FEDERALISM, THE COURTS AND CLASS ACTIONS

The Hon Justice Robert Beech-Jones*

As my friends and family constantly remind me, my appointment to the High Court of Australia did not imbue me with any greater judgment, wisdom or experience than I already possess, if any. My experience with representative proceedings[1] is not as a High Court judge, but as a former member of a Supreme Court of a State, and as someone who had some responsibility for the management of that Court.

As a judge of a Supreme Court of a State, much of the public discussion that took place about the utility of class actions, especially in the federal sphere, concerned shareholder and investor class actions, which was of little or no relevance to me. I do not mean to criticise that Court or those cases, but I was mostly concerned with the practicalities and fairness of the particular cases I heard or managed. That said, it is important to note that with the class actions I heard or managed, there could be no doubt that the represented parties had a genuine grievance in that they appeared to have suffered real damage, whether it be from fire, flood, removal of children or lost wages. All of those matters were very much the core work of the Common Law Division of the Supreme Court of New South Wales and at the heart of State jurisdiction. Whether anyone was legally liable for that loss or damage was a different matter - that was what the relevant class action was directed to resolving. However, my experience was that the representative procedure allowed those litigants to obtain the benefit of highly competent legal representatives to pursue claims about real damage they suffered, and without that procedure, there was no practical likelihood of them vindicating their legal rights.

The title of this address is "Federalism, the Courts and Class Actions". As a spoiler alert, it seeks to make a few points about the States, and in particular, State courts. It is very judge focussed, but after all, I am a judge. From my scan of the balance of the

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* Justice of the High Court of Australia. This is an edited version of a speech delivered to the Corporate Conduct + Class Actions Symposium 2024 on 2 May 2024.

[1] The phrases "representative proceedings", "class actions" and "group actions" will be used interchangeably while accepting all the potential ambiguity those phrases entail.

papers I anticipate, the topic will have some relevance to the balance of the conference.

Professor Zines observed that, other than adopting the general federal structure of the Constitution of the United States, "the framers of the Australian Constitution did not engage in theorising about the nature of the federation they were creating".[2] One thing you can say about our federation is that it does involve States and they cannot be ignored. Beyond that, at least in the world inhabited by economists and social scientists, the suggestion that the Commonwealth and States are "co-ordinate governments", that is, sovereign entities operating within their own spheres, has not held sway.[3] Instead, the preferred paradigms for understanding how federalism works in practice are so-called "competitive federalism" and "cooperative federalism".[4] Competition and cooperation in this context can be vertical (that is, between the Commonwealth and the States)[5] and horizontal (that is, amongst the States and amongst the Territories).[6] Although constitutional lawyers mostly focus on vertical competition, it seems that economists have been mostly focused on horizontal competition.[7] Competitive and cooperative federalism each have their advocates, but even those who argue that competition best explains what occurs in practice accept that there is a substantial degree of cooperation between competitive governments in our federation.[8] To put it another way, there is a spectrum between competition and cooperation.

This talk is an attempt to look at the current state of class actions through these views of federalism in action. Discussions about federalism usually involve considering the legislative and executive acts and policies of various levels of government and rarely encompass their judicial arms. It is relatively easy to conceptualise a federation in which governments are seen as competing with each other to provide the optimum mix of services, taxes and policies that affect people's choices about where to live and

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[2] Leslie Zines, 'Changing Attitudes to Federalism and its Purpose' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 86, 86.
[3] Ibid 96.
[4] Brian Galligan, 'Processes for Reforming Australian Federalism' (2008) 31(2) *UNSW Law Journal* 617, 619; Jonathan Pincus, 'Productive Reform in a Federal System' in Productivity Commission, *Productive Reform in a Federal System* (Roundtable Proceedings, 2006) 25, 39.
[5] Cliff Walsh, 'Competitive Federalism — Wasteful or Welfare Enhancing?' in Productivity Commission, *Productive Reform in a Federal System* (Roundtable Proceedings, 2006) 53, 59.
[6] Ibid 71.
[7] Ibid 59.
[8] Ibid 54.

work. The States have been described as "social laboratories".[9] The same idea does not directly translate to the courts of various jurisdictions as their work is usually based only on locale and subject matter. I will come back to this, but despite attempts to characterise them differently, courts are not service providers and generally should not be in the market of competing with other courts to attract cases. However, courts and the judges who manage them have an interest in, and responsibility for, ensuring they are accessible to those seeking to vindicate or defend their rights. Courts and judges develop and apply the law with that principle in mind, along with the necessity to be fair, impartial and efficient. This is not just applicable on a case-by-case basis but extends to how courts manage their resources and exercise their rule-making powers.

Legislative Development

I start with the legislative history. An extensive history of the enactment of class action legislation is beyond the scope of this talk. However, it is not just treason that is a matter of dates;[10] the timing and reasons for the staggered introduction of class action regimes across the country is important to understand where we are and, perhaps, where we are going.

The genesis of the legislative reforms concerning class actions implemented over recent decades is a report by the Law Reform Committee of South Australia published in 1977.[11] Amongst other recommendations, that report proposed an opt out procedure and the introduction of a form of contingency fees.[12] Save for a change to the rules of the Supreme Court of South Australia introduced in 1987,[13] the Law Reform Committee's recommendations were not taken up, although the current version of the South Australian Uniform Civil Procedure Rules also provides for an opt out procedure.[14]

At a federal level, the first referral to the Australian Law Reform Commission in respect of group proceedings was made in February 1977. Change was a long time coming in

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[9] See, eg, Graeme Davison, John Hirst and Stuart Macintyre (eds), *The Oxford Companion to Australian History* (Oxford University Press, 2001), 597-9.
[10] Alexandre Dumas, *The Count of Monte Cristo* (1845); Transcript of Proceedings, *SZFDE v Minister for Immigration & Citizenship* [2007] HCATrans 248.
[11] Law Reform Committee of South Australia, 'Thirty-Sixth Report of the Law Reform Committee of South Australia Relating to Class Actions' (Report No 36, 1977).
[12] Ibid 8-9.
[13] Former r 34 of the Supreme Court Rules 1987 (SA).
[14] Uniform Civil Procedure Rules 2020 (SA), rr 24.5, 24.7.

that the legislation introducing Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("*Federal Court Act*"), which included an opt out procedure, did not commence until 4 March 1992.[15] The Explanatory Memorandum to that Bill noted that its provisions were to similar effect as those introduced into the rules of the Supreme Court of South Australia.[16]

Drawing on both the rules of the Supreme Court of South Australia and the Federal Parliament's initiatives, with effect from 1 January 2000, the Supreme Court of Victoria made rules of court that reflected Pt IVA of the *Federal Court Act*.[17] There were unsuccessful challenges to those rules based on whether the rules were a valid exercise of the Court's rule-making powers.[18] However, before those challenges were exhausted, the Victorian legislature stepped in and enacted its own Pt IVA of the *Supreme Court Act 1986* (Vic) that was modelled on the federal equivalent with retrospective effect from 1 January 2000.[19]

The next cab off the rank was New South Wales. Like Victoria, the process commenced with a liberalisation of the rules of court. As far back as 1995, its rules[20] were construed in *Carnie v Esanda Finance Corp Ltd* ("*Carnie v Esanda*")[21] to allow a form of representative action. However, as interpreted, those rules and their successors in the Uniform Civil Procedure Rules 2005 (NSW)[22] had their limitations.[23] The Uniform Civil Procedure Rules were amended in November 2007 in terms that reflected s 33C of the *Federal Court Act*.[24] Rule 7.4(2) was construed to permit the Supreme Court of New South Wales to adopt both an opt in and opt out procedure.[25] The Uniform Civil Procedure Rules were further amended in December 2009 to bring them even closer to the regime in Pt IVA of the *Federal Court Act*.[26] A year or so later,

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[15] *Federal Court of Australia Amendment Act 1991* (Cth), s 3.
[16] Explanatory Memorandum, Federal Court of Australia Amendment Bill 1991 (Cth), [4].
[17] Supreme Court (General Civil Procedure) Rules 1996 (Vic), ord 18A.
[18] *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545; *Cook v Pasminco Ltd* [2000] VSC 534.
[19] *Supreme Court Act 1986* (Vic), Pt 4A, inserted by *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic), s 13.
[20] Supreme Court Rules 1970 (NSW), Pt 8, r 13.
[21] (1995) 182 CLR 398.
[22] Former r 7.4.
[23] See, eg, *O'Sullivan v Challenger Managed Investments Ltd* (2007) 214 FLR 1.
[24] Uniform Civil Procedure Rules (Amendment No 18) 2007 (NSW), sch 1.
[25] *Jameson v Professional Investment Services Pty Ltd* (2009) 72 NSWLR 281, 302 [120] (Spigelman CJ).
[26] Uniform Civil Procedure Rules (Amendment No 30) 2009 (NSW), sch 1 [3].

being three years after the judges of the Supreme Court of New South Wales had first acted, the legislature stepped in. With effect from 4 March 2011, the *Civil Procedure Act 2005* (NSW) was amended by the insertion of Pt 10,[27] which was modelled on Pt IVA of the *Federal Court Act*, although there are differences which I will come to.

From at least 1999, Queensland had rules of court similar to those considered in *Carnie v Esanda*.[28] However, it was not until 1 March 2017 when Pt 13A was inserted into the *Civil Proceedings Act 2011* (Qld), which was modelled on Pt IVA of the *Federal Court Act*.[29] With effect from 9 September 2019, Tasmania enacted similar legislation.[30] With effect from 25 March 2023, Western Australia followed suit.[31]

To date, neither South Australia, the Northern Territory nor the Australian Capital Territory have enacted legislation to facilitate class actions, although they have rules of court that appear to be similar to those considered in *Esanda v Carnie*.[32] In the case of South Australia, this is ironic, because it was its Law Reform Committee that set the ball rolling as far back as 1977.

Vertical and Horizontal Federalism

Between the enactments of Pt IVA of the *Federal Court Act* in 1992 and similar provisions in Victoria in 2000, the High Court published its decision in *Re Wakim; Ex parte McNally* ("*Re Wakim*")[33] striking down that part of the cross-vesting scheme that purported to confer jurisdiction on federal courts outside of the matters identified in ss 75 and 76 of the *Constitution*.[34] However, so much of the legislative scheme that vested in each State and Territory Supreme Court the jurisdiction of the other State and Territory Supreme Courts was untouched. The effect of *Re Wakim* on the Federal Court's jurisdiction was partly offset by the subsequent extension of its jurisdiction to hear matters arising under laws of the Commonwealth Parliament.[35] Still, the practical

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[27] *Courts and Crimes Legislation Further Amendment Act* 2010 (NSW), sch 6.1 [2].
[28] Uniform Civil Procedure Rules 1999 (Qld), rr 75-77.
[29] *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld), s 10.
[30] *Supreme Court Civil Procedure Act 1932* (Tas), Pt VII, inserted by *Supreme Court Civil Procedure Amendment Act 2019* (Tas), s 10.
[31] *Civil Procedure (Representative Proceedings) Act 2022* (WA).
[32] Supreme Court Civil Rules 2006 (SA), rr 80-84; Supreme Court Rules 1987 (NT), ord 18; Court Procedure Rules 2006 (ACT), rr 265-267.
[33] (1999) 198 CLR 511.
[34] *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth), s 9(2); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW), s 4(1).
[35] *Judiciary Act 1903* (Cth), s 39B(1A)(c), inserted with effect from 17 April 1997 by the *Law and Justice Amendment Act 1997* (Cth), sch 11, item 1.

effect of *Re Wakim* was that, until the States and Territories came on board, opt out class actions were a distinctly federal phenomenon and could only involve cases that contained some element of federal law. Generally, actions arising out of the cavalcade of disasters I referred to at the commencement of this speech, such as floods, fires and famine, do not involve an exercise of federal jurisdiction. Try as hard as one can, it is difficult to find misleading or deceptive conduct when your house has been burnt or flooded. At the risk of repetition, access to justice for cases of that kind which are purely within State jurisdiction are vitally important. They can involve many people who have experienced great hardship or loss. These cases are also usually complex and often require large financial outlays to investigate, and even more to run. In short, they are the sort of cases for which class action regimes exist or should exist.

If all of the cross-vesting scheme had been upheld in *Re Wakim*, then class actions concerning matters arising purely in State jurisdiction could have been pursued in the Federal Court. However, *Re Wakim* went the other way. Instead of a period of sustained vertical competition between the Commonwealth and the States about class actions, there has been a mixture of vertical and horizontal competition along with some cooperation. This is best illustrated by the introduction of the Queensland legislation referred to earlier. That legislation also included provisions that retrospectively removed the limitation period for civil claims arising out of child sexual abuse. In introducing that legislation to the Queensland Parliament, the then Premier noted that changes were being made to allow victims to bring legal action.[36] However, the Premier also observed that "[w]e have seen causes of action being commenced in other jurisdictions because of the lack of a contemporary representative action regime in Queensland". The Premier told Parliament that the proposed bill "will allow for class actions that are relevant to Queensland to be dealt with in our state by our judges and lawyers who know Queensland best".[37]

At the time that legislation was introduced, I was case managing and then later heard one of the cases I strongly suspect the Premier had in mind, being a class action arising out of the flooding of much of Brisbane and its surrounds in January 2011. I can assure you I take no offence to the Premier's observations. I was clearly not a

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[36] Queensland, *Parliamentary Debates*, Legislative Assembly, 16 August 2016, 2747 (Annastacia Palaszczuk, Premier).
[37] Ibid; see also the second reading speech: Queensland, *Parliamentary Debates*, Legislative Assembly, 8 November 2016, 4266 (Yvette D'Ath, Attorney-General).

judge who "[knew] Queensland best", although I now know far more about Queensland rainfall than I ever thought was humanly possible. In all seriousness, if ever there was a case that would be especially suited to be decided by the Supreme Court of a State, that case was it. It concerned a large natural disaster affecting tens of thousands of Queenslanders in Queensland's largest city and involved allegations about the management of a large piece of Queensland infrastructure by Queensland State owned entities. The case was preceded by a Royal Commission presided over by an experienced and senior State Supreme Court judge who was later appointed Chief Justice of Queensland.[38] Nevertheless, as I understand, the case was not conducted in Queensland because of the absence of a class action regime in that State at the time. Instead, it was heard in a New South Wales court by a New South Wales judge using that State's class action regime and exercising jurisdiction under the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld)[39] and *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW).[40]

As I said, the Premier explained that the class action regime was introduced as part of a package of reforms directed to the rights of victims of child sexual assault. That should serve as a pointed reminder of the type of issues that can arise with class actions at a State level. Those issues have a political and social resonance that are louder than complaints about lack of shareholder disclosure.

In relation to the Premier's concerns about such cases being decided elsewhere, if any of you have spent time in a State or Territory other than New South Wales or Victoria, you will know that there is an understandable anxiety sometimes bordering on resentment when important decisions are being made about you elsewhere by decision-makers who have no connection to you whatsoever. In this case, that decision was being made by a court system consisting of a judge or judges appointed by an executive government whom the people of Queensland did not play any part in electing and operating under the laws of a legislature in which the people of Queensland had no representation. The Premier's comments about enhancing the position of victims and having class actions heard locally not only reflected the reality of State politics but also reflected federalism in action.

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[38] See Queensland Floods Commission of Inquiry, *Final Report* (Report, March 2012).
[39] Under s 4.
[40] Under s 9.

Particular Issues

I referred earlier to the description of States as "social laboratories".

One consequence of the staggered way in which the class action regimes were introduced was that as each regime was enacted, each legislature took the opportunity to repair the wrinkles in the scheme enacted by its predecessor.

For example, the New South Wales scheme addressed what were perceived to be two potential problems with Pt IVA of the *Federal Court Act*. First, the New South Wales scheme was drafted so that representative proceedings could be taken against several defendants, even if not all of the group members had a claim against all defendants.[41] That problem with Pt IVA of the *Federal Court Act* came home to bite in *Phillip Morris (Australia) Ltd v Nixon*.[42] Second, the New South Wales scheme expressly confirmed that it was permissible for representative proceedings to be brought on behalf of a confined group of individuals,[43] as was held to be the case with Pt IVA of the *Federal Court Act* in *Multiplex Funds Management Ltd v Dawson Nominees Pty Ltd*.[44] Both changes were significant to the expanded use of class actions, and the latter was especially important as it enabled funders and group members to agree on financing terms for the proceedings. Provisions similar to s 166(2) of the *Civil Procedure Act 2005* (NSW) were included in the legislative scheme that was subsequently enacted in Queensland.[45]

One thorny legal issue of federalism is limitation periods. Leaving aside Victoria, each of the legislative schemes to which I have referred has a provision to the effect that, upon commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceedings relates is suspended, with that suspension lifted when the member opts out of the proceedings or the proceedings are determined without finally disposing of the group member's claim.[46] The operation of these provisions when a case is conducted in the court of

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[41] *Civil Procedure Act 2005* (NSW), s 158(2).
[42] (2000) 170 ALR 487.
[43] *Civil Procedure Act* (NSW), s 166(2).
[44] (2007) 164 FCR 275, 295 [141]-[142] (Jacobson, French and Lindgren JJ).
[45] *Civil Proceedings Act 2011* (Qld), s 103K(2).
[46] *Federal Court of Australia Act*, s 33ZE; *Civil Procedure Act* (NSW), s 182; *Civil Proceedings Act* (Qld), s 103Z; *Civil Procedure (Representative Proceedings) Act* (WA), s 32; *Supreme Court Civil Procedure Act* (Tas), s 89B: the Tasmanian provision sets out an additional instance whereby the suspension will be lifted, namely, in circumstances where the proceedings are discontinued.

one forum that relates to a limitation period arising under the law of another relevant jurisdiction has been mulled around, but it is fair to say that it is not straightforward.

The Courts

Now I come to the Courts.

It is evident from the recent history of class actions canvassed earlier that much of the initiative to introduce class actions at the State level of the kind that are relatively commonplace today came from the judiciary. In Victoria and then New South Wales, the rule-making power conferred on the Supreme Courts of those States was first exercised by the judiciary to expand the scope for class actions to reflect the approach adopted in Pt IVA of the *Federal Court Act*, which was then followed by legislative action to put them on a more secure footing. In the case of New South Wales, this only happened some years later. That is not the limit of the actions taken by judges in this context. In her second reading speech introducing the legislative changes that facilitated class actions in the Supreme Court of Tasmania,[47] the State's Attorney-General thanked the judges of that Court for having raised the matter with the government.[48]

These actions should not surprise anyone. Courts and judges, especially at a State level, have often taken a relatively robust view of their entitlement to take action and, if necessary, advocate in relation to matters affecting their own court's jurisdiction and practices. For example, I am aware of a number of State judges with expertise in corporations law regularly making submissions to parliamentary committees considering legislative reforms in circumstances where I expect that their federal counterparts might be far more reticent in speaking out.[49] I suspect, but do not know for certain, that this is some sort of practical outworking of the more robust version of the separation of judicial power from other forms of government power that operates at a federal level[50] compared to the State level.[51] In any event, no one should be under

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[47] *Supreme Court Civil Procedure Amendment Bill 2018* (Tas), item 10.
[48] Tasmania, *Parliamentary Debates*, House of Assembly, 29 November 2018, 86 (Elise Archer, Attorney-General).
[49] See, eg, Hon Reginald Barrett AO, Submission to The Treasury, *Clarifying the Treatment of Trusts under Insolvency Law* (7 December 2021); Tim Game SC and Justice David Hammerschlag, Submission No. 17 to the Australian Law Reform Commission, *Review into Australia's Corporate Criminal Responsibility Regime* (20 December 2019).
[50] See *Constitution,* Ch III.
[51] See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

any misapprehension that senior State judges will not robustly defend their court's jurisdiction and take whatever steps, including speaking out, to defend their courts and their role in securing access to justice, even in the face of political debate about class actions and their utility.

When I first discussed the topic of this talk with the organisers, I believe they obtained the impression that I was intending to speak about competing class actions. It is fair to say that their response was perhaps less than enthusiastic. The trail of competing class actions is well trodden in the textbooks and case law.[52] What I meant to convey was that I wanted to touch on the topic of *competing courts* and potentially *cooperating courts*, but to do that, I need to remind you of a particular set of competing class actions, namely the various AMP class actions in 2018.

On 9 May 2018, a class action was commenced in the Supreme Court of New South Wales against AMP Ltd ("AMP") naming Ms Marie Wigmans as the lead plaintiff ("the Wigmans proceedings"). About seven hours later, another class action was filed against AMP in the Federal Court naming Wileypark Pty Ltd as the lead plaintiff. Over the next two weeks, a further three class actions were filed against AMP in the Federal Court by different lead applicants. AMP filed applications in the Federal Court seeking the transfer of the four class actions commenced in that Court to the Supreme Court,[53] while the four lead applicants in the Federal Court proceedings filed applications in the Supreme Court seeking the transfer of the Wigmans proceedings to the Federal Court. To top it off, Ms Wigmans also filed an application in the Supreme Court for an anti-suit injunction to restrain the four lead applicants in the Federal Court from pursuing the proceedings they had initiated in that Court.

The applications filed in the Supreme Court by the four lead applicants in the Federal Court seeking to transfer the Wigmans proceedings to the Federal Court were refused by Justice Stevenson.[54] His Honour concluded that New South Wales was the natural forum for the resolution of Ms Wigmans' claims.[55] His Honour accepted that the Supreme Court had power to grant the anti-suit injunction sought by Ms Wigmans but declined to make the order at that stage. Instead, his Honour invited the four lead

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[52] See, eg, Damian Grave, Kenneth Adams and Jason Betts, *Class Actions in Australia* (Lawbook Co, 3rd ed, 2022), 437-91.
[53] Under s 1337H of the *Corporations Act 2001* (Cth).
[54] *Wigmans v AMP Ltd* (2018) 128 ACSR 534.
[55] Ibid 539 [31] (Stevenson J).

applicants in the Federal Court to consider whether they would now agree that the four Federal Court proceedings they had commenced should be transferred to the Supreme Court.

Two days later, AMP's applications to transfer the four Federal Court proceedings to the Supreme Court were listed before Justice Lee for directions. His Honour expressed concern about protecting the Federal Court's capacity to later consider the transfer applications in the face of a possible anti-suit injunction being granted by the Supreme Court. His Honour invited the four lead applicants in the Federal Court to consider making an application to "preserve the status quo" and indicated that, if it was made, it was likely to be referred to the Full Court of the Federal Court "to be heard and determined at short notice".[56] The form of application that appears to have been invited by his Honour was an application for an anti-anti-suit injunction against Ms Wigmans. That is certainly how Ms Wigmans and her legal advisors understood it. To head that off at the pass, Ms Wigmans filed an application in the Supreme Court which was described as an anti-anti-anti-suit injunction.

By now things might be thought to have become a little out of control. Following a direction by the Chief Justice of New South Wales, Ms Wigman's motion for the anti-anti-anti-suit injunction was referred to the then Chief Judge in Equity (and now President of the Court of Appeal) Justice Ward. Her Honour accepted that the Supreme Court had power "in its inherent jurisdiction and/or in the equitable jurisdiction, to grant an anti-anti-anti-suit injunction of the kind ... sought",[57] but added that "as a matter of policy, this Court should not take steps that may interfere with or undermine the processes of the Federal Court". Her Honour observed that there would need to be "powerful reasons" before that type of injunction would be granted.[58] Her Honour refused the application.

Meanwhile, the applications brought by AMP to transfer the four Federal Court proceedings to the Supreme Court were referred to the Full Court of the Federal Court. The Full Court ultimately ordered that the Federal Court proceedings be transferred to

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[56] *Wileypark Pty Ltd v AMP Ltd* [2018] FCA 1052, [18] (Lee J) (emphasis removed).
[57] *Wigmans v AMP Ltd* [2018] NSWSC 1118, [16] (Ward CJ in Eq).
[58] Ibid [18] (Ward CJ in Eq).

the Supreme Court and, in doing so, addressed some of the limitation issues I referred to earlier.[59]

Once the argument over which Court would hear the matter was resolved, the next skirmish concerned which proceeding would go forth. I will not recount that saga other than to note that it was resolved by the decision of the High Court in *Wigmans v AMP Ltd*.[60] The end result was that a consolidation of two of the proceedings brought by two applicants in the Federal Court was allowed to go forth with the remaining proceedings stayed, including the Wigmans proceedings, even though it was filed first.

The discussion by at least some of the judges in this saga of the possibility of one Australian court injuncting the litigants in another Australian court from pursuing their cases was something of a trip down memory lane. It is noteworthy that some of these judgments that discussed the possibility of a court granting an anti-suit injunction referred to authorities dealing with the power to grant such injunctions against litigants pursuing proceedings in foreign courts. In 1947, Justice Williams observed that "[f]or the purposes of private international law, South Australia is a foreign country in the courts of New South Wales".[61] There are many instances in the past of the Supreme Court of one State injuncting litigants from pursuing a case in the Supreme Court of another State,[62] and the Federal Court restraining litigants from pursuing proceedings in the Supreme Court of a State.[63]

However, it is now established beyond any doubt that there is a single common law of Australia,[64] and in *Kable v Director of Public Prosecutions* (NSW), the High Court observed that "[u]pon federation it ... [became] plausible, for the first time, to speak of one Australian judicial system which was a unified structure" and that later legislative changes placed the High Court at the apex of that unified system.[65] With cross-vesting between State and Territory Supreme Courts having survived *Re Wakim*, the scope of horizontal anti-suit injunctions should be almost non-existent with everything resolved

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[59] *Wileypark v AMP Ltd* (2018) 265 FCR 1.
[60] (2021) 270 CLR 623.
[61] *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 375, 396 (Williams J).
[62] See, eg, *Beecham (Australia) Pty Ltd v Roque Pty Ltd* (1987) 11 NSWLR 1.
[63] See, eg, *Westpac Banking Corporation v Eltran Pty Ltd* (1987) 14 FCR 541.
[64] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[65] (1996) 189 CLR 51, 138 (Gummow J).

by reference to which proceedings should be transferred in the interests of justice.[66] As for vertical anti-suit injunctions, the Supreme Court of New South Wales and the Federal Court are not foreign to each other. They occupy the same building. When I was a Supreme Court judge, some of my best friends were on the Federal Court.

The wash-up from the AMP litigation was, in my opinion, a recognition by all that at least some vertical cooperation was a good idea. On 1 November 2018, the Chief Justice of New South Wales and the Chief Justice of the Federal Court agreed on a protocol concerning the approach to be adopted to multi-jurisdictional competing representative actions.[67] The protocol contemplates there being a joint case management hearing for the various representative hearings presided over by a judge from each court and those judges then conferring to determine the appropriate management of the competing class actions. A similar protocol was entered into between the Chief Justice of the Federal Court and the Chief Justice of Victoria in June 2019.[68] It has been observed that there are currently limited reported instances of the protocols being invoked, but that may be because the relevant players now understand the ground rules or other factors are driving the choice of forum, or both.

Courts in Competition?

The protocol agreed upon by the Chief Justice of New South Wales and the Chief Justice of the Federal Court following the AMP litigation recited that the spectacle of anti-suit injunctions had the capacity to affect the integrity of the processes of each of the respective courts and to undermine the administration of justice. Why did it have that capacity? Anti-suit injunctions are often granted in international commercial disputes, so what is the big deal? I think the answer lies partly in what I said earlier, namely that the State Supreme Courts and Federal Courts are not foreign to each other, but also in the proposition that if the saga had continued, one might have got the impression that courts were engaged in some form of unseemly competition with one another to retain cases and receive new ones.

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[66] See *Bankinvest AG v Seabrook (*1988) 14 NSWLR 711; *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400.

[67] Federal Court of Australia, *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings*, November 2018.

[68] Federal Court of Australia, *Protocol for Communication and Cooperation Between Supreme Court of Victoria and Federal Court of Australia in Class Action Proceedings*, June 2019.

So, what's wrong with that?

The topic of whether, and, if so, how courts should "market" themselves has not been very well explored. The effect of the various legislative schemes that I have described mean that, for many class actions, the lead plaintiff and their advisors will often have a choice as to which forum to commence in. This is not peculiar to class actions. For many types of cases, the availability of choice is not restricted to selecting which jurisdiction, federal or state, a party can commence a proceeding in. A party to a substantial commercial tenancy dispute in New South Wales will often have the choice of commencing in the New South Wales Civil and Administrative Tribunal, the District Court of New South Wales, various divisions in the Supreme Court of New South Wales (the Common Law Division, the Equity Division, or the Commercial List in the Equity Division), the Federal Court or at least one of the divisions of the Federal Circuit and Family Court of Australia. Why shouldn't those various institutions market themselves as the best place to start proceedings?

Like most legal questions, the answer is "maybe", but there are limits. One is the point I made earlier about all Australian courts being part of a unified system, which along with our federal structure means that for particular disputes, particular courts with a particular connection to that dispute are not just the appropriate forum but, at least from the public perspective, the only proper forum to resolve that dispute.

Another limit on courts jostling for work is buried in my use of the word "start", that is, a court must not seek to only appeal to those who start proceedings. Decisions to start proceedings are mostly made by one side, namely, plaintiffs and applicants. Courts should be innovative. The most successful of all such judicial innovations in my lifetime was the Commercial Division, and then Commercial List, of the Supreme Court of New South Wales pioneered by former Chief Judge Rogers. The innovations he introduced made the Commercial Division, and then the Commercial List, an attractive place to litigate. His innovations played a very significant role in enhancing the Court's reputation for decades. Judicial innovation that renders litigation more efficient as well as quicker and cheaper for all parties, such as case management where appropriate or lowering the cost of seeking approvals for smaller class actions, is undoubtedly a good thing. If the consequence of innovation is that litigants see a particular forum as a preferable place to commence proceedings or both parties form that view, then so

be it. If that looks and sounds like courts being competitive, then *que sera, sera*. However, if the "innovations" are seen to be attempts to rustle up business by only appealing to those who commence proceedings at the expense of those who defend the proceedings, then we are in trouble. If that were to occur, there is a real potential of compromising the appearance of a court's impartiality. Once a court's institutional integrity is compromised, it is very difficult to restore.

Current Realities

Can I finish with a brief summation of some of the federal realities that face those who have to engage with class actions.

It may have been obvious from the beginning of this speech, but one underlying point that I have been trying to make concerns the importance of the various State systems to the current realities of class actions. That is so even though the recent figures from Professor Morabito indicate that it is still the case that well over a majority of the class actions filed since 1992 have been in the Federal Court[69] and that shareholder and investor claims predominate.[70]

Nevertheless, the quadruple significance of the State judicial systems is that class actions are not an exclusively federal phenomenon; State courts can also hear most federal claims, there are some vitally important class actions that can only be brought in the State systems, and State Courts have their own culture and practices when it comes to enabling access to justice and defending their right to do so. Those realities need to be considered with the fact that the legislative and executive branches of State government operate according to their own political realities, and they do not necessarily correspond with their federal counterparts, much less the latest musings in the financial press.

I say this because sometimes the underlying tone of some participants in the debate around class actions appears to reflect a desire that class actions disappear and, if that cannot be achieved directly, suggest that it be achieved indirectly by regulating class actions out of existence. However, the current legislative and political realities of class actions are that they are not the responsibility of any single legislature or any

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[69] Vince Morabito, *Empirical Perspectives on Twenty-One Years of Funded Class Actions in Australia* (Report, April 2023), 10: 72.3%.
[70] Ibid 17: Total of 55.4% (42.1% claims by shareholders, 13.3% claims by investors).

single court. Given the interlocking legislative regimes and multi-jurisdictional engagement with opt out class actions, it is highly doubtful that any single legislature could get rid of them even if it wanted to, and there are limits to any attempt to strictly regulate them given the scope for flight to another Australian jurisdiction.

All that is simply horizontal and vertical federalism in action.

Thank you for listening and good luck with the conference.