University of New South Wales Law Research Series

Research Paper #6: 19 November 2020

Class Action Remedies: Cy-près; ‘An Imperfect Solution to an Impossible Problem’

PETER CASHMAN AND AMELIA SIMPSON

[2020] *UNSWLRS* 67

UNSW Law
UNSW Sydney NSW 2052 Australia

E: unswlrs@unsw.edu.au
W: http://www.law.unsw.edu.au/research/faculty-publications
AustLII: http://www.austlii.edu.au/au/journals/UNSWLRS/
SSRN: http://www.ssrn.com/link/UNSW-LEG.html

Research Paper #6: 19 November 2020

***Class action remedies: cy-près*; 'an imperfect solution to an impossible problem'**[1]

Peter Cashman[2] & Amelia Simpson[3]

> *The legal doctrine of* cy-près *is neither new nor radical, yet it has rarely been used by the Australian courts. Its power to do good—to help right wrongs—is immense and virtually untapped in the Australian marketplace*.[4]

There are many circumstances in which unlawful conduct may result in the 'unjust enrichment' of wrongdoers at the expense of a multitude of consumers, customers, investors and other members of the community.

This may encompass, inter alia, impermissible fees or charges by financial institutions or other service providers; increased prices as a result of price fixing; misleading and deceptive representations in relation to consumer goods; defective or unsafe products; inflated share prices as a result of non-compliance with continuous disclosure obligations; or fraudulent conduct.

Very often, those affected will not seek or obtain a remedy notwithstanding the availability or pursuit of class action proceedings.

Even where a class action is pursued, a variety of informational, attitudinal, procedural, evidentiary and legal obstacles will preclude relief to many if not most individuals.

Such obstacles include:

- ignorance on the part of those who have suffered a loss that they have been a victim of unlawful conduct
- a lack of awareness of the availability of a remedy for the loss suffered
- a disinclination to seek recovery of relatively small individual losses
- the disincentive arising out of potential transaction costs
- classes confined, either at the commencement or conclusion of proceedings, to those who 'opt in' or register their desire to participate
- class definitions limited, ab initio, to a subset of those who have causes of action
- legal requirements for proof of individual causation
- the substantive law in respect of the causes of action
- legal constraints on the aggregate assessment of damages
- evidentiary problems in proving or quantifying the loss suffered
- uncertainty as to (or the absence of) the availability of *cy-près* remedies.

---

[1] Comment by (an unnamed) judge made at the Fluid Recovery and *Cy-près* Relief Symposium, held at the University of San Francisco, 30 October 2010, quoted in the Symposium Report: *Litigation, Settlement and the Public Interest: Fluid Recovery and Cy-près Relief* (March 2011) <http://www.publichealthtrust.org/docs/USF-PHI%20Cy%20Pres%20Symposium%20Report.pdf>.

[2] Barrister, 3 Wentworth Chambers; Adjunct Professor of Law, University of New South Wales.

[3] Solicitor; Research Assistant.

[4] Louise Sylvan, *Cy-près: The Next Best Thing?* (2003) Choice www.choice.com.au/goArticle.aspx?id=103708>

Thus, notwithstanding the availability and extensive use of class actions in Australia, substantial numbers of persons who suffer loss and injury are not compensated.

This lack of 'access to justice' is explicable but troubling. While it cannot be realistically expected that there be universal enforcement of legal rights, there are some areas where improvements can and should be made.

As Cotterell has observed, the notion of access to justice has different theoretical, philosophical and policy dimensions:

> The term 'access to justice', as used in social policy and law reform contexts, has primarily meant two things in liberal democratic countries: (i) access to consistent, timely, fair and enforceable dispute resolution by state legal institutions or associated processes, in circumstances where local, relatively informal solutions to conflict do not exist, or are inaccessible, ineffective or inappropriate; and (ii) the ability to assert legal rights effectively,… So access to justice has focused primarily on dispute processing, conflict resolution and legal rights – and generally on ability to access the benefits of the rule of law. This has been the typical meaning of the term among lawyers and activists whose attention is on the state legal system, their hopes pinned on it.'[5]

As he proceeds to note, there is an extensive and potentially unlimited range of 'justice seeking strategies. These include: improving knowledge of the law; procedural changes to improve access; legal substantive change; the differential treatment of populations to support disadvantaged or marginalised groups; justice claims made at a tangent to state law and, at a more radical level, pervasive legal and societal change.[6]

Within our analysis of the operation of the class action regime in Australia, our focus is more confined. In considering the remedies available in class action proceedings it is noteworthy that Australia has, with limited exceptions, not adopted a remedy that, although controversial, has become commonplace in class action litigation in the United States and Canada. We are referring to the use of *cy-près* remedies in circumstances where identification of class members and/or the distribution of compensation to individual affected class members may be impossible, impractical or unduly expensive.

Although on occasions the parties to class action litigation in Australia have agreed, as a term of settlement, to make payment to persons or entities not within the ambit of the class, this has been relatively rare. Moreover, the question of whether the Australian courts have power to order this form of relief (in the absence of agreement between the parties) is problematic. Before examining this in detail we refer to some recent Australian class actions, which illustrate various dimensions of the problem.

The Nurofen litigation

In the *Nurofen* litigation, a class action was commenced in the Federal Court on behalf of consumers who had purchased 'targeted pain relief' Nurofen over a five year period at a substantially higher price than the 'standard' Nurofen pain relief product. Both contained the same therapeutic ingredient. The case was intended as a 'test case' to determine whether some form of *cy-près* relief is available in the anticipated event that relatively few of those who had paid the increased price were likely to receive individual compensation in the event that liability was established.

[5] Roger Cotterell, 'Access to Justice, Moral Distance and Changing Demands on Law' (2019) 36 *Windsor Yearbook of Access to Justice* 193, 194.

[6] Ibid 195-196.

It was assumed that of those who had paid the higher price, only a proportion would be likely to be identified and individually come forward and claim compensation or reimbursement of the 'excess' amount of the price at the conclusion of the proceeding. Moreover, even those who wished to claim were likely to experience evidentiary problems in establishing their entitlement and in quantifying their loss. Nurofen was an over the counter product likely to have been purchased in circumstances where relatively few consumers would have retained receipts or other documentary evidence of purchases. Moreover, the relatively small quantum of compensable loss was unlikely to be pursued by many consumers and even motivated consumers were likely to be deterred by the transaction costs incurred in pursuing claims. Furthermore, individual notice was not possible and would have been disproportionately expensive in any event. Public notice was unlikely to bring the matter to the attention of most of the members of the class.

At the outset of the litigation, the issue of liability seemed relatively straight forward, at least to those acting for the applicant and class members. The causes of action relied upon gave rise to strict liability. Moreover, a civil penalty proceeding brought by the ACCC had succeeded and resulted in a substantial penalty,[7] which was increased on appeal by the Full Federal Court.[8]

In the successful appeal to the Full Court in respect of the allegedly inadequate penalty imposed at first instance, the Full Court noted, inter alia, that:

- the Nurofen that was said to be 'targeted' at four different types of pain was sold at about double the price of the 'standard' Nurofen which also provided a dose of 200mg of ibuprofen[9]
- contrary to the representations by the respondent, ibuprofen does not 'target' any particular type of pain. It treats all pain in precisely the same way and representations that it targets pain is inherently misleading[10]
- 5.9 million sales of the four 'targeted' pain relief products over five years, yielded revenue to the respondent of about $45 million
- millions of consumers were liable to be misled by the representations that each product was targeted to treat a particular type of pain when they were all identical products.[11]

In the class action the applicants sought the following relief:

- damages pursuant to the *Australian Consumer Law* (ACL) [12]
- various declarations in respect of failure to comply with statutory guarantees and misleading and deceptive conduct[13]
- an award of damages in an aggregate amount[14]

---

[7] *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424. Edelman J had previously determined liability in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 4)* [2015] FCA 1408.

[8] *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181 (Jagot, Yates and Bromwich JJ).

[9] Ibid [5].

10 Ibid [6].

11 Ibid [7].

12 Pursuant to ss 236 or 271.

13 Pursuant to ss 18, 33, 56 and 59 of the ACL.

14 Pursuant to ss 33Z(1)(e) and/or s 33Z(1)(f) and/or s 33ZF and/or s 23 of the *Federal Court of Australia Act 1976* (Cth). This was a case where the total amount received by the respondent from the sale of the higher price 'targeted ' pain relief Nurofen could be quantified on the basis of the respondents records. In the Queensland floods class action litigation there is a pending application for an award of damages in an aggregate amount. See *Rodriguez & Sons Pty Limited v Queensland Water Supply Authority t/as Seqwater (No 25)* [2020] NSWSC 1544.

- an order making provision for the establishment of a fund and for payment or distribution of money to group members who made claims within a specified time[15] (after the publication of notice)
- that in the event that there was money remaining in the fund after the determination and payment of claims of eligible group members and the funding commission sought by the funder, an order that such money be allocated in such manner as the court considers appropriate or necessary to ensure that justice is done in the proceeding.[16]

It was proposed that such residue be paid to a pain relief medical organisation. The respondent contended, inter alia, that:

- the applicants and each class member would have to prove individual reliance as a precondition to entitlement to compensation
- the representations in relation to 'targeted' pain relief were not misleading or deceptive
- there was no breach of the statutory guarantees
- the Court lacked power to make (or in the exercise of its discretion should not make) an award of damages in an aggregate amount
- the Court lacked power to make the other orders sought by the applicants
- In the event that the Court had such power(s), the legislation purporting to confer such power(s) effects an acquisition of property otherwise than on just terms, contrary to the limitation imposed by s 51(xxxi) of the *Constitution* or imposes a tax in a law dealing with matters other than taxation and is therefore invalid.

The response of the applicants to these contentions need not be addressed for present purposes.

The matter proceeded for a period of almost two years during which time there were a variety of interlocutory battles, including: an (unsuccessful) application for orders to close the class and require those class members seeking compensation to register their interest within a specified time; an (unsuccessful) application for security for costs and a (successful) application to recuse the judge on the grounds that she was a member of the Full Court which had increased the civil penalty.

The matter resulted in a settlement agreement on the eve of the scheduled trial. This was subsequently approved by Nicholas J of the Federal Court.[17] Under the terms of the settlement, a settlement fund in the sum of $3.5 million was established to facilitate the payment of timely claims by class members; the legal costs incurred by the applicants were to be paid on top of, rather than out of, the settlement fund; claims were to be assessed by an independent accounting body; claims could be paid without proof of purchase of Nurofen; subject to the overall cap, claims could be paid in full but a reduced percentage (of 20%) would be paid to the litigation funder; the premium for adverse costs insurance was paid in addition to the amount of the fund; any interest earned accrued to the fund. However, any residue in the fund after the payment of approved timely claims was to be returned to the respondent.

Thus, the matter was resolved without resolution of the 'test case' issues which were sought to be determined in the litigation. Relatively few of those who paid the higher prices for the 'targeted' pain relief Nurofen obtained compensation. Such instances where substantial numbers of indeterminate individuals suffer economic loss or other forms of compensable loss or injury without obtaining a remedy are not uncommon.

---

[15] Pursuant to ss 33Z(2) and 33ZA of the *Federal Court of Australia Act* 1976 (Cth).
[16] Pursuant to s 33ZF and/or s 23 of the *Federal Court of Australia Act* 1976 (Cth).
[17] *Hardy v Reckitt Benckiser (Australia) Pty Limited (No 3)* [2017] FCA 1165.

The Volkswagen 'clean diesel' litigation

At the other end of the spectrum are cases where those who have suffered loss are readily identifiable and where the individual losses are more substantial. However, in many such cases the majority of class members still do not recover compensation even where class action proceedings result in a successful outcome.

The recent Volkswagen 'clean diesel' class action proceedings illustrate this dimension of the problem of under-compensation. In late 2015 five class actions were commenced on behalf of approximately 100,000 Australian consumers who had purchased diesel cars. The proceedings were vigorously contested until late 2019 when a settlement agreement was reached between the parties. This was approved by Foster J in early 2020.[18]

Under the terms of the settlement, the respondents agreed to pay all of the legal costs incurred by the applicants in all class action proceedings, together with an amount of up to $120 million as the total settlement amount to be paid to eligible group members. All 100,000 consumers who purchased the affected vehicles were eligible group members. However, in order to be eligible to receive compensation group members had to register a claim, and provide evidence of eligibility, within a specified time frame. Only about 40% of eligible group members did so. Moreover, this was a settlement fund capped at the amount of approximately $120 million even if all eligible group members submitted timely claims. Thus, an increase in the number of eligible claimants (above the upper threshold amount for payment by the respondents) would have reduced the individual compensation payments to class members.

It is not clear why only less than half of those entitled to compensation made timely claims. This lack of compensation for the majority of eligible class members needs to be considered in light of the concurrent proceedings brought by the ACCC which resulted in a pecuniary penalty of $125 million.[19]

The class action and other litigation following invalid tobacco license fee legislation.

A multitude of examples may be given to illustrate the need for some form of *cy-près* remedy. The class action, representative proceedings and group litigation over amounts paid by tobacco consumers in respect of tobacco license fees is illustrative of such need.

Following the decision of the High Court[20] that the NSW state law imposing licence fees[21] was invalid as such fees were duties of excise within the meaning of s 90 of the *Constitution* a somewhat unseemly dispute arose between tobacco wholesalers and retailers as to who should keep the money. Such money had previously been paid by consumers (as part of the price paid to retailers for tobacco products) and passed on by retailers to tobacco wholesalers but had not found its way to the state revenue authority.

As between the tobacco wholesalers and the retailers, it was determined by the High Court[22] that the retailers were entitled to a return of the money passed on to wholesalers (but not as yet remitted to the relevant taxing authority). Notwithstanding this, the wholesalers held on to very substantial sums which led to a proliferation of litigation.

---

[18] *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637.
[19] *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166.
[20] *Ha v New South Wales* (1997) 189 CLR 465.
[21] *Business Franchise License (Tobacco) Act 1987* (NSW).
[22] *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516.

A commercial litigation funder (then known as) IMF signed up a very large numbers of tobacco retailers to funding agreements and funded various group proceedings in the Commercial Division of the NSW Supreme Court. Other claims against tobacco wholesalers were pursued both individually and by way of a representative action in the NSW Supreme Court. This went on appeal to the NSW Court of Appeal and to the High Court following challenges, including on the grounds of alleged abuse of process.[23]

The representative action[24] was instituted at the behest of the commercial firm 'Firmstones'. In pursuing claims on behalf of individual retailers Firmstones sought a success fee of one third of any money received by retailers from tobacco wholesalers. However, in view of concern at the imminent expiration of the limitation period for pursuing claims a representative action was commenced for the purpose of recovering money on behalf of retailers who had not made claims. A class action was commenced on behalf of consumers seeking recovery of the money from retailers and wholesalers.

The group actions funded by IMF resulted in settlements pursuant to which substantial amounts were paid by the wholesalers to the retailers. The representative action (by majority) survived the challenge to the funding arrangements (and became a seminal case). However, the majority in the High Court held that the representative action rule was not validly engaged. The class action brought on behalf of consumers was struck out because of various idiosyncratic factual complications.

The amount of revenue collected and held by the tobacco wholesalers , which became the subject of this tripartite forensic tug of war, was in respect of license fees collected by retailers from consumers and passed on to wholesalers and not remitted to the taxing authority in respect of a limited time frame. As it would have been impossible for any individual consumer to establish that the amount(s) that they paid for tobacco products were in respect of this particular time frame, the class action seeking recovery of this money was unable to facilitate a refund to any particular identifiable consumers. Hence it was struck out by Windeyer J.[25] An application for special leave to appeal to the High Court against a decision of the Court of Appeal of New South Wales refusing leave to appeal to that court from a decision of Justice Windeyer at first instance was refused in April 2004. According to Gleeson CJ: 'the decision of Justice Windeyer was a discretionary decision, based on the view that it was inappropriate to allow the action to proceed by or against represented parties. The learned judge gave leave to re-plead on the basis that ... [the] client could proceed with an individual action. There are insufficient prospects of success of an appeal against the decision of the Court of Appeal to warrant a grant of special leave to appeal to this Court, and the application is refused with costs.'[26]

Thus, the consumers who had in fact paid the license fees in question were not entitled to any redress whereas the retailers who brought proceedings or claims against the wholesalers were largely successful in obtaining much of the money in question. This was a windfall for them as they had merely been the conduit through whom the money had been obtained from consumers and passed on to the wholesalers in the expectation that it would ultimately end up in the hands of the relevant state and territory revenue authorities. The funds that were not remitted to the retailers remained in the possession of the wholesalers, which was, of course, also a windfall for them.

---

[23] *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* 229 CLR 386*.* There were, in fact, 7 separate proceedings.

[24] Under Pt 8 r 13 of the *Supreme Court Rules 2005* (NSW).

[25] See: *Myriam Cauvin v Philip Morris Limited* (ACN 004 694 428) (Including as representative of the Companies set out in Schedule 1 of the Statement of Claim) & Ors [2003] NSWSC 631 (Bell J) (striking out parts of the statement of claims); *Cauvin v Philip Morris Limited* [2002] NSWSC 736 (Windeyer J); *Cauvin v British American Tobacco Aust Services Ltd* [2002] NSWCA 253.

[26] [2004] HCATrans 093.

The only beneficiaries of this protracted litigious saga were the somewhat undeserving wholesalers and retailers, the lawyers who conducted the proceedings and the commercial litigation funders who bankrolled the exercise.

1.1 The remedy problem[27]

As noted above, there are a variety of complex reasons why many of those who suffer loss and injury do not recover compensation notwithstanding the availability or pursuit of class actions. In such circumstances, an important public interest question arises as to whether there should be some legal or procedural mechanism available in Australia to require those who have been unjustly enriched to disgorge the amount unlawfully obtained and to facilitate payment of some or all of this amount for the benefit of the class of persons who have suffered loss, or in some other manner.

In this Research Paper, we focus on one possible 'solution' to part of this bigger problem: the need for and the potential availability of *cy-près* remedies.

1.1.1 Origins of *cy-près* remedies

Cy-près principles developed in the context of charitable trusts.[28] Where it may be impossible or impracticable to give effect to the declared intention of a donor, courts are empowered[29] to give effect as near as is possible to that intention to prevent the donation from failing altogether.[30]

For example, where a disposition is directed to a charitable purpose which cannot be fulfilled in the precise manner stated but the trust instrument manifests a 'general charitable intention',[31] the court can order its application for a purpose that is closely aligned with the donor's declared intention. Similarly, where funds are applied for a specific charitable purpose which later fails, or where the original charitable purpose is fulfilled but some monies are remaining, the courts can employ *cy-près* principles to obtain the 'next best' outcome. In some jurisdictions, legislation vests the Attorney-General with the power to seek orders for the establishment of *cy-près* schemes in limited circumstances.[32]

1.1.2 *Cy-près* in the context of litigation

This 'next best' approach to the application of funds has been adapted to the litigation context. As noted by Higgins:

> *Cy-près* solutions may serve many ends. Compensation of wronged parties may be effected by a class action where private actions will be prohibited by the disproportionate legal and

[27] Parts of the Research Paper are adapted from work carried out by the first author for the Victorian Law Reform Commission in the course of its Civil Justice Review and originally published as part of the *Civil Justice Review Report*, 2008.

[28] See generally Rachael Mulheron, *The Modern Cy-près Doctrine: Applications & Implications* (Taylor & Francis, 2006) ch 3.

[29] Either under the general law or statutes such as the *Charities Act 1978* (Vic) s 2.

[30] On the relationship between the general law and statute, see *Aston v Mount Gambier Presbyterian Charge* [2002] SASC 332.

[31] See Butterworths, *Halsbury's Laws of Australia*, vol 4 , 75 Charities '2 General Charitable Intention' [75-605]–[75-610].

[32] See, e.g., *Charities Act 1978* (Vic) s 4(3).

> administrative costs of action. A subsidiary concern as regards compensation is the preservation of intra-class equity. Demographic and socioeconomic factors may militate against recovery by certain sectors of affected consumer classes. Barriers of information, education and access may prevent direct recovery by parties who would nonetheless be able to enjoy indirect compensation through the administration of a *cy-près* mechanism.
>
> Goals of disgorgement/punishment can be achieved through *cy-près* —the defendant is not allowed to retain illegally obtained profits merely through the subtlety and dispersion of the illegal means. Associated deterrent ends can similarly be achieved through demonstrating that wrongdoers will be prevented from retaining illegal profits. The purposes to which residual funds are then put can further achieve these ends through educational and litigation uses.[33]

Cy-près principles have some utility in class action proceedings, given the difficulties that can attend the quantification and/or distribution of damages in such cases. In consumer class actions, classes are often large and diverse and potential returns to individuals are often small.[34] In these circumstances, it is difficult to ensure compensation of the class. For example:

> Certain trade practices violations, though flagrant, may have dispersed and de minimis effects that present barriers to consumer action. A horizontal price fix that results in an incremental $2 rise in the price of a consumer good over a 12 month period is unlikely to warrant any individual cause. However, across a wide class, nugatory individual effects may aggregate to a significant total abuse.[35]

One Canadian author notes that direct compensation of consumers or class members can be cost prohibitive or impossible for a variety of reasons, including a lack of records, difficulty in locating class members, the expense associated with extensive notice campaigns, and class member complacency.[36]

As one United States court noted in approving a settlement:

> *Cy-près* is the only way to avoid having the unclaimed funds…revert to [the defendant], escheat [i.e. forfeit or transfer] to the government, or provide a huge windfall to the few [class members] who filed claims.[37]

The focus of class action law in Australia has been primarily, if not exclusively, on compensation where losses of individuals can be clearly identified and proved. Also, most class action reform has been merely procedural in nature with little if any change to existing legal rights or remedies. Disgorgement, punishment and deterrence have not been traditional aims of the Australian regime. This means that, where it is impossible or impracticable to compensate people directly, defendants will be able to keep the profits or benefits obtained because of their unlawful conduct.

In class actions, there are two distinct situations in which *cy-près* principles may have some use. First, to deal with the undistributed residue of a judgment or settlement, to prevent its reverting to the defendant. Secondly, to deal with a situation in which it is impossible or impracticable, uneconomic or

---

[33]Ruth Higgins, 'The Equitable Doctrine of Cy-près and Consumer Protection' (2002) *The Trade Practices Act Review* <www.tpareview.treasury.gov.au/content/subs/105_Attachment1_ACA.rtf>.

[34] Ibid 2.

[35] Ibid 1.

[36] Jasminka Kalajdzic, 'Public Goals by Private Means & Public Actors Protecting Private Interests: A Response to Professor Jones' (2013) 53 *Canadian Business Law Journal* 371.

[37] *In re Heartland Payment Systems Inc Customer Security Breach Litigation* (S.D. Texas) 851 F.Supp.2d 1040 (2012). The class comprised over one hundred million payment-card holders.

otherwise inappropriate to distribute direct compensation to individuals who have suffered loss or damage from unlawful conduct, but where it is possible to calculate aggregate damages for the group.

Mulheron has described the *cy-près* doctrine as 'one of the most variable points of comparative class actions jurisprudence', resulting from differing philosophies as to the objectives class actions should serve.[38] In some overseas jurisdictions, such as the US and Canada, the use of *cy-près* schemes in both situations is well established. As Mulheron notes:

> The notion underpinning class actions *cy-près* is that where a judgment or settlement has been achieved against a defendant, and where distribution to the class of plaintiffs who should strictly receive the sum is 'impracticable' or 'inappropriate', then (subject always to court approval) the damages should be distributed in the 'next best' fashion in order, as nearly as possible, to approximate the purpose for which they were awarded.[39]

The principles may be applied in the form of 'price rollbacks', whereby the residue is used reduce the cost to *future* purchasers of the defendant's goods or services.[40] This may also be in the form of coupons provided to identified class members. However, this form of relief may be considered problematic. It means that class members will have to buy from or deal with the defendant to take advantage of the class action award. Moreover, a general reduction in future purchase will likely mean that those who suffered losses are not compensated, while future purchasers who have not suffered losses gain the benefits of the action. It is also possible that defendants will 'internalise' losses during the relevant time period.[41]

Furthermore, the damages may effectively subsidise the defendant and give them a competitive price advantage. This last disadvantage was referred to in a United States antitrust case involving jeans:

> [T]his method is not appropriate in non-monopoly markets like the jeans market since it compels consumers to collect their refunds by making further purchases of the defendant's products, to the detriment of the defendant's competitors.[42]

The second form of *cy-près* relief, ordered where direct compensation of the class is not possible or practicable, is the distribution of monies to nominated organisations which have interests or aims that are judged to be aligned with those of class members.[43] This can be said to confer some indirect benefit on the class.

However, in some instances the connection between class members and the ultimate recipients under a *cy-près* distribution has been slight. This risks damaging public confidence in the integrity of the courts, and has led to criticism of *cy-près* principles, as discussed below.

1.2 *Cy-près* in other jurisdictions

1.2.1 United States

[38] Rachael Mulheron, *Class Actions and Government* (Cambridge University Press, 2020) 351.
[39] Mulheron (n 28) 215.
[40] Ibid 218. See also the examples at 219–20.
[41] Ibid 220–1.
[42] *State of California v. Levi Strauss & Co.,* 715 P.2d 564, at 572 (Cal. 1986).
[43] Ibid 222. See also *Catala v Resurgent Capital Services LP* (Civil No.08cv2401 NLS, S.D. California, June 22, 2010) in which the parties agreed that the defendant would make only *cy-près* distributions to third parties because of the high administrative costs of facilitating payments to class members. The settlement was approved by the court.

Most class actions at federal level in the United States are governed by rule 23 of the *Federal Rules of Civil Procedure*.

Rule 23(e)(1) requires that the courts give preliminary approval of proposed settlement before notice of it is given to the class. If the proposal would bind class members, there must be a hearing and court finding that it is 'fair, reasonable, and adequate' according to specific criteria about which the parties must provide the court with information. Among those criteria, the adequacy of relief must be considered, including 'the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims'.[44] The Advisory Committee note to the December 2018 amendments to Rule 23 set out a non-exhaustive list of details which the parties should provide to the court to satisfy their obligations under Rule 23(e)(1). The Advisory Committee stated: 'Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.'[45]

As there is no express reference to *cy-près* distribution:

> it is by virtue of judicial innovation that the United States possesses the most developed *cy-près* jurisprudence relevant to class actions—although it is fair to say that the application of *cy-près* in this context has received quite a mixed reception among American courts.[46]

There has been a degree of ambivalence among some members of the judiciary in the United States about the appropriateness of some forms of *cy-près* relief and the frequency with which it should be employed by the courts.[47]

However, it is clear that *cy-près* distribution is permissible where it occurs pursuant to a settlement agreement between the parties.[48] This is, of course, subject to judicial approval of the terms of settlement. In some instances, courts have taken an active role in advertising for applications from potential recipients for the residue resulting from settlement agreements.[49] Mulheron notes that *cy-près* relief is more commonly applied to unclaimed residues but the 'distribution of the entire settlement or judgment sum is not precluded in practice'.[50]

This appears to be, however, a rare occurrence. According to one American scholar on class actions, the federal courts approve approximately one such 'full c*y-près*' a year and, up to 2018, there were likely fewer than twenty such settlements approved.[51] As Rubenstein notes, full c*y-près* distributions are rare and occur in narrow class action contexts, where statutory caps on damages or large class sizes render

---

[44] *Federal Rules of Civil Procedure* Rule 23(e)(2)(C)(ii).

[45] See Rhonda Wasserman, 'The New, Improved Class Action Rule: The December 2018 Amendments to Rule 23' (2019) 90 *Pennsylvania Bar Association Quarterly* 182 <https://ssrn.com/abstract=3471949>. As noted by Marcus, this appears to reflect a 'minimalist' view of *cy-près,* which should be employed only when there is a residue and additional payments are not possible because of distribution costs or the inability to identify class members*:* Richard Marcus, 'Revolution v Evolution in Class Action Reform' (2018) 96 *North Carolina Law Review* 903, 933-4.

[46] Mulheron (n 28) 236.

[47] Ibid 238, quoting *Mace v Van Ru Credit Corp*, 109 F 3d 338, 345 (1997).

[48] See, e.g., *In re 'Agent Orange' Product Liability Litigation*, 818 F 2d 179, 185 (1987) (noting the wider latitude available to courts where cases settle).

[49] See, e.g., *Superior Beverage Co v Owens–Illinois*, 827 F Supp 477, 478 (ND Ill, 1993).

[50] Mulheron (n 28) 242–4. It is not clear whether a *cy-près* distribution can be ordered for the entirety of the settlement or judgment in the absence of the parties' consent.

[51] Professor William B. Rubenstein as Amicus Curiae Supporting of Respondents at 11-13, *Frank v. Gaos*, 138 S. Ct. 1697 (2018) (No. 17-961) 3, 6, 12-13 <https://www.supremecourt.gov/DocketPDF/17/17-961/62679/20180905110304553_Rubenstein%20Amicus%20Brief%20and%20Appendix.pdf>.

any meaningful distribution unworkable.[52] Where they do occur, they are subject to extensive scrutiny by the courts and are often awarded alongside injunctive relief which is of benefit to class members.[53]

According to Redish et al, there appears to have been an increasing incidence of *cy-près* distributions in class action settlements in recent years in the United States.[54]

Yet, as Rubenstein notes:[55]

> …there is something of a trend away from *cy pres*. In 2010, the American Law Institute issued an influential report supporting *pro rata* redistribution over *cy pres*, thereby relegating *cy pres* to a secondary position to be used only when more redistribution is no longer feasible. Many courts have adopted this approach; none have rejected it. Moreover, appellate courts have increasingly put restrictions on the use of *cy pres*, particularly in insisting that the *cy pres* recipients truly serve interests related to the class's causes of actions; this nexus requirement—and the mechanics of *cy pres*—are discussed in the following sections. Alongside this reining in of *cy pres*, a host of state legislatures have gone in precisely the opposite direction by enacting specific rules concerning the distribution of residual class action funds which not only encourage the use of *cy pres*, but encourage that the monies be sent to organizations with no necessary nexus to the class's case; though the particulars differ, the rules all aim to direct funds via *cy pres* to organizations providing legal services to the indigent (and/or to organizations working in the class's interests).

While there is no guidance in Rule 23 about the use of *cy-près,* the American Law Institute (ALI) *Principles of Aggregate Litigation* have been referred to with approval by U.S. courts.[56] The *Principles* state that a *cy-près* award is appropriate only where individual class members cannot be identified through appropriate effort, the amounts are not sufficiently large to make individual distributions economically viable, or there is some residue left after the class been able to make a claim.[57] The Principles recognise the deterrent function of class actions in the US.[58] The preference of the ALI for distribution of the residue of funds to identified class members *pro rata* appears to be increasingly adopted by the courts.[59]

According to Mulheron, there is a level of inconsistency in judicial approaches to the nexus required between the loss or damage to which the class action was directed and the aims or objectives of *cy-près*

---

[52] Ibid 15-16.
[53] Ibid.
[54] Some empirical data which suggests such an increase are provided in Martin Redish, Peter Julia and Samantha Zyontz, 'Cy-près Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis' (2010) 62 *Florida Law Review* 617. More recently, a in brief by Rubenstein (n 51), Professor Rubenstein listed the cases in which the courts have approved full *cy-près* distribution.
[55] William Rubenstein, *Newberg on Class Actions* (June 2020 update) § 12:32 (5th ed.)
[56] Alon Klement and Robert Klonoff, 'Class Actions in the United States and Israel: A Comparative Approach' (2018) 19 *Theoretical Inquiries in Law* 151, 167, citing *Principles of the Law of Aggregate Litigation* § 3.07 (American Law Institute, 2010). Klement and Klonoff refer to a number of judgments in which the courts have adopted the principles, e.g., *In re Citigroup*, 2016 WL 4198194; *Klier v. Elf Atochem N. Am., Inc*., 658 F.3d 468 (5th Cir. 2011); *Better v. YRC Worldwide Inc*., No. CIV.A. 11-2072-KHV, 2013 WL 6060952 (D. Kan. Nov. 18, 2013). The authors compare the US with the Israeli Class Action Law of 2006, which expressly permitted *cy-près* remedies and set up a public fund.
[57] American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07 (Cy-près Settlements) 2010.
[58] Ibid.
[59] See, e.g., Rubenstein (n 51) 8.

recipients.[60] This is sometimes described by courts as a 'reasonable approximation' test involving consideration of a non-exhaustive list of factors, including 'the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reasons why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the *cy-près* recipient.'[61]

Rubenstein identifies five themes which emerge from the approach requiring a nexus between the harm which has been inflicted on the class and the *cy-près* distribution. First, courts have required a nexus between the recipient(s) and claims.[62] Second, courts have required that class actions which are national in scope must not be distributed solely within one state.[63] Similarly, organisations operating on a

---

[60] Mulheron (n 28) 270.

[61] *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir.2012).

[62] Rubenstein (n 55) § 12:33. Rubenstein cites, inter alia: *In re Lupron Marketing and Sales Practices Litigation*, 677 F.3d 21, 34–36 (1st Cir. 2012), cert. denied, 133 S. Ct. 338, 184 L. Ed. 2d 239 (2012) (an action related to overcharging for a drug, in which residual funds were distributed for the promotion of research into diseases treated by that drug); *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 707, 74 Fair Empl. Prac. Cas. (BNA) 525, 71 Empl. Prac. Dec. (CCH) P 44869 (8th Cir. 1997) (in which the residue from a racial discrimination case was distributed to a scholarship foundation for black students who resided in the same area as the class); *In re EasySaver Rewards Litigation*, 921 F. Supp. 2d 1040, 1050 (S.D. Cal. 2013) (an online privacy and data security case in which funds were distributed to law schools to fund internet privacy or data security education programs and academic positions); *In re LivingSocial Marketing and Sales Practice Litigation,* 298 F.R.D. 1, 7–9 (D.D.C. 2013), 2013 WL 6825561 (D.C. Cir. 2013) (a consumer fraud class action where the residue was distributed to two consumer advocacy organizations). Rubenstein cites examples of cases where *cy-près* distributions were not approved because the nexus was considered to be insufficient, including: *Dennis v. Kellogg Co*., 697 F.3d 858, 866, 83 Fed. R. Serv. 3d 461 (9th Cir. 2012) (where a *cy-près* donation of $5.5 million worth of food was not sufficiently connected to the concerns of consumer protection laws); *Nachshin v. AOL*, LLC, 663 F.3d 1034, 1041 (9th Cir. 2011) (where the residue from an online privacy case could not be distributed to a legal aid foundation which was not connected to the objectives of the laws involved); *In re Airline Ticket Com'n Antitrust Litigation*, 307 F.3d 679, 682, 2002-2 Trade Cas. (CCH) ¶ 73824 (8th Cir. 2002) (An antitrust case against airlines concerning caps on ticket commissions earned by travel agencies in which the residue could not be distributed to the National Association for Public Interest Law); and *Campbell v. First Investors Corp.,* 2012 WL 5373423, *7 (S.D. Cal. 2012) (an industrial relations class action in which a settlement was not approved which involved a *cy-près* distribution to a non-profit medical research organisation for children's health issues). One recent case in which the District Court refused to approve a *cy-près* settlement on the basis of the nexus between the claims (against a company that allegedly manufactured, distributed, and retailed jeans that were labelled as "Made in USA" but contained foreign-made components, in violation of state statutory provisions) and the various recipients (Step Up Women's Network, FIDM Scholarship, Race for the Cure, Juvenile Diabetes Research Foundation and Ability First) which did not relate to the goal of consumer protection is *Hofmann v. Dutch LLC,* 317 F.R.D. 566 (S.D.Cal., 2016).

[63] However, geographic factors may be more relevant where there is a significant sum to be distributed *cy-près.* See the decision of Justice Zouhary in *In re Polyurethane Foam Antitrust Litigation*, 178 F.Supp.3d 621 (N.D.Ohio, 2016), 624: 'This Court agrees that geographic scope can be a factor in the selection of a *cy pres* recipient, particularly where the *cy pres* distribution is substantial and offered *in lieu of* any recovery by class members. See, e.g.*, Nachshin*, 663 F.3d at 1037, 1040–41 (demanding *cy pres* recipients match geographic scope of nationwide class where class members received no money and *cy pres* amount totalled $110,000). But this is not such a case, as the *cy pres* distribution—assuming there is one at all—involves only residual, unclaimed funds amounting to less than $50,000 (Doc. 2010-1 at 3). In other words, the amount matters here, as does the fact that the *cy-près* funds are "leftovers." The scant *cy-près* amount contemplated in this case overrides any concern for matching the geographic scope of the class, and compels a recipient with a narrower focus where the impact of the donation will be greater.' See also *In re Easysaver Rewards Litigation*, 906 F.3d 747 (C.A.9 (Cal.), 2018), in which the Court of Appeals, Ninth Circuit upheld the District Court's approval of a *cy-près* distribution to recipient universities in one state in relation to an action against an internet retailer on behalf of a nationwide class (and despite three

national basis may be inappropriate for actions limited to class members within one state. Third, where no reasonably approximate recipient is identifiable, the court is able to approve distribution to entities with different interests or aims. Fourth, the court will scrutinise the proposed recipient to ensure that it is an established or reputable entity and the money will be used well. Finally, the court will not approve a settlement distribution to an entity with whom the parties, counsel or judge have a significant connection or prior relationship.

While most courts have required a relationship or nexus between the two, some have approved distributions to recipients without such a relationship or whose causes were not related to the purpose of the class action.[64] This can be viewed as a recognition among some judges of the flexibility of the equitable doctrine. For example, in *Superior Beverage Co v Owens–Illinois*, the Court stated:

> [I]n recent years, the [*cy-près*] doctrine appears to have become more flexible. Funds remaining in antitrust cases have been awarded to law schools to support programs having little or no relationship to antitrust law, competition or the operation of our economy. […] [W]hile use of funds for purposes closely related to their origin is still the best *cy-près* application, the doctrine of *cy-près* and courts' broad equitable powers now permit use of funds for other public interest purposes by educational, charitable, and other public service organizations, both for current programs or, where appropriate, to constitute an endowment and source of future income for long-range programs to be used in conjunction with other funds raised contemporaneously.[65]

In one case concerning price-fixing of race souvenirs,[66] the court approved the distribution of funds to numerous bodies covering a diverse range of charitable or benevolent causes, despite the objections of the defendants.[67] The court was of the view that '[t]he absence of an obvious cause to support with [undistributed or unclaimed] funds does not bar a charitable donation'.[68]

In another case,[69] the court allowed the undistributed remainder of a settlement fund to pass to a civil legal aid scheme which had only a tenuous connection to the litigation. However, the judge approving the settlement emphasised that as two decades had elapsed since the cause of action concerning alleged securities fraud arose, 'the passage of time has eroded any assumption that [securities fraud research or prevention] would benefit class members in any meaningfully additional way'.[70]

Mulheron suggests that this approach may mean that 'hunting for the "next best" application of the monies becomes a highly subjective and discretionary exercise, akin, perhaps, to a lottery or prize for

---

attorneys being alumni of those universities). The Court considered that the university programs would have a national impact on research on internet privacy and data security issues which were central to the claim.

[64] See, e.g. *Superior Beverage Co v Owens–Illinois*, 827 F Supp 477, 478– 80 (ND Ill, 1993); *In re Motorsports Merchandise Antitrust Litigation*, 160 F Supp.2d 1392, 1394 (ND Ga, 2001). See also Mulheron (n 28) 271–3.

[65] *Superior Beverage Co. v. Owens-Ill., Inc.,* 827 F. Supp. 477 (N.D. Ill. 1993) quoted by Albert Foer*, Enhancing Competition Through the Cy-près Remedy: Suggested Best Practices*, The American Antitrust Institute, March 2009, 15. Foer proceeds to offer some suggestions as to 'best practices' for courts, lawyers and state enforcement officials at 30-32.

[66] *In re Motorsports Merchandise Antitrust Litigation,* 160 F Supp 2d 1392, 1396–9 (ND Ga, 2001).

[67] The Make-A-Wish Foundation, the American Red Cross, Race Against Drugs (a nationwide drug prevention education program), Children's Healthcare of Atlanta, the Atlanta Legal Aid Society, the Georgia Legal Services Program, Kids' Chance (an organisation providing scholarships for children whose parents have been killed or incapacitated in workplace accidents), the Duke Children's Hospital and Health Center, the Lawyers Foundation of Georgia and the Susan G Komen Breast Cancer Foundation.

[68] At 1394, citing *Jones v National Distillers*, 56 F Supp 2d 355, 359 (SDNY 1999).

[69] *Jones v National Distillers*, 56 F Supp 2d 355, 358–9 (SDNY 1999).

[70] Ibid.

the most inventiveness.'[71] Nonetheless, this approach 'ensures the optimal use of scarce resources, and allows for a greater degree of pragmatism and flexibility.'[72]

United States courts have noted that the appropriateness of a distribution which lacks specificity, in circumstances where the class is diverse and numerous, may depend on the supervision exercised by the court. For example, in the *Agent Orange* litigation, the District Court had approved the establishment of an independent 'class assistance foundation … to fund projects and services that will benefit the entire class'[73] (which included Australian claimants). On appeal, the court considered that:

> [T]he district court must in such circumstances designate and supervise, perhaps through a special master, the specific programs that will consume the settlement proceeds. The district court failed to do so in the instant case. Instead, it provided that the board of directors of a class assistance foundation would control, inter alia, 'investment and budget decisions, specific funding priorities … [and] the actual grant awards … and that the court would retain only "[a] comparatively modest supervisory role" in such decision-making' … [W]hile a district court is permitted broad supervisory authority over the distribution of a class settlement … there is no principle of law authorizing such a broad delegation of judicial authority to private parties.[74]

In particular, the court highlighted that the proposed board would be under no obligation to consider the interests of the class as a whole and would be able to carry out activities which were inconsistent with the judicial function.

On the other hand, notwithstanding the need for judicial vigilance and supervision over court approved distributions, the scarcity of judicial resources may mean that it is not appropriate or possible for courts to be overly involved in the design and administrative implementation of settlements.

In some cases, judges have been critical of proposed *cy-près* settlement proposals. For example, in the Microsoft antitrust litigation[75] the proposed settlement would have established a charitable foundation funded by Microsoft with at least $400 million to be used for the purpose of providing computer technology to impoverished schools. As one author has observed:

> The court held that the distribution of computers and software by the foundation would favor Microsoft products, and would therefore have a detrimental effect on Microsoft's competitors: "The agreement raises legitimate questions since it appears to provide a means for flooding a part of the kindergarten through high school market, in which Microsoft has not traditionally been the strongest player (particularly in relation to Apple), with Microsoft software and refurbished PCs."[76]

As the same author notes, in the final settlement approved by the court the defendant was required to honour coupons for purchases made from its competitors.

Cy-près remedies in the United States generally fall into two general categories: 'earmarked escheat' and consumer trust funds:

---

[71] Mulheron (n 28) 273.This arbitrariness led to the argument (rejected by the court) that defendants should themselves be able to select the charities to receive the proceeds of *cy-près* distribution: *In re Motorsports Merchandise Antitrust Litigation*, 160 F Supp 2d 1392, 1395 (ND Ga, 2001).

[72] Mulheron (n 28) 274.

[73] *In re 'Agent Orange' Product Liability Litigation*, 818 F 2d 179, 184 (2d Cir, 1987) ('Agent Orange').

[74] *'Agent Orange'*, 818 F 2d 185 (2d Cir, 1987).

[75] *In re Microsoft Corp. Antitrust Litigation*, 185 F.Supp.2d 519 (D.Md.,2002.).

[76] Foer (n 65) 5 quoting from the judgment: 185 F.Supp.2d 519, 528 <http://works.bepress.com/albert_foer/1>.

> Earmarked escheat involves a governmental plaintiff. In governmental escheat the residue is directly deposited into a government agency's general fund, again “for use on projects that benefit non-collecting class members and promote the purposes of the underlying cause of action. The consumer trust fund approach aims at financing existing consumer protection organizations or creating a new organization: such institutions will be required to use the funds for the benefit of class members, consumers or those similarly situated, for instance by supporting lawsuits, lobbying, or other projects related to consumer protection and education.[77]

In the United States, the question of whether a *cy-près* distribution is permissible depends in part upon the legislative or other bases for the class action.[78]

In some jurisdictions state procedural rules address the types of entities that may receive *cy-près* distributions of funds not claimed by class members[79] or require that a certain proportion of residual funds be given to designated bodies.[80] Thus, in some states legal aid bodies are the designated recipients of some of the residual funds available *for cy-près* distribution. This was presumably intended in part to compensate for cutbacks in government funding.

As Hazard has noted, key cases involving *cy-près* settlements can be analysed in terms of trust law:

> A trust-based approach to class action settlements can offer a coherent understanding of *cy-près* under substantive law and the law of remedies, in which the relevant determination is how much money the defendant unlawfully accrued. Such a determination can be distinct from how much damage was done to class members of the class, but the two determinations are not mutually exclusive. This approach can provide a substantive basis for *cy-près*, and also can clarify whether *cy-près* – disgorgement – is an appropriate remedy.[81]

In antitrust cases, in addition to private class actions, a *parens patriae* action may be brought under legislation which permits state Attorneys General to bring actions for damages on behalf of the citizens of the state.[82]

As one author notes:

> The essence of the *cy-près* doctrine, … is that distributions should be made in a manner “as near as possible” to an immediate direct distribution. In the case law, it appears that while some *cy-près* distributions proposed to courts have adequately reflected this nexus between the injured

[77] Ibid 7-8.
[78] Ibid 11.
[79] For example, the *Code of Civil Procedure* in California reflects the legislatures stated goal to ensure that funds are distributed, to the extent possible, in a manner designed to further the purposes of the underlying causes of action or to promote justice for all Californians. Certain types of organisations are specified as potential recipients of funds. At a national level, organisations such as the Public Justice Foundation often receive distributions from *cy-près* awards. See also Mulheron (n 38) 343-4.
[80] For example, in Washington the state class action rule was amended to provide that no less than 25% of residual funds from a class action settlement be given to a private foundation that provides funding for statewide legal services. Similar provisions have been introduced by other states, including North Carolina.
[81] Summary of the paper presented by Professor Hazard at the Fluid Recovery and Cy-près Relief Symposium, held at the University of San Francisco, October 30, 2010, published in the Symposium Report: *Litigation, Settlement and the Public Interest: Fluid Recovery and Cy-près Relief* , March 2011 <http://www.publichealthtrust.org/docs/USF-PHI%20Cy%20Pres%20Symposium%20Report.pdf>. See generally, Geoffrey Hazard, ‘The Cy-près Remedy: Procedure or Substance?’ (2011) 45 *University of San Francisco Law Review* 597.
[82] Pursuant to section 4C of the *Clayton Act.*

class and the *cy-près* distribution; in other cases the nexus is remote or completely absent. Most courts correctly operate on the proposition that a nexus cannot be absent.[83]

The approval of class action settlements is an exercise of judicial discretion and appellate courts have adopted different perspectives and principles in deciding whether or not to overturn settlements approved at first instance.

In one case, the Third Circuit Court of Appeals overturned an anti-trust settlement and held that the trial court had abused its discretion by approving a charitable donation of undistributed settlement funds before determining the total value of the amounts claimed by class members.[84] The appellate court was of the view that the trial court did not have all of the necessary facts to enable it to determine whether the settlement provided sufficient direct benefits to class members before approving a *cy-près* award. The court held that a district court must specifically determine that a claims-made settlement incorporating a *cy-près* fund provides sufficient direct compensation to class members before granting final approval. According to the Third Circuit, a district court typically must find that the portion of the settlement distributed *cy-près* represents only a small percentage of total settlement funds.

Cy-près provisions have also been incorporated in a number of settlements involving alleged privacy violations by various companies providing services through the internet.

In November 2010, a Northern District of California judge approved a settlement in an Internet privacy class action arising out of Google Buzz's automatic sharing of users' Gmail contact lists. Google paid US$8.5 million to an 'independent fund', to 'support organizations promoting privacy education and policy on the web.' The lawyers for the class received 25% of the settlement fund to cover their legal fees and expenses. The settlement funds were likely to be tax-deductible and the donations were made to organisations such as the MacArthur Foundation and the Stanford Center for Internet and Society, which were allegedly already 'favored charities' of Google.[85]

A class action was also brought against Facebook arising out of an early problematic feature which automatically posted information on user's transactions to third party websites. Under a settlement agreement, Facebook agreed to pay $9.5 million into a *cy-près* fund to 'establish a charitable foundation' that would 'fund organizations dedicated to educating the public about online privacy'. A Facebook representative would be appointed to the Board of the new entity but affected class members would not receive any compensation. Class representatives received a small incentive payment and a quarter of the fund was paid to the lawyers acting for the class. Despite objections, the District Court approved the settlement as 'fair, reasonable, and adequate' under Rule 23(e)(2) of the *Federal Rules of Civil Procedure*.[86] A divided (2:1) panel of the Ninth Circuit dismissed the appeal.[87] A petition for rehearing *en banc* was denied, despite the dissent of six judges.[88]

---

[83] Ibid 13-14 (footnotes omitted).

[84] *In re Baby Products Antitrust Litigation Nos. 12-1165, 12-1166, and 12-1167,* 708 F.3d 163 (3d Cir. 2013). See David Balser et al., 'Are Cy-près Settlements Really Faux Settlements? Analyzing Recent Criticism of Cy-près Funds in Class Settlements' *BNA Class Action Litigation Report*, (Sept. 28, 2012).

[85] Article by Consumer Watchdog, 'GOOGLE INC: Consumer Watchdog Balks at Cy-près Recipients' 8 October 2013. Consumer Watchdog was one of the objectors to the settlement.

[86] *Lane v. Facebook, Inc*., Civ. No. C 08–3845, 2010 WL 9013059 (ND Cal., Mar. 17, 2010).

[87] *Lane v. Facebook, Inc.*, 696 F. 3d 811 (2012). Judge Kleinfeld began his dissent with the words: '*This settlement perverts the class action into a device for depriving victims of remedies for wrongs, while enriching both the wrongdoers and the lawyers purporting to represent the class.*'

[88] *Lane v. Facebook, Inc.*, 709 F. 3d 791 (2013).

Although the United States Supreme Court declined to grant leave to appeal, Chief Justice Roberts commented that the settlement raised matters of concern and indicated that the Court would soon need to address the appropriateness and fairness of *cy-près* settlements:

> Granting review of this case might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy-près* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on. This Court has not previously addressed any of these issues. *Cy-près* remedies, however, are a growing feature of class action settlements…[89] In a suitable case, this Court may need to clarify the limits on the use of such remedies.[90]

In 2018, the Supreme Court granted certiorari to determine whether a settlement involving a *cy-près* award 'but no direct relief to class members satisfies the requirement that a settlement binding class members be "fair, reasonable, and adequate".' The action, *Frank v Gaos*, was brought against Google alleging violations of the *Stored Communications Act* 18 USC § 2701 et seq and various state law provisions. The proposed settlement required that Google make certain disclosures online, distribute over $2 million of the proceeds to reimburse legal fees and other costs and distribute over $5 million to non-profit entities whose work indirectly benefits class members, in this case by research and advocacy for internet privacy. Lower courts had approved the settlement on the basis that individual class member returns were so small as to render the settlement non-distributable.[91] A large number of amici briefs were filed in the matter.[92] However, the Supreme Court did not decide the question. Instead, the matter was remanded to the Ninth Circuit on an unrelated issue of standing.[93]

A recent privacy class action settlement in similar terms to the settlement in *Frank v Gaos* was approved by the District Court.[94] That action alleged that Google alleging that it intercepted and stored private electronic communications transmitted by class members over unencrypted wireless internet connections in violation of statute. The class size of around sixty million people and the settlement

---

[89] Referring to the article by Redish, Julia and Zyontz (n 54) 653–656.

[90] *Marek v. Lane*, 134 S. Ct. 8, (2013) 9.

[91] *In re Google Referrer Header Privacy Litig*. 87 F. Supp. 3d 1122, 1128, 1132 (N.D. Cal. 2015). This was upheld by the Ninth Circuit: 869 F.3d 743 (9th Cir. Aug. 22, 2017).

[92] See, for example, Brief of Amicus Curiae American Association for Justice in Support of Respondents, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17- 961) <https://www.supremecourt.gov/DocketPDF/17/17-961/62748/20180905144817662_Frank%20v%20Gaos%20AAJ%20Amicus%20Brief%209%205%2018.pdf>; Brief of Law Professors as Amici Curiae in Support of the Respondents, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17- 961) <https://www.supremecourt.gov/DocketPDF/17/17-961/62721/20180905133154705_17-961%20bsac%20Law%20Professors.pdf>. For commentary on the case, see e.g., Linda Mullenix, '129 Million Class Members $0, Charities $6.5 Million, Attorneys $2 Million: Are Cy Pres-Only Settlements Fair, Adequate and Reasonable?' (October 29, 2018). Vol. 46(2) Preview of United States Supreme Court Cases 24, University of Texas Law, Public Law Research Paper, <https://ssrn.com/abstract=3272993>; Asher Cohen, 'Settling Cy Pres Settlements: Analyzing the Use of Cy Pres Class Action Settlements' (2019) 32 *Georgetown Journal of Legal Ethics* 451, 453-4; Bethany Caracuzzo, 'Where Do We Go from Here: Article III Standing and Cy Pres-Only Settlements in Privacy Class Actions in the Wake of Frank v. Gaos', (2019) 29 *Competition: J. Anti., UCL & Privacy Sec. Cal. L. Assoc.* 138.

[93] *Frank v Gaos* No 17-961; 139 S. Ct. 1041; 203 L. Ed. 2d 404 (2019).

[94] *In re Google LLC St. View Elec. Commc'ns Litig.,* No. 10-MD-02184-CRB, 2020 WL 1288377 (N.D. Cal. Mar. 18, 2020).

amount of $13 million USD, combined with the difficulty and costs involved in the identification of class members in this case, signified to the court that the fund was non-distributable. The court awarded a full *cy-près* distribution to, what the court considered to be, 'the most effective advocates for internet privacy in the country, meaning that the award was likely to yield actual improvements to internet privacy' as well as injunctive relief.[95] At the time of writing, the decision is on appeal to the Ninth Circuit.[96]

In another recent privacy settlement matter, the Court of Appeals for the Third Circuit stated that full *cy-près* settlements are not *per se* unfair for the purposes of Rule 23(e)(2), although the District Court had exercised 'cursory certification and fairness analysis' in the approval process, such that it should be vacated and the matter remanded back to the District Court.[97]

On recent developments in the US, Lee J commented in 2019:[98]

> The controversy in the United States as to whether, or in what circumstances, a class action which proposes a *cy-près* "award" that provides no direct relief to class members is consistent with requirements of class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate", is not a matter of present concern in this country. What is of relevance, is the acceptance of the principle that the doctrine has some application in distributing settlement funds which cannot practically be distributed.

One United States writer has made a number of suggestions for reform so as to ensure that *cy-près* distributions serve the best interests of the class:

> First, to align the interests of class counsel and the class, courts should presumptively reduce attorneys' fees in cases in which *cy-près* distributions are made. Second, to ensure that class members, potential objectors, and courts have the information they need to assess the fairness of a settlement that contemplates a *cy-près* distribution, class counsel should be required to make a series of disclosures when it presents the settlement for judicial approval. Third, to inject an element of adversarial conflict into the fairness hearing and to ensure that the court receives the information needed to scrutinize the proposed *cy-près* distribution, the court should appoint a devil's advocate to oppose the settlement in general and the *cy-près* distribution in particular. Finally, the court should be required to make written findings in connection with its review of any class action settlement that contemplates a *cy-près* distribution.[99]

As the author notes, and as the cases referred to above illustrate, *cy-près* may give rise to problems in practice.

One such problem is the risk of conflicts of interest. As noted by Professor Rose:

> In a proposed settlement, the parties might suggest as a *cy pres* recipient a charity that the judge is fond of, for example, in order to increase the likelihood the judge will approve the settlement without closely scrutinizing it for its fairness to class members. Or if a charity that class counsel is fond of stands to receive *cy pres* funds, she might not push as hard as she

[95] Ibid 13.

[96] *In re Google LLC St. View Elec. Commc'ns Litig*., No. 10-MD-02184-CRB, 2020 WL 1288377 (N.D. Cal. Mar. 18, 2020).

[97] *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, 934 F.3d 316 (C.A.3 (Del.), 2019) 326.

[98] *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196 [21].

[99] Rhonda Wasserman, '*Cy-près* in Class Action Settlements' (2014) 88 *Southern California Law Review* 97. See also Cohen (n 92). Cohen argues that *cy-près* settlements should be subject to a rebuttable presumption of invalidity to ensure adequate court scrutiny and address policy concerns connected to risks of conflict.

> otherwise would to increase the claims rate, or might even agree to an unfettered *cy pres* settlement despite the feasibility of a claims process.[100]

Proposed *cy-près* distributions have attracted criticism by United States appellate judges, including Judge Posner of the Seventh Circuit Court of Appeals.[101] Concerns have focused on (a) the nature of the proposed recipient of *cy-près* payments, (b) whether distribution to class members is not feasible and (c) the question of whether payments to persons other than class members, including by way of *cy-près* distributions, should be taken into account in determining the reasonableness of counsels fees.

In rejecting various terms of the terms of the proposed settlement of six class actions arising out of allegedly misleading representations concerning the dietary supplement glucosamine, Judge Posner also rejected the proposed *cy-près* payment of $US 1.13 million to the Orthopaedic Research and Education Foundation:

> The [Foundation] seems perfectly reputable, but it is entitled to receive money intended to compensate victims of consumer fraud only if it's infeasible to provide that compensation to the victims- which has not been demonstrated.[102]

Judge Posner was also critical of the clause in the settlement agreement which provided that any judicially mandated reduction in legal fees would result in the amount reverting to the defendant. As he observed:

> This is a gimmick for defeating objectors. If the class cannot benefit from the reduction in the award of attorney's fees, then the objector, as a member of the class, would not have standing to object, for he would have no stake in the outcome of the dispute. The simple and obvious way for the judge to correct an excessive attorney's fee for a class lawyer is "to increase the share of the settlement received by the class, at the expense of class counsel." *Redman v RadioShack Corp*., 768 F 3d at 632.[103]

Parallel with expression of judicial concerns have been academic and other[104] critiques of *cy-près* theory and practice. In a frequently cited article, Redish et al offer a number of legal and policy criticisms of *cy-près* awards.[105] First, they contend that the involvement of an uninjured beneficiary (the *cy-près* recipient) transforms civil litigation from a bilateral private adjudicatory model into a trilateral process that violates the Constitutional 'case or controversy' requirement.[106] Secondly, they contend that procedural due process is undermined because counsel for the class have no incentive to pursue vigorously individualised relief for class members. Thirdly, they argue that *cy-près* distributions illegitimately transform the enforcement of the underlying civil law from a compensatory framework

---

[100]Amanda Rose, 'Classaction.gov' (February 10, 2020). Vanderbilt Law Research Paper No. 20-05, University of Chicago Law Review, Forthcoming, Available at <https://ssrn.com/abstract=3534317> 30. Professor Rose argues that a federally-run class action website, enabling class members to express preferences for particular charitable causes to benefit from *cy-près* schemes as part of an online registration process, would mitigate this risk.

[101] Judge Posner's criticisms of class action settlements is not confined to *cy-près* distributions. See his scathing rejection of the proposed 'scandalous' settlement in *Eubank v Pella Corporation*, 753 F.3d 718 (7th Cir. 2014), 721.

[102] *Pearson v NBTY Inc*, Seventh Circuit Court of Appeals, November 19, 2014, 772 F.3d 778 (7th Cir. 2014) 784. See also *Holtzman v Turza* 728 F 3d 682 (7th Cir 2013).

[103] *Pearson v NBTY Inc*, Seventh Circuit Court of Appeals, November 19, 2014, 772 F.3d 778 (7th Cir. 2014), 786.

[104] See e.g., James Beck and Rachel Weil, *"Cy-près" Awards: Is the end near for a legal remedy with no basis in law?,* Washington Legal Foundation, Critical issues Working Paper, No 188, October 2014.

[105] Redish, Julia and Zyontz (n 54). As noted above, this critique was referred to in the above quoted statement by Chief Justice Roberts.

[106] See Article III of the US *Constitution*.

into the equivalent of a civil fine.[107] Redish describes the *cy-près* doctrine as a 'perversion of the underlying law being enforced through resort to a backdoor procedural shell game'.[108] Its use in litigation is likened to the courts forcing 'the proverbial square peg into a round hole'.[109]

As Berryman notes, *cy-près* mechanisms should not be 'allowed to become the personal fiefdom of class action lawyers, to distribute largesse to favoured charities while at the same time masking their own healthy legal fees'.[110]

One example of egregious use of the *cy-près* mechanism arose in the United States class action litigation arising out of personal injuries allegedly caused by the appetite suppressants fenfluramine and phentermine (Fen-Phen). Out of a $US 200 million settlement in a Kentucky case, $US74 million went to the class members with $US 106 million divided between three lawyers and a fourth consultant lawyer. $US 20 million was distributed to the Kentucky Fund for Healthy Living which had been created and managed by the four lawyers involved in the class action. Moreover, the judge who approved the settlement was named a director of the fund and paid $US5,000 per month. The judge subsequently resigned from the bench after adverse findings by the Judicial Conduct Commission. Civil and criminal proceedings were brought against the lawyers.

Whilst such an egregious example is clearly aberrant, some academic commentators have contended that *cy-près* distributions generally foster various 'pathologies' in the context of class action litigation and are intended, in part, to inflate the size of lawyers' fees.[111] In their opinion:

> *Cy-près* performs unconstitutional alchemy by effectively transforming the underlying substantive law from a compensatory remedial model into a civil fine by means of nothing more powerful than a procedural joinder device.[112]

For others, the inequitable outcomes and problems associated with *cy-près* mean that the doctrine is imperfect, but 'at least *cy pres* is a real attempt to solve a real problem'.[113] Chasin notes that *cy-près* distributions are often made to 'organizations that have no rational ties to the underlying class action, with no expectation that the funds will benefit absent class members.'[114] However, as Dyk observes, 'it is

---

[107] For an assessment of these criticisms, from a Canadian perspective, see Jasminka Kalajdzic, 'The "Illusion of Compensation": Cy près Distributions in Canadian Class Actions' (2013) 92(2) *Can Bar Rev* 173, which is further discussed below.

[108] Martin Redish, 'The Liberal Case Against the Modern Class Action' (November 20 2019). Northwestern Public Law Research Paper No. 19-21, 4 <https://ssrn.com/abstract=3490677>.

[109] Ibid 14.

[110] Jeff Berryman, 'Class Actions (Representative Proceedings) and the Exercise of the Cy-près Doctrine: Time for Improved Scrutiny' (Paper presented at the Second International Symposium on the Law of Remedies, Auckland, 16 November 2007) 37.

[111] See, e.g., Redish, Julia and Zyontz (n 54).

[112] Ibid 666.

[113] Brian Fitzpatrick, 'Why Class Actions Are Something both Liberals and Conservatives Can Love' (2020) 73 *Vanderbilt Law Review* 1147, 1149 <https://ssrn.com/abstract=3612322>.

[114] Chris Chasin, 'Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to *Cy Pres Comme Possible*' (2015) 163 *University of Pennsylvania Law Review* 1463. Chasin proposes a 'quasi-democratic' process whereby the court would seek the views of all identified class members on the distribution of the *cy-près* funds. In a similar vein, Dyk proposes a binding vote for the class on the recipient of the distribution: Abraham Dyk, 'A Better Way to Cy Pres: A Proposal to Reform Class Action Cy Pres Distribution' (2019) 21 N.Y.U. *Journal of Legislation & Public Policy* 635.

important to keep in mind that *cy pres* serves a valuable role in encouraging both the deterrence and compensation functions of the class action.'[115]

Notwithstanding general criticisms, and the clearly inappropriate *cy-près* distributions proposed in some United States settlements, there is clearly considerable support for *cy-près* remedies in the United States. Support has been expressed by various public interest organisations which have both opposed arguably inappropriate proposed settlements in some cases and also directly derived pecuniary benefits from *cy-près* distributions made in their favour in others.

1.2.2 Canada

The class action statutes in most Canadian jurisdictions allow for aggregate damages to be awarded in certain circumstances and provide for the distribution of residue award amounts.[116]

For example, s 34 of the *Class Proceedings Act*[117] in Manitoba provides:

> *Undistributed award*
>
> (1) The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even if the order does not provide for monetary relief to individual class or subclass members.
>
> *Considerations re undistributed award*
>
> (2) In deciding whether to make an award under subsection (1), the court must consider:
>
> (a) whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass; and
>
> (b) any other matter the court considers relevant.
>
> *Undistributed award if class members unknown*
>
> (3) The court may make an order under subsection (1) whether or not the class or subclass members can be identified or all their shares can be exactly determined.
>
> *Award may benefit non–class members*
>
> (4) The court may make an order under subsection (1) even if the order would benefit:
>
> (a) persons who are not class or subclass members; or
>
> (b) persons who may otherwise receive monetary relief as a result of the class proceeding.
>
> *Unclaimed award*
>
> (5) If any part of an [aggregate] award… remains unclaimed or is otherwise undistributed after a time set by the court, the court may order that the unclaimed or undistributed part of the award:
>
> (a) be applied against the cost of the class proceeding;

[115] Dyk (n 114) 670.
[116] See Mulheron (n 28) 232–4.
[117] CCSM 2002, c C130.

(b) be forfeited to the Government;

(c) be returned to the party against whom the award was made.

Similar provisions operate in Saskatchewan,[118] Newfoundland and Labrador,[119] Alberta,[120] and New Brunswick.[121]

The discretion and flexibility of the court in distributing residue amounts according to *cy-près* principles is circumscribed in two ways.[122] Firstly, there must be a reasonable expectation that the monies will be applied in a manner that will benefit the class or part of the class. Secondly, the court must turn its mind to whether 'unreasonable benefits' will be conferred on non-class members (although the court is empowered to make an award which would benefit non-class members).

In British Columbia, the legislation differs slightly from that outlined above. It provides that if all or part of an award or settlement have not been distributed by within the relevant time set by the court, half of the residue must be distributed to the Law Foundation of British Columbia. The court must order that the remaining fifty percent of the residue 'be applied in any manner that may reasonably be expected to benefit class or subclass members, including, if appropriate, distribution to the Law Foundation of British Columbia' [123] If the class action was related to damage or loss primarily suffered by Indigenous people of Canada, or an order under subsection 1 would be impractical or impossible, the entirety of the residue must be 'applied in any manner that may reasonably be expected to benefit class or subclass members.'[124] As in Manitoba, the discretion of the court is restricted by a mandatory consideration of whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass.[125]

As Mulheron notes, 'now that the statutory changes have taken effect in British Columbia, the Law Foundation may be expected to receive very significant monies arising from undistributed residues.'[126]

In Quebec, the court can award of aggregate damages (expressed as 'collective recovery') and order the defendant to 'deposit the established amount in the office of the court or with a financial institution operating in Quebec, or to carry out a reparatory measure that it determines or to deposit a part of the established amount and to carry out a reparatory measure that it deems appropriate'.[127]

Where the court considers that compensating class members directly would be 'impossible or too expensive', after making provision for costs, legal fees and claims by members of the class, the court is empowered to distribute 'the balance in the manner it determines, taking particular account of the

---

[118] *Class Actions Act*, SS 2001, c C-12.01, s 37.
[119] *Class Actions Act*, SNL 2001, c C-18.1,s 34. In Newfoundland and Labrador the court is not obliged to consider whether a proposed mode of distribution would deliver unreasonable benefits to non-class members, although it is mentioned as a relevant consideration: s 34(2).
[120] *Class Proceedings Act*, SA 2003, c C-16.5, s 34. The Alberta provision allows the court to make 'any order [it] considers appropriate' to deal with unclaimed or undistributed amounts, rather than setting out the three options available in Manitoba and other jurisdictions: s 34(5).
[121] *Class Proceedings Act*, SNB 2006, c C-5.15, s 36.
[122] See R Mulheron (n 28) 270.
[123] *Class Proceedings Act*, RSBC 1996, c 50, s 36.2(1).
[124] Ibid s 36.2(2).
[125] Ibid s 36.2(3).
[126] Mulheron (n 38) 348.
[127] *Code of Civil Procedure*, RSQ 1965, c C-25, s 1032.

interest of the members, after giving the parties and any other person it designates an opportunity to be heard'.[128]

In Ontario, the *Class Proceedings Act* was recently subject to sweeping reforms. The courts had previously 'interpreted the interplay between the aggregate damages (section 24) and judgment distribution (section 26) provisions of the [Class Proceedings] Act as authorizing *cy-près* distributions.'[129]

As noted by Mulheron:

> Although Ontario's provisions appear to be worded on the basis that any undistributed residue of an aggregate award can be distributed *cy-près* … the provision has clearly been applied to entire judgments or settlements, apparently on the basis that it would be impracticable to provide a more direct benefit by distributing any part of the monetary award to individual class members.[130]

A 2019 report of the Law Commission of Ontario recommended that there should be an explicit recognition of *cy-près* distributions in the statute in circumstances where it is impractical or impossible to compensate the class, 'using best but reasonable efforts'.[131] The Commission recommended that the court approve the recipient under the *cy-près* distribution, bearing in mind 'indirect benefits to the class and the behaviour modification goal of the Act.'[132]

Following this report, the *Class Proceedings Act* was amended to include an express power to make distributions on a *cy-près* basis along the lines proposed by the Commission.[133] The relevant section provides:

> 27.2 (1) The court may order that all or part of an award under section 24[134] that has not been distributed to class or subclass members within a time set by the court be paid to the person or entity determined under subsection (3) on a *cy-près* basis, if the court is satisfied that, using best

---

[128] *Code of Civil Procedure*, RSQ 1965, c C-25, ss 1034–6. See Mulheron (n 28) 233.

[129] Kalajdzic (n 107). The Appendix to the article contains a summary of *cy-près* distributions in Canadian class actions, 180. As noted by the VLRC, the statute as previously enacted was 'less expansive' than those in other jurisdictions, because the court had to satisfy itself that 'a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order' to distribute the funds; the residue remaining after the time set by the court for the application of funds automatically reverts to the defendant, and the court does not need to consider whether 'unreasonable benefits' might flow to non-class members in deciding whether or not to make an order: Victorian Law Reform Commission (VLRC), *Civil Justice Review Report*, 2008, 535.

[130] Mulheron (n 28) 235–6. Mulheron cites *Tesluk v Boots Pharmaceutical plc* (2002), 21 CPC (5th) 196 (SCJ), in which Justice Winkler stated at [16]: 'Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a *cy-près* distribution to recognized organizations or institutions which will benefit class members.' A 'full *cy-près* award was also made in *Alfresh Beverages Canada Corp v Hoechst AG,* (2002) 16 CPC (5th) 301, relating to price fixing of preservatives on behalf of a diverse class including those who made or sold products including the preservatives and consumers over a substantial time period. A *cy-près* scheme was appropriate for the residue of money remaining after the compensation of distributors and manufacturers who could be more readily identified. The recipients were the Canadian Council of Grocery Distributors and Canadian Federation of Independent Grocers, the Food Institute at the University of Guelph, the Consumers Association of Canada and the Canadian Association of Food Banks.

[131] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report,* (Toronto: July 2019) <https://ssrn.com/abstract=3512227>.

[132] Ibid.

[133] The changes came into force on 1 October 2020.

[134] S 24 relates to aggregate assessment of monetary relief.

reasonable efforts, it is not practical or possible to compensate class or subclass members directly.

(2) In approving a settlement under section 27.1, the court may approve settlement terms that provide for the payment of all or part of the settlement funds to the person or entity determined under subsection (3) on a *cy-près* basis, if the court is satisfied that, using best reasonable efforts, it is not practical or possible to compensate class or subclass members directly.

(3) For the purposes of subsections (1) and (2), payment may be made on a *cy-près* basis to,

(a) a registered charity within the meaning of the *Income Tax Act* (Canada) or non-profit organization that is agreed on by the parties, if the court determines that payment of the amount to the registered charity or non-profit organization would reasonably be expected to directly or indirectly benefit the class or subclass members; or

(b) Legal Aid Ontario, in any other case.

The impact of the new Ontario class action legislative framework generally, and the *cy-près* provisions in particular, is yet to be seen. Comment on the first question is beyond the scope of this paper. However, it might be anticipated that the revised *cy-près* framework will allow for greater clarity.

The *cy-près* doctrine also has a role under the Federal Court's rules on class actions, which state that 'a judge may make any order in respect of the distribution of monetary relief, including regarding an undistributed portion of an award due to a class or subclass or its members'.[135]

Although the Canadian Supreme Court specified in 2013 that *cy-près* recipients are authorised under the various statutes to charities, Mulheron notes that the statutes do not necessarily contain such a limitation on their face.[136] However, it is clear that the court will scrutinise recipients. As one judge in approving a settlement in Ontario stated:

> It is necessary and appropriate that only well-recognized entities be the recipients of the *cy-près* distributions. Such entities have an established record of providing non-profit services, with transparency in respect of their activities and accounting. They provide the greatest level of confidence and assurance to the general consuming public that the monies distributed will be responsibly used.[137]

Canadian courts have recognised the role that the doctrine of *cy-près* can play in providing access to justice and the compensatory and deterrence objectives of class action statutes:

> *Cy-près* distributions are generally intended to meet at least two of the principal objectives of class actions. They are meant to enhance access to justice by directly or indirectly benefitting class members, and they may provide behaviour modification by ensuring that the unclaimed portion of an award or settlement is not reverted to the defendant.[138]

---

[135] *Federal Courts Rules*, SOR/98-106, r 299.3(2).

[136] *Sun-Rype Products Ltd v Archer Daniels Midland Co* [2013] 3 SCR 545, [2013] SCC 58, [101], cited in Mulheron (n 38) 353. Please note, subsequently enacted provisions in Ontario have provided such a limitation: Class Proceedings Act, S.O. 1992, s 27.2(3).

[137] *Ford v F Hoffman–La Roche Ltd* (2005) 74 OR (3d) 758 (SCJ) [158] ('Ford'). Various factors were used to evaluate possible recipients of funds in that matter; see [84], [96]. There were also measures for accountability and transparency in the planned use of the funds; [49], [86], [98].

[138] *Slark v Ontario*, 2017 ONSC 4178 [38], citing *Carom v. Bre-X Minerals Ltd.,* 2014 ONSC 2507 [123].

Mulheron has commented:

> It has been judicially acknowledged in Canadian courts that *cy-près* provisions in class action regimes serve the important policy objectives of general and specific deterrence of wrongful conduct, and that 'the private class action litigation bar functions as a regulator in the public interest for public policy objectives'. This statutory incorporation of the *cy-près* doctrine is further evidence that class suits in this jurisdiction do not serve a solely compensatory function (a view entirely at odds with Australian law reform, legislative and judicial opinion).[139]

However, the support for the *cy-près* doctrine is not entirely at odds with Australian law reform proposals given various recommendations for reform in South Australia and in Victoria, including by the Victorian Law Reform Commission.[140]

Settlements where all of the settlement fund is proposed to be distributed to one or more nominated third parties may give rise to different policy and legal considerations than those where there is a residue after various class members have had an opportunity to claim and be paid their entitlements. However, as noted, in many instances individual claims may not be practicable. Moreover, in many Canadian cases there have been low take up rates even where funds are available to be claimed by class members.[141]

According to Berryman, discussion of the doctrine relating to *cy-près* distribution of damages awards in Canada, as at 2007, was limited to five reported cases.[142] Since then *cy-près* distributions have been considered in numerous other cases. According to one study, in the period 2001-2012 *cy-près* payments were made in at least 65 class actions and around $C100 million was paid to charitable organisations in fixed *cy-près* settlements alone.[143] By 2013 it was firmly 'established in Canadian class action jurisprudence and among class action practitioners that reversion of unclaimed settlement funds to defendants is contrary to the policy objectives of class actions and therefore to be avoided.'[144]

In one settlement of a shareholder class action, an amount of $C3.5 million was available for distribution in Canada after the allocation of funds between Canadian and American class actions. The presiding Judge calculated that class members might only recover 0.2 cents in the dollar after legal and administrative costs of distributing this residue had been recovered. Although agreeing to make a *cy-près* distribution, the court did not agree to the distribution of all of the funds to the Law Foundation of Ontario's Access to Justice Fund, as proposed by counsel for the class.[145] Twenty percent of the funds were distributed to the Telfer School of Management at the University of Ottawa, following intervention by a single class member who was an alumnus of that University.[146] As Perell J noted in that case:

---

[139] Mulheron (n 28) 234, quoting *Alfresh Beverages CanadaCorp. v Hoescht AG* (2002), 16 CPC (5th) 301(SCJ) [16].
[140] VLRC (n 129).
[141] See, e.g., Paul Morrison and Michael Rosenberg, 'Missing in Action: An Analysis of Plaintiff Participation in Canadian Class Actions' (2011) 53 *Sup Ct L Rev* (2d) 97.
[142] These cases are *Sutherland v Boots Pharmaceutical PLC* [2002] OJ No 1361; *Currie v McDonald's Restaurants of Canada* [2006] OJ No 813; *Garland v Embridge Gas Distribution Inc*, [2006] OJ No 4273; *Gilbert v CIBC* [2004] OJ No 4260 and *Ford v F Hoffman–La Roche* (2005) 74 OR (3d) 758 (SC). See Berryman (n 110) 18.
[143] See Kalajdzic (n 107).
[144] Ibid 176-177.
[145] Apart from in the present case, the Access to Justice Fund received substantial *cy-près* payments from settlements in: *Cassano v. Toronto Dominion Bank*, 2009 ONSC 3573; *Skopit v. BMO Nesbitt Burns Inc.,* 2010 ONSC 6039; *Smith Estate v. National Money Mart*, 2010 ONSC 1334; *Wein v. Rogers Cable Communications Inc.,* 2011 ONSC 7290; *Markson v. MNBA*, 2012 ONSC 5891; *Krajewski v. TNOW Entertainment Group,* 2012 ONSC 3908.
[146] *Carom v BreX Minerals Ltd*, 2014 ONSC 2507 (Perell J).

> *Cy-près* awards are somewhat controversial, and academics have debated whether and how such awards advance the purposes and public law policies of class actions.[147] There has been some academic criticism about the transparency and rationale for how courts approve the recipients of *cy-près* awards. The simple answer is that courts are not in the business of being a grant approving institution and the issue of a *cy-près* award arises in the context of an adversarial system in which the court is responsive to the submissions of the parties and treats a *cy-près* award as subject to the same approach and the same principles that apply to the rest of the proposed settlement or to the administration of an approved settlement.

Whilst *cy-près* settlements in Canada have undoubtedly achieved a large degree of public and judicial support, concerns have been raised at the large number of cases where the distributions lacked any connection between either the class or the nature of the class action.[148] American courts (particularly appellate courts) have been said to be more vigilant than Canadian courts in rejecting proposed *cy-près* distributions.[149]

However, there are countless examples of judges exercising careful scrutiny of *cy-près* provisions in settlements and requiring an adequate connection between the case, class member interests and recipients, even where the likelihood of a distribution is 'somewhat remote'[150] or the funds to be distributed are modest in size.[151]

Such scrutiny should be a crucial element of any *cy-près* framework. As Kalajdzic notes: [152]

> A transparent and principled approach to *cy-près* is consistent with procedural access to justice. Deference to counsels' choice of recipients on grounds of the parties' contractual liberty is not. A court procedure must be principled and fair to inspire confidence and be seen as promoting the rule of law among its users. Settlements that, with the imprimatur of the courts, confer

---

[147] Citing the following [141]: Luiz Bihari, 'Saving the Law's Soul: A Normative Perspective on the *Cy-Près* Doctrine' (2011), 7 *Canadian Class Action Review* 293; Christina Sgro, 'The Doctrine of *Cy Près* in Ontario Class Actions: Towards a Consistent, Principled, and Transparent Approach' (2011), 7 *Canadian Class Action Review* 265; Jeff Berryman, 'Nudge, Nudge, Wink, Wink: Behavioural Modification, *Cy près* Distributions and Class Actions' in Jasminka Kalajdzic (ed.) *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (Markham, Nexis Lexis, 2011); Jasminka Kalajdzic, 'Access to Justice: Revisiting Settlement Standards and *Cy près* Distributions' (2010) 6 *Can. Class Action Rev*. 215; Elizabeth Rebecca Potter and Natasha Razack, '*Cy Près* Awards in Canadian Class Actions: A Critical Interrogation of what is Meant by "as near as possible"' (2010) 6 *Canadian Class Action Review* 297; Jeff Berryman, 'Class Actions and the Exercise of *Cy-près* Doctrine: Time for Improved Scrutiny' in Jeff Berryman and Rick Bigwood (eds), *The Law of Remedies: New Directions in the Common Law* (Irwin Law, 2009); John Kleefeld, 'Book Review: The Modern *Cy près* Doctrine: Applications and Implications by Rachael P. ' (2007), 4 *Canadian Class Action Review* 203; Redish, Julia and Zyontz (n 54).

[148] See e.g., Jeff Berryman, 'Class Actions and the Exercise of Cy-près Doctrine: Time for Improved Scrutiny', in Jeff Berryman and Rick Bigwood (eds), *The Law of Remedies: New Directions in the Common Law* (Irwin Law, 2009) ch 22.

[149] Kalajdzic (n 107) 184.

[150] See, e.g., *Harper v. American Medical Systems Canada Inc*., 2019 ONSC 5723, 2019 CarswellOnt 15947 [47]-[50] (Perell J). A 'rational connection between the subject matter of a particular case, the interests of class members and the *cy-près* recipient' is required: *O'Neil v. Sunopta, Inc.*, 2015 ONSC 6213 (Ont. S.C.J.) [16].

[151] For example, in *Sorenson v. Easyhome Ltd.*, 2013 ONSC 4017 (Ont. S.C.J.), Perell J refused to approve the distribution of funds to a proposed recipient with which counsel had represented in a pro bono capacity and which had taken similar positions in submissions to the Ontario Securities Commission, reasoning that the class counsel would receive an indirect benefit from such an order [12]-[13], [30]-[33].

[152] Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, 2018) 124 (footnotes omitted).

significant sums of money on organisations personally selected by counsel "without a single penny finding its way into the hands of a class member" undermine not only substantive access to justice but also procedural and symbolic access to justice.

1.3 *Cy-près* relief in Australia

1.3.1 Class actions

The role of *cy-près* schemes in the Australian class action context has been examined on a number of occasions in law reform reports and discussion papers. In a 1979 discussion paper,[153] the ALRC noted the possible use of *cy-près* principles where it is impossible or impracticable to track down individuals within the class or calculate their individual losses, where it is unlikely that class members will make claims, or where the distribution would be uneconomic.[154]

The ALRC recognised that the application of *cy-près* schemes could 'overcome practical and legal difficulties involved in maintaining class actions which would otherwise blunt their effectiveness against a wrongdoer.'[155] *Cy-près* remedies would allow class actions to 'assume the character of a consumer protection mechanism to deter unlawful conduct, force the wrongdoer to surrender unlawful profits and distribute those profits in a way to benefit class members'.[156]

Cy-près remedies could affect a shift in the philosophy underlying class actions in Australia from a sole focus on compensation. The ALRC noted some opposition among stakeholders to this change.[157]

Thus one important policy issue is 'whether it is preferable for the enforcement of legislation to be left to private individuals who come forward—in the knowledge that they will usually be few, or to governmental agencies.'[158]

In 1995, Vince Morabito and Judd Epstein undertook a review of civil proceedings involving multiple claimants under Victorian law.[159] They recommended the introduction of a Victorian class action procedure comparable to Part IVA of the *Federal Court of Australia Act 1976* (Cth).[160] Morabito and Epstein recommended specific statutory powers to make *cy-près* distributions 'in appropriate circumstances'.[161]

In the draft of the NSW legislation which introduced a statutory class action regime, there was provision for *cy-près* remedies along the lines recommended by the Victorian Law Reform Commission (discussed below). However, this was removed from the draft legislation before enactment following lobbying by lawyers representing the interests of potential corporate defendants.[162]

In submissions to the 2008 VLRC Civil Justice Review, there was considerable support for the introduction of a *cy-près* remedy in class actions. One large national law firm contended that in the

---

[153] Australian Law Reform Commission, *Access to the Courts—II: Class Actions*, Discussion Paper No 11 (1979).
[154] Ibid [48].
[155] VLRC (n 129) 537.
[156] ALRC (n 153) [50].
[157] Ibid [52].
[158] Ibid [52].
[159] On behalf of the Victorian Attorney-General's Law Reform Advisory Council, a predecessor of the VLRC.
[160] Vince Morabito V and Judd Epstein, *Class Actions in Victoria—Time for a New Approach,* Victorian Attorney-General's Law Reform Advisory Council, Expert Report 2, (1997) 44 (Recommendation 2).
[161] Ibid 57 (Recommendation 12).
[162] Vince Morabito, 'Lessons from Australia on Class Action Reform in New Zealand (2018) 24 *New Zealand Business Law Quarterly* 178, 191.

context of class actions, and particularly in the area of anti-competitive conduct, *cy-près* remedies would reduce the cost and complexity of proceedings, result in the modernisation and simplification of the law and promote fairness and access to justice.[163]

Ultimately, the Victorian Law Reform Commission was persuaded that *cy-près* remedies should be introduced in the context of class actions in Victoria. It recommended that:

- The Supreme Court should have discretion to order *cy-près* type remedies where (a) there has been a proven contravention of the law, (b) a financial or other pecuniary advantage has accrued to the person contravening the law as a result of such contravention, (c) the loss suffered by others, or the pecuniary gain obtained by the person contravening the law, is capable of reasonably accurate assessment and (d) it is not possible, reasonably practicable or cost effective to identify some or all of those who have suffered a loss.
- The power to order *cy-près* type remedies should include a power to order payment of some or all of the amount available *for cy-près* distribution into the Justice Fund which the VLRC recommended should be established.
- The court's power to order *cy-près* type remedies should not be limited to distribution of money only for the benefit of persons who are class members or who fall within the general characteristics of class members.
- The court's general discretion as to how any *cy-près* relief should be implemented should not be limited to any proposal or agreement of the parties to the class action proceeding.
- Unless the court orders otherwise, the parties should be required to give court-approved notice to the public that the power to order *cy-près* type remedies may be exercised. Where appropriate, this should include notice to particular entities that the court or the parties consider may be appropriate recipients of funds available for *cy-près* distribution.
- Subject to leave of the court, persons other than the parties to the class action proceeding may be permitted to appear and make submissions in connection with any hearing at which *cy-près* orders are to be considered by the court.
- There should be no general right of appeal against the exercise of the court's discretion as to the nature of the *cy-près* relief ordered but there should be a limited right of appeal, based on *House v The King*[164] type principles.[165]

These recommendations were not implemented in Victoria before the then Government lost office. However, the Victorian Government expressed support for the Commission's report before losing office.

Australian class action statutes do not expressly provide for the application of *cy-près* by the courts. As Mulheron has commented:

> Of the leading class actions jurisdictions, Australia is the odd one out—the Australian federal class action regime … does not statutorily reference a *cy-près* distribution of all or any part of the judgment that a class may obtain against a defendant ... Reversion to the defendant of any unclaimed amount is preferred to a *cy-près* distribution.[166]

She suggests that:

---

[163] Submission CP 7 (Maurice Blackburn).
[164] (1936) 55 CLR 499.
[165] VLRC (n 129).
[166] Mulheron (n 28) 230.

> Australian judges are seemingly more circumscribed [than their Canadian and American counterparts] as to how undistributed residues should be handled. These differences are largely attributable to the drafting and design decisions which were taken by their respective legislatures to begin with.[167]

In relation to judgments of the court, each of the class action statutes in Australia permits the court to 'award damages in an aggregate amount without specifying amounts awarded in respect of individual group members'.[168] To make such an award, the court must be satisfied that 'a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment'.[169] Each statute also provides that where damages are awarded, the court 'must make provision for the payment or distribution of the money to the group members entitled'.[170]

Under each statute, the court is empowered to constitute a fund into which monies are paid by the respondent to facilitate distribution of the fund to the class.[171] The courts must specify a date before which class members can make a claim upon the fund.[172] After that date, the respondent can apply for an order that the residue revert to it.[173] Each court has a *discretion* to make such orders as it 'thinks fit' (NSW and Vic) or are 'just' (Cth and Qld) as to the return of the money.[174]

The provisions confer a discretion to decline to order the reversion of the funds. In each jurisdiction the statutory reference is to '*the money* remaining in the fund' without making any express provision for the payment of only some or part of such money to the defendant. Arguably an order for payment of less than the full amount might be within the ambit of the power of the court to 'make such orders as it thinks fit'. Query also whether this might authorise an order that the whole of the amount remaining in the fund be paid to the defendant on condition that the defendant then apply some or all of it for some court designated 'public interest' purpose?

In Victoria, the courts are additionally empowered to 'make such other order as is just, including, but not restricted to, an order for monetary relief other than for damages and an order for non-pecuniary damages'.[175]

However, there is no real clarity on these issues.

Sections 33Z and 33ZA of the *Supreme Court Act 1986* and the *Federal Court of Australia Act 1976,* ss 177 and 178 of the *Civil Procedure Act* 2005 (NSW) and ss 103V and 103W of the *Civil Proceedings Act*

---

[167] Mulheron (n 38) 319.
[168] *Federal Court Act 1976* (Cth) s 33Z(1); *Supreme Court Act 1986* (Vic) s 33Z(1); *Civil Procedure Act 2005* (NSW) s 177(1); *Civil Proceedings Act 2011* (Qld) s 103V(1).
[169] *Federal Court Act* 1976 (Cth) s 33Z(3); *Supreme Court Act* 1986 (Vic) s 33Z(3); *Civil Procedure Act* 2005 (NSW) s 177(3); *Civil Proceedings Act 2011* (Qld) s 103V(3).
[170] *Federal Court Act* 1976 (Cth) s 33Z(2); *Supreme Court Act* 1986 (Vic) s 33Z(2); *Civil Procedure Act* 2005 (NSW) s 177(2); *Civil Proceedings Act 2011* (Qld) s 103V(2).
[171] *Federal Court Act 1976* (Cth) s 33ZA; *Supreme Court Act* 1986 (Vic) s 33ZA; *Civil Procedure Act* 2005 (NSW) s 178; *Civil Proceedings Act 2011* (Qld) s 103W.
[172] *Federal Court Act 1976* (Cth) s 33ZA(3)(c); *Supreme Court Act* 1986 (Vic) s 33ZA(3)(c); *Civil Procedure Act* 2005 (NSW) s 178(3)(c); *Civil Proceedings Act 2011* (Qld) s 103W(3)(d).
[173] *Federal Court Act 1976* (Cth) s 33ZA(5); *Supreme Court Act 1986* (Vic) s 33ZA(5); *Civil Procedure Act 2005* (NSW) s 178(5); *Civil Proceedings Act 2011* (Qld) s 103W(5).
[174] Ibid.
[175] S 33Z(1)(g). Cf s 33Z(1)(g) of the *Federal Court of Australia Act 1976* (Cth), which provides that the court can 'make such other order as the court thinks just'. See VLRC (n 129) 538, 549-50.

2011 (Qld) do not appear to allow courts to make a *cy-près* award as the principal distribution in a judgment in representative proceedings.

Provisions which expressly provide that the respondent is able to apply for an order for reversion of unclaimed monies reflect the 1988 ALRC recommendations.

The ALRC considered that: [176]

> The grouping procedure is not intended to penalise respondents or to deter behaviour to any greater extent than that provided for under the existing law. Any money ordered to be paid by the respondent should be matched, so far as is possible, to an individual who has a right to receive it. If this cannot be done, there is no basis for confiscating the residue to benefit group members indirectly, or for letting it fall into Consolidated Revenue, simply because the procedure used was the grouping procedure. It would be a significant extension of present principles of compensation to require the respondent to meet an assessed liability in full even if there is no person to receive the compensation. Any such change would be in the nature of a penalty, and would go beyond procedural reform.[177]

The recommendations were born out of the prevailing political climate, in which there was considerable organised opposition to the introduction of any form of class action procedure, and reflected a philosophical understanding of the purpose of the class action regime which was based solely on compensation. The political opposition to the introduction of class action procedures led to a concern on the part of the ALRC that any proposed change in the substantive law (as distinct from procedural law) would create additional grounds for opposition to any proposed procedural reform.

The same report recommended that where the respondent had not applied for the residue to be reverted to it, or the court had declined to make such an order for whatever reason, the money should 'go into a special fund which could be made available for the financing of grouped proceedings'.[178] However, despite the recommendations of law reform bodies, a statutory justice fund has not been established in any Australian jurisdiction to receive such funds. No clear alternative was provided in the legislation. The four class actions statutes are silent as to the application of the undistributed remainder if the court exercises its apparent discretion *not* to return that remainder to the defendant.

Another obstacle to *cy-près* relief under the present statutory class action regimes are the provisions in each act[179] which allow the court to discontinue or stay proceedings where the respondent's costs of

---

[176] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [237]-[240].
[177] Ibid [239]. In a 1977 report which examined whether a class action regime should be introduced in South Australia, the Law Reform Committee of South Australia noted significant opposition to the ability of defendants to obtain the residue of judgments in group proceedings. The Commission recommended that any such residue instead be paid to a litigation fund and 'later undistributed balances could be paid to Consolidated Revenue': Law Reform Committee of South Australia, *Relating to Class Actions*, Report No 36 (1977) 9-10. See also VLRC (n 129) chapter 8.
[178] Ibid [240]. The Victorian Law Reform also recommended that its proposed Justice Fund could be a beneficiary of undistributed damages which could be used not only provide financial assistance to plaintiffs in class actions (and other public interest cases) but also to meet some or all of any costs order made against a party assisted by the fund (VLRC (n 129) chapter 8).
[179] S 33M *Supreme Court Act 1986* (Vic); s 33M *Federal Court of Australia Act 1976* (Cth); s 65 *Civil Procedure Act 2005* (NSW); s 103J *Civil Proceedings Act 2011* (Qld).

identifying class members and distributing money to them 'would be excessive having regard to the likely total of these amounts'.[180] The provisions reflect the philosophy that:

> The grouping procedure is not intended to penalise respondents or to deter behaviour to any greater extent than provided for under the existing law. Any money ordered to be paid by the respondent should be matched, so far as possible, to an individual who has a right to receive it.[181]

As Professor Morabito has noted:

> Section 33M has been criticized because it leaves class members without remedy just because they are disparate and their individual claims are relatively small. This is inconsistent with the access to justice aim of [the class actions regime] and hinders the ability of [class action] proceedings to enforce the law and discourage unlawful behaviour.[182]

However, the courts appear to have been disinclined to discontinue or stay proceedings under these provisions.

The question of the distribution of the residue of settlements in class actions was subject to judicial consideration in 2019 by Justice Lee.[183] Lee J considered the power of the court to approve a clause providing that any outstanding amount in the settlement fund may be distributed by the administrator to some or all participating group members, the Financial Rights Legal Centre 'or such other community legal centre as approved by the Court', according to the administrator's discretion.[184]

Lee J noted at [17]:

> Approving a settlement containing such a provision would not be unprecedented as, in recent years, the Court has seen a number of settlement agreements purporting to empower a scheme administrator to pay the residuum of a settlement distribution pool to charities and not-for-profit organisations, although, as far as I am aware, the source of power to allow such a scheme has not been discussed in any detail. Nor has there been any detailed consideration as to how and when such a power, if it exists, should be exercised.

There have been a number of such agreements approved by the court. For example:

- The settlement in *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)*[185] gave the administrator absolute discretion to distribute to the Australian Shareholders' Association the total amount remaining in the settlement after the final distribution if under $$20,000, or where the amount to individual class members would be less than $100, that amount, rather than making pro rata distributions to the participating class members.
- A similarly worded discretion to make distributions to the Australian Thyroid Foundation was included in *Downie v Spiral Foods Pty Ltd* [2015] VSC 190.

---

[180] S 33M *Supreme Court Act 1986* (Vic); s 33M *Federal Court of Australia Act 1976* (Cth); s 65 *Civil Procedure Act 2005* (NSW); s 103J *Civil Proceedings Act 2011* (Qld).
[181] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), [239] cited in Morabito (n 162) 190. See also *ACCC v Golden Sphere International Inc* (1998) 83 FCR 424, 449 (O'Loughlin J).
[182] Vince Morabito, 'The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions' (2004) 42(3) *Osgood Hall Law Journal* 473, 490, cited in VLRC (n 129) 539.
[183] *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196.
[184] Ibid [16].
[185] [2012] VSC 625.

- In 2018, Ball J approved a settlement which provided 'for the pro rata redistribution of unclaimed moneys to group members or, where the amount of unclaimed moneys is less than $20,000, for the payment of the money to the Public Interest Advocacy Centre.'[186]
- In the same year, Murphy J approved a settlement which included a term that 'if the total amount of the unclaimed funds in respect of Inactive Claimants is less than $20,000 (and thereby uneconomic to distribute) the Administrator may in its discretion apply those unclaimed funds to the Public Interest Advocacy Centre.'[187] Of the settlement terms generally, Murphy J stated '[s]uch terms are common in shareholder class actions and I consider them appropriate.'[188]
- In *Lenehan v Powercor*,[189] the settlement conferred an absolute discretion on the administrator to distribute residue amounts under $5000, or $100 per participating claim member to 'BlazeAid (a volunteer-based organisation that works with families and individuals in rural Australia after natural disasters)'
- In *Burke v Ash Sounds Pty Ltd (No 4),*[190] the discretion related to residue amounts under $3000, or $100 per participating claim member to Beyond Blue.
- In *Andrews v Australia and New Zealand Banking Group Limited,* Middleton J described three provisions as 'unexceptional'.[191] The first two concern interest and court supervision respectively. The third 'makes provision for any unallocated amount to be paid to the Consumer Action Law Centre if it is not feasible to distribute it to group members. I would anticipate this would occur if the writing of cheques is uneconomic, or if the amount cannot be reasonably divided between the number of group members because further distributions would result in fractions of cents.'[192]

In *Wotton v State of Queensland (No 11),* Murphy J commented:[193]

> [I]n *King v AG Holdings Ltd (formerly GIO Holdings Ltd)* [2003] FCA 980 Moore J approved a settlement distribution scheme which provided that residue settlement funds would be paid to the Australian Institute of Management for the benevolent purpose of training corporate officers and directors, or to the Australian Shareholders Association. If the power under s 33ZF extends to the disposition of settlement funds to third party organisations such as those it must extend to the use of settlement funds for the provision of beneficial services to those class members who choose to utilise the service.

As remarked by Professor Morabito:[194]

---

[186] *Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited (No. 4)* [2018] NSWSC 1584 [86].
[187] *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527.
[188] Ibid [93].
[189] [2020] VSC 159,
[190] [2020] VSC 58.
[191] [2019] FCA 2216 [44].
[192] [44].
[193] [2018] FCA 1841 [22].
[194] Morabito (n 162) 191. In an earlier report, Morabito stated: 'I am only in the early stages of an empirical study of provisions in class action settlement distribution schemes, or orders made after the judicial approval of class action settlements, that deal with the "destination" of the residue of settlement funds. But I have already discovered that in at least 18% of all settled class actions, the relevant agreements or orders envisaged the payment of the residue of the settlement fund to persons or entities other than the defendants/respondents including (in addition to the two organisations mentioned above) the class members, the Salvation Army, the

> Notwithstanding the absence of express *cy-près* powers, in recent years an increasing number of judicially approved settlement agreements have empowered the settlement scheme administrator to pay specified portions of the settlement residues to several charities and not-for-profit organisations

According to Lee J, the power to make a *cy-près* distribution in certain circumstances is found in equity:[195]

> …the Court presently possesses sufficient power to fashion a remedy to allow a distribution of a settlement sum pursuant to a form of *cy-près* scheme if it is *impracticable or impossible* to distribute all or some of the settlement sum to group members individually (being circumstances directly analogous to there being a trust which has exhausted its original purpose and a surplus remains).

He stated that, even if this power was not available in equity, 's 33V(2) of the Act is wide enough to provide this Court with such power.'[196] Justice Lee clarified:[197]

> The adoption of the expedient of a *cy-près* scheme with respect to a residual sum would fall within the power to make orders with respect to the distribution of money paid under a settlement, provided that such a scheme was "just". Taking into account the equitable analogue which, at the very least, provides some guidance as to what might be considered "just" in analogous circumstances, where a *cy-près* scheme was applied in a way which went to assisting a charity or cause closely related to those persons to whom the money is owed (but not able to be distributed), the application of such a scheme could, depending upon all the other circumstances, be "just".

Lee J expressed disapproval of settlement proposals which give administrators *a discretion* to pay amounts to charitable or not-for-profit entities at the s 33V application stage. He stated that:[198]

> If such an order is to be made, it should be made pursuant to a specific order in relation to a specific sum, upon the court being satisfied that distribution to those otherwise legally entitled to the specified sum, is impracticable or impossible. It is conceivable that this state of satisfaction might be reached at the time of approval, but it seems to me that in many cases, consideration of this issue may need to be deferred to await assessment of how earlier distributions have proceeded.

In the instant case, Lee J commented:[199]

Exodus Foundation, the Australian Thyroid Foundation, the Public Interest Advocacy Centre and the class representative's solicitors (for unpaid legal costs)': *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017), 14 <http://globalclassactions.stanford.edu/sites/default/files/documents/Morabito_Fifth_Report.pdf>.

[195] *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196 [24]. At [23], Lee J stated that the flexibility of equity and the 'well-established position in the United States, seems … to fulfil the requirement that the principled application of equitable remedies "must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction": see *In re Diplock; Diplock v Wintle* [1948] Ch 465 at 481-482; *Gee v Pritchard* [1818] 36 ER 670; (1818) 2 Swans 402 at 674 [414].'

[196] Ibid [25]. S 33V(2) provides that on approval of settlement or discontinuance of class action proceedings, the Court may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

[197] Ibid [26].

[198] Ibid [27].

[199] Ibid [28]-[29].

> Turning to the current proposal, I have no reason to doubt that the Financial Rights Legal Centre is a worthy target of largesse; however, I have a protective role in relation to group members, and this responsibility is acute in relation to vulnerable group members who have difficulties of a financial nature. It is very easy to be generous with other people's money. I am far from satisfied, on the present evidence, that it is *impracticable or impossible* to distribute all of the settlement sum to group members or to some of them, even if it requires serial distributions.
>
> The claims administrator in this case is highly experienced. Instead of approving the proposed regime in cl 11.3, what I will do is reserve liberty for the claims administrator to apply to the Court, in the event there is a residual sum, to present proposals which facilitate the most efficient distribution of this residual sum to those of the group members who are most in need of it.

1.3.2 Consumer law statutes

As an alternative to a *cy-près* provision in class action legislation, provision may be made for *cy-près* remedies under consumer law statutes. Statutory regulators which monitor and enforce consumer and competition legislation could seek *cy-près* relief or other forms of compensation on behalf of consumers in situations where it is unlikely that an individual would commence individual or class action proceedings. This is often the case where the individual losses or damages are small and there is a significant risk of adverse costs being awarded.

However, the ability of the Australian Competition and Consumer Commission (ACCC) to seek compensation, including any *cy-près* remedy where appropriate, has been severely circumscribed under both the *Trade Practices Act 1974* (Cth) (the TPA) and the *Competition and Consumer Act 2010* (Cth) (the CCA) which superseded the TPA.[200] The court is empowered to make any order it considers appropriate to compensate persons who have suffered loss or damage from contraventions under the Act on application from the ACCC or a person who had suffered loss or damage.[201]

S 87(1B) of the CCA provides that the ACCC may make an application on behalf of one or more persons who have suffered, or are likely to suffer, loss or damage by conduct of another who was engaged in the contravention of provisions including Part IV and Division 2 of Part IVB, with certain exceptions. However, s 87(1B)(b) requires the ACCC to obtain written consent to the application before it is made. The ACCC is, therefore, only able to make such an application on behalf of a group of people who have been identified and who have consented to the action. It must also be made within six years of the accrual of the cause of action.[202] The legislation does not incorporate any express mechanism for *cy-près* remedies and the ability for the court to order *cy-près* distributions, when considered in 2014 by the Harper Panel, was rejected because it was said to involve the court in policy determinations without guidance in the legislation.[203] Professor Beaton-Wells described this as 'an unsatisfactory response to an otherwise meritorious proposal.'[204]

---

[200] For more detail on the state of the law under the TPA, see VLRC (n 129) 540-3.
[201] *Trade Practices Act 1974* (Cth) s 87(1A).
[202] CCA s 87(1CA). Similar requirements applied under s 87 of the TPA.
[203] Competition Policy Review Panel, *Competition Policy Review: Final Report* (March 2015), 415-6.
[204] Caron Beaton-Wells, 'Private Enforcement of Competition Law in Australia - Inching Forwards?' (2016) 39(3) *Melbourne University Law Review* 681, 733.

In *Medibank Private Ltd v Cassidy*,[205] the Federal Court held that its power to grant injunctive relief under s 80 of the *Trade Practices Act 1974* did not extend to awarding compensation to non-parties (consumers) to non-representative proceedings on application of the ACCC.[206] The High Court refused special leave.[207] Despite multiple amendments of the TPA and its reformulation in the CCA and recommendations of law reform bodies, the ability of the ACCC to obtain compensation remains subject to limitations.[208]

Submissions to a review of the TPA carried out by the Treasury in 2003 which supported an express power to make *cy-près* orders were expressly rejected by the Treasury in its report.[209] It stated that:

> Acceptance of such a proposal would be to invite the Court, which is concerned with the administration of the Act, to become inappropriately involved in matters of policy in an area where the Act offers no guidance.[210]

However, the system of civil penalties has been significantly enhanced.[211] Also, on the application of the regulator, where there is a proven contravention of certain provisions of the legislation, the court may make an order directing the person who has engaged in the unlawful conduct to perform a service, specified in the order, that relates to the conduct, 'for the benefit of the community or a section of the community'.[212]

Moreover, some regulators have been obtaining *cy-près* type payments through negotiated enforceable undertakings.[213]

As noted at the start of this Research Paper, the need for *cy-près* remedies is highlighted in the tobacco license fee litigation. Another matter which demonstrates this need in the context of the *Fair Trading Act 1987* (NSW) is *Commissioner for Fair Trading v Thomas*.[214] S 72 of the *Fair Trading Act* as then enacted empowered the court to 'make such order or orders as it thinks appropriate' for contraventions of the section which had led to or would likely lead to persons sustaining loss or damage, if the Court considered that the order(s) would compensate 'compensate the first-mentioned person wholly or in part for the loss or damage or [would] prevent or reduce the loss or damage'.[215]

---

[205] [2002] FCAFC 290.

[206] *Medibank Private Ltd v Cassidy* [2002] FCAFC 290 [35], [45] (Sundberg, Emmett and Conti JJ) ('Medibank'). The same outcome was reached by Dowsett J in *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881 in relation to the provision in its amended form.

[207] See Transcript of Proceedings, *Cassidy v Medibank Private Ltd* (High Court of Australia, McHugh and Hayne JJ, 20 June 2003).

[208] VLRC (n 129) 540-3.

[209] Ibid 543.

[210] Trade Practices Act Review Committee, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003), 163.

[211] See, e.g., *Australian Competition and Consumer Commission v Origin Energy* [2015] FCA 55 (White J). *Australian Competition and Consumer Commission v Optus Internet Pty Limited* [2019] FCA 2221; *Australian Competition and Consumer Commission v Medibank Private Limited* [2020] FCA 1030; *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44.

[212] Section 246(2)(a) of Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

[213] For example: ASIC negotiated arrangements whereby unlicensed rental companies entered into enforceable undertakings including provision for $250,000 to be paid to two community legal centres; ASIC also accepted an enforceable undertaking from National Australia Bank, whereby $2m was paid for financial literacy initiatives.

[214] *Commissioner for Fair Trading v Thomas* [2004] NSWSC 479 ('*Thomas*'). Cited in VLRC (n 129) 542-3.

[215] *Fair Trading Act 1987* (NSW) s 72.

The Court considered the 'jurisdictional question' as to whether the court was empowered under s 72 to order the establishment of a trust comprising monies recovered from defendant credit consultants who had been found to have contravened the *Fair Trading Act*.[216] The proposed trust would be administered by the Commissioner over a set period, after which the residue would be distributed to the Financial Counselling Trust Fund, an entity involved in the financial counselling training and education for non-profit groups.[217] The Court distinguished *Cauvin,*[218] noting that powers under s 72 were broader than those available under the TPA. According to Justice Shaw:

> any appropriate orders are empowered [under s 72] if they are compensatory in character, and the making of such orders does not require the person who suffers loss or damage … to be the applicant or plaintiff invoking the court's jurisdiction [as with s 87(1)]. The adjective 'appropriate' [in s 72] is of wide import and confers a broad discretion in the court to do justice.[219]

Justice Shaw commented:

> It appears that in *Cauvin*, the orders sought were not directed to compensate consumers for identifiable loss or damage but [wholly] for other, more general, community purposes.[220]

However, in the instant case, Justice Shaw did not order the residue to be distributed to the Financial Counselling Trust Fund, instead ordering that the residue revert to the defendant.[221]

Consumer Affairs Victoria

Section 115 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) provides that the Director of Consumer Affairs Victoria is able to 'institute or continue proceedings on behalf of … a person or persons in respect of a consumer dispute'.[222] The Director must be satisfied that there is a good cause of action and that instituting or continuing the proceedings is in the public interest.[223] There is also a requirement of written consent from the persons on whose behalf the proceedings are brought, but for representative proceedings only the consent of the representative party is required.[224] The court is empowered to 'make any order it considers fair' if it finds that there has been a contravention and another person has suffered loss or damage as a result.[225]

In addition to any penalty, where a person is found guilty of an offence under the statute, the court has a discretion to order compensation of up to $10,000 or a prescribed amount to a person who 'was humiliated or distressed by the conduct constituting the offence' in the opinion of the court.[226] The court also has a power to order a mandatory injunction 'on application by the Director or any other

---

[216] *Thomas* [2004] NSWSC 479 [24].
[217] Ibid [1].
[218] *Cauvin v Philip Morris Limited* [2002] NSWSC 736 (Windeyer J).
[219] *Thomas* [2004] NSWSC 479 [27].
[220] Ibid [27].
[221] Ibid [54]–[55].
[222] The term '*consumer dispute'* is defined in s 115(5) as 'a dispute between a purchaser or purchasers or a possible purchaser or purchasers and a supplier about a supply or supplies or possible supply or supplies of goods or services in trade or commerce,' other than a dispute relating to the *National Consumer Credit Protection Act 2009* (Cth).
[223] *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 115(2)(a), (c).
[224] *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 115(3)(a), (b). The Director is able to continue or institute proceedings even if the consent is revoked under s 115(4).
[225] S 216(1). This includes a refund or payment of the amount of any loss or damage, s 216(2).
[226] S 218.

person'.[227] Under this section, the court can order that money be refunded.[228] While the statute does not expressly provide the court with the power to make cy-près orders, the broad discretion conferred under the act could comprehend such a power, as might be inferred from the judgment in *Thomas*.[229]

1.3.3 Existing *cy-près* type mechanisms

New South Wales: Financial Counselling Trust Fund

The Financial Counselling Trust Fund was established in 1993 by a trust deed executed by the Minister for Consumer Affairs and is maintained through an arrangement analogous to a *cy-près* scheme, set up in accordance with regulations under the *Credit Act 1984* (NSW).[230] The Financial Counselling Trust Fund monies can be applied to assist non-profit organisations engaged in financial counselling, the training of financial counsellors or other educational programs with regard to personal financial management for the public of NSW.[231] The money in the Fund is derived from penalties paid by credit providers for contraventions of the *Credit Act* and it is administered under the NSW Department of Fair Trading's Financial Counselling Services Program.[232]

Under the *Credit Act 1984* (NSW), amounts affected debtors have to pay under non-compliant contracts may be reduced in some circumstances. Where this occurs, the credit provider is able to apply to NCAT for an order increasing that liability, which can order that the debtor is liable for the whole or part of the charge in the non-compliant contract.[233] The Tribunal is able to deal with more than one contract, or a specified class of contracts at the same time which relates to a contravention by the same credit provider.[234] The Tribunal is able to order that the debtor must repay amounts for which they are liable under s 86, but that an amount is to be paid into the Financial Counselling Trust Fund, having regard to the number of contracts concerned.[235] To make such an order, the Tribunal must be satisfied that the non-compliance and relevant circumstances were ' sufficiently serious to warrant the credit provider being penalised' and that it would be 'unreasonable' to require the provider to adjust the debtors' accounts or to refund them money, for example, because of the number of contracts concerned.[236]

In the Second Reading Speech to the *Credit (Amendment) Bill 1992* (NSW) which introduced s 86B, the NSW Attorney-General stated:

> [I]t is clear that in cases involving thousands of contracts where the Tribunal does not find that a breach is a minor error which ought to be excused, a credit provider whose credit charges are partially restored faces very considerable costs in identifying and locating past and current borrowers, reconstructing contracts, calculating refunds, adjusting existing loan accounts,

---

[227] S 201(1)-(2).
[228] S 201(6)(b).
[229] See VLRC (n 129) 544, which discusses this suggestion in relation to the *Fair Trading Act 1999* (Vic). As the VLRC notes, an application for injunctive relief, under both the 1999 and 2012 statutes, may be made by any person, signifying that this could be sought by a consumer advocacy group in appropriate circumstances.
[230] The *Credit (Savings and Transitional) Regulation 1984* (NSW), reg 29 states that the fund 'is established for the receipt of money the subject of a direction under section 86B' of the *Credit Act 1984* (NSW).
[231] *Credit (Commonwealth Powers) Act 2010* (NSW) Sch 3 Part 2 Div 1.
[232] See NSW Office of Fair Trading, *Financial Counselling Services Program Interim Guidelines 2019-2022* (August 2019) <https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0011/371675/Financial-Counselling-Services-Program-Guidelines-2019-2022.pdf>.
[233] *Credit Act 1984* (NSW) s 85(1)-(2).
[234] S 86.
[235] S 86B. The Tribunal is able to estimate the number of contracts concerned, if necessary, s 86B(2).
[236] *Credit Act 1984* (NSW) s 86B(3)(a),(b).

> processing and posting refunds and dealing with those returned unclaimed. The benefit to individual borrowers, on the other hand, may be small. This bill gives the Tribunal an alternative: the discretion to direct that forfeited credit charges be paid into a fund used to benefit consumers of credit as a whole.[237]

However, as noted by the VLRC, this form of indirect compensation through a framework comparable to a *cy-près* scheme was a benefit brought about because of the primary object of the legislation: to penalise credit providers.[238]

Victoria: the Victorian Consumer Law Fund

In Victoria, the Consumer Law Fund[239] derives finance from a number of sources, including penalties ordered under the *Australian Consumer Law* (Victoria).[240]

The Minister for Consumer Affairs is able to draw on sections of the fund[241] to provide payments, on the recommendation of the Director, to the Director or any other person or organisation. The purposes to which the funds may be applied are broader than those available under the equivalent NSW fund. The Minister may make payments for 'the purposes of improving consumer wellbeing, consumer protection or fair trading' of any other purpose consistent with the objects of the ACL (Victoria).[242]

In *Director of Consumer Affairs Victoria v Gibson (No 3),* pecuniary penalties were granted for contraventions of the ACL (Victoria) against a woman who had falsely claimed to have overcome terminal cancer through natural remedies and nutrition, in relation to charitable donations she represented were being and would be made through her company. Mortimer J commented in obiter:[243]

> The last matter is by way of observation. As I noted at the start of these reasons, by s 134(2)(a) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic), any pecuniary penalty ordered by a court under s 224 of the ACL (Vic) is to be paid into the Victorian Consumer Law Fund. If Ms Gibson were to actually pay the pecuniary penalties imposed (whether by instalments or otherwise), in the Court's respectful opinion, and in the particular circumstances of these contraventions, it may be appropriate for consideration to be given to whether there is a mechanism by which the funds can be donated to some or all of the organisations, and people, which Ms Gibson had promised would receive donations. In that way, some good might still come for the vulnerable people, and the organisations supporting them, which were indirectly drawn into this unconscionable sequence of events.

Community service orders under the Competition and Consumer Act 2010 (Cth)

---

[237] NSW, *Parliamentary Debates*, Legislative Assembly, 9 April 1992, 2473 (Peter Collins).
[238] VLRC (n 129) 546.
[239] A trust fund established under s 134 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic), which is administered by Consumer Affairs Victoria.
[240] *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 134.
[241] Limited to money from pecuniary penalties paid under s 134(2)(a), money appropriated by Parliament for the fund and the residue of any amount paid into the fund pursuant to a non-party order after the final day for payment has elapsed, s 136(3).
[242] S 136(1)-(2).
[243] [2017] FCA 1148 [117].

Prior to the *Competition and Consumer Act*, s 86C of the *Trade Practices Act* empowered the court to make 'non-punitive orders' on application by the ACCC, regarding contravention of specified sections.[244] One such order was a 'community service order', which required the contravener to perform a service 'for the benefit of the community or a section of the community' related to the contravening conduct.[245]

As mentioned above, the previous provisions providing for community service orders have been adopted in the *Competition and Consumer Act 2010* (Cth).[246]

There is, arguably, greater scope for these remedies to be used in practice. In the matter of *Director of Consumer Affairs Victoria v Gibson (No 3)* (referred to above) Mortimer J stated:[247]

> There were other non-punitive orders the Director could have sought. As I have already noted, the Director himself could have chosen to publicise the findings on liability and penalty through a court-approved notice, and that would have removed at least some of the concerns identified.
>
> More critically, the Court had available to it the powers in s 246(2)(a): namely, a power to direct a person to "perform a service that is specified in the order, and that relates to the conduct, for the benefit of the community or a section of the community".
>
> The Court could have been asked to direct Ms Gibson, for example, to perform a service at one or more of the charitable organisations to which she had promised she and her company would give money. The Court could have been asked to direct her to perform a service at one or more institutions caring for people who really do have cancer. Those would have been orders with tangible features of both specific and general deterrence. Pecuniary penalties may not operate as any real deterrent if people (whether those to whom the orders are directed or those who are the objects of general deterrence) have no capacity to pay, or are willing to do whatever they can to avoid paying, including becoming bankrupt. However, directing a person to give up her or his time, and to perform a service to the community, is an order that can be enforced

[244] The introduction of community service orders in this context followed a recommendation of the ALRC: Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No 68, Recommendation 36.

[245] *Trade Practices Act 1974* (Cth) s 86C(4). Two examples provided in the Act were to require a training video to be made available which explained statutory advertising obligations or a community awareness program for those who had been found to have engaged in misleading or deceptive conduct. French J commented on orders that might be made under s 86C in *Australian Competition and Consumer Commission v Econovite Pty Ltd* [2003] FCA 964 [15]: '[I]t is debatable whether mandated general advice about the provision of mineral supplements to livestock is a service that relates to conduct involving mis-statements about the composition of nutrient blocks. The examples of community service orders provided in the statute itself suggest something with a corrective element in relation to the contravention'. The section was also considered by the Federal Court in *Australian Competition and Consumer Commission v High Adventure Pty Ltd* [2005] FCA 762, in which the court drew the applicant's attention to the potential utility of a s 86C order instead of the large pecuniary penalty sought. Gray J imposed less onerous penalties in that matter, noting however, that he imposed them 'reluctantly' and reiterating his belief that 'an order under s 86C would have been of far greater value', [50], [53]. The penalty was increased on appeal to the Full Court: *Australian Competition and Consumer Commission v High Adventure Pty Limited* [2005] FCAFC 247

[246] Section 246(2)(a) of Schedule 2 to the *Competition and Consumer Act 2010* (Cth). See, e.g., *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44; *Australian Competition and Consumer Commission v Startel Communication Co Pty Ltd* [2014] FCA 352; *Australian Competition and Consumer Commission v Titan Marketing Pty Ltd* [2014] FCA 913.

[247] [2017] FCA 1148 [113]-[116].

more readily against any person, irrespective of financial capacity. And, in a case such as this, it is more likely to have brought home to Ms Gibson the impact of her conduct, and its offensiveness to members of the Australian community who really are struggling with cancer and its effects, whether on themselves, their families or their friends. Most Australians are, in one way or another, touched by cancer as a terrible illness.

Perhaps there were good reasons no such orders were sought. It is not possible to know.

1.4 The need for a statutory *cy-près* power

On the introduction specific statutory power to grant *cy-près* schemes in the class action context, Lee J stated in 2019:[248]

> Law reformers have an abiding interest in specific statutory reform, sometimes when it is unnecessary. A real question arises as to the necessity for such specific provisions because of the width of the powers the Court already has (under provisions such as ss 33V(2) and 33ZF of the Act) and also, importantly, because of the powers of the Court, as a court of equity (s 5(2) of the Act), to fashion appropriate remedies to respond to exigencies such as the inability or impracticability of distributing a fund.

With respect, his Honour's statement about law reformers seeking statutory reform when it is unnecessary, due to existing powers of the court, needs to be considered in light of recent controversy, and divided judicial views, about the nature and extent of the powers conferred on judges in connection with class actions. It is the authors' view that such a specific reform is not superfluous and could provide real benefits to users of the class action regime. The recognition of a specific power could generate greater certainty and consistency in the distribution of settlements. It could delineate the situations in which the power should be exercised. Statutory changes would 'avoid ongoing uncertainty and scope for forensic argument and appeals about the nature and extent of the existing powers.'[249]

The approach advocated by Lee J of '[r]eliance upon some generalist power is neither desirable nor sufficiently transparent.'[250]

There is academic support for such an express power. Chamberlain and Watson have criticised the absence of specific procedural rules in New Zealand, emphasising the lack of certainty on particular points, including *cy-près* issues.[251] The lack of procedural rules is said to have 'a negative impact on the vindication of a class action party's substantive rights.'[252]

As Mulheron suggests:[253]

> the Australian legislature would do well to consider amending the class action regime in Pt IVA to expressly permit, but not mandate, cy-près distributions for that jurisdiction. In doing so, and

---

[248] *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196 [18].
[249] VLRC (n 129) 550. The remit of, for example, section 33Z(1)(g) of the Victorian legislation or s 33V of the Federal legislation, is by no means certain.
[250] Mulheron (n 38) 357.
[251] Nikki Chamberlain and Susan Mary Watson, 'The Emergence and Reform of the New Zealand Class Action: The Second Empirical Study' (May 14, 2020) in Brian Fitzpatrick & Randall Thomas (eds) *Cambridge International Handbook of Class Actions,* Cambridge University Press, 2020, Forthcoming, 24 <https://ssrn.com/abstract=3600437>.
[252] Ibid 25.
[253] Mulheron (n 28) 232.

> in learning from the experiences of jurisdictions elsewhere, statutory restrictions ... could be usefully imposed upon the use of the doctrine, and the worst excesses of coupon recovery could be either statutorily or judicially disallowed.

One example of where such a power could be usefully employed is illustrated by the abovementioned Australian litigation arising out of the constitutional invalidity of state tobacco license fee laws. In that protracted litigation, retailers and wholesalers fought over a windfall for themselves. Consumers who had suffered the real loss were not able to be identified as would be required for a class action to succeed and for relief to be ordered.

In addition, *cy-près* principles would have some utility to address wrongdoing in the cartel and price-fixing context, where losses are hard to establish and difficult to quantify and losses can be passed on to consumers by wholesale and retail purchasers.

As noted by the VLRC:

> In the Australian vitamins class action litigation, the class as originally formulated encompassed all groups in this chain of supply, including the ultimate consumers.[254] Eventually, the ultimate consumers and indirect purchasers were excluded from the ambit of the class. The settlement provided a substantial amount for distribution to first-line purchasers and nothing for those who may have suffered loss further down the line.[255]

1.4.1 Matters which should be addressed by statutes providing *cy-près* relief

There are a number of matters which would need to be addressed to ensure that *cy-près* relief is available and effective, should the court be given an express power to grant that relief.

Firstly, any legislative provision which empowers the court to grant *cy-près* relief should include a provision to address occasions where the relevant limitation period for claims has not expired and individuals who fall outside the class but who have suffered loss or damage for which they might make a claim. Without such a provision, defendants could be ordered to 'disgorge' all profits while still being open to claims based on those profits. This has been viewed as 'manifestly unfair'.[256]

As noted by the VLRC:[257]

> There are a number of ways in which this potential problem could be addressed. For example, the power to order cy-près relief could be limited to situations where there was no real prospect of future claims by individual class members, including where the individual amounts in issue are relatively modest or where the relevant limitation period(s) has expired. Alternatively, this could be a factor required to be taken into account by the court in deciding whether to order cy-près remedies or in determining the nature and extent of cy-près relief to be ordered.
>
> Another option would be to order that the distribution of any money by way of cy-près relief be deferred for a specified period, within which individual class members would have an opportunity to come forward and make claims for payment based on their individual legal entitlements. Depending on the nature of the case, the question of distribution of damages to members of the class would ordinarily be considered first, before the cy-près distribution of any residue. However, in cases where the individual payments to class members are likely to be

---

[254] *Bray v F Hoffman–La Roche Ltd* (2002) 118 FCR 1 [2].

[255] *Darwalla Milling Co Pty Ltd v F Hoffman–La Roche Ltd (No 2)* [2006] FCA 1388 [5]. Cited in VLRC (n 129) 551.

[256] Ibid.

[257] Ibid.

> modest and the transaction costs of assessing each individual claim are likely to be disproportionate to the amount in question, cy-près remedies may be the preferred or only option other than allowing the defendant to retain monies found to have been unlawfully obtained.

In addition, noting the obstacles to *cy-près* relief in the current statutes, any legislative power to grant *cy-près* relief would need to be applicable notwithstanding ss 33M and 33N of the *Federal Court of Australia Act 1976* (Cth) and their equivalents in class action legislation in other jurisdictions.

As noted in this Research Paper, the proper recipients of *cy-près* distributions have been a matter of some contention in other jurisdictions. There is a question about whether *cy-près* relief should be for the indirect benefit of those within the putative class, for those who might, for example, consume products, use services, or have an interest in shares in the present and future, or broader sections of society and the 'public interest' more generally. The breadth of the discretion and the extent to which there should be rights to appeal its exercise should be clarified by statute.

The exercise of the court's discretion will inevitably involve competing or conflicting public interest considerations, value judgements and a choice between various alternatives and, on one view, restrictions set out in statute would merely impede the court's ability to discern the most appropriate outcome in a given case.[258]

Various law reform bodies have recommended the establishment of a statutory class action fund.[259] The *cy-près* power could expressly allow the court to order the distribution of monies to such a fund. This also has an advantage, from a defendants' perspective, where such funds are able to be used to meet any costs order made in favour of a defendant who has been successful.

A further issue concerns whether the court should have a general discretion as to how any *cy-près* relief should be implemented or whether the court's role should be limited to approving or choosing between proposals made by the parties to the litigation. In the report arising out of the civil justice review conducted by the Victorian Law Reform Commission in 2008, it was recommended that the court should have a general discretion which should not be constrained by the proposals of the parties.

Should the court have be given the discretion as to how any *cy-près* relief should be implemented, statutory provision for the intervention by public interest organisations or other entities to make submissions on this issue would help inform the court as to how best to ensure that relief provides indirect benefits to class members.

There may also be scope for guidance for the courts in exercising this discretion, perhaps in court practice notes, along the lines suggested by Menocal:

> i. A proposed *cy-près* fund should invoke the active involvement of the adjudicator to ensure that indirect distribution benefits absent class members and meet[s] the standards of openness, fairness and effectiveness.
>
> ii. The process of *cy-près* distribution begins with a consideration and articulation by the court of the purposes and intended beneficiaries of the fund and the standards for fairness and accountability in distribution.

---

[258] Ibid 552.

[259] These law reform recommendations are summarised in Peter Cashman and Amelia Simpson 'Class actions and litigation funding reform: the rhetoric and the reality' Research Paper #1 (16 July 2020).

> iii. The principal role of plaintiff's counsel is to assure that indirect distributions offer the greatest benefits possible to absent class members—not to select and advocate for specific recipients of a *cy-près* fund.
>
> iv. When economically feasible, the court should base fluid recovery (benefit *cy-près*)
>
> distributions on an open, competitive application process…
>
> v. Outreach, evaluation, selection, administration and monitoring functions should be carried out in a competent, cost-effective, and defensible manner.
>
> vi. Fairness in fluid recovery distributions requires two indispensable conditions: (1) equal access to information and the criteria on which distributions are made, and (2) clear disclosure or prohibition of conflict of interest circumscribing the critical functions of evaluation, recommendation, and selection.[260]

As noted at the beginning of this Research Paper, class action legislation presently provides for notice to be given of any matter at any stage of a class action proceeding. Thus, if *cy-près* remedies are available, it may be necessary to give court-approved notice to the public that the power may be exercised. In appropriate cases, notice could also be given to potential recipients of *cy-près* distributions.[261]

The statute should also clarify whether the court's discretion to grant *cy-près* remedies should be subject to appeal.[262]

Any parliamentary debate and drafting of reforms to the class action regime which contemplate *cy-près* remedies would also offer an opportunity for the consideration of alternative forms of relief such as through forfeiture or create a civil penalty based on the amount of any 'unjust enrichment'.[263]

It is of interest to note that under current legislation providing for the imposition of civil penalties, there is provision for the amount of the penalty to be paid to someone other than the revenue authorities. In the recent case of *Augusta Ventures Limited v Mt Arthur Coal Pty Limited*[264] in considering whether the court should make an order for security for costs in a class action arising out of the failure to make payments to employees in accordance with their alleged entitlements, White J, sitting as a member of the Full Federal Court, noted that a court imposing a pecuniary penalty under the *Fair Work Act 2009* (Cth) may order that the penalty, or part of it, be paid to the Commonwealth, a particular organisation or to a particular person.[265]

Collier J has noted that in penalty proceedings in industrial litigation:[266]

> There is extensive authority supporting the proposition that, in circumstances where penalty proceedings in an industrial context were commenced by a party other than an enforcement agency, any pecuniary penalties ordered payable by the Court are ordinarily be paid to the party prosecuting the proceedings. Such an order has been referred to as the "usual" order: *Woodside Burrup Pty Ltd v Construction, Forestry, Mining and Energy Union* [2011] FCA 949 at [148], *Gibbs*

---

[260] Berryman (n 110) 34-35, quoting Armando Menocal, 'Proposed Guidelines for Cy-près Distribution' (1998) 37(1) *Judges' Journal* 22. Cited in VLRC (n 129) 553.
[261] See VLRC (n 129) 554.
[262] See ibid 554.
[263] See ibid 554.
[264] [2020] FCAFC 194.
[265] Section 546(3), referred to at [141]. The purpose of the penalty was discussed by the High Court in *Commonwealth of Australia v Director, Fair Work Building Industry Assessment* [2015] HCA 46; (2015) 258 CLR 482.
[266] *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 5)* [2013] FCA 1384 [25].

v The Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216 at 223, *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (No 2)* (2001) 110 IR 372; [2001] FCA 672 at [8], and *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [44], [65].

In one *Fair Work Act* matter brought by a nurses' union against the Australian Red Cross, Judge Vasta of the Federal Circuit Court stated:[267]

> The Applicant has submitted that I should make the "usual order" that the pecuniary penalty be paid to the Applicant. The Applicant spoke of the "usual order" as that term was used in Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 5) [2013] FCA 1384. At paragraph 24, the Court noted that the pecuniary penalty paid to the Applicant union, in that case, recognised the trouble, risk and expense of bringing proceedings which are in the public interest, which advance the objects of the legislation and which benefit the wider community…
>
> In some ways, it would be grossly unfair to enrich the union simply because they are the Applicant. The Applicant achieved their aims in bringing this litigation because they were able to shine a spotlight upon behaviour that was not in keeping with the standards expected in the Australian workplace. That should be reward enough.
>
> It is also my view that the FW Act is an Act that really weaves the fabric of industrial relations within this country. As such, any action that amounts to a contravention is an action that seeks, whether on purpose or inadvertently, to tear at that fabric in such a way all of society suffers.
>
> In that respect, it is the whole of society who have suffered. The reparation for that suffering of society should then be made to the community. Therefore, it is my view that in a case such as this, the pecuniary penalty is one that ought to be paid to the Commonwealth.[268]

However, the section is usually applied to award penalties to the applicant or the person bearing the costs of the application, except in very limited circumstances. The practical operation of the section thus appears to be quite circumscribed.

The Full Court of the Federal Court stated in *Sayed v CFMEU*:[269]

> Given the legislative history of ss 539(2) and 546(3) of the FW Act, since the enactment of ss 44 and 45 in the pioneering 1904 Act, and the manner in which the "usual order" was articulated in such early cases as the *Vehicle Builders' Employees' Federation* case and Seymour, which is reflected in the Explanatory Memorandum,[270] we consider that the power conveyed

---

[267] *Queensland Nurses' Union Of Employees v Australian Red Cross Society & Ors (No.2)* [2016] FCCA 3132 [23], [25]-[27].
[268] In the context of class actions, Mulheron (n 38) ch 9.
[269] *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4 [101]-[102], [116], [121].
[270] The Fair Work Bill 2008 Explanatory Memorandum provides at [2157]-[2158]: 'Subclause 546(3) provides that the court may order pecuniary penalties (or part of a pecuniary penalty) to be paid to the Commonwealth, a particular organisation or a person. Ordinarily, any pecuniary penalty awarded by the court is paid to the applicant or, in the case of proceedings brought by a Commonwealth official such as an inspector, to the Commonwealth (on the basis that the applicant represents the Commonwealth). Also, it gives the court the flexibility to award the

> by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant. We accept that there may be cases (of which this is not one) where the penalty, or a part of the penalty, should be paid to another person in the circumstances described by Gray J in *Plancor* at [44] [271] …
>
> In this appeal, … the policy considerations of s 546(3) "speak loudly" in the circumstances to justify the payment of the penalty imposed to the individual affected by the contravention who, under the authority of the FW Act, commenced and maintained this enforcement proceeding. If Mr Sayed had not pursued the action, it is unlikely that it would have been pursued. He took on the proceeding at obvious cost to himself…[272]
>
> The examples given in the Explanatory Memorandum and by Gray J in *Gibbs*[273] as to when a payment (or a part payment) might be made to a particular person support the view that, depending on the factual circumstances of a particular case, a particular person for whose benefit, in effect, the contravention proceeding was brought may be the beneficiary of a s 546(3) order in the types of cases there referred to.
>
> …it is not apparent to us why the receipt of a penalty should not operate as an incentive to an affected person to bring a prosecution like this under the FW Act. After all, as Wilcox J noted in *Finance Sector Union*, it ensures the enforcement of the legislative scheme. Moreover, as Jessup J put it in *Murrihy*, this incentive to bring and maintain such a proceeding makes it more likely that the applicable provisions of the FW Act "will be more than mere words on the statute book".

In a recent award of penalties otherwise than in the 'usual' way, the decision was overturned on appeal, in which Collier J stated:[274]

> While s 546(3) does confer a power on the Court in respect of the award of penalties, that power should be given effect in its context. His Honour interpreted s 546(3) as giving him discretion to award the penalties other than in accordance with the ordinary rule, namely to a party who was neither the successful applicant for the order, nor a party actually bearing the costs of the application (such that it would be appropriate for that person to be the recipient of the penalties).

---

penalty to someone other than the plaintiff or applicant where the plaintiff or applicant requests. For example, where an inspector brings penalty proceedings against the director of a company that has gone into liquidation, the inspector might request the court to pay any penalty to an employee rather than the Commonwealth in circumstances where the employee is out of pocket as a result of the company being liquidated.'

[271] *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* [2008] FCAFC 170. Gray J considered at [44] that the 'correct view is that the initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons … in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the Gibbs … exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.'

[272] For a recent decision in which an award was made to an applicant as a 'person' under s 546(3)(c) see *Bevis v Va Holdings Pty Ltd Trading as Granton Homes & Ors* [2020] FCCA 2082.

[273] *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216.

[274] *Ramsay v Menso* [2019] FCA 1273 [25].

> Contrary to the position adopted by his Honour, this view is not supported by Sayed, and indeed is contrary to the authority of that case.

Although tangential to the main focus of the present Research Paper, the fact that the *Fair Work Act 2009* (Cth) provides that civil penalties may be awarded in favour of, not only the Commonwealth, but a party or other person or organisation is of interest.

Concluding remarks

An express judicial power to grant *cy-près* remedies would signal parliamentary recognition that class actions may serve purposes other than compensation to those who are able to be identified and establish their entitlements. There is significant flexibility allowed to the courts in equity. However, the existence of an express statutory power would confirm parliamentary, and therefore public, approval of flexible approaches to settlement distributions. In this way, an express power would confirm the legitimacy of such distributions and support public confidence in the resolution of civil claims through the judicial process.

The scope of such a power is a matter for Parliament. However, it is suggested that if the power were to contemplate full *cy-près* awards, it could usefully broaden the scope of the class action regime. There is, arguably, already a recognition among some stakeholders and members of the public that class actions are a tool to achieve social justice outcomes, to illuminate poor corporate and government practices which have caused real harm, to stimulate public debate and to deter wrongdoing. A statutory power could solidify this role of the regime. The risk of such a power being overused is low; in North American jurisdictions were such powers exist, they represent a small minority of *cy-près* awards. It should also be noted that any statutory provision could provide specific recipients of funds, which could provide resources to legal aid services and prevent any '"distasteful" lobbying of judges'.[275]

In many cases of corporate misconduct resulting in quantifiable unjust enrichment, strong policy reasons support an outcome other than those who have engaged in unlawful conduct remaining the financial beneficiaries simply because the identification of the victims or the distribution of compensation to them is impossible, impractical or unduly expensive.

[275] Mulheron (n 38) 349.