ENTREPRENEURS AND FIGUREHEADS – ADDRESSING MULTIPLE CLASS ACTIONS AND CONFLICTS OF INTEREST

MICHAEL LEGG*

I INTRODUCTION

Class action practice has been significantly altered with the acceptance of the closed class group definition and litigation funding.[1] The new landscape was considered in *Kirby v Centro Properties Limited*[2] in relation to two novel issues. The first was how to manage multiple class actions brought under Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('*FCA Act*') in the interests of group members. The second was how to respond to entrepreneurial litigation that may give rise to conflicts of interest between the lawyer and the group members. Justice Finkelstein approached both issues with radical suggestions drawn from the United States: the adoption of a litigation committee and the auctioning of the class action lawyer's role.[3]

This article continues Justice Finkelstein's examination of these issues by drawing on the US experience with securities class actions, including the *Private Securities Litigation Reform Act*[4] ('*PSLRA*'), to explore what solutions might be available.

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* Senior Lecturer, Faculty of Law, University of New South Wales and Consultant, Clayton Utz. BCom (Hons), MCom (Hons), LLB (UNSW) and LLM (UC Berkeley). Solicitor of the Supreme Court of New South Wales and Member of the New York Bar.

1 See *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, confirming the legitimacy of third parties funding litigation; and *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 ('*Multiplex*'), allowing limited groups or closed classes which are commenced on behalf of a known group specifically created for, and prior to, the commencement of the class action.

2 *Kirby v Centro Properties Ltd* (2008) 253 ALR 65 ('*Kirby*').

3 Nick Lenaghan, 'Judge Upsets Class-action Applecart', *The Weekend Australian Financial Review* (Sydney), 11–12 October 2008, 10; Susannah Moran, 'Independent Investors May Oversee Centro Case', *The Australian* (Sydney), 11 October 2008; Carolyn Cummins and Vanda Carson, 'Judge Warns Investors Over Lawyers' Domination', *The Sydney Morning Herald* (Sydney), 11 October 2008; and Alex Boxsell, 'Centro Soap Opera Plays Out in Court', *The Australian Financial Review* (Sydney), 17 July 2009, 43.

4 *Private Securities Litigation Reform Act of 1995*, Pub L No 104-67, 109 Stat 737 (1995).

II MULTIPLE CLASS ACTIONS BEFORE AND AFTER THE LIMITED GROUP

A Multiple Class Actions Prior to *Kirby v Centro Properties Limited*

Duplicative proceedings may be struck out or stayed as vexatious or an abuse of process because 'a double action on the part of the Plaintiff would lead to manifest injustice'.[5] In *Johnson Tiles Pty Ltd v Esso Australia Ltd*, Merkel J had to address the existence of three competing *FCA Act* class actions against the same respondent in respect of an explosion at the Longford gas plant in Victoria. Justice Merkel acknowledged that it would be vexatious and oppressive for the respondent to be subjected to more than one class action.[6] The vexation can be explained on the basis that group definitions in multiple class actions in relation to the same subject matter may overlap so that each group member, although not a party, is seeking relief from the respondent for the same claim in multiple proceedings.[7] However, the commencement of multiple bona fide class actions prior to the court giving substantive directions will not, of itself, be vexatious and oppressive as otherwise the first to file would be able to prevent any later competing class actions.[8] Justice Merkel overcame the vexation by ordering that the first and second proceedings be consolidated, and the third proceeding be stayed.[9]

The usual position in relation to the lawyers is that only one solicitor may appear on the record. The choice of lawyers is dealt with by staying the litigation until common representation is obtained.[10] In *Johnson Tiles,* two solicitors were allowed to be on the record but they had to jointly engage one set of counsel.[11]

The form in which multiple class actions may arise has been altered due to the Full Federal Court decision in the Multiplex class action that allowed a closed class under Part IVA of the *FCA Act*.[12] The closed class approach involves a class action being commenced on behalf of a known group. Multiple class actions are less likely to overlap in terms of group membership and so the proceedings will not be vexatious or an abuse of process in the sense explained

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5 *McHenry v Lewis* (1882) 22 Ch D 397, 408 (Bowen LJ), 400 (Jessel MR): 'it is prima facie vexatious to bring two actions where one will do'. See also *Moore v Inglis* (1976) 9 ALR 509, 513–14; *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) ATPR ¶41-679 ('*Johnson Tiles*'), ¶42-677; *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* [2009] HCA 43 (Unreported, French CJ, Gummow, Hayne, Heydon and Crennan JJ, 13 October 2009) [27].

6 *Johnson Tiles* (1999) ATPR ¶41-679, ¶42-687.

7 The vexation can be avoided if each group member opts out of all but one proceeding. Such a process is likely to create confusion and still leave many group members who are in more than one proceeding.

8 *Johnson Tiles* (1999) ATPR ¶41-679, ¶42-678.

9 Ibid ¶42-688.

10 *Lewis v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601, 619, 622, 624; *Goold & Portes Pty Ltd v Housing Commission* [1974] VR 102; *SCI Operations Pty Ltd v Australian Paper Manufacturers Ltd* (1983) 51 ALR 365; *Carnie v Esanda Finance Corp Ltd* (1996) 38 NSWLR 465, 470; and *Hamod v State of New South Wales* [2001] FCA 157(Unreported, Conti J, 28 February 2001) [57].

11 *Johnson Tiles* (1999) ATPR ¶41-679, ¶42-688.

12 *Multiplex* (2007) 164 FCR 275, 291, 293.

above. However, the closed class increases the possibility of multiple class actions in relation to the same subject matter as multiple groups can be formed.

B The Centro Class Actions

The multiple class actions dynamic post the acceptance of class actions using closed class group definitions is illustrated by the three *FCA Act* class actions filed against the Centro Group. Richard Kirby, as the representative party, commenced two actions: one brought against Centro Properties Limited ('CPL') and CPT Manager Limited covering a period of 9 August 2007 to 15 February 2008 and another one against Centro Retail Limited and Centro MCS Manager Limited relating to a period from 7 August 2007 to 15 February 2008. The Kirby proceedings, like the Multiplex proceedings referred to above, were closed as the group was defined by reference to each group member having entered into a litigation funding agreement. The proceedings comprised 955 members. The solicitor on the record was Maurice Blackburn Pty Ltd and the proceedings were funded by IMF (Australia) Ltd ('IMF'). The third action was issued by Nicholas Vlachos, Monatex Pty Ltd and Ramon Franco, as the representative parties, and has all four Centro companies as respondents. This proceeding was a traditional opt-out class action but it excluded those entities in the Kirby class actions. It covered shares purchased in the period from 5 April 2007 to 28 February 2008. Slater & Gordon were the solicitors for the applicants and the proceedings were funded by Commonwealth Legal Funding LLC.[13]

The three class actions did not have overlapping membership and so were not 'a double action' on the part of any Centro shareholder. Nonetheless they did 'share the same nucleus of operative facts' and would result in trials raising the same or similar issues leading to Finkelstein J declaring that 'something must be done'.[14] The respondents were of the same mind, and with the support of Mr Kirby, sought to have the Vlachos class action stayed.[15]

The Federal Court canvassed a number of ways to move forward, including:

- allowing one proceeding to go to trial as a test case with the others being stayed;
- consolidation; or
- a joint trial.[16]

The criteria for making such a choice was said to be 'fraught with difficulty'.[17] However, Finkelstein J did identify factors that should not be taken into account: who filed first, the interests of the lawyers and litigation funders,

13 *Kirby* (2008) 253 ALR 65, 66–7; Slater & Gordon Lawyers, 'New Centro Class Action Issued', (Press Release, 25 May 2008); Alex Boxsell, 'Funder Banking on Class Action', *The Australian Financial Review* (Sydney), 1 May 2008, 6; and Maurice Blackburn, *The Centro Class Action* <http://www.mauriceblackburn.com.au/areas/class_actions/current/Centro.asp> at 8 August 2009.

14 *Kirby* (2008) 253 ALR 65, 66, 68–9.

15 Ibid 71.

16 Ibid 68.

17 Ibid 72.

and the view of the respondents and Mr Kirby that the Vlachos class action should be stayed. Further, his Honour would have been assisted by knowing the views of group members, information about the lawyers experience and expected fees, and the terms of the litigation funding.[18] The desire to know the group members' views and act in their best interests gave rise to the idea of an independently-selected litigation committee.[19]

III CLASS ACTIONS AND CONFLICTS OF INTEREST

A Class Action Promoters and Conflicts of Interest

The rise of entrepreneurial litigation means that class action promoters have significant financial interests in the outcome of specific cases and, more generally, the success of their business. It is the class action promoter who conducts due diligence on the proceeding and who runs the 'book build'[20] to create a financially viable claim. At the same time, the representative party may have far less at stake in the litigation and be heavily reliant on the lawyers as to how the proceedings should be run. Further, although the class action may resolve group members' legal claims, they do not direct how the class action is run and may have little say as to how it is concluded.[21]

In terms of principal (group) and agent (lawyer), the principal has too little at stake to expend resources monitoring the agent and the agent has superior information.[22] The lawyer for the group is therefore a potentially unreliable agent of the group and may prefer their own interests over those of the group.

B The Centro Class Actions

The Centro class actions were described by Finkelstein J as 'lawyer-driven litigation' where the representative party is 'a figurehead, with little at stake, and who is usually not very well informed about the theories of their case'.[23] This development was of concern to Finkelstein J because the entrepreneurial lawyer was not subject to adequate monitoring and largely operated in their own self-interest.[24]

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18 Ibid 72–3.

19 Ibid 73–4.

20 In finance the book build is the process of generating a book of investor demand for shares. The term is used here to mean the process of generating a book of claimant demand for a class action which includes being willing to enter into a litigation funding agreement and retainer.

21 See generally, Jill Fisch, 'Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA' (2001) 64 *Law & Contemporary Problems* 53, 55–6; and John Coffee, 'Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice"' (2008) 30 *Cardozo Law Review* 407, 411–13.

22 Richard Posner, *Economic Analysis of Law* (3rd ed, 1986) 537; John Coffee, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action' (1987) 54 *University of Chicago Law Review* 877, 883–6.

23 *Kirby* (2008) 253 ALR 65, 67.

24 Ibid 67.

The steps that led up to the application for a stay of the Vlachos action are of significance as they form the basis for the allegations of a conflict of interest:

- The Kirby actions were filed on 9 May 2008. Maurice Blackburn was aware that Slater & Gordon were also planning to commence a class action.
- On 13 May 2008, Maurice Blackburn advised Slater & Gordon that IMF would fund Slater & Gordon's clients if they agreed to join the Kirby actions. The proposal was discussed but did not eventuate.
- On 23 May 2008 the Vlachos action was filed.
- On 9 July 2008 the solicitors for CPL and CPT Manager wrote to all the other parties suggesting that either the Kirby actions or the Vlachos action be stayed pending the determination of the other action.
- On 21 July 2008 Maurice Blackburn and Slater & Gordon responded. Maurice Blackburn stated that it did not propose to comment on whether the Vlachos action should be stayed but provided reasons why the Kirby actions should not be stayed. Slater & Gordon's response was that none of the actions should be stayed because of the differences in the pleadings and the group members in the various actions did not overlap.
- On 8 August 2008 the solicitors for CPL and CPT Manager advised Maurice Blackburn that their clients would apply for a stay of the Vlachos action if the Kirby actions were expanded to include the Vlachos group members and the pleadings were amended to incorporate the allegations that were peculiar to the Vlachos action.
- On the same day Maurice Blackburn replied and advised that their client, Mr Kirby, now supported a stay of the Vlachos action as he was 'concerned that the existence of the Vlachos proceeding will result in delays, extra expenses and inefficiencies in the resolution of his proceedings'. Further, if the Vlachos action were stayed Mr Kirby would amend the group definition in the Kirby actions to create an 'open class' so that Vlachos group members who were not clients of IMF would become members of the Kirby group free of any obligation to pay commission to IMF.[25]

Justice Finkelstein expressed concerns that these developments created a risk that Maurice Blackburn and IMF had a conflict between their personal interest of depriving their competitors of the opportunity to offer a competing class action and their duty to their clients to not make the settlement of the proceedings more costly and difficult. Settlement may become more difficult because respondents are reluctant to settle when there is uncertainty and a lack of finality as to

25 Ibid 69–71.

quantum which may arise if the Kirby proceedings were altered to incorporate the Vlachos action, thus moving from a closed class to an open class.[26]

Justice Finkelstein raised the concept of a litigation committee because he harboured two concerns: first, that the representative party, Mr Kirby, was not an adequate proxy for the absent group members; and second, that Maurice Blackburn and IMF appeared to have a conflict of interest.[27] His Honour also suggested the use of auctions as a way to deal with lawyer-driven class actions.[28]

IV THE US APPROACH – PRIVATE SECURITIES LITIGATION REFORM ACT

US courts traditionally appointed the lead plaintiff (the equivalent of the representative party under Part IVA of the *FCA Act*) and the lead counsel on a 'first come, first serve' basis.[29] This meant that the need to choose between multiple class actions was resolved in favour of whoever won the race to the courthouse. This approach created considerable concerns. First, it produced largely lawyer-driven litigation;[30] second, the clients were often 'professional plaintiffs' who lacked the incentive to monitor the lawyers effectively;[31] and third, it gave rise to 'strike suits' (litigation commenced in the hope that a corporate defendant would settle because it was cheaper than defending the matter).[32]

The US Congress responded to the above concerns by enacting the *PSLRA*, which sets out mandatory procedures for the appointment of a lead plaintiff in securities class actions. The *PSLRA* follows a three-step process for the

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26 Ibid 71. It should be noted that the difficulty of settling the Kirby proceedings may have existed regardless of any agreement to alter the group definition because the respondents would be reluctant to settle whilst ever the Vlachos proceeding was pending as they could not achieve finality nor a cessation of litigation costs. See Francis McGovern, 'The Defensive Use of Federal Class Actions in Mass Torts' (1997) 39 *Arizona Law Review* 595, 595.

27 *Kirby* (2008) 253 ALR 65*,* 72.

28 Ibid 73.

29 Elliott Weiss and John Beckerman, 'Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions' (1995) 104 *Yale Law Journal* 2053, 2062; *In re Cendant Corp Litig*. 264 F 3d 201 ('*In re Cendant*'), 255 (3rd Cir 2001); *In re Cavanaugh* 306 F 3d 726, 729 (9th Cir 2002).

30 See *In re Enron Corp Securities Litigation*, 206 FRD 427, 441–2 (SD Tex 2002). 'Congress was reacting to significant evidence of abusive practices and manipulation by class action lawyers of their clients in private securities lawsuits ... Because class counsel's fees and expenses sometimes amount to one-third or more of the recovery, class counsel frequently has a significantly greater interest in the litigation than any individual member of the class'.

31 R Chris Heck, 'Conflict and Aggregation: Appointing Institutional Investors as Sole Lead Plaintiffs Under the PSLRA' (1999) 66 *University of Chicago Law Review* 1199, 1202. The indictment of law firm Milberg Weiss reveals that the 'professional plaintiffs' were often paid kickbacks in exchange for serving as lead plaintiff on class actions devised by the law firm. See James McDonald, 'Milberg's Monopoly: Restoring Honesty and Competition to the Plaintiffs' Bar' (2008) 58 *Duke Law Journal* 507.

32 See *Blue Chip Stamps v Manor Drug Stores*, 421 US 723, 740–3 (1975); and Janet Cooper Alexander, 'Do the Merits Matter? A Study of Settlements in Securities Class Actions' (1991) 43 *Stanford Law Review* 497, 548–50.

appointment of the lead plaintiff. The first step consists of the first plaintiff to file a class action, publishing a notice advising of the pendency of the action and stating that any member of the purported class may move the court to serve as lead plaintiff.[33] In step two, the *PSLRA* builds on the class action requirement in rule 23 of the Federal Rules of Civil Procedure ('FRCP') of an adequate representative party, by requiring the court to consider the losses allegedly suffered by the various plaintiffs that seek to serve as the lead plaintiff and select the 'presumptively most adequate plaintiff', being the 'person or group of persons that ... has the largest financial interest' in the suit.[34] The third step of the process is to give other plaintiffs an opportunity to rebut the presumption.[35] The presumption can be rebutted if the proposed lead plaintiff would not fairly and adequately protect the interests of the class, or was subject to unique defences that made the plaintiff incapable of adequately representing the class.[36]

Where there are multiple Federal Court class actions, the court will first consider whether to consolidate them pursuant to rule 42(a) of the FRCP[37] and then undertake the above three step process in relation to the consolidated class action, or for each individual class action.[38]

The lead plaintiff has the responsibility, subject to the approval of the court, of selecting and retaining counsel.[39] US courts have interpreted the *PSLRA* to allow various procedures for the selection of lead counsel, including selection by the lead plaintiff with some court oversight and the use of auctions.[40]

The US deals with multiple class actions through consolidation and then the appointment of the lead plaintiff for the resulting consolidated class actions. Conflicts of interest were addressed by the appointment of a group member with a large financial stake. As the lead plaintiff had significant funds at stake and was a sophisticated user of legal services, it was hoped that they would, and could, actively monitor the conduct of a securities class action so as to reduce the

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33 15 USC §78u-4(a)(3)(A).

34 15 USC §78u-4(a)(3)(B)(iii)(I)(bb). The size of a financial interest is determined by: (1) the number of shares purchased during the class period; (2) the number of net shares purchased during the class period (ie the number of shares retained during the period); (3) the total net funds expended during the class period; and (4) the approximate loss suffered during the class period. See *Re Bear Stearns Companies, Inc Securities, Derivative, and Employee Retirement Income Security Act*, *(Erisa)* 2009 WL 50132, 7 (SDNY 2009).

35 *In re Cavanaugh*, 306 F 3d 726, 729–31 (9th Cir, 2002).

36 15 USC §78u-4(a)(3)(B)(iii)(II). The operation of the presumption and attempts to rebut it are dealt with in *In re Cendant*, 264 F3d 201 (3rd Cir, 2001).

37 FRCP 42(a) provides: 'If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.'

38 See 15 USC §78u-4(a)(3)(B)(ii) and *In re Bear Stearns Companies, Inc. Securities, Derivative, and Employee Retirement Income Security Act (Erisa)* 2009 WL 50132, 5 (SDNY 2009). The management of multiple class actions filed in different US state courts, or in Federal court and a state court, is more complicated. See Geoffrey Miller, 'Overlapping Class Actions' (1996) 71 *New York University Law Review* 514.

39 15 USC §78u-4(a)(3)(B)(v).

40 Federal Judicial Centre, *Manual for Complex Litigation, Fourth* (2004) 538–9 <http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/$file/mcl4.pdf> at 8 September 2009.

litigation agency costs that may arise when lead counsel's interests diverged from the interests of group members.[41]

The US approach supports the use of consolidation as occurred in *Johnson Tiles* and was suggested in relation to the Centro class actions. An Australian court would still need to manage the selection of the representative party and the lawyers which would involve determining whether to allow one or more of each.[42] The mechanics of managing multiple class actions is not of particular concern; rather it is facilitating the provision of reliable information to the judge so they can employ the mechanics in the interests of group members. The US approach does not deal with litigation funders as funding is provided by the lawyers. Litigation funding is discussed below.

V GROUP MEMBER WITH 'THE LARGEST FINANCIAL INTEREST'

The success of the *PSLRA* requirements in dealing with conflicts of interest through the appointment of lead plaintiffs with the largest financial interest has been mixed according to empirical studies. Retirement funds for public and union employees[43] have actively offered themselves as lead plaintiffs but private institutional investors[44] have stepped forward far less frequently.[45] Further, individual plaintiffs have continued to be an important source of lead plaintiffs. The PriceWaterhouseCoopers 2008 Securities litigation study found that pension funds appeared as lead plaintiff in 48 per cent of all cases filed during 2008, compared to 42 per cent in 2007 and accounted for $2.9 billion, or 81 per cent, of total settlements during 2008.[46]

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41 Elliott Weiss and John Beckerman, above n 29, 2121.

42 *Johnson Tiles* (1999) ATPR ¶41-679, ¶42-687, allowing the representative parties from two separate class actions to serve as representative parties for the consolidated class action and allowing for two solicitors to be on the record.

43 For example, California Public Employees' Retirement System, the New York State Common Retirement Fund, the New York City Pension Funds, Teachers Retirement System of Oklahoma, Electrical Workers Local 357 Pension Fund, and City of Fort Myers Police Officers' Retirement System.

44 For example, banks, mutual funds, hedge funds and insurance companies.

45 See Stephen Choi and Robert Thompson, 'Securities Litigation and its Lawyers: Changes During the First Decade After the PSLRA' (2006) 106 *Columbia Law Review* 1489, 1504: 'The number of cases with pension funds as lead plaintiffs hovered between ten and twenty for the period 1997 through 2000, but then began to grow dramatically to thirty-one in 2001 and fifty-six in 2002'; Randall Thomas and James Cox, 'Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions' (2006) 106 *Columbia Law Review* 1587; and Michael Perino, 'Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions' (Paper No 06-0055, St John's University Legal Studies Research Paper Series, 2006) <http://ssrn.com/abstract=938722> at 3 September 2009, finding cases with public pension lead plaintiffs have larger settlements, recover a greater percentage of the stakes at issue in the case, have greater attorney effort, and have lower fee requests and awards than cases with other types of lead plaintiffs.

46 PriceWaterhouseCoopers, *2008 Securities litigation study* (2009) 26–8 <http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF> at 3 September 2009.

The proliferation of pension funds as lead plaintiffs has been linked to their activist ideology, limited relationships with corporate management and concerns with corporate governance but also class action lawyer's contributions to both public sector fund trustees and union-related political action committees to encourage the pension fund to seek to be lead plaintiff and retain the lawyers as lead counsel.[47] While the *PSLRA* has resulted in group members with a large financial stake becoming lead plaintiff and achieving large recoveries, it is less certain whether the lawyers are better monitored and whether costs are reduced.[48] Further, the relationship between the pension funds and lawyers may cause them to prefer their interests over group members' interests.

In contrast, private institutional investors do not take on the lead plaintiff role because:

- instituting and managing litigation is not within their area of expertise.
- litigation takes up management time so that there is an opportunity cost.[49] The question facing management is whether the resources could be better spent on the main business which may be far more lucrative than the damages received from a law suit.
- concerns that the institutional investor will need to give discovery, resulting in not just further costs but the potential disclosure of proprietary information about how investment decisions are made.
- unwanted publicity, especially as the companies they invest in and will be suing may also be their clients.
- where an institution retains an investment in a going concern entity on which they have lost money the resources devoted to the class action reduce the resources available for dividends or investments. The institutional investor may effectively fund its own pay-out from the litigation.[50]

In investment terms, '[t]he lack of private institutional involvement likely reflects that litigation is not a positive net present value transaction for institutional investors'.[51] In the US, institutional investors can avoid many of the costs set out above and still recover by simply being part of the class and free-riding on other's efforts.

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47 Charles Silver and Sam Dinkin, 'Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions' (2008) 57 *DePaul Law Review* 471, 482–7.

48 See, eg, Andrew Gold, 'Experimenting with the Lead Plaintiff Selection Process in Securities Class Actions: A Suggestion for PSLRA Reform' (2008) 57 *DePaul Law Review* 447; and James Cox and Randall Thomas, 'Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions To Participate in Securities Class Action Settlements' (2005) 58 *Stanford Law Review* 411.

49 15 USC §78u-4(a)(4) provides that the lead plaintiff is entitled to 'reasonable costs and expenses (including lost wages) directly relating to the representation of the class …' so that some costs may be reimbursed.

50 Michael Legg, 'Institutional investors and shareholder class actions: The law and economics of participation' (2007) 81 *Australian Law Journal* 478, 481–2.

51 Choi and Thompson, above n 45, 1504.

The *PSLRA*'s attempt to address conflicts of interest appears to have been only partially successful. Consequently further reforms have been proposed which seek to either incentivise private institutional investors to come forward through some form of bonus payment for taking on the role of lead plaintiff, or to regulate the relationship between pension funds and lawyers, including banning contributions or at least requiring their disclosure to the court.[52]

In Australia, participation in shareholder class actions has not been empirically examined but anecdotal evidence suggests that industry and private superannuation funds participate, as do institutional investors and individuals.[53] However, superannuation funds and institutions have avoided being the representative party. This is likely to be for the same reasons that private institutional investors in the US do not take on the lead plaintiff role, but it is also because they are paying a significant percentage of any recovery to a litigation funder to devise a litigation strategy and manage the litigation process, including the lawyers.[54] Indeed litigation funding has been advocated because it improves the efficiency of litigation through introducing commercial considerations that aim to reduce costs.[55] However, the Centro decision demonstrates that litigation funders may have the same conflicts of interest that lawyers have in relation to group members – a preference for their own financial interests. The presence of a litigation funder may improve efficiency but does not necessarily address conflicts of interest.

If a more robust monitor of entrepreneurial lawyers and litigation funders were desired, the Australian Parliament could enact legislation similar to the *PSLRA*. However, more would need to be done to encourage institutional investors or superannuation funds to seek the role of representative party.

VI LITIGATION COMMITTEE

A Power to Appoint a Litigation Committee

US courts have specific power pursuant to the *PSLRA* to appoint the lead plaintiff(s) from the group members that put themselves forward, as discussed

52 See Charles Silver and Sam Dinkin, 'Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions' (2008) 57 *DePaul Law Review* 471; 'Third Circuit Task Force on the Selection of Class Counsel' (2001) 74 *Temple Law Review* 689, 705; John Coffee, 'Litigation Governance: A Gentle Critique of the Third Circuit Task Force Report' (2001) 74 *Temple Law Review* 805, 810.

53 Annabel Hepworth, 'Big Funds in Class Act', *The Australian Financial Review* (Sydney), 28 July 2006, 1; Mathew Dunckley, 'Bid to Separate Centro Actions', *The Australian Financial Review* (Sydney), 25 August 2008, 57; Alex Boxsell, 'Mum and Dad Take to Class Action', *The Weekend Australian Financial Review* (Sydney), 11–12 July 2009, 37–9.

54 The indemnity for adverse costs that the litigation funder provides removes costs exposure pursuant to s 43(1A) of the *FCA Act* as a disincentive to well-funded superannuation funds and institutions being the representative party. This places the funds and institutions in the same position as those in US litigation where each party bears their own costs.

55 *QPSX Ltd v Ericsson Australia Pty Ltd (No 3)* (2005) 219 ALR 1, 13.

above. The position in Australia is less clear. Justice Finkelstein relied on section 33ZF of the *FCA Act*, which provides that 'the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding', to be able to appoint a litigation committee.[56]

A litigation committee is not envisaged by Part IVA of the *FCA Act*. Rather the *FCA Act* focuses on one or more representative parties as being responsible for commencing proceedings and adequately representing group members.[57] It is unclear whether a committee member would become a representative party, as is the case in the US, or simply remain as a group member but with specified responsibilities. As a representative party they would need to meet the requirements set out in sections 33C and 33D of the *FCA Act*. They are also liable for adverse costs orders pursuant to section 43(1A) of the *FCA Act* and may be subject to fiduciary obligations to the group. If the latter, then they remain in the position of not being parties to the litigation and not having any liability for costs. However, they may assume fiduciary obligations to the group.[58] The status of the litigation committee member is unclear.

If it is assumed that the Court can order the use of a litigation committee, it does not have the power to order particular group members to become representative parties nor would it be likely to be able to require them to serve on the committee in their group member role.[59] The group member's participation on the litigation committee is voluntary. However, if a litigation committee cannot be formed it may be appropriate for the Court to make an order that the

56 *Kirby* (2008) 253 ALR 65, 73–4.

57 See, eg, *FCA Act* ss 33C, 33D and 33T.

58 In the US the lead plaintiff is regarded as a fiduciary due to their obligation to represent the collective interest of the group. See *In re Cendant Corp Securities Litigation*, 404 F 3d 173, 198 (3rd Cir, 2005), *Martens v Thomann*, 273 F 3d 159, 173–4 n 10 (2nd Cir, 2001); and *Crawford v Equifax Payment Services, Inc*, 201 F 3d 877, 880 (7th Cir, 2000). In Australia no authoritative judicial statement exists. However, a fiduciary relationship may arise where: (a) there is the existence of an undertaking by one person to act in the interests of another: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96–7 and *Breen v Williams* (1996) 186 CLR 71, 93; (b) there is a vulnerability to another's power or vulnerability necessitating reliance: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 142 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 200–1; *Breen v Williams* (1996) 186 CLR 71, 134; (c) there is a power held by a person (the fiduciary) to affect the interests of the other person in a real or practical sense: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 68, 96–7; and (d) there is a reasonable expectation that a person (the fiduciary) will act in the interests of another in and for the purposes of the relationship: *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 181. The group members may have the necessary vulnerability and expectation that the representative party and any litigation committee would act in the group members' interests. The representative party and any litigation committee in directing the class action will at least impliedly undertake to act in the group members' interests and have a power to affect group members' interests. For a contrary view see Damian Grave and Ken Adams, *Class Actions in Australia* (2005) 130.

59 *Tongue v Council of the City of Tamworth* (2004) 141 FCR 233 ('*Tongue*'), 238 (Jacobson J): 'An unwilling party should not be forced to litigate against his or her will. That is a principle which applies in ordinary proceedings. There is no reason why the same approach should not apply in representative proceedings'.

proceeding cease to continue as a representative proceeding which may encourage volunteers.[60]

B Selection of Litigation Committee

In the US, the litigation committee concept has arisen in securities class actions where multiple lead plaintiffs have been appointed by the court. The ability to aggregate investors shareholdings so that together they qualify as the 'person or group of persons that ... has the largest financial interest' in the suit has been a contentious issue in the US. The positions taken by the courts have turned on the interpretation of the words in the *PSLRA* and the Act's legislative history. Some courts have rejected multiple lead plaintiffs completely, while others have taken a flexible approach allowing a small group of lead plaintiffs.[61] The debate over the desirability of multiple lead plaintiffs provides some guidance to Australian courts as to how a litigation committee might be utilised.

The overarching issue for any committee approach is whether the committee members can adequately and fairly represent the group members' interest.[62] To this may be added a concern as to how effectively and efficiently the committee will operate in managing the litigation and directing the lawyers as it entails additional costs.[63] Consequently, US courts have required information on how the committee members will reach a consensus, co-ordinate their efforts in the litigation, including conduct meetings or participate in the discovery process, and resolve differences of opinion or inter-group conflicts.[64]

The aggregation of lead plaintiffs to create a form of litigation committee has been criticised because it may limit the ability of the lead plaintiffs to monitor class counsel where the committee becomes unwieldy or where the individual committee members' incentives to monitor lawyer behaviour decreases as each attempts to free-ride on the other.[65] The Securities and Exchange Commission, in an amicus brief, expressed particular concern in situations where 'lead plaintiff status is sought by a "group" of persons who were previously unaffiliated, each of whom have suffered modest losses, and who thus have no demonstrated

60 *Tongue* (2004) 141 FCR 233, 238; and *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 464.

61 Allowing a single lead plaintiff only: *In re Donnkenny Inc Securities Litigation*, 171 FRD 156, 157 (SDNY 1997); *Gluck v CellStar Corp*, 976 F Supp 542, 549 (ND Tex 1997); *Sakhrani v Brightpoint Inc*, 78 F Supp 2d 845, 853 (SD Ind 1999); *In re Network Associates Inc Securities Litigation*, 76 F Supp 2d 1017, 1023–7 (ND Cal 1999); *Aronson v McKesson HBOC Inc*, 79 F Supp 2d 1146, 1154 (ND Cal 1999). Allowing a group of lead plaintiffs: *In re Party City Securities Litigation*, 189 FRD 91, 114 (DNJ 1999); *Takeda v Turbodyne Techs Inc*, 67 F Supp 2d 1129, 1131, 1139 (CD Cal 1999); *In re Baan Co Securities Litigation*, 186 FRD 214, 217 (DDC 1999); *In re Advanced Tissue Sciences Securities Litigation*, 184 FRD 346, 352–3 (SD Cal 1998); *In re Oxford Health Plans Inc*, 182 FRD 42, 45 (SDNY 1998); *Schriver v Impac Mortgage Holdings Inc*, 2006 US Dist Lexis 40607 (CD Cal 2006), 22–4.

62 *In re Cendant* 264 F 3d 201, 266 (3rd Cir, 2001).

63 *Ferrari v Gisch* 225 FRD 599, 608 (CD Cal 2004).

64 *In re Gemstar-TV Guide International Inc Securities Litigation*, 209 FRD 447, 450–2 (CD Cal 2002); Federal Judicial Centre, above n 40, 536–7.

65 *Yousefi v Lockheed Martin* Corp, 70 F Supp 2d 1061, 1068 (CD Cal 1999).

incentive or ability to work together to control the litigation. The problem is made worse if the members have been recruited by counsel'.[66]

However, in a recent empirical study it was found that 'groups perform better than individuals as lead plaintiffs in larger cases, while groups that include an entity yield larger settlements and greater provable loss ratios than those that occur with mere aggregation of individuals'.[67]

Some courts have also found that a committee which contains a variety of interests, such as an institutional investor, a pension or superannuation fund and an individual private investor, allows for a broader range of shareholder interests to be represented.[68] In terms of numbers, the Securities and Exchange Commission supported a group of between three and five plaintiffs.[69]

The effectiveness of a litigation committee depends on its size, constituents and how they will interact. In the Centro class actions, Finkelstein J indicated that he would seek information from potential committee members as to why they should be appointed, such as size of financial interest, and ability or experience in monitoring solicitors.[70] The US experience suggests that such information is necessary but not sufficient. The Court needs to ascertain not just the suitability of an individual committee member but their ability to work effectively with the rest of the committee and how the committee as an organ of oversight will function. The appointment of a litigation committee can result in better representation for the group, including monitoring of the lawyers and litigation funder, but will require an assessment of its membership and guidance (possibly in the form of court directions) as to its operation.

VII AUCTIONS

A Power to Conduct an Auction

The power in section 33ZF(1) has been held to include the power to supervise costs agreements entered into between the representative party and/or his or her legal representatives and the group members.[71] An auction may be seen as more proactive method of supervision. However, auctioning of the lawyer's role is not as straightforward as might be thought because of the role of the litigation funder, which is discussed below at Part IX.

Even if an auction could be conducted, the concern in Centro was not so much the fees that the lawyers stood to gain but rather the ability of the court to receive input from the group members on the issue of how the court should rule

66 *In re Baan Co Securities Litigation*, 186 FRD 214, 224 (DDC 1999).
67 James Cox and Randall Thomas, above n 45, 1638–9.
68 *In re Oxford Health Plans Inc*, 182 FRD 42, 47 (SDNY 1998); *Yousefi v Lockheed Martin Corp*, 70 F Supp 2d 1061, 1068 (CD Cal 1999).
69 *In re Baan Co Securities Litigation*, 186 FRD 214, 216–17, 224 (DDC 1999).
70 *Kirby* (2008) 253 ALR 65, 74.
71 *Johnson Tiles* (1999) ATPR ¶41-679, ¶42-681 citing *FCA Act* ss 23, 33V, 33ZJ and 33ZF. In relation to the Court's general jurisdiction over costs, see *Woolf v Snipe* (1933) 48 CLR 677, 678–9.

on the management of the multiple class actions. The litigation committee or adequacy of representation would seem to be better mechanisms for achieving this.

B The Auction Process

The use of auctions in the US to select lead counsel predated the *PSLRA* but has continued to be employed by some courts, including in antitrust class actions.[72] Auctions have been employed because of court dissatisfaction with the selection of lead counsel and associated fee arrangements. The auction process can be very simple with lawyers submitting the percentage of any recovery that they would accept, or more complex, with fee proposals for discrete stages of the litigation (ie certification of the class action, discovery, settlement or trial), with varying percentages depending on the size of the recovery and including qualitative information such as qualifications and experience.[73]

The aim of the auction process has been largely to extract the best fee deal for group members. One empirical study has found that there is a significant correlation between the use of auctions and lower attorneys' fees.[74] Auctions can also provide a way for new firms to enter the market for plaintiff-side securities class action lawyers, thus rendering the overall market more competitive.[75]

However, auctions can also result in a low cost/low quality selection whereby costs are minimised but so is the potential recovery.[76] Some bids can be complex and therefore difficult for courts to assess their relative costs to the group. A court cannot assess which bid is the cheapest without first assessing the likely amount of recovery which leads the judge into the merits of the suit. Qualitative aspects can also be difficult to assess and result in the process becoming overly subjective.[77]

Auctions may also countermand the private attorney-general role of class actions if the lawyers who discover contraventions of the law are not appointed as lead counsel and are not reimbursed for their time thus reducing lawyers' incentives to seek out and disclose illegality.[78]

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72 *In re Oracle Securities Litigation*, 131 FRD 688 (ND Cal 1990); and Jill Fisch, 'Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction' (2002) 102 *Columbia Law Review* 650, 651.

73 Jill Fisch, above n 21, 81. For an example see *In re Bank One Shareholders Class Actions*, 96 F Supp 2d 780, 787, 791–9 (ND Ill 2000) where the winning law firms bid was to charge 17 per cent of the first $5 million recovered, 12 per cent of the next $10 million and 7 per cent of the next $10 million, with no fee charged for any amount recovered in excess of $25 million (thus setting a cap of $2.75 million on the total fees) but with a request that the Court consider a possible bonus fee if more than $25 million were recovered which discourages counsel from settling at $25 million because of the self-imposed cap.

74 Michael Perino, 'Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions' (Paper No 06-0034, St John's University Legal Studies Research Paper Series, 2006) 27 <http://ssrn.com/abstract=870577> at 8 August 2008.

75 *In re Cendant*, 264 F 3d 201, 259 (3rd Cir, 2001).

76 Chief Judge Edward R Becker, 'Report: Third Circuit Task Force on Selection of Class Counsel' (2001) 74 *Temple Law Review* 689, 724.

77 *In re Cendant*, 264 F 3d 201, 259–60 (3rd Cir, 2001).

78 Ibid 259.

There is also a risk that auctions could result in a 'winner's curse', selecting bidders who overestimate the likelihood or amount of a recovery. Such a bidder may then find themselves litigating an unprofitable case which creates an incentive to settle early and cheaply.[79] More generally, fee structures will create incentives for lawyer behaviour. A flat percentage fee may overcompensate lawyers in straightforward cases or cases that settle early. A declining percentage of recovery fees may limit lawyer windfalls but also can cause a lawyer to promote settlement once the percentage associated with the further increment of recovery is not attractive. An increasing percentage of recovery fees can hamper settlement as the lawyers are incentivised to push for higher recoveries.[80]

VIII ADEQUACY OF REPRESENTATION

In the US, it is a fundamental principal of due process and class actions that the lead plaintiff must loyally advance and protect the group members' interests.[81] Rule 23(a)(4) of the FRCP provides that one or more members of a class may sue or be sued as representative parties on behalf of all members only if, inter alia, 'the representative parties will fairly and adequately protect the interests of the class'. At its core, the purpose of the adequacy requirement is to uncover conflicts of interest between the lead plaintiff and the group they seek to represent.[82] Adequate representation ensures that although a group member's rights are determined without him or her being present, or afforded a hearing, their interests are before the court because the representative shares those same interests. Rule 23(a)(4) has also been interpreted to find that a lead party will be inadequate when they lack the knowledge and understanding of the claims and theories raised in the case so that they are unable to make informed decisions and cannot meaningfully supervise lead counsel.[83]

The importance of adequacy of representation has been acknowledged in Australia and is expressly addressed in section 33T of the *FCA Act*.[84] However, section 33T only allows for a group member to move the Court for the

79 Ibid 260.

80 *In re Auction Houses Antitrust Litigation*, 197 FRD 71, 80–1 (SDNY 2000).

81 In *Hansberry v Lee*, 311 US 32, 42–3 (1940), the US Supreme Court held that adequate representation of interests was necessary to meet constitutional due process requirements for binding non-parties.

82 *Amchem Products, Inc v Windsor*, 521 US 591, 625–6 (1997). See also *Rodriguez v West Publishing Corp*, 563 F 3d 948, 959 (9th Cir, 2009).

83 See, eg, *In re Monster Worldwide Inc. Securities Litigation*, 251 FRD 132, 135–6 (SDNY 2008), which found putative representative inadequate where deposition testimony showed that he 'has no interest in, genuine knowledge of, and/or meaningful involvement in this case and is simply the willing pawn of counsel'; *In re AEP ERISA Litigation*, 2008 WL 4210352, 3 (SD Ohio 2008); and *Beck v Status Game Corp*, 1995 WL 422067, 5–6 (SDNY 1995).

84 See *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398, 408, 424, 427 in the context of the NSW representative action procedure.

replacement of an inadequate representative.[85] The Court acting on its own initiative is left to rely on section 33ZF. Nonetheless, adequacy of representation provides a mechanism for protecting group members from a representative party that has a conflict of interest or is otherwise unable to adequately represent the group.[86] The Court can require that an adequate representative be found or the proceedings will be discontinued.

In the Centro class action, if Mr Kirby was not an adequate proxy for the absent group members then the Court could have acted to replace him as the representative party because he was an inadequate representative.[87] This could have resulted in one or more representative parties who were capable of assessing the desirability of Maurice Blackburn's and IMF's proposal to open the class. To date, the Federal Court has not given adequacy of representation the prominence it deserves. This is partially explained by the structure of the *FCA Act* and the limitations on the utility of section 33T. However, a meaningful inquiry into the representative party's ability to be an adequate representative would be an effective way to limit conflicts of interest and give the group members voice.

IX LITIGATION FUNDING

A The Litigation Funder and Multiple Class Actions

Australia needs to examine the management of multiple class actions from the perspective that class actions are usually a 'package deal' – litigation funder/lawyer/representative party/group members. The lawyer, representative party and group members have contractual ties to a particular funder. The funder who pays the cost of the litigation (such as the lawyer's fees, disbursements, project management and claim investigation costs), usually has some form of authority from group members to manage the litigation, including instructing the lawyer, and indemnifies the litigant against the risk of paying the respondent's costs if the case fails. In return, if the case succeeds, the funder is reimbursed for the costs of the litigation, receives a percentage of the proceeds, and in some cases a project management fee.[88]

If one representative party is chosen over another then the above contractual matrix means the funder and lawyer follow. The consolidation of proceedings allows for multiple representatives and at least two solicitors on the record so that

85 Section 33T(1) provides: 'If, on an application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and may make such other orders as it thinks fit.'

86 See *Femcare Ltd v Bright* (2000) 100 FCR 331, 351–2.

87 *Kirby* (2008) 253 ALR 65, 71.

88 Vicki Waye, 'Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs' (2007) 19(1) *Bond Law Review* 225, 297; and Michael Legg, above n 50, 703. See *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* [2009] HCA 43 (Unreported, French CJ, Gummow, Hayne, Heydon and Crennan JJ, 13 October 2009) for an example of a litigation funding arrangement without an indemnity.

there could be two funders provided they are able to cooperate on litigation strategy. However, if only one representative party is chosen some contractual agreement between the funders may be necessary so that each funder recovers from the group members they have contracted with and the payment of the lawyers and other costs is shared in some manner. Some funders may refuse to cooperate and not be prepared to be at risk on costs when they have not selected the lawyers or cannot exercise a degree of control over decisions in the litigation. This would probably result in that class action being stayed.[89]

The contractual matrix is also very significant for the ability of a court to employ an auction. An auction would seek to terminate or alter pre-existing contractual relations as one lawyer is selected to represent the group but they will have no contractual relations with some funders and some group members. The power in section 33ZF(1) allows for the supervision of costs agreements with lawyers.[90] However, the ability to supervise or alter contractual relations with a litigation funder is less clear as the funder is not an officer of the court and the fee arrangements are not amenable to the Court's taxation of costs process.[91] Similar issues as arise for consolidation would present themselves here:

- Who do the group members pay a share of their recovery to?
- Which funder(s) pay for the lawyers?
- Which funder(s) are liable for any adverse costs order?

If legislation was enacted to specify criteria for the representative party, such as the US requirement of the group member with the largest financial interest, then consideration would have to be given to how the group members aligned with an unsuccessful representative party/funder/lawyer would be treated.

- Would group-members free-ride on the chosen representative party?
- Would group members' contractual obligations be somehow statutorily novated to the funder that paid for the lawyers who ran the case?[92]

The class action relying on litigation funding introduces an extra level of complexity that needs to be addressed by a judge, or the legislature, in managing multiple class actions.

B Litigation Funding and Conflicts of Interest

The regulation of litigation funding has been discussed but not acted upon since at least May 2006.[93] The Centro class action raises regulatory issues in the

89 The staying of the class action may be to the advantage of group members as their lawyer and funder do not incur the costs of running the case but the alleged contraventions are pursued by the representative party that is selected.

90 *Johnson Tiles* (1999) ATPR ¶41-679, ¶42-681, ¶42-682.

91 *Kirby v Centro Properties Limited* [2009] FCA 695 (Unreported, Ryan J, 26 June 2009) [42].

92 For an example of a form of statutory novation see *Corporations Act 2001* (Cth) ss 601FS, 601FT.

context of conflicts of interest and the protection of group members. Litigation funders are not as susceptible to court control as lawyers as they are not officers of the court.

External to the court, a litigation funder may owe fiduciary duties to group members, which would include an obligation to avoid conflicts or be under an implied duty of good faith, but both may be contractually excluded.[94] If litigation funding is subject to Part 7 of the *Corporations Act 2001* (Cth) as a financial product or financial service then the funder must hold an Australian Financial Services Licence which necessitates 'adequate arrangements for the management of conflicts of interest'.[95] However, disclosure and consent to a potential conflict, even if quite harmful to a group member, may be an acceptable form of management.[96] If a particular litigation funding arrangement is a managed investment scheme regulated by Chapter 5C of the *Corporations Act 2001* (Cth)[97] then the scheme must be operated by a responsible entity that is subject to a duty to 'act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests'.[98] If the responsible entity was the litigation funder, such a duty may protect group members by requiring that their interests be preferred over the litigation funder's interests.[99] The statutory prohibitions on misleading or deceptive conduct and unconscionability would also still be available.[100]

Another suggestion has been that the lawyer for the group members will act as a suitable protection because of the duties arising from the solicitor-client relationship.[101] However, as the Centro class action suggests, solicitors can find themselves in positions of conflict because of their much more lucrative and ongoing relationship with the funder.

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93 Standing Committee of Attorneys-General, *Litigation Funding in Australia* (May 2006); Laurie Glanfield, 'Litigation Funding – Issues of Regulation' (Paper presented at the AILA National Conference, Sydney, 1 November 2006); Michael Legg, above n 50, 489; Vicki Waye, above n 88; Peta Spender, 'After Fostif: Lingering uncertainties and controversies about litigation funding' (2008) 18 *Journal of Judicial Administration* 101, 113–15; and John Walker, 'Policy Issues in Litigation Funding' (Paper presented at the Supreme and Federal Court Judges' Conference, Hobart, 28 January 2009).

94 Vicki Waye, above n 88, 254–6.

95 John Walker, above n 93, 12–13; *Corporations Act 2001* (Cth) s 912A(1)(aa).

96 See *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35.

97 See *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 (Unreported, Sundberg and Dowsett JJ, Jacobson J dissenting, 20 October 2009) finding that the litigation funding arrangements and solicitors' retainers in the Multiplex class actions constituted a managed investment scheme.

98 *Corporations Act 2001* (Cth) s 601FC(1)(c). The same duty is imposed on officers of the responsible entity by *Corporations Act 2001* (Cth) s 601FD(1)(c).

99 *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 (Unreported, Sundberg and Dowsett JJ, Jacobson J dissenting, 20 October 2009), [104] noting that either the litigation funder or the lawyers for the applicant could be the responsible entity. It would also be possible for a third party (a so-called responsible entity for hire) to be appointed.

100 See, eg, *Trade Practices Act 1974* (Cth) Pt IVA and s 52; *Corporations Act 2001* (Cth) s 1041H; and *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA, 12CB, 12CD and 12DA.

101 *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (No 3)* (2009) 71 ACSR 588, 601.

Whilst the above protections where available would assist, they require a group member to become aware of a conflict and have sufficient knowledge and interests at stake that they can overcome the collective action problem that necessitated a class action in the first place.

A prophylactic response is better than after the event litigation. The adequacy of representation requirement and the employment of a litigation committee provide mechanisms for monitoring. Litigation funders could seek to voluntarily adopt these forms of governance. Alternatively, the regulation of litigation funding should expressly address conflicts of interest.

X CONCLUSION

Class action practice has been significantly altered with the acceptance of the closed class and litigation funding. Both of these developments impact on the management of multiple class actions and the continued rise of entrepreneurial litigation thus leading to a search for tools to address conflicts of interest and to give voice to group members.

Absent legislative intervention, the requirement of adequacy of representation that currently applies to the representative party could be utilised to address conflicts of interest and allow a court to proceed with greater confidence in determining how to manage multiple class actions in the interests of group members. The litigation committee, subject to group members volunteering and the resolution of some uncertainties, could also be structured to provide an effective monitoring tool.

Other tools such as auctions or the US approach of appointing the group member with the largest financial interest have their attractions but would seem to require a legislative framework to make their use possible. This is primarily because of the need to address the role of the litigation funder and the associated matrix of contracts that supports third party funding.