

Submission No. 018

**Limitation of Actions (institutional Child Sexual Abuse)
and Other Legislation Amendment Bill 2016 and the
Limitation of Actions and Other Legislation (Child Abuse
Civil Proceedings) Amendment Bill 2016**

Submission to the Parliament of Queensland Legal
Affairs and Community Safety Committee

16 September 2016

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Who we are

The Australian Lawyers Alliance ('the ALA') is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au

Introduction

1. The Australian Lawyers Alliance ('ALA') welcomes the opportunity to have input into the Committee's considerations of the issues raised by the two Bills being considered in this inquiry.
2. We commend the process now underway in Queensland to review limitation periods for claims of child abuse and consider class action legislation. We welcome the bipartisan nature of these reforms and look forward to working constructively with the Committee to ensure the strongest legislation to protect individuals' rights is enacted.
3. The ALA has been active in promoting the lifting of statutes of limitation for child abuse in all Australian jurisdictions. We have engaged actively with the Royal Commission into institutional responses to child sexual abuse (the Royal Commission) on this issue. We commend the reform that has already occurred in Victoria and NSW in relation to limitation periods and other obstacles to justice for abuse survivors.
4. We emphasise the importance of national consistency in legal reforms on this issue. Victoria and NSW have introduced useful reforms in this area and whilst the ALA recognises that a broader consultation process is underway through the State Government Issues Paper² process, it is the view of the ALA that it would be of significant benefit to residents in all states if the same advances that have been made in southern states were also implemented now as part of the current bills being considered in Queensland. This would not only help to ensure consistency of laws across institutions that operate across borders, but also in recognition that anything less than this may lead to Queensland survivors having access to an inferior level of justice to that available in Victoria and NSW.
5. The Australian Lawyers Alliance (ALA) also welcomes and is pleased to have the opportunity to comment on the amendments to the Queensland *Civil Proceedings Act* 2011 that proposes to insert a new Part 13A "Representative proceedings in Supreme Court".
6. The first part of this submission relates to the lifting of statutes of limitation for child abuse, while the second part of the submission discusses the proposed amendments to the *Civil Proceedings Act*.

² Issues Paper – The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: *Redress and Civil Litigation Report* – understanding the Queensland context, August 2016.

Removal of limitation periods for child abuse

7. As the representative body for lawyers who represent clients who have suffered institutional abuse, we understand the obstacle that limitation periods pose in providing access to justice for survivors of childhood abuse. Our members have represented numerous such survivors, and have assisted them in navigating complex legal systems and processes.
8. Unfortunately, our members have also been unable to assist many survivors because their claims were statute barred. Where institutions have been unwilling to reach negotiated settlements, survivors have felt that they have been again exploited by institutions that facilitated abuse causing irreparable injuries for which compensation would be just.
9. Other clients have been left with little option but to accept compensation that was manifestly inadequate in view of the injuries that they have suffered as a result of child abuse. Limitation periods have acted as shadows over any negotiation that institutions have entered into.
10. The Royal Commission has recognised the negative impacts that limitation periods can have where the abuse has been of a sexual nature. To this end, it recommended that all state and territory governments introduce legislation to remove limitation periods that apply to claims for damages for personal injury resulting from “sexual abuse of the person in an institutional context when the person is or was a child”.³
11. The Royal Commission has been clear that it feels that its terms of reference confine it to making recommendations about child sexual abuse, and that other abuse in the absence of sexual abuse or an institutional nexus is beyond its scope. However, in looking to reform limitation periods in Queensland, it is the view of the ALA that a broader approach to the types of abuse suffered by children is appropriate. To this end, Victoria and NSW offer valuable examples of the types of child abuse that should be free from the constraints of limitation periods. Similar reforms should also be adopted in Queensland.
12. National consistency on limitation periods is also desirable, according to the Royal Commission. A lack of consistency has given rise to added complexity when claims for child

³ Royal Commission into institutional responses to child sexual abuse, *Redress and Civil Litigation Report* (2016) (Redress and Civil Litigation Report), recommendation 85.

abuse cross state borders.⁴ It also leads to unfairness, as survivors have access to different remedies depending on where they were abused.

13. Limitation periods should be lifted retrospectively according to the Royal Commission.⁵ The urgency of this reform was emphasised by the Royal Commission, which encouraged action as soon as possible.⁶
14. As revealed by the Royal Commission and other sources, survivors of child sexual abuse take an average of around 22 years to report the abuse that they have suffered.⁷ There are a number of reasons for these delays, including that people may fear those who perpetrated the crimes against them, fear that they will not be believed, or even that they disclosed their experiences when they occurred and not been believed.
15. Arguing for an extension of the limitation period, as the current law in Queensland requires, places an undue burden on claimants who are already reliving what is likely to have been the most traumatic experience of their lives.⁸ Such extensions are notoriously difficult to secure under the current Queensland law.
16. There is no reason that removing limitation periods would give rise to unfair trials. As noted by the Royal Commission, other protections exist to ensure that trials are fair. Evidence must still be admissible, and courts can always stay proceedings if they feel that a fair trial is not possible.⁹ Perpetrators can often continue to be charged and convicted beyond reasonable doubt many years and even decades after the crimes were committed. This fact highlights the lack of logic in arguing that civil claims, which must be proved on the lesser standard of 'balance of probabilities', must be finalised in a relatively short period of time to be fair.¹⁰
17. Limitation periods have, however, not been the only obstacles to justice for survivors. Some further suggestions for reform are necessary to ensure that survivors of child abuse are able

⁴ Redress and Civil Litigation Report, 457.

⁵ Redress and Civil Litigation Report, recommendation 86.

⁶ Redress and Civil Litigation Report, recommendation 88.

⁷ Redress and Civil Litigation Report, 444; Patrick Parkinson, Kim Oates, Amanda Jayakody, 'Study of Reported Child Sexual Abuse in the Anglican Church', (May 2009), at 5.

⁸ We have noted this previously in our submission to the Royal Commission:

<http://www.lawyersalliance.com.au/documents/item/353>, [45].

⁹ Redress and Civil Litigation Report, 458.

¹⁰ This point was raised in our response to the Royal Commission's Consultation Paper on Redress and Civil Litigation (2015), echoing points made in the Victorian Discussion Paper on the *Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014 Exposure Draft*:

<http://www.lawyersalliance.com.au/documents/item/353>, [40].

to access justice unbridled by unfair legal constraints. The ALA will address these in a response to the Issues Paper.

18. We now turn to analysis of the two proposed bills.

THE GOVERNMENT BILL

Restriction to institutions

19. As previously indicated, the ALA opposes restricting the removal of limitation periods to abuse linked to institutions, recognising also that neither the Victorian nor NSW legislation is so restricted. It would seem manifestly unjust that actions could only lie against institutions for the misconduct of their staff and servants but not against the same abusive individuals or indeed, abusive individuals generally. Actual abusers should not be immune from suit.
20. While the terms of reference of the Royal Commission constrains its consideration to abuse linked with institutions, meaning it is only able to make recommendations in this regard, there is no reason to differentiate the class of individuals who might benefit from this reform. If survivors are in a position to sue a perpetrator that is not an institution, it would be unreasonable to prevent them from doing so simply by virtue of the Royal Commission's terms of reference. This approach would mean that some survivors would end up feeling that they had been abused by the wrong person, and injustice would be the result.
21. Ultimately, it is likely that abuse committed in an institutional context will be most significantly affected by the reforms, as institutions are more likely to be capable of paying compensation than other defendants. There is no need, however, to enforce this preference by restricting limitation reform.
22. There should be national consistency on this issue and a survivor in Queensland should not be in a worse position than one in Victoria or New South Wales.

Restriction to child sexual abuse

23. It is also the firm view of the ALA that the injuries that this reform relates to should not be restricted to those emanating from childhood sexual abuse.
24. Again this is an important issue for consideration in ensuring consistency with other states. Most importantly, however, such a restriction fails to take into account the full extent of injuries that can occur in cases of abuse, such as physical and psychological abuse, both of which can be significant.

25. In light of this, it is the view of the ALA that lifting of limitation periods should apply to sexual, physical and associated psychological/psychiatric abuse in line with the precedent set by Victoria and NSW.

Deeds of release

26. Section 48, referred to in clause 5, makes the right of action retrospective even in respect of judgments or dismissals on grounds of expiry of limitation periods, but with credit given for sums paid. It would be appropriate to use either the Victorian or NSW wording so as to ensure a consistent approach.
27. It seems unjust to prevent claimants from having claims that have been rejected on other grounds revisited. If, for example, a claimant was unsuccessful due to the use of the *Ellis* defence,¹¹ the ALA believes that this claimant's claim should be able to be considered afresh.
28. It would be similarly be inequitable for deeds of release signed under the existing legal framework to remain enforceable if limitation periods were removed retrospectively. This would have the impact of punishing individuals who sought to resolve their claims expeditiously, under a law that was unfairly advantageous to defendants.
29. A number of claims have already been resolved outside of court processes, by way of informal settlements, which have been influenced by the existence of limitation periods which would have prevented successful claims had they been pursued at court. Claimants have been in a significantly weakened bargaining position in these settlement conferences, believing that if they did not accept even manifestly inadequate sums in compensation for their injuries, they would be entitled to nothing at all. This is in fact still the case and will continue to be so until reform is implemented. Deeds of release have usually been signed as a part of these settlements, including indemnities which prevent claimants from pursuing any further claims against the institution for the abuse that they suffered.
30. If reform is implemented, this class of survivors will have been unfairly disadvantaged if the deeds of release survive. It would thus be important to ensure that deeds of release signed under the existing regime do not prevent claimants from mounting new claims. Any settlement amount received in respect of earlier claims would fairly be included in calculations for any compensation payable in light of the reforms currently being considered.

¹¹ *Trustees of the Roman Catholic Church v Ellis*, [2007] NSWCA 117. In this case the claimant, Ellis, failed in his action for compensation for historical child sexual abuse as the Court found that the trustees were not the appropriate defendant, allowing the Catholic Church to evade responsibility for abuse due to the structure of its finances.

31. In the same way as proposed for judgments, any amounts previously paid under a settlement should be taken into account in any new settlement or judgment.

Personal Injuries Proceedings Act 2002 (PIPA)

32. The ALA considers amendments to PIPA are necessary, however they go further than those presently suggested and will be dealt with in our response to the Issues Paper.

THE PYNE BILL

Jury trials

33. The ALA is supportive of the proposition that jury trials not be automatically excluded for abuse survivors.

Stay of proceedings

34. The definition in s22A of the proposed amendments to the *Civil Proceedings Act 2011* dealt with in clause 5 applies only to proceedings against an institution. To render institutions liable but not the actual abusers is not consistent. Moreover, the preconditions are quite onerous. The plaintiff must establish that acts or omissions of the defendant caused or contributed to delay, that there has been an inquiry finding in relation to the institution's link to the abuse, or that the defendant apologised for, or made an admission in relation to the abuse. Only then can the action not be permanently stayed or dismissed. An exception exists where time makes it difficult for the defendant to deny or disprove admitted issues.
35. These onerous requirements will have the effect of rendering the section, from a practical perspective, unworkable and as the section is designed to deal with delays of two years or more only once proceedings are commenced, unnecessary.
36. There always remains discretion in the court to stay or dismiss where a fair trial is not possible. It is, however, to be noted, that criminal trials on the higher criminal standard, often proceed for matters more than fifty years old and there is no reason why civil claims should not likewise be able to proceed.

Definition of abuse

37. The definition of child abuse in this Bill includes sexual abuse or serious physical abuse or any other abuse perpetrated in connection with sexual abuse. While we broadly agree that this definition is appropriate, the ALA believes that the Victorian definition, which refers to sexual and physical abuse and related psychological abuse,¹² is preferable. The NSW wording, which adds the word “serious” before “physical abuse”, is, for practical purposes, much the same.¹³ The “any other” abuse perpetrated in connection with sexual abuse or serious physical abuse in the Pyne Bill would seem to pick up associated psychiatric or psychological sequelae in the other jurisdictions, but is less effective than the Victorian or the NSW wording.

Retrospectivity

38. Section 49, referred to in clause 14, appears to make the right of action retrospective except where the claim has previously been considered. Under that section, if the claim has previously been determined by a court, for reasons other than that the limitation period has expired, the limitation period will not be lifted. Similarly, if the matter was settled before the original limitation period expired, the limitation period will not be lifted.

39. The ALA refers to its submissions under the heading ‘Deeds of release’, from paragraph 26, above.

Personal Injuries Proceedings Act 2002 (PIPA)

40. The ALA considers amendments to PIPA are necessary, however they go further than those presently suggested and will be dealt with in our response to the Issues Paper.

RECOMMENDATIONS

As previously indicated, the ALA commends the Queensland Parliament for its efforts in seeking to remove statutes of limitation with respect to institutionalised sexual abuse cases as being an

¹² *Limitations of Actions Act 1958* (Vic), s 270(1)(b): “an act or omission in relation to the person when the person is a minor that is physical abuse or sexual abuse; and (ii) psychological abuse (if any) that arises out of that act or omission”.

¹³ *Limitations Act 1969* (NSW), s6A(2): “In this section, child abuse means any of the following perpetrated against a person when the person is under 18 years of age: (a) sexual abuse, (b) serious physical abuse, (c) any other abuse (connected abuse) perpetrated in connection with sexual abuse or serious physical abuse of the person (whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse)”.

important and necessary step forward in providing access to justice for survivors of such abuse.

The ALA also recognises and welcomes that a separate State Government Issues Paper process is underway to explore a breadth of issues in relation to further improving access to justice for survivors as well as more thoroughly responding to the various findings of the Royal Commission, and the ALA looks forward to also contributing submissions as part of that process.

That being said, as indicated throughout this submission there are three substantive points that the ALA feels strongly should be included more urgently as part of any current Bill that goes before the Parliament seeking to lift statutes of limitation with respect to abuse cases.

Specifically, the ALA makes the following recommendations:

- That any reforms undertaken in Queensland now should mirror as much as possible reforms to date in Victoria and NSW, including with respect to broadening any lifting of limitation beyond institutions. The importance of national consistency generally has been emphasised by the Royal Commission. Consistency will ensure fairness;
- Removal of limitation periods for child abuse should not be limited only to sexual abuse but should include physical abuse and associated psychological abuse;
- Limitation periods for sexual and physical abuse, and associated psychological abuse, should be removed retrospectively including for both judgments and settlements. Deeds of release signed under the existing laws should not prevent survivors from mounting new claims.

The ALA appreciates the opportunity to make the above submission and is happy to make itself available for further consultations on these issues.

Proposed amendments to the *Civil Proceedings Act 2011*

General comments

41. The ALA welcomes the proposed Part 13A as contained in the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016* (Qld) as an important access to justice measure for Queenslanders.
42. Representative proceedings provide an effective vehicle for facilitating access to justice for a significant number of people who would not otherwise be in a position to take individual action against powerful wrongdoers because of the costs of litigation. The ALA believes that each state and territory in Australia should adopt legislation to create a scheme allowing representative actions in substantially similar terms to Part IVA of the *Federal Court of Australia Act 1976* (Cth). The proposed Part 13A does this.
43. Representative or group proceedings regimes exist in Australia in the form of Part IVA of the *Federal Court of Australia Act 1976* (Cth), Part 4A of the *Supreme Court Act 1986* (Vic) and Part 10 of the *Civil Procedure Act 2005* (NSW). In each instance those regimes have been established by the passage of legislation.¹⁴
44. The ALA notes that the amendments to the Federal Court scheme that have been adopted in NSW are also proposed to be incorporated into the Queensland regime. The ALA supports these inclusions, that is, the ALA supports the inclusion of the following provisions in the proposal:
 - a. Sub-section 103C(2) that addresses the “*Phillip Morris v Nixon*” issue; and
 - b. Sub-section 103K(2) that removes any doubt that representative classes can be “closed”.

Benefits of a comprehensive facilitated representative proceedings regime

45. The starting point for consideration of the benefits of a representative proceeding regime is the following comment by the Hon Justice McHugh in *Carnie v Esanda Finance Corp Ltd*:

The cost of litigation often makes it economically irrational for an individual to attempt to enforce legal rights arising out of a consumer contract. Consumers should not be denied the opportunity to have their legal rights determined when it can be

¹⁴ *Federal Court of Australia Amendment Act 1991* (Cth), *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic), *Court and Crimes Legislation Further Amendment Act 2010* (NSW).

*done efficiently and effectively on their behalf by one person with the same community of interest as other consumers.*¹⁵

46. In *Wong v Silkfield*¹⁶ the High Court quoted the second reading speech for the bill that introduced Part IVA as follows:

The bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.

*The second purpose of the bill is to deal efficiently with the situation where the damages sought by each claim are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.*¹⁷

47. The ALA notes that Part IVA of the *Federal Court of Australia Act 1976* (Cth) and Part 4A of the *Supreme Court Act 1986* (Vic) have seen many thousands of individuals and companies recover losses. It is suggested that it is likely that these actions benefit the wider community by making wrongdoers accountable and thereby improving compliance with corporate standards and consumer safety standards whereas, absent a facilitated class action procedure, very few claims have been made for compensation by groups of claimants.

48. Successful Australian class actions have compensated people suffering injuries from defective products and those misled into poor investments.¹⁸ There have also been four cartel class actions to date, all of which have settled.¹⁹

¹⁵ *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at [10].

¹⁶ *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

¹⁷ Second reading speech for the bill for the *Federal Court of Australia Amendment Act, 1991* (Cth), House of Representatives, Parliamentary Debates, Hansard, 14 November 1991 at 3174.

¹⁸ Defective products: *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219, *Darcy v Medtel Pty Ltd (No 4)* [2004] FCA 1599 (pacemakers); *Casey v DePuy International Limited* [2010] FCA 617 (prosthetic knees); *Stanford v DePuy International* Federal Court NSD 213/2011 (hips). Misleading borrowers: *Bass and Another v Permanent Trustee Co Ltd and Others* [1999] HCA 9 (the NSW Homefund class action). Misleading investors: *Lukey v Corporate Investment Australia Funds Management Pty Ltd* [2003] FCA 1602; *Spangaro v Corporate Investment Australia Funds Management Ltd (No 2)* [2003] FCA 1363; *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19; *O'Sullivan v Challenger Managed Investments Ltd* [2008] NSWSC 602; *Rod Investments (Vic) Pty Ltd v Clark (No 2)* [2006] VSC 342; *Cadence Asset Management Pty Ltd v Concept Sport Limited* [2006] FCA 944; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4)* [2010] FCA 1029; *Watson v AWB Limited (No 7)* [2010] FCA 41; *Hobbs*

49. Class actions have also successfully sought compensation for a range of other reasons²⁰ and a number of actions for victims of mass torts have been concluded, are on foot or have been flagged.²¹ One of the most substantial class actions in Australia was conducted in the Supreme Court of Victoria on behalf of residents and businesses who suffered horrific injuries, loss and damage in or around Kilmore East and Kinglake in Victoria on Black Saturday, 7 February 2009.²² This action was settled on 23 December 2014.²³ Another significant class action is being conducted in the Supreme Court of NSW on behalf of those who suffered loss and damage in the 2011 floods in South East Queensland. This claim was commenced in NSW because Queensland did not have an adequate representative procedure. The introduction of the proposed Part 13A will finally give victims of mass wrongdoing in Queensland an effective procedural framework to bring a representative claim.

Inadequacy of section 75 of the *Uniform Civil Procedure Act 1999 (Qld)*

50. The old 'Chancery rule'²⁴ on which s75 is based is inadequate.²⁵

51. In *O'Sullivan v Challenger Managed Investments Ltd*²⁶ the Hon Justice White in the NSW Supreme Court determined that the plaintiff's application for declarations could be maintained under the similar rule in that state at the time²⁷ but that it could not extend to the claims for damages.²⁸ An attempt to amend the rule failed to address its inadequacies,

Anderson Investments Pty Limited v Oz Minerals Limited (No 2) [2011] FCA 1506; *Kirby v Centro Properties Limited (No. 6)* [2012] FCA 650; *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168; *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028.

¹⁹ *Vitamins (Darwalla Milling Co Pty Ltd and other v F Hoffman-La Roche Ltd and others*, (2006) 236 ALR 322); *Cardboard boxes (Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd*, [2011] FCA 671); *Air cargo (Auskey International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd*, FCA, VID 903 of 2009); *Rubber chemicals (Wright Rubber Products Pty Ltd v Bayer AG*, FCA, VID 837 of 2009).

²⁰ *Tobacco licence fee recovery following Roxborough and Others v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399; *The Longford gas plant explosion class action (Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 244).

²¹ The following claims were made for classes who suffered serious illnesses caused by negligence: *Hilton v Melbourne Underwater World Pty Ltd and Ors* [2004] VSC 357 and *Georgiou v Old England Hotel Pty Ltd* [2006] FCA 705).

²² *Mathews v SPI Electricity and SPI Electricity* [2012] VSC 66.

²³ *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663.

²⁴ *Duke of Bedford v Ellis* [1901] AC 1.

²⁵ See also Rule 9.21 of the *Federal Court Rules 2011*.

²⁶ *O'Sullivan v. Challenger Managed Investments Limited* (2007) NSWSC 383.

²⁷ Rule 7.4 SCR (prior to its recent amendment).

²⁸ The rule was amended in an attempt to address this failing yet in *Jameson v Professional Investment Services Pty Ltd*, Young CJ in Eq exercised his discretion under the amended Rule 7.4(2) to strike out the claims by

as has been identified by Legg et al,²⁹ in which the authors noted that the new rule failed to address many issues such as:

- mechanisms to terminate representative proceedings after commencement;
- standing requirements;
- whether the representative proceedings rule should require or allow an opt in, opt out or limited group procedure for forming the group; or
- substituting the representative party.

52. The Chancery rule does not contain many of those procedural provisions in the proposed Part 13A going to issues that arise *after* the commencement of a representative proceeding; for example, those mandating the opt out process,³⁰ resolving issues common to sub-groups and individuals,³¹ the suspension of limitation periods for group members,³² regulating settlement,³³ the giving of notices to group members³⁴ and the power of the court on judgment.³⁵

53. It is submitted that for these reasons the regime has not attracted much interest from victims of mass wrongdoing.

Benefits of adopting a regime modelled on Part IVA

54. Many significant interlocutory issues relating to Part IVA of the *Federal Court of Australia Act 1976* (Cth)³⁶ have been resolved by the courts in a number of matters, thereby clarifying many procedural aspects of these regimes. For example, there is now a vast body of jurisprudence concerning the application and interpretation of ss33C and 33N of the *Federal*

victims of the Westpoint collapse 'because of the lack of commonality of representation and reliance': (*Jameson v Professional Investment Services Pty Ltd* [2007] NSWSC 1437). The Hon Justice Young's decision was overturned by the Court of Appeal, which held that his Honour failed to give sufficient weight to the common issues or the fact that the representative proceeding would provide a mechanism for a significant number of people to obtain access to justice (*Jameson v Professional Investment Services Pty Ltd* [2009] NSWCA 28). Despite the encouraging comments and decision of the NSW Court of Appeal in *Jameson* the need for more comprehensive procedural machinery than was available under the NSW Rule 7.4 was clearly demonstrated.

²⁹ Michael Legg, Vanessa McBride and S Stuart Clark, 'The NSW Representative Proceeding: A Class Action Half-Way House' 12 *UNSWLR* 176.

³⁰ Section 103G.

³¹ Sections 103M, 103N and 103O.

³² Section 103Z

³³ Section 103R.

³⁴ Sections 103T and 103U.

³⁵ Sections 103V, 103W, 103X, 103Y, 103ZC.

³⁶ Being roughly equivalent to Part 4 of the *Supreme Court Act 1986* (Vic)

Court of Australia Act in relation to the commencement of proceedings and s33V in relation to the settlement approval process.

55. The considerable volume of procedural jurisprudence interpreting and clarifying the application of Part IVA, suggests that there is considerable merit in introducing substantially uniform procedures in each of the Federal Court, Supreme Court of Victoria, the Supreme Court of NSW and the Supreme Court of Queensland.
56. The proposed Part 13A does this, only departing from uniformity to clarify areas in which Part IVA and the Victorian regime have been found to be wanting. This was done in NSW by the passage of Part 10 of the *Civil Procedure Act 2005* (NSW). Not only does the broad consistency between the draft proposed Part 13A in Queensland and Part IVA Federally mean that there may be less scope for a new series of interlocutory challenges, it also provides litigants with a greater degree of certainty and clarity regarding the operation of the provisions in the draft Bill.
57. Uniformity is one significant reason why the establishment of a representative or group proceeding regime should occur by the passage of legislation.
58. Legislative support for the exercise of broad powers for the court is considered necessary. This is seen in s33ZF of the *Federal Court of Australia Act 1976* (Cth) that gives that court the power to make any orders that the interests of justice require. The provision is reflected in the proposed s103ZA. The ALA supports its inclusion.

Consent to be a group member

59. Section 103D dealing with when consent to be a group member is, or is not, required differs from the Commonwealth, Victorian and NSW regimes in that it does not require consent by a Territory, Minister of a Territory, a body corporate established for a public purpose by a law of a Territory, or an officer of a Territory.
60. The ALA suggests that the reference to a Territory should be added to s103D for consistency with the Commonwealth, Victorian and NSW regimes, and as a matter of comity.

Closed classes

61. The ALA supports the introduction of a provision in Queensland of s103K(2) as it will remove any uncertainty and facilitate closed classes in the same manner as prescribed by s166(2) of Part 10 of the *Civil Procedure Act 2005* (NSW).

62. Closed class representative actions are relatively common in the Federal Court and the Victorian Supreme Court and while the provision may not be necessary since the decision of the Full Court of the Federal Court in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*³⁷ it is suggested that the addition of the provision will remove the threat of such a controversy arising in Queensland class actions.³⁸
63. Closed classes may also enable a defendant to ‘better ascertain their potential liability’,³⁹ and whether to seek the payment of security for costs.

The Philip Morris issue

64. The ALA supports the suggestion that the Queensland legislation resolves the Phillip Morris issue.⁴⁰ While the Full Court of the Federal Court appears to have recently concluded that Phillip Morris was wrong, it is best to ensure legislative clarity concerning the question of whether each group member must have a claim against each defendant.
65. The Full Court in *Cash Converters International v Gray* [2014] FCAFC 111 held [at 13]:

*It is common ground that the applicant must have a claim against each respondent. But does s33C(1) of the FCA require that each group member have a claim against each respondent to the proceedings? The answer is no.*⁴¹

66. This appears to resolve the uncertainty created by decision of the Full Court of the Federal Court in *Bray v F Hoffman-La Roche Limited* (2003) 130 FCR 164 as it was arguable that it did not resolve the problem.⁴²
67. Such uncertainty is not in the interest of any party and is conducive to ongoing disputation and interlocutory appeals. The proposed legislative solution in Queensland is supported by the Committee. Section 103C(2) provides that:

The person may start a representative proceeding on behalf of other persons against more than 1 defendant, whether or not each of the other persons have a claim against each of the defendants in the proceeding.

³⁷ (2007) 164 FCR 275.

³⁸ Such a provision is consistent with the approach and recommendations of the Victorian Law Reform Commission in its *Civil Justice Review*: Report dated 28 May 2008 (Recommendation 100 at 38, and discussion at Chapter 8, 524 at [2.1]).

³⁹ King Wood Mallesons: *Class Actions Year in Review* 2011, 9.

⁴⁰ *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453.

⁴¹ Section 33D requires the applicant to have standing or “sufficient interest” to commence and continue a representative proceeding against each respondent.

⁴² Note *McBride v Monzie* (2007) 164 FCR 559 where Finkelstein J held that he was bound by *Bray and Kirby v Centro Properties Ltd* [2010] FCA 1115 per Ryan J at [11] and [21] where he held that the comments in *Bray* were obiter and that he was therefore bound to follow *Phillip Morris*.

68. The provision is supported as it removes any doubt.

Suspension of limitation periods

69. Section 33ZE of the *Federal Court of Australia Act 1976* (Cth) provides that limitation periods do not continue to run for group members while their claim is before the court in a representative proceeding.

70. The Explanatory Memorandum to the *Federal Court of Australia Amendment Bill 1991* (Cth) explained it in the following terms:

The provision is designed to remove any need for a group member to commence an individual proceeding to protect himself or herself from expiry of the relevant limitation period in the event that the representative action is dismissed on a procedural basis without judgment being given on the merits.

71. In *Bright v Femcare*⁴³ Justice Stone stated:

*Section 33ZE evinces the legislature's concern that an individual group member's claim should not be prejudiced by the proceedings having been brought as a representative proceeding.*⁴⁴

72. The proposed s103Z is equivalent to s33ZE of the Part IVA and this avoids uncertainty regarding the suspension of limitation periods for group members.

RECOMMENDATIONS

The ALA makes the following recommendations:

- Section 103D of the proposed Part 13A should be amended for consistency with the Commonwealth, Victorian and New South Wales regimes to require consent by a Territory, Minister of a Territory, a body corporate established for a public purpose by a law of a Territory, or an officer of a Territory to be a group member;
- The proposed Part 13A should be adopted, subject to the proposed amendment above.

⁴³ [2002] FCA 11.

⁴⁴ *Ibid* [8].