Finality and Fairness in Australian Class Action Settlements

Michael Legg* and Samuel J Hickey†

Abstract

The extent to which a group member is bound by the outcome in a class action is of great significance to group members, parties and the justice system generally as it raises the core concerns of finality and fairness. In relation to judgment, the High Court of Australia in the *Timbercorp* class action determined that the resolution of a class action will not dispose of the individual claims of group members that fall beyond the scope of the common issues that were the subject of the proceeding. However, in relation to settlement, the position is unclear because courts have exhibited divergent reasoning in relation to the resolution of the individual claims/issues of group members, as exemplified by the *Great Southern* and *Willmott Forests* class actions. The purpose of this article is to employ a claims/issues framework as an analytical tool to ascertain the extent to which a group member's claims/issues can be determinatively resolved by settlement.

I Introduction

The extent to which a group member is bound by the outcome in a class action because of judgment or settlement is of great significance to group members, representative parties (plaintiffs), defendants and the justice system generally. The group member will want to know which, if any, of their claims or part thereof are to be decided through the class action. This will impact their decision-making as to: whether they need to bring their own individual claim; whether they need to opt out of the class action to preserve their claim; or whether to take other steps to protect their interests. The representative party needs to know the extent of their authority to represent group members. This, in turn, impacts the calculus of the plaintiff lawyer and litigation funder in the conduct or financing of the class action respectively. Equally, defendants will be concerned to know if the class action will resolve all claims against them, except for those of group members that opt out, or whether they may face further litigation. Moreover, the justice system seeks to achieve finality and fairness, which requires all participants to know the extent to which their rights are to be determined, and the steps they can take to protect those rights.

* Professor, UNSW Law, University of New South Wales, Sydney, Australia. This research is supported by the IMF Bentham Class Actions Research Initiative.

† LLM candidate, Harvard Law School, Cambridge, Massachusetts, United States.

In relation to judgment, the High Court of Australia in the *Timbercorp* class action determined that the resolution of a class action will not dispose of the individual claims of group members that fall beyond the scope of the common issues that were the subject of the proceeding.[1] However, in relation to settlement, the position is less clear because judgments in the *Great Southern*[2] and *Willmott Forests*[3] class actions exhibited divergent reasoning in relation to the resolution of the individual claims/issues of group members. The purpose of this article is to examine the extent to which a group member's claims/issues can be determinatively resolved by settlement, including whether group members can be precluded from raising claims or defences based on their unique circumstances in future litigation. To this end, we present a framework consisting of four mutually exclusive categories to classify the claims of group members. This framework clarifies the uncertainties in the case law by identifying the kinds of claims that can be finally resolved through judgment and settlement, and those that cannot.

The structure of this article is as follows. Part II begins by explaining the principles of fairness and finality with specific reference to the difficulties that arise in the class action because of the existence of group members. The relevant provisions of Australia's class actions regimes will also be summarised. This Part then sets out our taxonomical framework for examining the scope, or meaning, of claims/issues in a class action which will be used to examine the reasoning in the *Timbercorp*, *Great Southern* and *Willmott Forests* class actions. This framework is based on close analysis of the statutory regime governing class actions (pt IVA of the *Federal Court of Australia Act 1976* (Cth) and its State counterparts[4]) and the case law interpreting these instruments. Part III will set out the High Court's reasoning in the *Timbercorp* class action and employ the claims/issues framework introduced in Part II to explain its ramifications. Part IV addressees the settlements in the *Great Southern* and *Willmott Forests* class actions and outlines the jurisprudence that emerged from these cases. Part V then uses the claims/issues framework to determine the degree of finality that can be achieved in a class action settlement.

II Background

A *Finality and Fairness*

Finality is a defining tenet of judicial power. It posits that once controversies have been judicially resolved, they are not to be reopened except in limited circumstances.[5] The importance of finality is obvious: it protects the judicial

---

1 *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212 ('*Timbercorp*').

2 *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (recs and mgrs apptd) (in liq)* [2014] VSC 516 (11 December 2014) ('*Great Southern*').

3 *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439 ('*Willmott Forests*').

4 *Supreme Court Act 1986* (Vic) pt 4A; *Civil Procedure Act 2005* (NSW) pt 10; *Civil Proceedings Act 2011* (Qld) pt 13A.

5 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17 [34]. See also *Bailey v Marinoff* (1971) 125 CLR 529; *Gamser v Nominal Defendant* (1977) 136 CLR 145; *DJL v Central Authority* (2000) 201 CLR 226; *Burrell v R* (2008) 238 CLR 218, 223 [15].

function from collateral attack by precluding parties from contending, outside of judicial review, that a decision was wrong.[6] Further, without an element of finality, judicial power cannot be exercised effectively to decide the rights and liabilities of parties.[7] The importance of finality in litigation has also been articulated in policy terms: the public has an interest in efficient and economic litigation rather than duplication of costs and delay;[8] and, in relation to the litigants themselves, 'a party should not be twice vexed in the same matter'.[9]

The principle of finality manifests through multiple procedural rules in civil litigation, relevantly here, the doctrine of *Anshun* estoppel.[10] *Anshun* estoppel precludes parties from asserting a claim or issue of law or fact if that claim or issue was so connected to the subject matter of an earlier proceeding involving that party that it was unreasonable that the claim or issue had not been raised in that earlier proceeding.[11] In the context of class actions, finality is especially important due to the number of persons that might comprise a claimant group and look to the class action for resolution of their disputes. Finality is also significant for respondents, with the class action providing a means to define and conclude their liability.[12] Indeed, a central feature of the class action is that it seeks to resolve issues once for numerous group members so as to avoid re-litigating those issues.[13]

In class actions, the importance of finality must be tempered by the need to take account of the representative nature of the class action and the situation of individual group members. Class actions are commenced by a representative party who nominates themselves as the person to bring and conduct the proceedings.[14] The consent of a person to be a group member, or to the choice of representative party, is not required.[15] They may not know of the commencement of the proceeding, nor wish that it be brought, yet they are included, subject to being afforded an opportunity to later exclude themselves or opt out.[16] Group members may, or may not, enter into a retainer with the solicitor conducting the class action.[17] Consequently they may have received no legal advice as to their interests. Group

---

6 Justice Margaret Beazley and Chris Frommer, 'The Distinctive Character of the Judicial Function' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis, 2016) 14.

7 Ibid. See also *Kable v Director of Public Prosecutions for NSW* (2013) 252 CLR 118, 135 [38]–[39].

8 *Johnson v Gore Wood and Co* [2002] 2 AC 1, 31 (Lord Bingham). See also *Boland v Dillon* [2015] NSWCA 183 (2 July 2015) [60] (referring to 'the public interest in the finality of controversies'); *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, 538.

9 *Johnson v Gore Wood and Co* [2002] 2 AC 1, 31.

10 While the case law primarily focuses on *Anshun* estoppel, it does establish that abuse of process and issue estoppel may also be relevant doctrines, although they are not discussed in this article.

11 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; *Timbercorp* (2016) 259 CLR 212, 226 [14]; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507, 517–18 [22].

12 *Giles v Commonwealth of Australia* [2014] NSWSC 83 (21 February 2014) [81]; *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1, 21–2 [74] ('*Melbourne City Investments*').

13 *A S v Minister for Immigration and Border Protection* [2014] VSC 593 (28 November 2014) [54].

14 See, eg, *Johnston v Endeavour Energy* [2015] NSWSC 1117 (19 August 2015) [64].

15 *Federal Court of Australia Act 1976* (Cth) s 33E. Consent can be sought and provided, but is not required: *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 123 [49].

16 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 31–32 [38]–[41] (*'Mobil Oil'*); *Johnston v Endeavour Energy* [2015] NSWSC 1117 (19 August 2015) [64].

17 See, eg, *Australian Securities Investment Commission v Richards* [2013] FCAFC 89 (12 August 2013) ('*Richards*'); *Willmott Forests* (2016) 335 ALR 439.

members may have their rights determined without them being present before the court or being able to individually put forward their interests and arguments, yet they can be bound by the outcome of the class action.[18] Group members are thus at risk of unfair treatment. However, as Gleeson CJ stated in *Mobil Oil*, the goal of the class action regime is to deal with a multiplicity of claims together, consistent with 'the requirements of fairness and individual justice'.[19] In order to ameliorate the risk of unfairness, Australian judges seek to safeguard the interests of group members throughout the litigation process.[20] This role is most apparent in the context of applications brought before a court for settlement approval, in which a court will assume a protective role akin to the way it approaches infant compromises[21] or claims involving persons with disabilities.[22]

B *Australia's Class Action Regime*

It is necessary to outline the relevant provisions of Australia's class action regime as it provides the statutory framework that governs how class actions operate. Reference is primarily made to the federal provisions under pt IVA of the *Federal Court of Australia Act 1976* (Cth) as, for present purposes, there are no significant differences between the Federal provisions and their State counterparts. The article's analysis pertains equally to the Federal and State regimes. The numbering of the Victorian provisions which are referred to below mirrors that of the Federal legislation.

> The first relevant section is s 33C(1), which provides that where:
>
> (a) 7 or more persons have claims against the same person; and
>
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
>
> (c) the claims of all those persons give rise to a substantial common issue of law or fact;
>
> a proceeding may be commenced by one or more of those persons as representing some or all of them.

Section 33C has two important features. First, in conjunction with s 33D, it authorises the representative party to commence proceedings on behalf of the rest of the group, and for the representative party to continue proceedings in that same capacity. Second, the provision mandates the requirements for a class action to be brought, including the existence of 'a substantial common issue of law or fact'.

---

18 *Mobil Oil* (2002) 211 CLR 1, 32 [41]; Michael Legg, 'Judge's Role in Settlement of Representative Proceedings: Lessons from United States Class Actions' (2004) 78 *Australian Law Journal* 58, 63–4.

19 *Mobil Oil* (2002) 211 CLR 1, 24 [12].

20 See *Mobil Oil* (2002) 211 CLR 1, 27 [21]–[22] (Gleeson CJ) citing *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 498, 408 (Brennan J) for the need for judicial supervision of class actions to ensure that the interests of group member are not prejudiced by the conduct of the litigation on their behalf.

21 *Richards* [2013] FCAFC 89 (12 August 2013) [8]; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029 (21 September 2010) [23].

22 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191, 225 [171]. See also *Mercedes Holdings Pty Ltd v Waters (No 1)* (2010) 77 ASCR 265, 272 [28], in which Perram J explained that judges presiding over class actions in Australia essentially discharge a supervisory beneficial jurisdiction.

Section 33H(1) requires that the originating process define the group by specifying 'the questions of law or fact common to the claims of the group members'.

Australia adopts an opt-out class action model, whereby group members are included in the class action based on the group definition rather than consent. Section 33J provides that group members have the right to opt out of a class action by giving written notice that they intend to do so. Under s 33X(1)(a), group members must also be provided with notice of the right to opt out.

Although ss 33C and 33D focus on common issues, s 33Q arms the court with case management powers where the determination of the common issues will not finally determine the claims of all group members to resolve the remaining issues. Alternatively, a court may discontinue the class action once the common issues have been resolved, so that the remaining issues are pursued through other means.[23]

The central provision in relation to finality in class actions is s 33ZB, which reads as follows:

> A judgment given in a representative proceeding:
>
> (a) must describe or otherwise identify the group members who will be affected by it; and
>
> (b) binds all such persons other than any person who has opted out of the proceeding under section 33J.[24]

Section 33ZB ensures that group members who have not opted out of the proceedings are bound by a court's judgment. Group members who do opt out of the class action do not participate in any judgment award or settlement, and their claims survive the resolution of the class action and can be pursued separately.

Where a class action is to be resolved by settlement, s 33V provides that settlement must be approved by the court. Section 33V has been interpreted to mean that a court's task in a settlement approval application is to decide if it is satisfied that the settlement is fair and reasonable having regard to the interests of the group members who will be bound by it.[25]

Finally, s 33ZF gives the court the power '[i]n any proceeding (including an appeal) conducted under this Part' to make any order 'of its own motion or on application' which it 'thinks appropriate or necessary to ensure that justice is done in the proceeding'.[26]

---

[23] *Federal Court of Australia Act 1976* (Cth) s 33N. See *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 403–4; *Bright v Femcare Ltd* (2002) 195 ALR 574, 580 [18].

[24] The Victorian equivalent, *Supreme Court Act 1986* (Vic) s 33ZB, differs in that s 33ZB(b) states 'subject to section 33KA, binds all persons who are such group members at the time the judgment is given'. Section 33KA allows for an application that a person cease to be a group member or not become a group member.

[25] *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250, 258; *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 (28 January 1999) [16]; *Richards* [2013] FCAFC 89 (12 August 2013) [7]–[8].

[26] *Federal Court of Australia Act 1976* (Cth) s 33ZF grants standing to parties and group members while *Supreme Court Act 1986* (Vic) s 33ZF only grants standing to a party. Both allow the court to proceed of its own motion.

C *Claims/Issues Framework for Class Actions*

A class action may determine or resolve all or part of a group member's claim. The scope of a binding judgment or settlement in a class action may be conceived of in terms of the following kinds of issues and claims:

(1) common issues that are pleaded or specified to be resolved by the class action; that is, the issues derived from the claims that fall within the ambit of s 33C(1).

(2) the individual or non-common issues that are part of the claims that give rise to the common issues that are pleaded in the class action (for example, causation and damages).

(3) unpleaded or unspecified common issues that meet the class action requirements under s 33C(1), but are not included in the class action.

(4) individual claims that are separate from the claims being pursued in the class action; that is, claims that do not give rise to common issues that could be included consistent with the class action requirements.

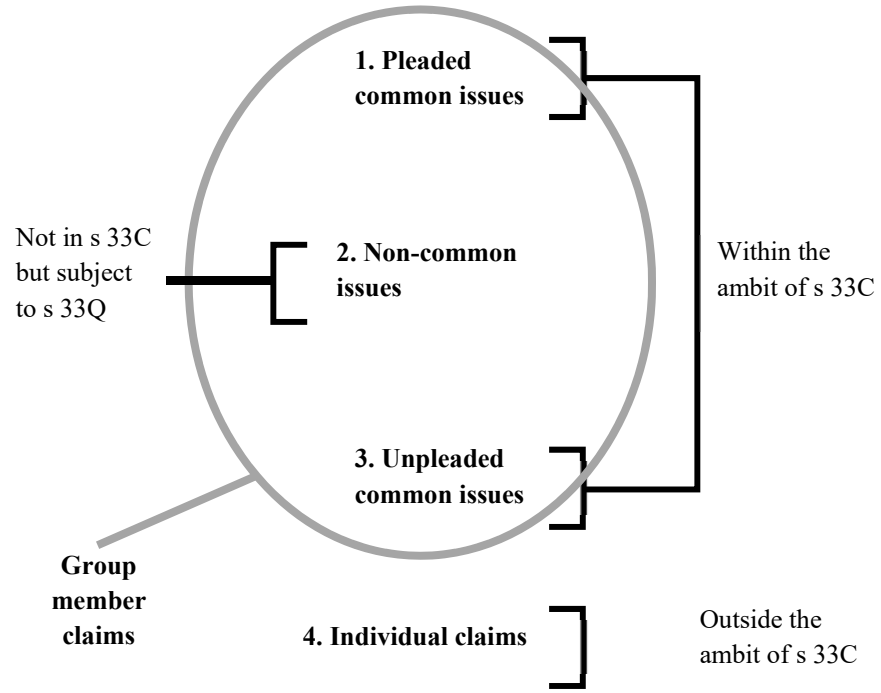
The claims/issues framework is an analytical tool aimed at assisting in determining the ability of the representative party to bind group members to the outcome of a judgment or settlement, and to allow for the respective positions to be contrasted, by reference to the above categories. It is important to highlight the distinction between claims that fall into Category Three and Category Four. Category Three issues are common to the group members and satisfy the requirements of s 33C but are not included in the class action.[27] Category Four claims by comparison are the individual claims of class members that cannot be raised in the class action for lack of compliance with the commonality aspect of s 33C(1)(c). Figure 1 below shows the relationship between each of the categories and s 33C.

As an analytical tool, the framework's taxonomy does not beget legal conclusions and the categories simply serve as a way of clarifying what courts are referring to when mentioning common and individual claims. This article will focus, in particular, on Category Three and Category Four in the context of settlement, as it is the resolution of these kinds of claims/issues that pose the greatest risk of unfairness for individual group members and that, due to the tension in the case law, gives rise to greatest legal uncertainty.

---

[27] Common issues may not be included in a class action by inadvertence, but they may also be excluded in an effort to focus on the most significant common issues that affect the likelihood of success in the class action and advance the determination of group member claims.

Figure 1: Claims/issues framework



III Finality and Class Action Judgments

A *Background to* Timbercorp

A class action proceeding was brought against members of the Timbercorp Group in the Supreme Court of Victoria under pt 4A of the *Supreme Court Act 1986* (Vic) following the collapse of that group in 2009 and its subsequent liquidation. The class action was brought on behalf of about 18 500 investors who had invested in horticultural and forestry managed investment schemes ('MISs') operated by the Timbercorp Group. The class action concerned alleged breaches of statutory disclosure obligations and sought relief including declarations that the representative party and the group members were not liable under the loan agreements that had been entered into between Timbercorp Finance and various group members for the purpose of funding the group members' participation in the schemes.[28] The common questions in the class action did not raise any issues about the validity or enforceability of the loans arising out of the lending process or the advancement of moneys under the loans.[29]

---

[28] *Timbercorp* (2016) 259 CLR 212, 223 [1]–[2], 224 [7] (French CJ, Kiefel, Keane and Nettle JJ), 242–3 [83]–[87] (Gordon J).

[29] Ibid 223 [1]–[2], 226 [14] (French CJ, Kiefel, Keane and Nettle JJ), 249 [119] (Gordon J).

The class action was unsuccessful at first instance and on appeal.[30] Timbercorp Finance brought separate proceedings for the balance of the outstanding loan amounts. Mr and Mrs Collins and Mr Tomes had been members of the class action proceeding (but neither were representative parties). In the proceedings brought by Timbercorp Finance, Mr and Mrs Collins and Mr Tomes each sought to raise claims and defences challenging the validity and enforceability of the loan agreements that had not been raised in the class action.

At trial, Robson J found that the individual group members were not precluded from raising their defences.[31] An appeal against this decision was dismissed by the Victorian Court of Appeal.[32] The primary issue before the High Court of Australia was whether the individual group members were entitled to raise defences to the debt recovery proceedings brought against them, or instead, were barred from doing so by *Anshun* estoppel or abuse of process.

B *The High Court's Reasoning*

The High Court unanimously dismissed the appeal and held that the individual group members were entitled to raise their defences in the debt recovery proceedings. The plurality comprised French CJ, Kiefel, Keane and Nettle JJ, while Gordon J wrote a separate concurring judgment.

For the purpose of determining whether the group members were prevented from raising their defences by *Anshun* estoppel, the plurality first considered Timbercorp Finance's submission that all members of the claimant group were privies in interest with the representative party. The doctrine of privies in interest posits that an individual who claims through another is subject to all estoppels affecting the person through whom that individual claimed.[33] If the representative party had been privies in interest with all of the other group members, then the question of whether it had been unreasonable for Mr and Mrs Collins and Mr Tomes not to have raised their defences in the class action would depend on whether it had been unreasonable for the representative party not to have raised those defences. If *Anshun* estoppel were approached in this fashion, it would be much more likely that the issue would be resolved in favour of Timbercorp Finance's liquidators.

The plurality found that a representative party represents group members only with respect to the claims that give rise to the common issues of law and fact, and that a representative party and group members are privies in interest only with respect to those claims.[34] Section 33ZB therefore did not bind group members in respect of individual claims beyond the scope of the common questions,[35] and group members were not privies in interest with a representative party in respect of their

---

30 *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* [2011] VSC 427 (1 September 2011); *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* [2013] VSCA 284 (10 October 2013).
31 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2015] VSC 461 (2 September 2015).
32 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] VSCA 128 (1 June 2016).
33 *Timbercorp* (2016) 259 CLR 212, 236 [54].
34 Ibid 231 [36]–[37], 234–5 [49].
35 Ibid 235 [52].

own individual claims.[36] This was so regardless of whether those individual claims should have been raised in the class action.[37] In reaching the same conclusion, Gordon J stated that pt 4A only resolved common questions of law and fact, and that the interests of a representative party and group members only aligned to the extent that each had an interest in those common questions.[38]

The plurality then went on to address the concepts of relevance and reasonableness that follow from the test for *Anshun* estoppel, namely: 'there could be no estoppel "unless it appears that the matter relied upon as a defence in the second action was so *relevant* to the subject matter of the first action that it would have been *unreasonable* not to rely on it"'.[39] The plurality did not need to consider the representative party's reasonableness in not bringing the group members' claims because there was no privity. In relation to Mr and Mrs Collins and Mr Tomes, the plurality found that it could hardly have been expected that they would have raised their individual defences in the class action where the common issues related to risks and misrepresentations affecting the MISs.[40] Indeed, the defences to the loan agreements were irrelevant to the issues raised in the class action.[41] Further, there was no risk of the individual defences giving rise to an inconsistency with respect to the findings in the class action.[42] The plurality also found that even if the defences had been relevant to the class action, there would remain questions as to whether Mr and Mrs Collins and Mr Tomes could and should have raised their defences in the class action.[43] Justice Gordon addressed this issue of reasonableness further, noting that a mechanical approach should not be applied and attention must be paid to the particular circumstances of the case,[44] including 'the scope of the group proceeding as determined by the definition of the group members and the common questions; the role of group members in a group proceeding; the counterclaim and its management; and the nature of the opt out procedure'.[45]

The plurality also dismissed Timbercorp Finance's contention that group members should have opted out of the class action when an opt-out notice had been published if they had wished to raise individual claims in future litigation. This submission had been based on the erroneous notion that the representative party in the group proceeding represented the unpleaded claims of the other group members; this not being the case, there was no need for Mr and Mrs Collins and Mr Tomes to opt out in order to preserve their position with respect to the claims now the subject of the defences.[46]

---

36 Ibid 235–6 [53].
37 Ibid 235–6 [53].
38 Ibid 254 [142].
39 Ibid 236–7 [56] (emphasis in original), quoting *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 602.
40 Ibid 237 [58].
41 Ibid.
42 Ibid 237–8 [61].
43 Ibid 237 [59].
44 Ibid 248 [111]–[115].
45 Ibid 248 [115].
46 Ibid 239 [67].

C *Application of Claims/Issues Framework*

The High Court's discussion of privity establishes that group members are bound by judgment on the common issues (Category One). As the representative party in *Timbercorp* was unsuccessful, there was no need to consider associated individual issues such as causation and damages. However, if the representative party had been successful, then the group members' associated individual issues would have required determination through further trials or use of some form of alternative dispute resolution (Category Two).[47] To this end, the trial of a class action resolves the common issues and typically the entirety of the representative party's claim.[48] Judgment and reasons in relation to the representative party's claim can provide precedential guidance as to how group members' Category Two claims may be resolved, although they do not necessarily determine these claims. Category Two claims may be determined as part of subsequent case management through the court relying on s 33Q.

The High Court also clarified the position in relation to Category Three and Category Four. In relation to Category Three claims, it is relevant that the plurality observed that privity operated so that 'one who claims through another is, to the extent of his claim, subject to … all estoppels affecting the person through whom he claims'.[49] This means that, if the representative party is subject to *Anshun* estoppel because there are claims that *could* have been brought because they gave rise to common issues and *should* have been brought because it was unreasonable not to bring them, but they were not included, then group members may also be prevented from subsequently bringing those claims in separate proceedings. However, the plurality noted that an exception to this position might arise in cases where group members lack control over the proceedings, as '[i]t would be quite unjust for a person whose legal interests stood to benefit by making a legal claim to be precluded if they did not have some measure of control of the proceedings in question.'[50]

The plurality's focus on control complicates the position on whether Category Three claims can be resolved by judgment. The plurality did not specify the degree of control that a claimant would have to possess in order for a judgment to prevent them from bringing their unpleaded claim in subsequent litigation. Further, an analysis of the degree of control required to bind Category Three claims in a judgment context is beyond the scope of this article, which is primarily concerned with settlement. However, it is unlikely that the plurality meant that Category Three claims cannot be resolved by judgment unless the owner of that claim was able to have that claim raised in the class action. In an opt-out class action, group members are highly unlikely to be able to exercise such control over which

---

47 *Federal Court of Australia Act 1976* (Cth) ss 33Q–33S. See, eg, *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1, 3–4 ('*McMullin (No 6)*'); *Wotton v State of Queensland (No 7)* [2017] FCA 406 (20 April 2017).

48 Federal Court of Australia, *Class Actions Practice Note — General Practice Note (GPN-CA)*, 25 October 2016, [3.2], [12.1] ('*Class Actions Practice Note (GPN-CA)*'). See, eg, *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 (1 December 2016) [26]; *Perera v Getswift Ltd* (2018) 357 ALR 586, 640 [206].

49 *Timbercorp* (2016) 259 CLR 212, 236 [54].

50 Ibid.

claims are raised, and requiring that individual group members actually have the discretion and influence to raise claims on their own behalf would undercut the utility of the class action as a representative procedure. The better view is that the control of a group member should be gauged by reference to the opt-out rights that were afforded to them and the content of the opt-out notice; these factors are explored in relation to settlement below.

The resolution of Category Four claims is not as complex; it is important to recall that the loan agreements that were the subject of Mr and Mrs Collins' and Mr Tomes' defences did not satisfy the requirements to be part of the common questions of the class action. The defences thus fell into Category Four and could not be resolved by judgment: a representative party cannot bring proceedings, or bind group members through the outcome of a trial, in relation to claims in Category Four because those claims are beyond the ambit of s 33C(1).

IV The Contrasting *Great Southern* and *Willmott Forests* Class Action Settlement Judgments

The factual backgrounds of *Great Southern* and *Willmott Forests* were similar to *Timbercorp*. In each case, the claimants alleged that the defendants that had managed agricultural MISs had breached statutory disclosure obligations. The claimants argued, among other things, that they would not have entered into loan agreements to finance their participation in these schemes but for the defendants' allegedly unlawful conduct. The claimants thus sought relief including declarations that the loan agreements were void and unenforceable.[51] *Great Southern* and *Willmott Forests* were both decided prior to *Timbercorp*, and in both cases the court was asked to approve a settlement that included terms admitting the validity and binding nature of loan agreements that individual group members in each case sought to dispute ('enforceability admissions').[52] The parties seeking settlement approval in both cases also sought an order *nunc pro tunc* under s 33ZF mandating that the representative party had the authority of the rest of the group to enter into the settlement agreement.[53] The *Great Southern* settlement was approved by the Supreme Court of Victoria. The *Willmott Forests* settlement was rejected by the Federal Court of Australia.

A *Great Southern*

The *Great Southern* proceedings comprised 16 class actions brought following the collapse of the Great Southern Group. In July 2014, the representative parties agreed to settle their claims and an application was made under s 33V of the *Supreme Court Act 1986* (Vic).

---

51 *Great Southern* [2014] VSC 516 (11 December 2014) [88]; *Willmott Forests* (2016) 335 ALR 439, 445–46 [14]–[16], 463 [117].

52 The sequence of decisions was the *Great Southern* settlement approval judgment, the *Timbercorp* decision at first instance and then the *Willmott Forests* settlement rejection judgment.

53 *Great Southern* [2014] VSC 516 (11 December 2014) [7]; *Willmott Forests* (2016) 335 ALR 439, 447 [23].

A portion of the group members objected to the settlement agreement, and four grounds of objection were put forward for refusing the application under s 33V.[54] First, the objecting group members claimed that the enforceability clauses were unfair because they went beyond the relief sought by the respondents in the class action, such that the settlement deed purported to achieve an outcome that went beyond the ambit of the class action and could not have otherwise been achieved via judgment.[55] However, Croft J found that there was no substance to this objection because 'the enforceability of the loan deeds was at the very heart of the Great Southern proceedings' and the relief available in the proceedings was contingent upon the validity of the clauses.[56]

Second, the objecting group members argued that the opt-out notices did not put them on notice of the risk that they might lose individual claims or defences; that is, the settlement went beyond the terms of the notice.[57] Justice Croft found that it was quite clear the enforceability of the loan deeds had been central to the proceedings and that the notice had provided group members with sufficient warning that any potential settlement might resolve claims relating to those agreements that had not been raised in the class actions.[58]

The third objection was that the enforceability clauses were generally not fair or reasonable. In rejecting this ground, Croft J took into account, among other things, the fact that the settlement reflected a genuine commercial compromise reached by negotiating parties vying to achieve finality.[59]

The final objection was that the enforceability clauses would prevent group members from raising their individual defences relating to the loan agreements in subsequent debt recovery proceedings.[60] Justice Croft noted that the clauses would indeed prevent such defences from being raised in this way, but that the settlement was nonetheless fair and reasonable. In any event, it was not appropriate for the Court to consider this ground because the individual defences had been posed at a hypothetical level as the objecting group members could not point to any defence that might arise in future proceedings.[61] His Honour went on to find that, even if the objecting group members could point to actual defences, they would be prevented from relying on those defences for two reasons.

First, they had failed to opt out of the class action, which in turn meant that they had elected to be bound by the claims made in the class action. If the objecting group members had wished to raise individual claims or defences relating to the loan agreements in future proceedings, then they should have opted out of the class actions when given the chance.[62] The purpose of the opt-out procedure was to

---

54 Some group members had previously unsuccessfully sought to be removed as group members: *Clarke v Great Southern Finance (in liq)* [2014] VSC 569 (14 November 2014).
55 *Great Southern* [2014] VSC 516 (11 December 2014) [87].
56 Ibid [91].
57 Ibid [78].
58 Ibid [98].
59 Ibid [100].
60 Ibid [77].
61 Ibid [119].
62 Ibid [130]–[132].

preserve the right of individuals with claims arising from the same subject matter as the class action to choose whether to commence individual proceedings and the necessary corollary of this for group members who did not opt out was that they were taken to have chosen to be bound by the issues raised in the class action.[63] Second, the defences would be bound by the doctrine of *Anshun* estoppel (or would constitute an abuse of process).[64] That is, if the class action went to judgment or settled, group members would be estopped from raising subsequent claims or defences that posited the loan deeds were unenforceable.[65] To this end, the enforceability clauses did not detract from the fairness and reasonableness of the settlement; they simply provided certainty.[66]

In considering the unreasonableness requirement of *Anshun* estoppel, his Honour noted that it would have been unreasonable for group members to raise their defences because, if they had wished to have done so, they should have opted out of the class action.[67]

Justice Croft approved the settlement and ordered pursuant to s 33ZF that the representative parties had the group members' authority, *nunc pro tunc*, to enter into and give effect to the settlement deed. His Honour's decision was not appealed by those group members who sought to contest their obligations under the loan agreements until over four years later, when the appeal was out of time, and an application for an extension of time to apply for leave to appeal the orders made in *Great Southern* was denied.[68] Rather, a number of those group members sought to avoid the effect of the settlement that had been approved when they became the subject of separate loan enforcement proceedings that sought repayment.[69]

B *Willmott Forests*

Willmott Forests concerned four related investor class actions brought following the collapse of the Willmott Group. The representative parties entered into a settlement agreement with the respondents, and an application for settlement approval was heard by Murphy J.[70] Similarly to *Great Southern*, the proposed settlement attributed to all group members enforceability admissions that loan agreements entered into for the purpose of funding participation in investment schemes were binding and enforceable, thereby preventing group members from raising defences based on their own unique circumstances in future proceedings. Consequently, some of the group objected to the proposed settlement.

---

63 Ibid [123].
64 Ibid [126].
65 Ibid [126].
66 Ibid [126].
67 Ibid [131]–[132].
68 *Dimitrov v Bendigo & Adelaide Bank Ltd* [2019] VSCA 41 (6 March 2019).
69 See, eg, *Byrne v Javelin Asset Management Pty Ltd* [2016] VSCA 214 (13 September 2016) ('*Byrne*'); *Bendigo and Adelaide Bank Ltd v Pekell Delaire Holdings Pty Ltd* (2017) 118 ACSR 592 ('*Pekell*'); *Dimitrov v Supreme Court of Victoria* (2017) 92 ALJR 12; *Bendigo and Adelaide Bank Ltd v Lonergan* [2018] VSC 357 (3 July 2018); *ABL Custodian Services Pty Ltd v Freer* [2018] VSC 355 (3 July 2018); *Bendigo and Adelaide Bank Ltd v Laszczuk* [2018] VSC 388 (10 August 2018).
70 *Willmott Forests* (2016) 335 ALR 439.

The parties seeking settlement approval made three submissions in support of the fairness of the binding loan enforceability admissions that are relevant for present purposes. First, it was submitted that the admissions were necessary to achieve finality of litigation, which was in the public interest.[71] Justice Murphy found that the parties seeking settlement gave too much weight to the importance of finality in litigation.[72] The better view was that the binding loan enforceability admissions would cause undue detriment to group members because they would bar group members from denying the enforceability of the loan agreements for any reason, even in relation to claims or defences that had not been pleaded and are based on individual or unique circumstances.[73] This was so notwithstanding that none of the objecting group members could point to a particular defence that they might raise in future proceedings.[74] His Honour noted that many of the group members would gain little from the settlement if it incorporated the binding loan enforceability admissions because the amount of settlement proceeds that would be distributed to them paled in comparison to what the liquidators of the Willmott Group would be able to claim from them in enforcing the loan agreements.[75]

Second, the parties seeking settlement approval argued that group members had been given the opportunity to opt out of the proceedings and they should have done so if they wished to pursue other claims in separate proceedings.[76] This submission raises two matters for consideration: the role of the opt-out mechanism and the sufficiency of the opt-out notice. His Honour focused on the latter. Justice Murphy found that the opt-out notices had not adequately warned group members that by failing to opt out they would lose the ability to raise claims based on their individual circumstances in future proceedings that had not been pleaded in the class action.[77] As such, they were not sufficient to bind the individual claims of group members to the settlement agreement. Justice Murphy approached the sufficiency of the notices by requiring consideration of the context in which group members read the notice, the actual terms of the notice and the audience to which the notice was directed so that it could be found that the notice unambiguously warned of the extent to which claims would or might be precluded in a manner that was understandable by a layperson.[78]

Justice Murphy also reviewed the opt-out notices issued in *Great Southern* and opined that they also were not sufficient to have prevented group members from bringing future actions based on their individual circumstances.[79] His Honour further disagreed with Croft J's finding in *Great Southern* that a necessary corollary of members not opting out of proceedings is that they should be taken to accept that the claims pleaded in their class action represented all of the claims available to them.[80]

---

71 Ibid 462–3 [115].
72 Ibid 465 [126], 467 [134].
73 Ibid 465 [127].
74 Cf *Great Southern*, [2014] VSC 516 (11 December 2014) [119].
75 *Willmott Forests* (2016) 335 ALR 439, 466 [130]–[131].
76 Ibid 463 [116], 468 [141].
77 Ibid 471 [153].
78 Ibid 471 [156].
79 Ibid 471 [155].
80 Ibid 470 [152].

Finally, the parties seeking settlement approval submitted that if the proceedings continued to judgment, and the applicants were unsuccessful (which, it was submitted, was likely), group members would be estopped from challenging the enforceability of the loan agreements under either the doctrine of *Anshun* estoppel or the principles relating to abuse of process.[81] Consequently, the enforceability admissions were not unfair because group members would likely lose their right to pursue the individual claims or defences even if the settlement was not approved.[82] Justice Murphy noted that it was common ground that judgment or settlement in a pt IVA proceeding would, by virtue of s 33ZB, preclude group members from asserting a claim that had been unsuccessfully raised in the class action (Category One).[83] His Honour also noted the view that a judgment or settlement *may* in some circumstances bind group members in respect of common claims that could have been pleaded in the class action but were not (Category Three).[84] However, it was not necessary for Murphy J to decide the precise application of *Anshun* estoppel and abuse of process to class actions because insufficient evidence had been adduced as to the nature of any individual claims of group members.[85]

Nonetheless, Murphy J did go on to consider the application of *Anshun* estoppel to group members at a hypothetical level, noting two relevant enquiries, the first being whether group members could have raised their individual claims within the class actions framework by making an application under ss 33Q, 33R or 33S of the *Federal Court of Australia Act 1976* (Cth).[86] The settlement parties submitted that, not only were parties entitled to make such applications, they were required to do so if their claims were to escape the application of *Anshun* estoppel or abuse of process.[87] His Honour did not accept this submission. The position of the parties seeking settlement approval mandated that group members should either give up their individual claims at the opt-out stage of the proceedings or otherwise bring their own proceeding; this would lead to a multiplicity of proceedings and was generally inconsistent with the aims of pt IVA.[88] Further, the position of group members is a 'passive' one, and this points away from any requirement on group members to identify their individual claims additional to the common claims and opt out to avoid an *Anshun* estoppel.[89] Justice Murphy also construed ss 33Q, 33R or 33S as not allowing for, or requiring, group members to raise individual claims.[90] The applicants' arguments regarding *Anshun* estoppel and abuse of process ultimately came down to the proposition that, if group members did not opt out, pt IVA litigation would be their only chance of litigating their rights, even in relation to claims that had not been pleaded and that fell beyond the scope of s 33C. Justice Murphy rejected this view.[91]

---

81 Ibid 463 [120].
82 Ibid.
83 Ibid 482–3 [208].
84 Ibid.
85 Ibid 483 [210].
86 Ibid 483 [211].
87 Ibid.
88 Ibid 484 [215]–[216].
89 Ibid 485 [217].
90 Ibid 486–8 [218]–[229].
91 Ibid 488–9 [230]–[231].

Having found that group members could not have, nor were they required to, raise their individual claims in order to avoid the operation of *Anshun* estoppel, Murphy J then turned to the second issue: whether it had been unreasonable for group members not to have raised their individual claims, and found in the negative.[92] In so finding, his Honour was influenced by the fact that there was no evidence suggesting that group members actually could have made an application under pt IVA to agitate their individual claims (that is, they lacked control over the proceedings).[93]

His Honour refused to grant settlement approval as the settlement was not fair or reasonable.[94]

V Finality and Class Action Settlements

The above discussion of *Timbercorp*, *Great Southern* and *Willmott Forests* raises a number of topics for consideration in determining which claims/issues can legitimately be included in a class action settlement. Our particular emphasis is on Category Three issues and Category Four claims. First, what is the scope of a representative party's authority on behalf of group members to negotiate and enter into a settlement agreement? Second, what role does s 33Q and the court's power to deal with 'remaining issues' perform in dealing with non-pleaded claims/issues in a settlement? Third, does the opt-out procedure allow for the inclusion of non-pleaded claims/issues in a settlement? Fourth, can notices be used to extend a representative party's authority to settle claims/issues beyond those pleaded? Fifthly, can *Anshun* support releases that dispose of unpleaded group member claims/issues? Sixthly, can the court's power to ensure that justice is done in s 33ZF be employed to approve a settlement that goes beyond the pleaded claims? The proper analysis of these topics is clarified below by the application of the issues/claims framework.

A *The Representative Party's Authority*

The class actions legislation clearly empowers a representative party to commence proceedings, to continue proceedings and to bring an appeal.[95] It expressly states that they may also settle their individual claims.[96] The legislation requires that any settlement or discontinuance of the class action be approved by the court,[97] but does not expressly state that the representative party may settle or discontinue a class action, subject of course to court approval. Nonetheless, it would be implicit that a

---

92 Ibid 490 [238].
93 Ibid 490 [240].
94 Ibid 465 [126], His Honour relied on his discretion under s 33V. Although arguments were put as to the scope of the representative party's authority, his Honour did not decide this issue: 461–2 [112]–[114]. A revised settlement was subsequently approved in *Kelly v Willmott Forests Ltd (in liq) (No 5)* [2017] FCA 689 (20 June 2017).
95 *Federal Court of Australia Act 1976* (Cth) ss 33A, 33C, 33D.
96 Ibid s 33W.
97 Ibid s 33V.

representative party who commences proceedings can conclude them other than by judgment (that is, by settlement or discontinuance).[98]

In *Timbercorp*, the High Court explained the representative party's authority by reference to the concept of privity. The plurality stated in reference to ss 33C(1) and 33H:

> These provisions identify the subject matter of a group proceeding as a claim which gives rise to common questions of law or fact. The plaintiff represents the group members with respect to their interests in that regard and the group members claim through the plaintiff to the extent of that interest. Their relationship is therefore that of privies in interest with respect to that claim.
>
> However, other provisions of Pt 4A also make plain that group members may have other, individual, claims which do not form part of the subject matter of the group proceeding.[99]

The plurality then went on to explain: 'The provisions of Pt 4A therefore confirm that a plaintiff in group proceedings represents group members only with respect to the claim the subject of that proceeding, but not with respect to their individual claims.'[100] Justice Gordon reached the same conclusion.[101]

In *Dillon v RBS Group (Australia) Pty Ltd (No 2)*, Lee J posed the question of '[W]hat … is one to do with a provision of a proposed settlement in which the applicants have purported to bind the group members to something that goes beyond the limit of [the] statutory agency?'[102] The statutory agency here is shorthand for the claims giving rise to the common issues that are part of the class action. Justice Lee followed the reasoning in *Timbercorp*, noting that it did not speak directly to settlement, but it nonetheless addressed 'the foundational notion that the representative person, or applicant, only represents group members with respect to the claim which is the subject of the proceeding, and no further'.[103] His Honour concluded:

> It should go without saying that an applicant is only entitled to deal with any other person's rights to the extent that the applicant is representing those rights. Indeed, it is simply wrong in principle for an applicant to presume to deal with the rights of third parties except to the extent that they are empowered by statute to deal with those rights. It follows it is inconsistent with the nature of the role of a representative party under Part IVA of the Act, as part of seeking to resolve a representative proceeding, to seek to settle all individual claims of group members howsoever arising against a respondent (in contradistinction to the *claim* the subject of the relevant proceeding).[104]

In contrast, the Victorian Court of Appeal in *Pekell* took a different approach.[105] The Court stated that *Timbercorp* dealt with judgment and did not apply

---

98 *Farey v National Australia Bank Ltd* [2016] FCA 340 (6 April 2016) [46] ('*Farey*').
99 *Timbercorp* (2016) 259 CLR 212, 234–5 [49]–[50].
100 Ibid 235–6 [52]–[53].
101 Ibid 253–4 [138]–[144].
102 [2018] FCA 395 (20 March 2018) [51] ('*Dillon*').
103 Ibid [49]–[50].
104 Ibid [60] (italics in original). See also *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289 (9 August 2018) [123].
105 (2017) 118 ACSR 592, 608 [56].

with equal force to claims resolved by settlement.[106] Further, it did not follow that a representative party could not settle a class action in a manner that affects the individual claims of group members.[107] There was nothing within pt 4A of the *Supreme Court Act 1986* (Vic) to circumscribe a court's power to approve such a settlement.[108] Rather s 33ZF empowers a court to make orders 'binding a plaintiff, group members and other parties to the settlement or authorising a plaintiff to enter into and give effect to the settlement on behalf of group members'.[109] The Court of Appeal explained that: '[s]uch an order supplies the privity which, as the High Court observed in *Timbercorp*, is otherwise absent in respect of the individual claims of group members'.[110] The Court went on to say that it would be highly surprising if pt 4A precluded parties from resolving claims between them on terms that also bring finality to other issues outstanding between those parties.[111]

The differing approaches in *Dillon* and *Pekell* may be reconciled by focusing on the explanation in *Timbercorp* that the express terms of the class actions framework allow only for a representative party to represent group members in relation to the common issues. This interpretation of the statutory regime extends to settlement as corollary of s 33C setting the extent of commonality in all class actions. However, the representative party may be able to obtain the authority to settle the individual claims/issues of group members in another manner, such as through s33ZF, as accepted by the Victorian Court of Appeal in *Pekell*. This is the subject of the discussion below in Part VF of this article, where it is argued that while the s 33ZF power is available, it should have a limited operation in relation to Category Four claims. In terms of the claims/issues framework, this interpretation means that the representative party can clearly settle Category One claims.

B *Individual Issues and s 33Q*

It is convenient at this point to indicate that the terminology of individual issues or claims can be confusing. The claims/issues framework above differentiates between: individual issues associated with the claims that give rise to the common issues in the class action — that is, the non-common issues such as causation and damages (Category Two); and individual claims that are separate from the common claims (Category Four).

The Victorian Court of Appeal, prior to the High Court's determination in *Timbercorp*, explained that although the commencement of the class action focused on common issues, it was possible to resolve claims that went beyond those common issues.[112] Support for this proposition relies upon s 33Q, which states that if 'the question or questions common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining questions'. The directions power may be used to

106 Ibid.
107 Ibid.
108 Ibid.
109 Ibid 608–9 [58].
110 Ibid.
111 Ibid 608 [57].
112 *Timbercorp Finance Pty Ltd v Collins* [2016] VSCA 128 (1 June 2016) [193].

establish one or more sub-groups, with their own sub-group representative, or for an individual group member to appear to resolve an issue that relates only to that group member.[113] Other steps may also be taken.[114] Further, where the directions-making power is insufficient to resolve an issue, s 33S allows for directions for the commencement of a separate proceeding for an individual or of a further class action for a sub-group of group members.

Sections 33Q, 33R and 33S all address Category Two of the framework. Specific legislative authority is given to the court to address Category Two through directions so as to promote finality. In contrast, Category Four claims are not before the court. The representative party does not have authority to bring Category Four claims and so the court never has jurisdiction over those claims. They simply have not been commenced in the court. These provisions also do not apply to Category Three as s 33Q addresses non-common or remaining issues. Category Three refers to unpleaded common issues.

It follows, that while Category Two is not part of, or resolved by a judgment on the common issues, it is inextricably part of a group member's cause of action and arguably needs to be included in any settlement to achieve finality. However, the better view would seem to be that the power to include Category Two in a settlement derives from the court's powers, and not the authority of the representative party, express or implied.[115] To the extent s 33Q is insufficient alone, it may be combined with, or inform orders under, s 33ZF. This is discussed below in Part VF of this article. Alternatively, it could be argued that there is no need to address Category Two in a settlement because once Category One is addressed by releases, Category Two has no independent existence.

C *Opt Out and its Variations*

The mandatory opt-out right is a key protection for group members as it provides the mechanism for a group member who does not want their claim determined by the class action to exclude themselves. It is the necessary corollary of allowing class actions to be commenced without group member consent.[116] The conventional approach to opt out is that it occurs soon after the close of pleadings, or at least prior to any resolution, including a settlement.[117] Consequently, the opportunity to opt out must be directed to both judgment and settlement. This was the situation in each of

---

113 *Federal Court of Australia Act 1976* (Cth) ss 33Q(2)–(3), 33R.

114 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* [2001] VSC 372 (5 October 2001) [37]; *Milfull v Terranora Lakes Country Club Ltd* [2002] FCA 178 (1 March 2002) [23]; *Muswellbrook Shire Council v The Royal Bank of Scotland NV* [2016] FCA 819 (9 June 2016) [10], [16], [22], [24].

115 See *Timbercorp* (2016) 259 CLR 212, 251 [127].

116 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [188].

117 Federal Court of Australia, *Practice Note* CM 17: *Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth)*, 9 October 2013, [7.3]: 'The usual practice is to send opt-out notices to group members shortly after the close of pleadings.' But see *Class Actions Practice Note (GPN-CA)* [11.6]: 'The timing of the opt-out notice to group members is a matter to be dealt with at a case management hearing.'

Timbercorp, *Great Southern* and *Willmott Forests*.[118] However, the right to opt out may arise contemporaneously with settlement, especially an early settlement.[119] There may also be an opportunity for a second opt out as part of a settlement.[120] Alternatively, there may be a class-closure process where group members are asked to register (opt in) to facilitate settlement negotiations, including a mediation, or as part of a proposed settlement.[121] In *Farey*, Beach J suggested in obiter dicta that a group member's participation in an opt-in process (or choosing not to opt out) could be relied upon to ascribe an implied authority to the representative to enter into broad releases of liability on that group member's behalf.[122]

Although the opt-out mechanism is seen as a protection for group members, the statement in *Farey* and the views expressed in *Great Southern* and *Willmott Forests,* raise for consideration whether the an opt-out opportunity can prevent a group member from pursuing certain claims/issues after a settlement.

Turning back to *Timbercorp*, the plurality reasoned that as the representative party can only bring claims that satisfy the requirements of s 33C, these are the only claims that form part of the class action and the right or need to opt out is only in relation to those common claims, not Category Four 'unpleaded claims'.[123] The High Court's approach makes it clear that it is the claims in Category One that the opt-out right is addressed to and, as the group members' individual Category Four claims are not part of the class action, there is no need to opt out so as to preserve them. Category Two stays or goes with Category One because opting out of the class action removes the group member and all their claims from the proceeding, not just the common issues that the claim(s) gave rise to. However, this still leaves it unclear as to the position in relation to Category Three. As opting out removes the group member and all their claims, it would clearly be effective in preserving a group member's ability to bring forward common issues that had not been pleaded (Category Three). The more difficult question is what not opting out means for a Category Three claim/issue, especially as failing to opt out does not equate with agreement or consent.[124] The case law has dealt with this issue through the lens of *Anshun* estoppel, which is discussed below in Part VE.

---

118 In relation to *Timbercorp*, opt-out notices were published in November 2010, with a further notice to take account of amendments to the pleadings approved for publication in March 2011: *Timbercorp Finance Pty Ltd (in liq) v Collins* [2015] VSC 461 (2 September 2015) [63]–[75]. The hearing commenced on 23 May 2011 and judgment was handed down on 1 September 2011. In relation to *Great Southern*, the opt-out notices were published in March 2012 and the settlement negotiations occurred between February and July 2014: *Great Southern* [2014] VSC 516 (11 December 2014) [92], [108], [112]. In relation to *Willmott Forests*, the opt-out notices were sent to group members on 14 March 2015 and 3 April 2015 and the settlement agreement was exchanged on 7 April 2015: *Willmott Forests* (2016) 335 ALR 439, 447 [23], 448 [29].

119 See, eg, *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541 (20 May 2011) [26]; *Inabu Pty Ltd v Leighton Holdings Ltd* [2014] FCA 622 (6 June 2014).

120 *Class Actions Practice Note* (*GPN-CA)* [14.2]; *Willmott Forests* (2016) 335 ALR 439, 447 [21]–[23].

121 *Melbourne City Investments* (2017) 252 FCR 1, 21–2 [74].

122 *Farey* [2016] FCA 340 (6 April 2016) [48].

123 *Timbercorp* (2016) 259 CLR 212, 239 [67] (French CJ, Kiefel, Keane and Nettle JJ), 253 [136] (Gordon J). See also *Timbercorp Finance Pty Ltd v Collins* [2016] VSCA 128 (1 June 2016) [185].

124 Geoffrey Miller, 'Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard' (2003) *University of Chicago Legal Forum* 581, 586; Simone Degeling and Michael Legg, 'Class Action Settlements, Opt-out and Class Closure: Fiduciary Conflicts' (2017) 11 *Journal of Equity* 319, 339–41.

In addition to *Anshun* estoppel, attention must also be given to variations on the traditional opt-out approach as potential ways to include Category Three and Category Four in a settlement. In a registration context where group members effectively opt in to a settlement, consent may be more readily found if the scope of the settlement is clearly explained so that it may be understood by the group members. However, where registration occurs after opt out then there is no meaningful way to avoid being bound by the terms of the settlement.[125] The choice is only between receiving something and receiving nothing for giving up the claims specified in the settlement agreement. The group member cannot meaningfully withhold their consent. This may be addressed, as it was in *Willmott Forests*, by informing group members that they can seek to challenge the orders. However, this raises the issue of the group members' ability to effectively challenge the course of a class action.[126] Alternatively, the registration process could also provide for a right to opt out of the settlement. Some sort of half-way approach could be crafted where registration results in receiving the benefit of the settlement and providing broader releases, while those that fail to register make no recovery, but also are only bound by narrower releases consistent with the authority pt IVA grants to a representative party. It is important to recognise that the opt-out, registration and settlement process can develop and change, as it has in the past, so that other creative approaches may develop. It is not possible to deal with all potential eventualities here.

Category Three issues are within the representative party's authority to raise in the class action as they fall within the ambit cast by s 33C, but for some reason the representative party does not exercise that authority to include those common issues at commencement. However, to achieve finality, it is desirable that these claims be included in a settlement. Whether a representative party will have the authority to include Category Three issues in a settlement will depend, in part, upon the content of the opt-out notice and the time at which it was sent to group members. The content of opt-out notices is dealt with below in Part VD of this article. In relation to timing, for a failure to opt out to allow for the settlement to have a binding effect on Category Three issues, group members should know the claims/issues being included in the class action and subsequently falling within the scope of the settlement. To this end, the failure to opt out might only enable the release of Category Three issues in situations where the opt-out notice clearly stated the nature of the releases contained in the settlement and was sent to group members at or after the time that the terms of the settlement became known to group members. Informing group members at settlement once the opportunity to opt out has passed is insufficient because there is no longer a real choice. These matters speak to s 33V and whether the settlement is fair and reasonable.

Excepting an exercise of s 33ZF, in order to include Category Four claims in a settlement there must be actual consent to broader releases because pt IVA does not provide the representative party with statutory authority to bring these claims. This means group members must have the opportunity to choose whether to have

---

125 *Willmott Forests* (2016) 335 ALR 439, 472 [162].

126 Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590.

their claims that are not within the representative party's statutory authority under pt IVA included or not.

Even when express consent is sought and a group member can exclude themselves from the class action, there remains a potential problem. The group member is forced to choose between the value of the settlement and the value of their Category Four individual claim. If the group member wants to pursue their individual claim, they must give up the right to participate in the settlement — they cannot have both.

D *The Content of Notices*

If granting group members the ability to opt out or opt in to a settlement can indeed extend a representative party's authority to bind group members in relation to Category Three issues, and tend toward an exercise of discretion under s 33ZF to bind Category Four claims, then the focus must shift to the form and content of the notice. Both the *Great Southern* and *Willmott Forests* judgments stated that where group members will lose their right to claim, the notice must define the scope of the proceeding and explain the ramifications of decisions to do nothing, to opt out or to register to participate in a settlement, depending on the actions available.[127]

Great Southern and *Willmott Forests* illustrate that the standard for discerning the clarity of a notice is not straightforward. In *Great Southern*, individual group member claims/defences were extinguished by the combination of: general statements about how class actions operate; references to the determination of 'rights, if any, to compensation or other relief'; and reference to seeking orders that would render the loans void.[128] In contrast, in *Willmott Forests*, the detailed explanation of how class actions operate, the claims being brought and the effect of the various options was insufficiently clear to support orders that would extinguish individual group member claims/defences.[129] However, both outcomes in *Great Southern* and *Willmott Forests* depended on comprehension of the context of the notices. The *Great Southern* notice limited the inability to make claims in other proceedings to those 'in relation to the matters the subject of the Great Southern group proceedings', but the enforceability of loans was said to be one of those subjects.[130] In *Willmott Forests*, the notice said that group members would lose their 'rights to bring any claim against any of the Respondents in relation to the allegations made in these class action proceedings', but individual claims/defences about the enforceability of loans was not an allegation in the class action.[131]

More generally, in *Willmott Forests*, Murphy J placed greater emphasis on the clarity of the notice, and was more prepared to take account of group members' lack of understanding. His Honour held that if it were to be contended that failing to opt out would or might be preclude group members from advancing claims/issues

---

127 *Great Southern* [2014] VSC 516 (11 December 2014) [46]; *Willmott Forests* (2016) 335 ALR 439, 471 [154].
128 *Great Southern* [2014] VSC 516 (11 December 2014) [92]–[98].
129 *Willmott Forests* (2016) 335 ALR 439, 468–80 [141]–[198].
130 *Great Southern* [2014] VSC 516 (11 December 2014) [94], [107].
131 *Willmott Forests* (2016) 335 ALR 439, 479–80 [193]–[198].

that are not pleaded in the class action, 'the opt out notice must unambiguously state this warning in terms that are understandable by a layperson'.[132] Justice Croft's analysis was far less forgiving: 'the opt out notice [was] sufficiently clear to anybody who had any interest in the Great Southern proceedings'.[133]

We note that, due to the diversity of persons who might comprise a class; each with varying degrees of sophistication, Murphy J's insistence on clear terms is preferable.

E *Anshun Estoppel*

Anshun estoppel was relied upon by the parties seeking settlement approval in *Great Southern* and *Willmott Forests* to justify precluding group members from raising their individual claims in future proceedings. In both cases, the parties seeking settlement approval argued that the enforceability admissions were not unfair, because if the matters proceeded to judgment, group members would still be prevented from raising these individual claims. *Anshun* estoppel is not applied directly but rather its possible future application is used to justify extending the scope of a settlement. This position was only accepted in *Great Southern*.

The *Anshun* estoppel argument or analogy only applies to Category Three claims/issues. The first limb of an *Anshun* estoppel is relevance or connection. The claim or issue to be estopped must be 'so relevant' or connected to the subject matter of the first action. A Category Three issue may satisfy this requirement because, as defined above, it is an unpleaded common issue that meets the requirements in s 33C. In contrast, a Category Four claim does not meet the s 33C requirements and could not be included in the class action, meaning it could not satisfy the relevance requirement.

However, assuming a Category Three issue meets the relevance requirement, it is still necessary to satisfy the second limb: unreasonableness. The focus for judgment is on the unreasonableness of the representative party, as the privy in interest of the group members, in not bringing forward the Category Three issues.[134] However, in the settlement context, the focus has been on the reasonableness of the group member in wanting to agitate 'fresh' claims or issues in separate proceedings.[135] The reason for this focus appears to be that the group member's actions should be assessed by reference to what they could have done to avoid being bound by the actions of their privy, the representative party.

Justice Gordon in *Timbercorp* noted that unreasonableness is not subject to a mechanical approach, and that attention must be paid to all of the circumstances.[136] This is discussed further below. Nonetheless, the case law has focused on two key factors that may determine whether it was unreasonable for a group member to have failed to raise a particular claim or issue in the class action. The first is the

---

132 *Willmott Forests* (2016) 335 ALR 439, 471 [156].
133 *Great Southern* [2014] VSC 516 (11 December 2014) [98].
134 *Timbercorp* (2016) 259 CLR 212, 231 [37].
135 *Great Southern* [2014] VSC 516 (11 December 2014) [131].
136 *Timbercorp* (2016) 259 CLR 212, 248 [111]–[115].

employment of the opt-out mechanism and the second is whether group members had the ability and opportunity to raise their claim in the class action.

1 *The Opt-Out Mechanism*

In *Great Southern*, Croft J found that group members would be estopped from raising their defences in subsequent proceedings because it would be unreasonable for them to do so in light of them having not opted out; by not opting out, group members had accepted the pleaded claims as representing all of the claims available to them.[137] Justice Murphy in *Willmott Forests* disagreed with Croft J's position as holding in all situations.[138] In *Timbercorp*, Gordon J expressly disapproved of the contention that

> if a group member does not either opt out of a group proceeding or seek directions in relation to their individual claim, then it will automatically be 'unreasonable in the context of that first proceeding' for them not to have done so, such that an *Anshun* estoppel will arise.[139]

This was because the statement was too absolute in its expression. The effect of the opt-out opportunity will turn on specific circumstances, which would include factors such as the timing of the opportunity, the content of the notice, and the characteristics of the group.

As explained above, failing to opt out is incompatible with client consent. A group member's failure to exclude themselves cannot be equated to consenting to the representative party's choice of common issues or that the group member does not wish to bring forward other common issues. The meaning of not opting out is unclear or unknown.[140] Nonetheless, as the High Court identified in *Timbercorp*, pt IVA operates by allowing a representative party to choose the common issues that are brought forward and binds group members who do not opt out to the determination of those issues.[141] However, the terms of the notice, as discussed above, will be crucial. Reasonableness would turn on whether a notice brought to the attention of group members the risk of unpleaded common issues (Category Three) later being included in settlement so that they could not be pursued separately.[142]

2 *Control*

In *Willmott Forests* and *Timbercorp*, both courts considered whether group members had control over the proceedings that would have enabled them to have raised their

---

137 *Great Southern* [2014] VSC 516 (11 December 2014) [132].

138 *Willmott Forests* (2016) 335 ALR 439, 470 [152].

139 *Timbercorp* (2016) 259 CLR 212, 248 [113]–[114].

140 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2015] VSC 461 (2 September 2015) [670], [682]. It may be the case that the group members are content with the common issues being pursued, but equally a group member may not know they are part of the class action, not have received the notice, or not understood the importance of the notice, at all or in relation to its ramifications for unpleaded Category Three issues.

141 *Federal Court of Australia Act 1976* (Cth) ss 33A 33ZB; *Timbercorp* (2016) 259 CLR 212, 233 [44], 235–6 [52]–[53].

142 *Timbercorp Finance Pty Ltd v Collins* [2016] VSCA 128 (1 June 2016) [201].

claims. Had such control existed, it would have been unreasonable for the defences to have been raised in subsequent proceedings.

The rationale behind this enquiry was stated by the plurality in *Timbercorp*: '[i]t would be quite unjust for a person whose legal interests stood to benefit by making a legal claim to be precluded if they did not have some measure of control of the proceedings in question.'[143] This begs the question: what degree of control must group members be able to exercise over the proceedings in order for it to be unreasonable for them to raise further issues in future proceedings?

The role of group members is necessarily a passive one, and in most cases they will not be able to exert the degree of control required to raise other issues.[144] It would only be in those rare circumstances in which a group member possesses sophistication, knowledge and resources that they would be able to agitate their individual issues of their own volition.[145] Even then, the group member needs to convince the representative party (and their lawyer) or the court that additional common issues should be the subject of the class action. As such, it will be unlikely that the *Anshun* estoppel analogy will prevent group members raising further issues in proceedings subsequent to a class action, subject of course to the effect of the opt-out opportunity discussed above.

3 *Difficulties associated with* Anshun *Estoppel*

Although *Anshun* estoppel may provide a useful theoretical tool for discerning the scope of the representative party's authority in a settlement context, in practice it faces several challenges that undermine its utility. In discerning whether *Anshun* estoppel arises on a particular set of facts, a court must determine whether the relevant connection exists between successive proceedings and whether, in light of that connection, it would be unreasonable to raise the claim or issue in question. Much will depend on the particular circumstances of a given case, as courts take into account

> all the relevant facts, including the character of the previous proceeding, the scope of any pleadings, the length and complexity of any trial, any real or reasonably perceived difficulties in raising the relevant claim earlier, and any other explanation for the failure to raise the claim previously.[146]

Typically, *Anshun* estoppel is raised when a second claim is commenced, and the respondent raises the estoppel as a defence.[147] In most cases, the court is therefore able to compare the pleaded claim in the second action with the completed first action in making its determination as to the elements of the estoppel. However, in the class action settlement context, judges are unlikely to have the material necessary

---

143 *Timbercorp* (2016) 259 CLR 212, 236 [54].

144 *Willmott Forests* (2016) 335 ALR 439, 485 [217].

145 See, eg, the representative party in *Lifeplan Australian Friendly Society Ltd v S&P Global Inc* [2018] FCA 379 (8 March 2018).

146 *Gibbs & McAllion Lloyd Pty Ltd v Kinna* [1999] 2 VR 19, 28 [28]. See also 26–7 [23].

147 See, eg, *Sahab Holdings Pty Ltd v Castle Constructions Pty Ltd* [2014] NSWSC 1281 (19 September 2014); *Solak v Registrar of Titles* [2011] 33 VR 40; *Stewart v Biodiesel Producers Ltd* [2009] WASC 145 (28 May 2009); *Redowood Pty Ltd v ASX-Perpetual Registrars Ltd* [2007] NSWCA 286 (18 October 2007); *Powell v Aymkone Pty Ltd* [2008] NSWSC 1270 (28 November 2008).

to determine whether an *Anshun* estoppel ought to arise because the class action is being settled and the second claim is not yet in existence.

F *Court Power*

In *Byrne* and *Pekell*, the Victorian Court of Appeal found that s 33ZF provided the power to make orders *nunc pro tunc* authorising the representative party in *Great Southern* to enter into and give effect to the settlement on behalf of group members.[148] In *Pekell*, the Court added that an order of this kind provides the element of privity that was otherwise absent in respect of the individual claims of group members; and this in turn allows class actions to be settled on terms preventing group members from raising individual claims.[149] Neither judgment needed to assess whether such an order could have, or should have, been made (that is, whether Croft J's discretion miscarried)[150] as they were not dealing with an appeal from the decision in *Great Southern*, but rather the interpretation of the orders and settlement deed approved by Croft J.[151] Nonetheless, s 33ZF is regularly invoked to authorise representative parties to settle class actions on behalf of group members.[152] However, the question remains: what is the scope of the representative party's extended authority that the court may approve, or what is meant by a group member's 'individual claim'?[153]

Section 33ZF was 'intended to confer on the Court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding'[154] and the breadth of the power has been reiterated on numerous occasions since.[155] Although a plenary power, it is not unlimited and any order must be in keeping with the requirements in the text of the provision.[156] Where a court exercises the statutory power in s 33ZF, the court must determine that such orders are 'appropriate or necessary to ensure that justice is done in the

---

148 *Byrne* [2016] VSCA 214 (13 September 2016) [55]; *Pekell* (2017) 118 ACSR 592 608–9 [58].

149 *Pekell* (2017) 118 ACSR 592, 608–9 [58].

150 See *House v R* (1936) 55 CLR 499, 504–5.

151 *Byrne* [2016] VSCA 214 (13 September 2016) [56]; See also *Pekell* (2017) 118 ACSR 592, 606–7 [51]–[52], where the Court of Appeal made it clear that Croft J's orders had effect irrespective of whether there was any excess of jurisdiction citing *New South Wales v Kable* (2013) 252 CLR 118, 133 [32], 134 [36].

152 *Byrne* [2016] VSCA 214 (13 September 2016) [55] and the cases cited in that paragraph.

153 See *Pekell*, which speaks of it being highly surprising if pt 4A prevented finality in relation to 'other *issues* outstanding between those parties or, in the case of a plaintiff, the group members that plaintiff represents' and further that full releases of 'all outstanding *claims*, whether at issue in the relevant proceedings or not' was not uncommon (emphasis added): (2017) 118 ACSR 592, 608 [57].

154 *McMullin (No 6)* (1998) 84 FCR 1, 4.

155 See, eg, *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 182 [48] ('*Courtney*'); *Wotton v Queensland* (2009) 109 ALD 534, 545 [41]: 'This provision, like all provisions conferring jurisdiction or granting powers to a court, should not be construed narrowly by making implications or imposing limitations which are not found in its express words: *Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404, 421'.

156 *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469; *Johnston v Endeavour Energy* [2015] NSWSC 1117 (19 August 2015) [92]; *Camping Warehouse v Downer EDI* [2016] VSC 784 (21 December 2016) [45]; *Re Banksia Securities Ltd (rec & mgr apptd)* [2017] VSC 148 (31 March 2017) [108]; *TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (subject to deed of company arrangement) (No 3)* [2018] NSWSC 1749 (15 November 2018).

proceeding'. The Full Court of the Federal Court has determined that the statutory test under s 33ZF will not be satisfied on the basis that orders were merely convenient or useful, but rather the proposed order must be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding.[157]

In the current context, where orders are being sought to extinguish group members' claims, it is relevant to consider judicial statements about the operation of s 33ZF and group members. In *Courtney,* Sackville J stated:

> In construing s 33ZF, it is also appropriate to recognise the unusual position of group members in a representative proceeding brought pursuant to Part IVA. Group members may benefit from the representative proceeding but their rights also might be adversely affected, since they are bound by any judgment in the proceeding unless they have opted out: s 33ZB(b). Consent is not required for a person to become a group member: s 33E(1). A group member must be given notice of his or her right to opt out of the proceeding (s 33X(1)(a)), but the group member will not necessarily receive personal notice of that right: s 33Y(5). … In a representative proceeding involving substantial numbers of group members, it is very likely that some, whether by choice, lack of means or lack of information, will not engage a lawyer.[158]

Justice Sackville went on to state that judicial control of a class action may be essential to protect the interest of group members and that '[s] 33ZF is directed to just such an issue'.[159]

Similarly, in *Blairgowrie*, Wigney J stated that where s 33ZF is concerned, the court should ensure that absent group members are not prejudiced by the determinations and orders made by the court under the section and that, '[t]he role of the Court in this respect is protective.'[160] The reference to the court's protective jurisdiction has previously arisen in the context of s 33V, where the jurisprudence has recognised that a settlement must be in the interests of group members as a whole, not just the representative party and respondent, and the court acts akin to a guardian for the unrepresented group members.[161] Thus, when considering whether to make an order under s 33ZF in a settlement approval application, in line with its protective role, the Court should exercise s 33ZF in accordance with s 33V and consider whether 'the rights or interests of group members [are] not adequately protected, or [are] materially prejudiced or adversely affected by the order', as such an order would be unlikely to be appropriate or necessary to ensure that justice was being done.[162]

The question as to the scope of releases and preclusion of future claims that relies on s 33ZF is to be determined by reference to achieving justice. A number of

---

157 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 224 [165]. The 'reasonably adapted' test was employed again by the Full Court of the Federal Court in *Melbourne City Investments Pty Ltd* (2017) 252 FCR 1, 21–2 [74].

158 *Courtney* (2002) 122 FCR 168, 182 [49]. See also *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec & mgrs app) (in liq)* (2015) 325 ALR 539, 560 [114] ('*Blairgowrie*').

159 *Courtney* (2002) 122 FCR 168, 183 [51].

160 *Blairgowrie* (2015) 325 ALR 539, 560–61 [115].

161 *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250, 258; *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 (28 January 1999) [16]; *Richards* [2013] FCAFC 89 (12 August 2013) [7]–[8].

162 *Blairgowrie* (2015) 325 ALR 539, 560–61 [115].

contextual factors need to be considered in seeking to determine what justice requires in terms of the allowable scope of a settlement, or more specifically whether unpleaded claims that fall into Category Two, Category Three and Category Four could be included in a settlement.

The above discussion in relation to s 33Q suggests that extending a settlement to Category Two should not be problematic. The court has specific power to address Category Two in terms of case management steps to achieve finality. The statutory regime provides for the resolution of Category Two and s 33ZF would be filling a statutory gap in relation to settlement where pt IVA is silent.[163] Category Three could also be included in a settlement subject to specific findings that it is just in the circumstances to preclude the pursuit of further common issues that had not been previously raised, including, in particular, the content of the opt-out notices.

Turning to Category Four, a helpful starting point is to consider the position in relation to judgment. The class action is designed to resolve common questions that arise from the same, similar or related circumstances. The class actions regime only provides the representative party with authority to act on the group member's behalf and bind them in relation to claims that satisfy s 33C. In short, if the proceedings were litigated, they would not resolve individual claims that are in Category Four. It has been observed that the decision in *Timbercorp* did not extend to settlements.[164] Nonetheless, the High Court's construction of the class actions statute is universal and applies to both judgment and settlement.

The class actions statute does not grant the representative party authority to bring Category Four claims before the court. This creates a particular problem for employing s 33ZF, which is applicable to 'any proceeding (including an appeal) conducted under this Part' and allows orders 'the Court thinks appropriate or necessary to ensure that justice is done in the proceeding'. Arguably, a standalone claim cannot be subject to an order relying on s 33ZF where it could not be included in a class action because it did not satisfy s 33C. A Category Four claim is not 'conducted under this Part'. Equally, it might be said that the orders are not aimed at justice 'in the proceeding'. On this approach, s 33ZF is not applicable on its own terms and could not provide the power to include Category Four claims into a class action settlement.[165] However, it may also be argued that the class action before the court grounds the power in s 33ZF and that then allows the court to make orders that would bring Category Four claims into the class action provided it is 'appropriate or necessary to ensure that justice is done'.

This then prompts for consideration: why is settlement different from judgment and what factors operate in the settlement context to make it in the interests of justice to take a position contrary to what a litigated outcome could achieve? The answer appears to be two-fold. The first is that broader releases may be necessary to achieve the settlement (but only insofar as the representative has authority to do

---

163 *McMullin (No 6)* (1998) 84 FCR 1, 3–4.

164 *Pekell* (2017) 118 ACSR 592, 608 [56].

165 This argument was dismissed in *Pekell*, but it is unclear what categories of claims the Court of Appeal had in mind: ibid 608–9 [58].

so).[166] The price of achieving the product of the settlement, whether that be compensation and payment of costs, or simply the avoidance of costs if the case were to fail, is no further claims by group members against the respondent. Second, courts see settlement as being in the litigants' and public's interest.[167] Finality, saving costs and expeditious resolution of proceedings have been conceived of as being central to achieving justice.[168] However, they do not trump justice, but rather are considerations to be weighed in determining where justice lies.[169]

Achieving justice includes affording individual group members procedural fairness. The class actions regime alters the usual requirements for procedural fairness, such as notice and the opportunity to be heard, including to present evidence and argument. Instead, the regime provides for: a representative who shares a sufficient interest in resolving common issues; a right to opt out; notices; court approval of settlements; and the ability to seek to replace a representative party that is an inadequate representative.[170] However, this alternate regime only applies to the claims that satisfy s 33C. Category Four claims, which exist wholly outside s 33C, are not subject to this regime of curtailed procedural fairness. As a result, if Category Four claims were to be included in a settlement, then the court must ensure that 'justice is done', which includes procedural fairness. A highly relevant factor would be whether the group member consents to their inclusion by instructing lawyers to include the claims in the settlement — perhaps through an opt-in or registration process (as discussed above)[171] or another court procedure such as joinder would need to be employed.[172] The granting of an opportunity to opt out of, or object to, a settlement that purports to bind Category Four claims puts the cart before the horse. Category Four claims are not part of the class action. The representative party has no statutory authority to include Category Four claims in a settlement. It is not a case of removing Category Four claims from a proposed settlement, but rather finding authority to include them.

---

166 *Tongue v Council of the City of Tamworth* [2004] FCA 209 (23 March 2004) [45]; *Harrison v Sandhurst Trustees* [2011] FCA 541 (20 May 2011) [26]; *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289 (9 August 2018) [125].

167 *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541 (20 May 2011) [26]. This reasoning may be supported by analogy with class-closure orders that are permitted when they operate to facilitate the desirable end of settlement and achieve finality for group members and respondents: *Melbourne City Investments* (2017) 252 FCR 1, 21–2 [74].

168 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 213 [98]; *Federal Court of Australia Act 1976* (Cth) pt VB; *Pearson v State of Queensland* [2017] FCA 1096 (14 September 2017) [14].

169 Michael Legg, 'Reconciling the Goals of Minimising Cost and Delay with the Principle of a Fair Trial in the Australian Civil Justice System' (2014) 33(2) *Civil Justice Quarterly* 157.

170 See *Femcare Ltd v Bright* (2000) 100 FCR 331, 347 [65]: 'The price of providing a mechanism for the vindication of rights held in common with others may be departure to some extent from the procedures ordinarily applicable in litigation inter partes.'

171 Registration processes are usually undertaken as a step towards, or as part of, a settlement. However, if a closed-class definition was adopted, then it may be possible to have group members consent to Category Four claims being included in any subsequent settlement as part of the execution of retainers and/or funding agreements. Equally, consent could be obtained from a closed class at the time settlement was being negotiated.

172 See, eg, *Federal Court Rules 2011* (Cth) r 9.05.

To the extent that *Pekell*[173] may be read as permitting settlements to release a group member's Category Four claims without consideration of how those claims are brought within the representative party's authority consistent with procedural fairness, the argument presented here regards this as wrong in principle. We suggest that before using s 33ZF to bind Category Four claims to a settlement agreement, the requirements of that section (that the court thinks an order is 'appropriate or necessary to ensure that justice is done in the proceeding') are highly unlikely to be satisfied without the court itself first ensuring that the holders of the Category Four claims consented to the inclusion of these claims.

Moreover, while the consent of claim holders should be highly influential in deciding whether to order the resolution of Category Four claims under s 33ZF, other factors may come into play as well. For example, it may also be apposite for courts to undertake pointed enquiry into whether the settlement specifically accounts for the fact that particular group members are being prevented from litigating their individual claims that were entirely unrelated to the class action being settled by reflecting the value of those claims in the settlement amount paid to those group members.

Ultimately, s 33ZF should not be exercised so as to bind Category Four claims to a settlement agreement and achieve finality except where procedural fairness is afforded and it is necessary to achieve a fair outcome in the proceedings.

VI Conclusion

The above analysis leads to the conclusion that a settlement can include: the common issues that are pleaded in the class action (Category One); and the individual or non-common issues associated with, or part of, the claims that give rise to the common issues that are pleaded in the class action (Category Two).

Unpleaded or unspecified common issues that meet the requirements of pt IVA of the *Federal Court of Australia Act 1976* (Cth) (or its State counterparts) (Category Three) may be the subject of settlement based on the opt-out opportunity provided the opt-out notice adequately brings the risk of Category Three issues being included in a future settlement to the attention of group members. Further Category Three issues may be included in a settlement based on an analogy with *Anshun* estoppel. However, it must have been reasonable for the group members not to take steps to avoid being bound by the actions of the representative party, including opting out. Much will turn on the information communicated to group members. Further, great care is required because the court may not be well-placed to determine if the *Anshun* analogy is apt in a particular case.

---

[173] (2017) 118 ACSR 592, 608–9 [57]–[58]. See also *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*, which accepted that *Timbercorp* may mean that a representative party lacks authority to settle group members' Category Four claims, but nonetheless made orders approving releases 'from claims by [group] members that are individual to the [group] member and outside the subject matter of the proceeding' without group member consent. The orders were agreed to so as to achieve finality and because the existence of Category Four claims was said to be 'theoretical': (2018) 358 ALR 382, 400–2 [95]–[100].

The individual claims of group members that are separate from the claims being pursued in the class action — that is, claims that could not be included consistent with the class actions legislation (Category Four) — cannot be part of a class action settlement unless a court has so ordered pursuant to s 33ZF. In our view, such claims should only be included through obtaining group member consent. The agitation of individual claims that are separate from the claims being pursued in the class action lies at the very heart of the tension between finality and fairness in settlement approval applications. These claims evoke considerations of finality because they pose an obvious risk of repeat litigation for respondents, yet their resolution without the affirmative consent of the claim holder often results in a perverse denial of procedural fairness and a manifestly unfair result.

Our conclusions in relation to the four categories of claims/issues assume the correct identification of each category when a settlement is proposed. However, this may be difficult as shown by the contrasting positions in *Great Southern* and *Willmott Forests* despite their very similar factual positions. Indeed, the terminology used in many of the cases does not clearly delineate the type of claim/issue that is under consideration. Consequently, we hope that use of the claims/issues framework will assist in clarifying exactly what claims or issues are being resolved by a settlement, which will in turn assist in the judicial analysis that is required in making orders under ss 33V and 33ZF of the class actions legislation.