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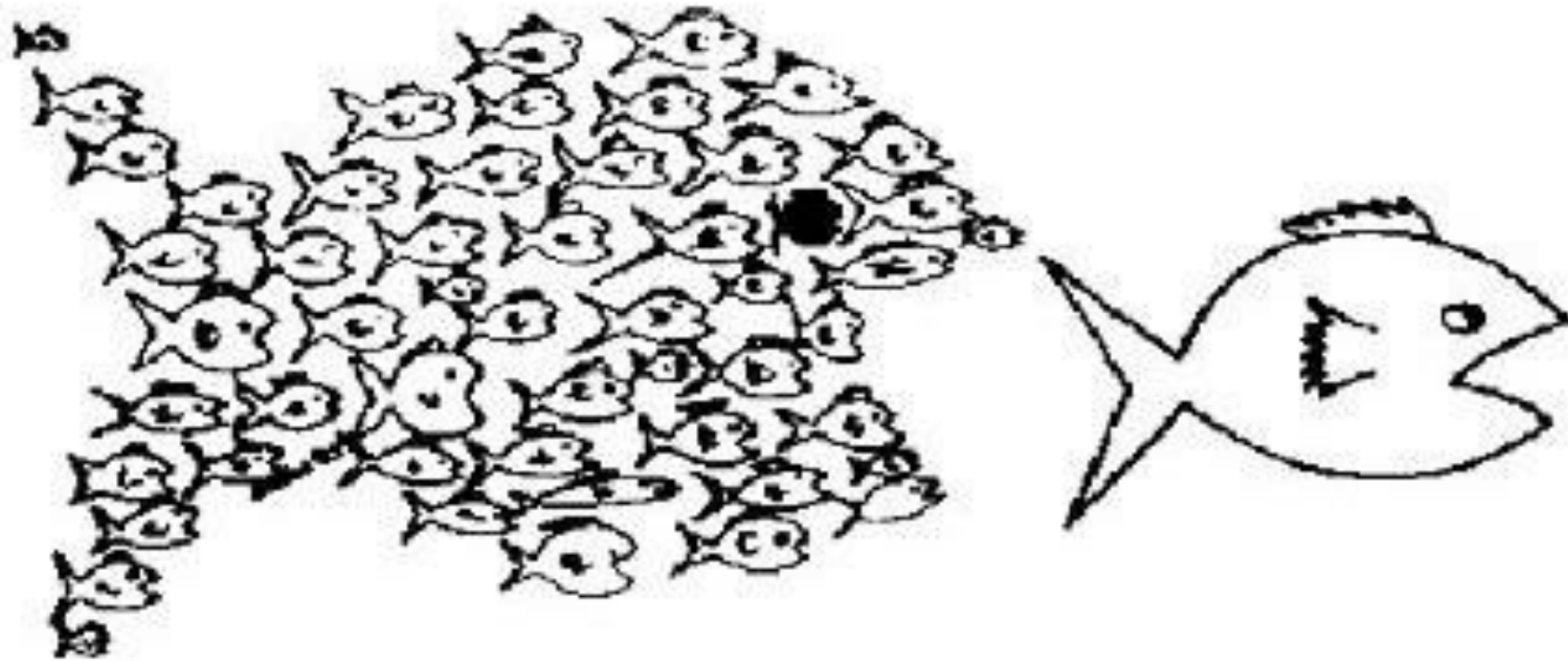
Managing Class Action Disputes – Class Definition

Nicholas Andreatidis QC, Angus O’Brien & Mei Ying Barnes – Level Twenty Seven Chambers

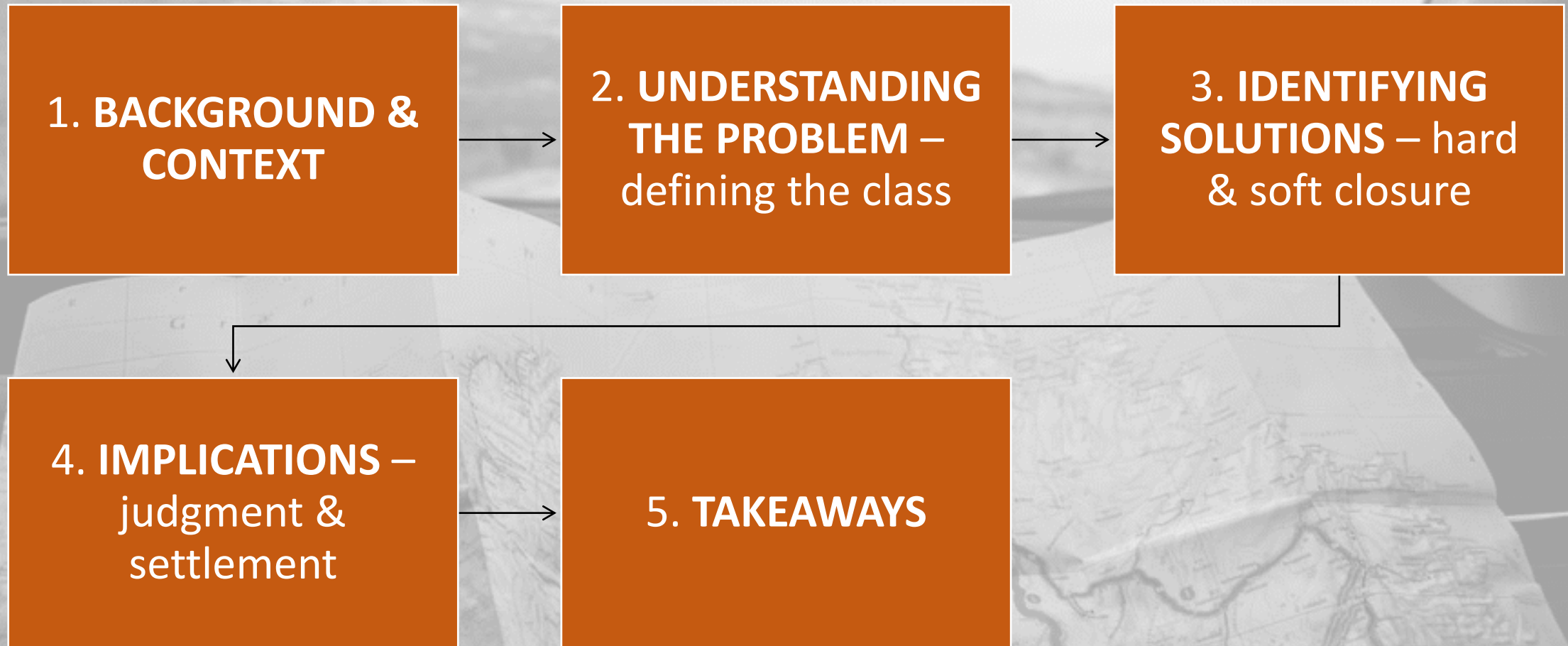
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>> Introduction



>> Roadmap



>> **Background & Context – Class Actions**

- > Representative proceedings vs. class actions
- > Popular forums: FCA, Vic, NSW ... Qld?
- > Broad subject matter: where there's class, there's an action
 - shareholders, investors, consumers, employees, non-citizens, tax payers
- > Who is bound by the judgment?

>> **Background and context – Litigation finance**

- > How does it work?
- > When might a funder become involved?
- > What are the strategic considerations weighing in favour of, and against, funding being granted?
- > Who is in control?

>> Defining the class – understanding the problem

- > Claims must be similar but need not be identical: *Federal Court of Australia Act 1976 (Cth) (FCA)*, s 33C; *Civil Procedure Act 2005 (NSW) (CPA NSW)*, s 157; *Civil Proceedings Act 2011 (Qld) (CPA Qld)*, s 103B.
- > Originating process must identify group members: FCA, ss 33E, 33H; CPA NSW, ss 159, 161; CPA Qld, ss 103D, 103F.
- > Closed vs. open proceedings
 - Open: where the class includes everyone who has suffered loss or damage as a result of the conduct of the defendant.
 - Closed: where, in addition, a group member must have entered a funding agreement with a particular litigation funder.

>> Defining the class – an example

Pearson v State of Queensland [2017] FCA 1096 at [1]:

“... A class member is any person who, during all or part of the period from 12 October 1939 to 4 December 1972 (the **Claim Period**):

(a) was or was deemed to be an Aborigine or a Torres Strait Islander (**Islander**) under one or other of *The Aborigines Preservation and Protection Act of 1939* (Qld), *The Aborigines’ and Torres Strait Islanders’ Affairs Act of 1965* (Qld), *The Torres Strait Islanders Act of 1939* (Qld), *The Aborigines Regulations of 1945* (Qld), *The Islanders Regulations, 1946* (Qld) or *The Aborigines’ and Torres Strait Islanders’ Regulations of 1966* (Qld) (the **control legislation**);

(b) lived in an area proclaimed or deemed to be a District or on land defined to be missions or reserves under the control legislation;

(c) was in paid employment arranged or entered into under the control legislation;

(d) had the whole or part of his or her wages taken, retained or otherwise paid by the employer to the Protector of Aborigines (including the Protector of Islanders) or to the superintendent of the reserve or mission in which he or she lived;

(e) has not been given the money so taken, retained by or paid to the Protector or superintendent as his or her wages;

(f) claims equitable relief and/or the payment of compensation in that regard; and

(g) as at the date of filing the Amended Statement of Claim (17 March 2017), has entered into a litigation funding agreement with the litigation funder, Litigation Lending Services Ltd (LLS).”

>> Commercial and strategic considerations – at commencement

> Why commence with an open class?

- When it is not possible to identify or contact a potential class member prior to the proceedings being issued.
- Reduces the possibility of a competing class action being filed.
- Allows defendant/s to understand potential scope of liability of the proceedings.

> Why commence with a closed class?

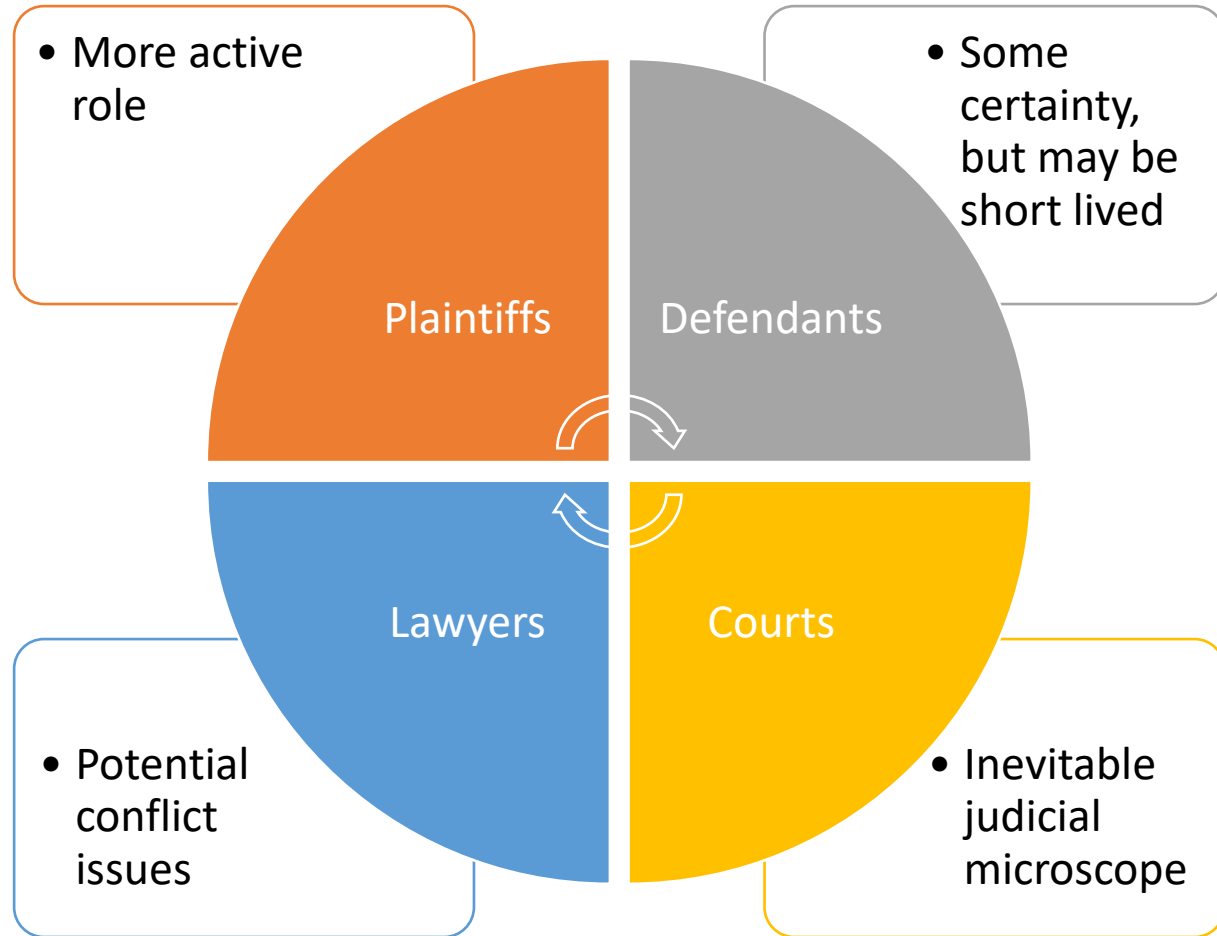
- Participation only by class members that wish to be involved.
- Greater similarity between claims may strengthen the case overall, reduce costs and take less time.
- Greater certainty as to claim size which assists in predicting costs, and accurately negotiating a settlement.

>> **Commercial and strategic considerations – for settlement**

> How does class closure facilitate settlement?

- Provides certainty to parties in discussing settlement figures
- Allows decision-makers to calculate exactly who is being paid what

>> Practical considerations



>> How do you close the class?

> Option 1: Formal amendment.

- Excluded persons cannot pursue a claim through the class action.
- But their claims are not extinguished and can be pursued in separate proceedings.

> Option 2: Notice and registration process.

- Soft closure: All group members (including unregistered) bound by any settlement, but unregistered members continue to participate in proceedings if no settlement achieved.
- Hard closure: Unregistered group members' rights extinguished, even if no settlement achieved.

>> **Traditional approach to class closure**

- > Established caselaw in Federal Court & Victoria
- > Primary considerations:
 - Desirability of settlement vs. locking participants out
 - Whether it is in the interests of the parties and the litigation as a whole, having regard to:
 - the point the case has reached;
 - the attitude of the parties; and
 - the complexity and likely duration of the case.

>> Recent controversy: Power to make class closure orders

- > Uncontroversial in Federal Court & Victoria
 - FCA, s 33ZF.
 - *Supreme Court Act 1986 (Vic)*, s 33ZG.
- > Recent NSWCA authority calls this into question:
 - *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66 (22 April 2020)
 - *Wigmans v AMP Ltd* [2020] NSWCA 104 (4 June 2020)

>> Implications of *Haselhurst*

- > Does not prevent class closure after settlement as part of approval process:
 - *Inabu Pty Ltd v CIMIC Group Ltd* [2020] FCA 510.
 - *Fisher v Vocus Group Ltd* [2020] FCA 579.

- > But settlement may become more difficult as quantum more uncertain

- > Alternative strategies to facilitate settlement
 - Class closure by amendment
 - Leave class open and manage risks through settlement terms

>> Key takeaways

- > Class actions are a useful tool, and still evolving
- > Everybody has an interest in certainty and finality—plaintiffs, defendants, funders
- > Class closure can be a means to obtain that, but Courts may be reluctant to take that step without their own baseline level of certainty

>> Key takeaways



Planning is bringing the future into the present so that you can do something about it now.

— Alan Lakein —

> If you don't consider, at the outset, the practical steps and issues that may arise in an action, the action is less likely to be conducted efficiently and may negatively impact the outcome.

AZ QUOTES

>> Questions?



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