not required. Group members may neither know of the commencement of the proceeding nor wish that it be brought or prosecuted, although Pt 4A does provide for notice to be given to group members of (among other things) the commencement of the proceeding.

. . . Pt 4A provides for what is sometimes called an 'opt out', rather than an 'opt in', procedure. That is, persons who are group members may opt out of the proceeding and, if they do, they are taken never to have been a group member (unless the Court otherwise orders). Group members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring.

A group member is not a plaintiff. It is right to say that a judgment obtained in the proceeding would bind those who had not opted out . . .²⁵

The status of group members is not clearly defined. Many of the statutory provisions, especially in relation to costs, point to a group member not being a party,²⁶ and yet they can be bound by a settlement or judgment. This variable status of group members then carries over into what may be known about them or required of them in relation to particulars or discovery.

22 Federal Court of Australia Act 1976 (Cth) ss 33Q(3) and 33R(2) and *Petrusevski v Bulldogs Rugby League Club Ltd* [2003] FCA 1056; BC200305745 at [10].

23 *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167; 166 ALR 731; [1999] FCA 1363; BC9906343 at [30].

24 Supreme Court Act 1986 (Vic) s 33ZC governs appeals and contains instances when a group member may appeal, such as, for the determination of a question that relates only to the individual group member or where the representative party does not commence an appeal.

25 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; 189 ALR 161; [2002] HCA 27; BC200203432 at [37]–[38], [40] and [50].

26 *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167; 166 ALR 731; [1999] FCA 1363; BC9906343 at [31]; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168; [2002] FCA 957; BC200204457 at [36]; *Tongue v Council of the City of Tamworth* [2004] FCA 1050; BC200405155 at [4].

Group definition

It has been generally understood that requiring detailed particulars or discovery, especially where group members are not identified as in a traditional opt-out class action,²⁷ would undermine the concept of a group proceeding where efficiencies and cost-savings are to be achieved through allowing a representative party to bring a claim on behalf of other similarly situated claimants.²⁸ Similarly, the ability of an applicant/plaintiff to provide particulars may be limited under an opt-out class action where the group members are not identified or if identified are not clients of the solicitor for the applicant/plaintiff.²⁹ However, the Australian Law Reform Commission in its original report on grouped proceedings did observe that ‘fairness to respondents and group members indicates that [discovery or particulars] should be permitted where appropriate’, but the court’s leave would be required and the group member would have to be identified.³⁰

The representative nature of the class action combined with the status of group members impacts the feasibility and desirability of ordering the provision of particulars and discovery. The feasibility of providing discovery from, and particulars of, group members is improved when a closed class is employed. A closed class involves a class action being commenced on behalf of a known group specifically created for, and prior to, the commencement of the class action.³¹ This form of group definition is favoured by litigation funders because it allows them to require each group member to accept the terms of their funding agreement thereby eliminating the so called ‘free-riders’.³² The Full Federal Court has found that Pt IVA of the Federal Court of Australia Act 1976 (Cth) permitted the use of such a definition.³³ Consequently where a closed class is utilised the group members will be known and will most likely have entered into a retainer with the lawyers who are acting in the proceedings.

27 The opt out model involves commencing the proceedings without the express consent of group members. All those entities that fall within the group definition are automatically part of the class action but the members are subsequently afforded an opportunity to exclude themselves from the proceedings. See M Legg, *Case Management and Complex Civil Litigation*, Federation Press, 2011, p 220.

28 ALRC, *Grouped Proceedings in the Federal Court*, Report No 46, 1988, at [166]–[167] and *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487; (2000) ATPR 41-759; [2000] FCA 229; BC200000845 at [131]–[136].

29 ALRC, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) at [7.101].

30 ALRC, above n 28, at [166].

31 See Legg, above n 27, p 220.

32 M Legg, ‘Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions — The Need for a Legislative Common Fund Approach’ (2011) 30(1) *Civil Justice Quarterly* 52 at 53.

33 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; 244 ALR 600; [2007] FCAFC 200; BC200711295. For a critique of the Full Court’s reasoning see M Legg, ‘Funding a class action through limiting the group: What does Pt IVA of the Federal Court of Australia Act 1976 (Cth) permit?’ (2010) 33(1) *Aust Bar Rev* 17.

P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)³⁴

P Dawson Nominees Pty Ltd commenced a Federal Court class action against Multiplex Ltd and Multiplex Funds Management Ltd, who were subsequently acquired by Brookfield Asset Management, (Multiplex) on behalf of about 100 group members, including 16 institutional investors, who alleged that they suffered loss as a result of the Multiplex's failure to disclose delays and increased costs in the construction of the Wembley Stadium in the United Kingdom contrary to s 674 of the Corporations Act 2001 (Cth). The represented group was defined, inter alia, on the basis that they 'had as at the commencement of the . . . proceeding entered a litigation funding agreement with International Litigation Funding Partners, Inc (ILF)'. Consequently, a closed class was being employed.

Multiplex sought discovery of two categories of documents: first, litigation funding agreements entered into by the 16 institutional investors and second, documents which (1) detail the institutional investor's trading in Multiplex securities, or (2) show whether the investor has entered into any arrangement which has mitigated or reduced the loss suffered on the acquisition of Multiplex securities.³⁵

Finkelstein J recognised that power existed to order that discovery be provided under s 33ZF of the Federal Court of Australia Act 1976 (Cth), but observed that:

The starting point is that the class actions regime under Pt IVA of the Federal Court Act is designed to require little or no active involvement by group members. A group member is a group member principally for the limited purposes of taking the benefit, or suffering the burden, of findings on common questions (ie, questions that are common to the claim brought by the named applicant and claims that may be pressed by group members). In an action where money relief may be sought by a group member, the group member will generally only be required to provide specifics about the quantum of his or her claim after the common questions have been resolved and that may be in a separate action.

Given the intent of the class action regime, there must be some compelling reason demonstrated before a court will order group members to go beyond their otherwise essentially passive role.³⁶

Finkelstein J ordered that the 16 funding agreements, redacted to remove confidential information, were to be disclosed but declined to order the group members to provide the trading information.

The funding agreements had to be disclosed as they went to a preliminary legal question of whether an institutional investor who was acting as agent, trustee or custodian could maintain a claim if they did not do so in the correct capacity, ie, they sued personally rather than as principal or beneficiary.³⁷ Finkelstein J appears to take the view that the burden of disclosing the funding

34 [2010] FCA 176; BC201001064.

35 Ibid, at [14] and [24].

36 Ibid, at [15]–[17]. Section 33ZF has been interpreted broadly, see *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 3–4; 156 ALR 257; BC9803267 and *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168; [2002] FCA 957; BC200204457 at [48].

37 Ibid, at [20]–[23].

agreements was minimal and it could avert additional procedural complications, such as if limitation periods expired and Multiplex intended to challenge whether participation in the class action had been achieved correctly. In short, a very practical approach was adopted.³⁸

The trading information was essentially sought to allow Multiplex to determine the quantum of the claims made against it for the purpose of participation in mediation. The applicant had previously provided trading information but Multiplex was concerned as to its accuracy and whether the institutions had factored in hedging strategies, securities lending agreements or the like which would have reduced the quantum of any losses.³⁹

Finkelstein J took the view that information as to damages should not be provided until after the common questions for trial had been determined. Indeed, his Honour observed that 'if the case goes to trial findings made may preclude the group members pursuing any claim for damages'.⁴⁰ Further, there was evidence that, even for institutional investors, the discovery had the potential to be onerous.⁴¹

Turning to the key argument of the mediation, Finkelstein J relied on the status of group members discussed above in observing that 'it is a common, if not an inevitable, feature of class actions that the defendant will be faced with uncertainty regarding the quantum of potential group member claims'. However, his Honour did not distinguish between the situation of the opt-out class action, and the situation in the Multiplex shareholder class action where a closed class was employed and the group members were known.⁴² Further, Finkelstein J expressed a reluctance to become involved in the essentially consensual process of mediation, especially where there was no evidence as to why such information needed to be discovered and what was sought was discovery from group members. His Honour expressed the view that he would have been more inclined to make the order if the mediator indicated that it was desirable.⁴³

The class action subsequently settled.⁴⁴

Thomas v Powercor Australia Ltd (Ruling No 1)⁴⁵

On 7 February 2009, a large bushfire destroyed or damaged a number of properties on the outskirts of the city of Horsham in Victoria. In September

³⁸ Funding agreements are now required to be disclosed pursuant to Federal Court of Australia, *Practice Note CM17 — Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, 1 August 2011 (originally commencing on 5 July 2010) at [3.6] and Supreme Court of Victoria, *Practice Note No 9 of 2010 — Conduct of Group Proceedings*, 29 November 2010, at [3.6]. However, the Multiplex shareholder class action demonstrates that the terms on which funding is granted or the agreement entered into may vary by group member.

³⁹ *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)* [2010] FCA 176; BC201001064 at [25]–[26].

⁴⁰ *Ibid.*, at [28].

⁴¹ *Ibid.*, at [29].

⁴² *Ibid.*, at [31].

⁴³ *Ibid.*, at [32]–[35].

⁴⁴ *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029; BC201006986.

⁴⁵ [2010] VSC 489; BC201007990.

2009 the plaintiff, Mr Laurence Thomas, issued proceedings against Powercor Australia Ltd pursuant to Pt 4A of the of the Supreme Court Act 1986 (Vic) on behalf of himself and ‘all other persons’ who suffered loss or damage as a result of the fire.

An opt-out class action was employed. The solicitor for the representative party advised that 67 members of the group had entered into a retainer with the solicitor, another 35 persons who may have claims were specifically known and it was estimated that there were another 100 to 150 persons who were likely to fall within the group definition.⁴⁶ Of the 67 clients documentation had been obtained from 56 of them and expert loss assessments had been prepared for 38 of them.⁴⁷

The defendant, Powercor Australia Ltd, sought discovery of documents relevant to the quantum of claims made by all group members who had retained the solicitor for the representative party prior to a determination of the liability of Powercor, so as to be able to sensibly participate in a mediation of the dispute. The plaintiff opposed the provision of any discovery.⁴⁸

The Horsham fire class action illustrates an intermediate situation between an opt out class action and a closed class where an opt out class action is employed but some of the group members are known because they have come forward and become clients of the lawyer retained to conduct the proceedings for the representative party. Forrest J concluded that ‘in a group proceeding of this nature there is no scope for an order for discovery by all group members, absent extraordinary circumstances . . .’.⁴⁹

However, this did not conclude the matter as Forrest J, guided by the overarching purpose and the need to attempt to resolve disputes by agreement or through the use of appropriate dispute resolution as set out in the Civil Procedure Act 2010 (Vic),⁵⁰ employed the court’s case management powers to ensure Powercor had adequate material to reach a considered view as to the quantum of the group’s claim.⁵¹ To that end orders were made for the provision of particulars of loss with supporting documentation to be provided by 10 group members (five of the most significant claims and five of the least significant claims) who had retained the solicitor for the representative party.⁵²

The Horsham fire class action can be contrasted with the Multiplex shareholder class action where Finkelstein J declined to order discovery to assist with a mediation. While the two judges took different views of the extent to which the court should take steps to promote the resolution of the dispute without recourse to a trial, it is also obvious that the provision of the information in the Horsham fire class action was less onerous than in the Multiplex shareholder class action, as it had essentially already been prepared.

A settlement was ultimately reached in the Horsham fire class action, but

46 Ibid, at [11].

47 Ibid, at [20]–[21].

48 Ibid, at [23].

49 Ibid, at [39].

50 Civil Procedure Act 2010 (Vic) ss 7, 9, 22, 47(3)(d), 48(2)(c).

51 *Thomas v Powercor Australia Ltd (Ruling No 1)* [2010] VSC 489; BC201007990 at [41]–[49].

52 Ibid, at [64]–[65].

after 5 weeks of hearings and with the court being asked to make rulings on 11 questions relevant to damages.⁵³

Meaden v Bell Potter Securities Ltd⁵⁴

Meaden brought a class action pursuant to Pt IVA of the Federal Court of Australia Act 1976 (Cth) against Bell Potter for various alleged contraventions of the Australian Securities and Investment Commission Act 2001 (Cth) (ASIC Act) and the Corporations Act 2001 (Cth) arising out of Bell's dealings as a stockbroker in relation to Progen Pharmaceuticals Ltd (PGL), which had its shares listed on the Australian Securities Exchange (ASX).

Bell Potter sought, inter alia, the following particulars:

- identify each person alleged to be a group member;
- a copy of all documents comprising each Financial Products Trading Account Agreement entered into by the applicant and each claimant with Bell Potter;
- each fact, matter or circumstance to be relied upon in alleging that each claimant was: (1) a 'consumer' within the meaning of s 12ED(1) of the ASIC Act; and (2) a 'retail' client within the meaning of Pt 7.7 of the Corporations Act;
- proper particulars of each alleged oral representation and/or recommendation alleged;
- proper particulars of each oral communication; and
- identify each share purchase of PGL shares, including the number of PGL shares purchased, the date and price of a share, the subject of the acquisitions.

The request for particulars was to enable Bell Potter to plead to the allegations in the statement of claim.⁵⁵

Edmond J ordered the provision of the particulars sought. Central to the approach taken by Edmond J was that the pleading used a 'closed class' group definition. This meant that the group members were known because they had as at the commencement of this proceeding entered into a funding agreement with Litigation Lending Services Ltd and a retainer agreement with Slater & Gordon Lawyers Ltd.⁵⁶ There was no evidence that answering the request would be oppressive.⁵⁷ Further, the allegations made in the statement of claim were, without exception, about conduct that Bell Potter engaged in with respect to 'the claimants'.⁵⁸ Consequently, unless Bell Potter was to 'not admit' all allegations, Bell Potter needed to know, the identity of each claimant.

In relation to the individual representations, recommendations or communications reference was made to *Connell v Nevada Financial Group Pty Ltd* where Drummond J considered an application pursuant to s 33N of the

53 *Thomas v Powercor Australia Ltd* [2011] VSC 614; BC201109368 and *Thomas v Powercor Australia Ltd (Damages Ruling)* [2011] VSC 586; BC201109373.

54 [2011] FCA 136; BC201100684.

55 *Ibid.*, at [12].

56 *Ibid.*, at [7]–[8].

57 *Ibid.*, at [27].

58 *Ibid.*, at [10]–[12].

Federal Court of Australia Act 1976 (Cth) that the proceedings no longer continue as a representative action under Pt IVA of the Act. Drummond J observed that representations made on different occasions and in a different form of words to each class member did not necessarily prevent the class action procedure being utilised, but that it was necessary for the applicant to plead with precision the terms of the representation so as to satisfy the commonality requirement in s 33C. If the pleading did not particularise the representations made then if a challenge was made based on a lack of commonality it would generally be necessary for the applicants to put in evidence the statements made that are said to contain each oral (or written) representation.⁵⁹ Simply pleading that representations were to the same substance and effect is insufficient. Edmond J also cited authority to the effect that while class actions by their nature may alter how a pleading is to be constructed it does not remove the need to plead the material facts that demonstrate the existence of a cause of action and the issues to be resolved.⁶⁰

Without knowledge of the actual representations Bell Potter's employees were said to have made, Bell Potter could not plead to the allegation.⁶¹

For completeness it should be noted that Edmond J made orders for the discontinuance of the proceeding as a class action on 27 April 2012 in response to an application by the respondent.⁶² An important component in the respondent's success was the information obtained through the order for particulars.⁶³

National Australia Bank Ltd v Pathway Investments Pty Ltd⁶⁴

The Victorian Court of Appeal (Bongiorno and Harper JJA and Bell AJA) considered the issue of discovery and particulars in relation to a group proceeding under Pt 4A of the Supreme Court Act 1986 (Vic), where Pathway Investments Pty Ltd and Doystoy Pty Ltd, on their own behalf and representing a closed class of other shareholders, seek damages against National Australia Bank Ltd (NAB) in respect of alleged non-disclosure contrary to s 674 of the Corporations Act 2001 (Cth) and misleading and deceptive conduct contrary to s 9 of the Fair Trading Act 1999 (Vic). The information not disclosed to the market, or misleadingly disclosed, related to the extent of losses from collateralised debt obligations, aka CDOs.

NAB sought from the plaintiffs the identification of the 20 largest shareholders who were group members by way of a request for particulars and

⁵⁹ Ibid, at [41], citing *Van Eck & Boucaut Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723 at 728; (1996) ATPR 41-529; BC9604269.

⁶⁰ Ibid, at [49], citing *Harrison v Lidiform Pty Ltd* (24 November 1998, unreported) at 14; *Bright v Femcare* (1999) 166 ALR 743; (1999) ATPR 41-720; [1999] FCA 1377; BC9906392 at [18]; *Williams v FAI Home Security Pty Ltd* [1999] FCA 1771; BC9908322 at [17].

⁶¹ Ibid, at [42].

⁶² *Meaden v Bell Potter Securities Ltd (No 2)* [2012] FCA 418; BC201202466. An application for leave to appeal from this interlocutory judgment was refused in *Meaden v Bell Potter Securities Ltd (No 3)* [2012] FCA 739; BC201205206.

⁶³ *Meaden v Bell Potter Securities Limited (No 2)* [2012] FCA 418; BC201202466 at [27].

⁶⁴ [2012] VSCA 168; BC201205619.

then discovery from those group members to assist in the provision of expert evidence. The documents sought to be discovered were those dealing with (1) NAB's exposure to losses from CDOs, ie, what the shareholders knew about NAB and potential losses from CDOs; and (2) the decision-making or materials relied on in deciding whether to acquire, hold or dispose of NAB shares during the relevant period.⁶⁵

The trial judge and the Court of Appeal declined to make orders for particulars or discovery as sought. Central to whether the particulars and discovery were needed turned on the common issues to be resolved as set out in the pleadings, and the need for the material sought, weighing what was required for the just determination of the proceedings, cost and delay.

The Corporations Act Ch 6CA requires listed disclosing entities to notify the ASX of information required to be disclosed by LR 3.1 where that information is not generally available and is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity.⁶⁶ NAB had filed a defence and denied (1) the allegation that the information was not publicly available and (2) the allegation that it was material to the price or value of the bank's shares. Put in the affirmative, the information that the bank knew (or should have known) as to its exposure to losses under impaired CDOs was generally available but immaterial during the relevant period.⁶⁷ Therefore it did not breach the continuous disclosure obligation.⁶⁸

Consequently, the particulars and discovery sought were not needed for the defendant to be able to meaningfully plead to the allegations. The common issues did not raise the conduct of NAB in relation to the group members but rather focused on what NAB was required to tell the market — what information was available and whether the information was material.⁶⁹ This was an objective test. The court adopts the position of the hypothetical investor.⁷⁰ These two factors distinguish the case from *Bell Potter*.

NAB's expressed reason for requiring the particulars and discovery was for the provision of expert evidence. The material sought was to be used to inform the conduct of an event study which would identify the cause and degree of share price movements.⁷¹ The trial judge, Pagone J, found that material sought

⁶⁵ *Ibid*, at [20]–[24].

⁶⁶ Corporations Act s 674 deals with listed disclosing entities and s 675 deals with other disclosing entities. When information is generally available is defined in s 676 and the material effect on price or value is defined in s 677.

⁶⁷ This was intended to place in issue the question of availability under s 674(2)(c)(i) and materiality under s 674(2)(c)(ii) of the Corporations Act.

⁶⁸ *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168; BC201205619 at [15]–[16].

⁶⁹ *Ibid*, at [35].

⁷⁰ *Ibid*, at [69]–[91] especially [70] and [87].

⁷¹ Event studies are a form of regression analysis which seeks to measure materiality and the magnitude of the impact of a misrepresentation on the share price by removing other unrelated events such as general market or industry wide events. See *Taylor v Telstra Corporation* [2007] FCA 2008; BC200711281 at [21]–[22] ('An events study is an econometric technique that seeks to measure the impact of specific events on a company's share price by removing other unrelated events such as market-wide movements. The events study seeks to determine how much of a share price movement on a particular day is due to a specific event such as a disclosure of a hereto undisclosed piece of information. The events

did not have sufficient forensic benefit based on the material placed before him at the common issues stage of the proceedings.⁷²

Although there was a closed class, the same as in *Bell Potter*, that was not determinative. Bell AJA reasoned that the trial judge was entitled to take account of the usual position and expectations of group members in a class action — ‘group members are entitled to expect that, in the usual course, the plaintiffs will be responsible for the carriage of the proceeding and group members will not be required to participate as a party or be subject to orders for discovery’.⁷³ The weight given to this factor may be less in a closed class. However, the factor cannot stand in the way of an order for discovery which is ‘demonstrably necessary for the fair and just determination of a defendant’s case’.⁷⁴ Bell AJA then explained that *Meaden v Bell Potter Securities Ltd*⁷⁵ was an example of the kind of case in which it was necessary for such an order to be made because the proper conduct of the defence could not be achieved without it.⁷⁶

Bell AJA also observed that the discretion to order particulars and/or discovery was subject to the overarching purpose in the Civil Procedure Act 2010 (Vic) ‘to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute’.⁷⁷ Further in making any order the court is required to further the overarching purpose by having regard to a number of specified objects. The first is the just determination of the civil proceeding. Others include the efficient conduct of the business of the court, minimising delay, the timely determination of the dispute and dealing with the proceeding in a manner which is proportionate to the complexity and importance of the issues, and the amount, in dispute.⁷⁸

Bell AJA found that it could not be said that the material sought had no relevance to the common issues but it was not an error for the trial judge to refuse to make such orders on the basis that NAB had not established that there was sufficient reason to think that such evidence could likely be obtained from the market participants or that the scope and extent of the discovery sought could not be justified having regard to the objective and hypothetical nature of the statutory tests or was (applying the overarching purpose) out of all proportion to the real issues in dispute.⁷⁹ Turning to the need for the material for the conduct of an event study Bell AJA found that the trial judge’s

study methodology invites the conclusion that if a disclosure causes a statistically significant fall in the share price it follows that the information disclosed was material and it enables an estimate to be made of the extent of the “price inflation” present in the share price as a consequence of any earlier non-disclosure.’) and A C MacKinlay, ‘Event Studies in Economics and Finance’ (1997) XXXV *Jnl of Economic Literature* 13 (setting out the history of the use of event studies as well the procedure for conducting an event study).

72 *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168; BC201205619 at [36]–[39].

73 *Ibid.*, at [50].

74 *Ibid.*, at [51].

75 [2011] FCA 136; BC201100684.

76 [2012] VSCA 168; BC201205619 at [52].

77 *Ibid.*, at [51], citing Civil Procedure Act 2010 (Vic) s 7.

78 *Ibid.*, at [51], citing Civil Procedure Act 2010 (Vic) s 9.

79 *Ibid.*, at [91] and [107]–[110]. Bell AJA at [26] commented that the width of the discovery sought imposed ‘very onerous obligations’.

discretion had not miscarried and he was on the evidence before him entitled to determine that it had not been established that the documents sought were needed to enable an expert to provide a report which would be likely to produce probative and admissible evidence.⁸⁰

Regent Holdings Pty Ltd v State of Victoria⁸¹

The Victorian Court of Appeal (Nettle, Redlich and Osborn JJA), only a month after the NAB class action decision, revisited the discovery and particulars issue in the Abalone class action brought pursuant to Part 4A of the Supreme Court Act 1986 (Vic).

The Abalone class action is brought by Regent Holdings Pty Ltd against the State of Victoria and Southern Ocean Mariculture Pty Ltd (SOM), on its own behalf and on behalf of a closed class of 194 group members. The class action alleged that the State and SOM negligently allowed the release of a herpes-like virus, abalone viral ganglioneuritis, from an abalone aquaculture farm operated by SOM and thereby caused each of the class members to suffer loss and damage.

The judge at first instance had ordered that 14 class members provide particulars and discovery of documents relating to quantum. The judge made the orders to facilitate a court-ordered mediation. The orders were made to enable the State to make sensible decisions in settlement discussions.⁸² The plaintiff sought leave to appeal the decision. Leave to appeal was refused.

The appeal was based on a number of arguments, including that the judge had proceeded on the basis of an incorrect principle that ordering particulars and discovery as to quantum, in advance of the trial of the representative party's claim, was now 'standard practice'. Further, making the orders for the purpose of facilitating the mediation improperly involved the judge in the essentially consensual process of mediation and settlement.⁸³

The Court of Appeal rejected a submission that it is generally accepted that a group member ought not be required to take any step in a class action until after determination of the representative party's claim. After considering the judgment of Gaudron, Gummow and Hayne JJ in *Mobil Oil Australia Pty Ltd v State of Victoria*⁸⁴ as to the status of group members the Court of Appeal stated that it is not of the essence of a class action that group members not be required to take any positive step before common questions are resolved, but rather, in some class actions that approach will follow. Yet in other class actions, such as the one under consideration, group members may be asked to take certain steps.⁸⁵

Central to the Court of Appeal's position were the existence of different types of group definition — an open or opt-out class action as employed in *Mobil Oil*, compared to a closed class as was adopted in the abalone class

⁸⁰ Ibid, at [96] and [99]–[100].

⁸¹ [2012] VSCA 221; BC201207244.

⁸² Ibid at [1] and [5].

⁸³ Ibid at [8].

⁸⁴ [2002] HCA 27; 211 CLR 1 at [38]–[41].

⁸⁵ [2012] VSCA 221; BC201207244 at [10]–[12].

action. The Court of Appeal observed:⁸⁶

in a case like the present, where the Group is limited and in effect closed; all members of the Group are represented by the one firm of solicitors; and the litigation is maintained by a single litigation funder for the benefit of the representative party and Group members alike, the prosecution of the representative party's claim is more akin to a joint enterprise in which the representative party and the Group members are engaged together with a view to maximising recovery. In such a case, it is not inappropriate for a judge to make procedural orders consummate with that paradigm.

The Court of Appeal continued by observing that this view did not turn particulars and discovery into a routine requirement in class actions employing a closed class, but rather, in the current case where it was proposed to mediate the whole class action in advance of trial, it was appropriate.⁸⁷

The Court of Appeal then took issue with the appellant's reading of the judgment in *National Australia Bank Ltd v Pathway Investments Pty Ltd*, discussed above, and rejected the existence of a principle to the effect that 'group members ought only ever be required to give discovery if it be demonstrably necessary for the determination of a representative party's claim'. The Court of Appeal also stated that observations to the effect that 'discovery orders are not ordinarily made against group members unless there are compelling reasons' would be stated too broadly if directed to all class actions.⁸⁸

The Court of Appeal repeatedly emphasised the fact specific nature of discretionary orders as to matters such as discovery, making judgments on such issues unlikely to be of general application.⁸⁹

The Court of Appeal was also adamant that it is not improper for a judge to make orders for particulars and discovery calculated to facilitate mediation. Indeed, settlement of proceedings was desirable and in Victoria Chapter 2 of the Civil Procedure Act 2010 (Vic) obligated courts and litigants to seek to achieve that end. The Court of Appeal saw the provision of more accurate and complete information as facilitating rational bargaining which was more likely to lead to rational settlements. In a context where the plaintiff's solicitors had stated that the class action was unlikely to settle on a class-wide basis for less than \$100 million, a respondent would want to be able assess the group's claims with some precision. Consequently, the Court of Appeal adopted a similar position to that taken in the Horsham fire class action and would require cogent submissions demonstrating that the provision of further information would undermine the mediation process before it would prevent a Court giving that assistance.⁹⁰

Finally, the Court of Appeal considered the burden and costs of compliance but did not find these sufficient to support a finding that the judge was in error.

⁸⁶ Ibid at [14].

⁸⁷ Ibid at [15].

⁸⁸ Ibid [16]–[18].

⁸⁹ Ibid at [19]. See also [15] and [18].

⁹⁰ Ibid at [23] and [27].

Future guidance

The five decisions discussed above provide useful guidance on a difficult issue, even if, as the Victorian Court of Appeal stated in the *Abalone* class action, each case turns on its own facts and circumstances.

To begin it should be observed that while the revolution in group definition that resulted in the acceptance of a closed class may have prompted defendants/respondents to challenge the received wisdom that the provision of discovery from, and particulars of, group members is not required, it does not resolve the issue. The use of a closed class definition reduces the impracticality or burden of providing particulars and discovery because group members are known. However, the use of a closed class is the beginning rather than the end of the process for ascertaining if particulars and/or discovery should be provided. Indeed even in an opt-out class action, particulars may be ordered if necessary for the just determination of the case.⁹¹ Group definition impacts the feasibility of providing particulars and discovery but it does not address whether the making of such orders is desirable.

The test or standard for determining whether an order for particulars of, or discovery from, group members should be made has been a demanding one in three of the above decisions, as shown by the language used by those courts: ‘compelling reason’,⁹² ‘extraordinary circumstances’⁹³ and ‘demonstrably necessary for the fair and just determination of a defendant’s case’.⁹⁴

However, in Victoria, the Court of Appeal has sent mixed messages as to whether there can be said to be any test or standard, with the *Abalone* class action decision rejecting the existence of any principle and preferring to focus on the existence of individual facts and circumstances. Notwithstanding this position the Court of Appeal did not see its judgment as meaning that that ‘class members ought generally be required to provide particulars and make complete or even substantial discovery in advance of the determination of a representative party’s claim’.⁹⁵ It is suggested that the focus must be on the purpose or reason for the respondents/defendants seeking particulars and/or discovery. This will then inform the desirability of making the orders sought.

The *Bell Potter* and *NAB* class actions demonstrate that particulars and possibly discovery are more likely to be ordered when the individual actions (eg, reliance on representations) or circumstances (eg, consumer) of group members are put in issue by the pleadings. This follows from both the practical necessity of a respondent/defendant being unable to respond to allegations that would otherwise be incomplete and as a matter of fairness, including avoiding the defendant/respondent being taken by surprise at trial.

91 *Thomas v Powercor Australia Ltd (Ruling No 1)* [2010] VSC 489; BC201007990. See also *Williams v FAI Home Security Pty Ltd* [1999] FCA 1771; BC9908322 at [18] requiring the applicants to particularise in relation to those group members presently known to the applicants the representations upon which they rely but noting that further particulars may be needed at a later point as other group members become known.

92 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)* [2010] FCA 176; BC201001064 at [17].

93 *Thomas v Powercor Australia Ltd (Ruling No 1)* [2010] VSC 489; BC201007990 at [39].

94 *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168; BC201205619 at [51].

95 *Regent Holdings Pty Ltd v State of Victoria* [2012] VSCA 221; BC201207244 at [15].

This outcome can be avoided where the applicant/plaintiff pleads a claim on its own behalf that is reflective of the claims that group members have so that the proceedings can focus on the applicant/plaintiff but resolve issues common to the group. The Practice Notes for class actions in the Federal Court and Victoria observe that '[t]he statement of claim should be drawn so that the [Applicant's/Plaintiff's] personal claim can be used as the vehicle for determining the common questions in the action'.⁹⁶ Some claims will more readily satisfy this requirement than others. Shareholder claims based on a corporation's disclosures to the market focuses on the conduct of the corporation. Similarly cartel claims focus on the conduct of the alleged cartel participants. The need to look at individual group members only arises at the causation and damages stage.⁹⁷

The position that knowledge of the basis or quantum of individual group members only arises after common questions have been determined has been subject to greater scrutiny with the growing reliance on alternative dispute resolution, and in particular mediation.⁹⁸ The Multiplex shareholder class action, on the one hand, and the Abalone and Horsham fire class actions, on the other, took different views on this issue but they also had differing statutory regimes to consider with the former being in the Federal Court and the latter two in the Supreme Court of Victoria. These are discussed further below. Nonetheless, it is widely recognised that settlement cannot be achieved unless a defendant/respondent is able to ascertain the expected quantum of a settlement.⁹⁹ Preparing a dispute for trial compared to preparing it for settlement creates a different dynamic. From the trial perspective information that goes to establishing the basis for a claim and its quantum are to be closely guarded with the aim of winning the contest. Court orders on discovery or particulars provide or deny an informational advantage. From a settlement perspective information that goes to the basis for a claim and its quantum are about reaching an understanding as to how the dispute can be resolved in a way that is acceptable to all participants. Information is a resource to be shared.¹⁰⁰ If courts are going to promote, or mandate, alternative dispute resolution then a different approach to particulars and discovery in relation to group members may be needed. The Abalone and Horsham fire class actions

96 Federal Court of Australia, *Practice Note CM17 — Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, 1 August 2011, at [2.2] and Supreme Court of Victoria, *Practice Note No 9 of 2010 — Conduct of Group Proceedings*, 29 November 2010 at [2.2].

97 In shareholder class actions there is an ongoing debate as to whether causation is a common or individual issue where there is an efficient market. Cf R Drinnan and J Campbell, 'Causation in Securities Class Actions' (2009) 32(3) *UNSWLJ* 928 and A Watson and J Varghese, 'The Case for Market-Based Causation' (2009) 32(3) *UNSWLJ* 948.

98 For examples of class actions resolved through mediation or shortly afterwards see *Kirby v Centro Properties Ltd (No 6)* [2012] FCA 650; BC201204703 (and for greater detail A Boxsell, 'Last big trick in Centro circus', *The Australian Financial Review*, 11 May 2012); *Clime Capital Ltd v Credit Corp Group Ltd (No 3)* [2012] FCA 218; BC201201223 at [8] and *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801; BC201105168 at [14].

99 For example, see R Fisher, W Ury and B Patton, *Getting to Yes*, 2nd ed, Penguin Books, 1991, pp 81–94 explaining the need for objective criteria to assist in resolving disputes.

100 See J Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, UBC Press, 2008, pp 78 and 114.

illustrate the necessary change. The Victorian Court of Appeal in the *Abalone* class action observed that mediation should not be conducted in ignorance but should be ‘an exercise in rational bargaining between relatively well-informed parties’.¹⁰¹ Equally, the parties and lawyers may be expected to adopt a different approach to disputing.

Mention should also be made of the enactment of the Civil Dispute Resolution Act 2011 (Cth) at the federal level which requires the provision of relevant information and documents to the other party to enable that person to understand the issues involved and how the dispute might be resolved. It has been suggested that in the context of shareholder class actions the applicant’s share trade information should be provided to the respondent.¹⁰² In a closed class, this information may be available for group members as well, which could assist in resolution. If such an approach was taken then the need for formal applications for particulars or discovery may arise less often.

Determinations as to whether, and to what extent, to make orders as to particulars or discovery will also depend on how onerous or difficult compliance is. The Federal Court, Victoria and New South Wales have legislation containing an overarching or overriding purpose which requires consideration of cost and delay, as well as justice, in the exercise of discretions such as the making of orders for particulars and discovery.¹⁰³ Interestingly these considerations can both support the making and refusal of orders for discovery and/or particulars. The *Bell Potter* class action illustrates how justice, in terms of procedural fairness, was more significant than cost and delay where there was no evidence that the request for particulars would be oppressive. In contrast, the *NAB* class action focused on the cost and delays that particulars and discovery can generate, thus suggesting their denial. The *Horsham fire* class action also suggests that case management powers can be employed so as to avoid an all-or-nothing approach and tailored orders can be made. An overarching or overriding purpose is of clear assistance in determining whether an order for particulars of, or discovery from, group members should be made, as it provides three indicia for the court to weigh in the context of a specific application.

Conclusion

The provision of discovery from, and particulars of, group members in class actions has traditionally been a rarity. However, recent applications have resulted in the courts expounding on the relevant considerations for determining whether to make the sought after orders. In summary, the courts have maintained a high threshold for the making of such orders but consideration must be given to what is just in the circumstances, including the ability of the respondent/defendant being able to meet the case against them

¹⁰¹ *Regent Holdings Pty Ltd v State of Victoria* [2012] VSCA 221; BC201207244 at [23].

¹⁰² B Slade, ‘Case Management in the Federal Court’, paper presented as part of the panel on Access to Justice for Multiple Claimants — Class Actions and Beyond at UNSW Law School’s 40th Anniversary Conference ‘Dispute Resolution in the Next 40 Years: Repertoire of Revolution’, 1 December 2011, p 13.

¹⁰³ Federal Court of Australia Act 1976 (Cth) s 37M, Civil Procedure Act 2010 (Vic) s 7 and Civil Procedure Act 2005 (NSW) s 56.

and any legitimate expectations of group members that they will not be burdened with steps in the conduct of the litigation. Consideration must also be given to cost and delay, which includes looking at the group definition which impacts whether information is available, the burden associated with the task, the potential narrowing of the issues in dispute and the potential savings in time and money that may flow from resolving the dispute through alternative dispute resolution.