

REPLACING INADEQUATE CLASS REPRESENTATIVES IN FEDERAL CLASS ACTIONS: *QUO VADIS?*

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I INTRODUCTION

It was no doubt the duty of the Court in such suits to see that the absent interests were fairly and honestly represented.¹

However, it is precisely because of the flexible utility of the representative action that judicial control of its conduct is important, to ensure not only that the litigation as between the plaintiff and defendant is efficiently disposed of but also that the interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf. The self-proclaimed carrier of a litigious banner may prove to be an indolent or incompetent champion of the common cause in the courtroom.²

The comments set out above were made in 1921 and 1995 by Starke J and Brennan J of the High Court of Australia, respectively, in relation to representative actions that are regulated by the rules of court that govern proceedings filed in Australia's superior courts.³ These traditional representative action rules may accurately be described as the predecessors to modern class action regimes.⁴

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1 *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34, 76.

2 *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 408.

3 A complete list of these rules may be found at Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Lawbook Co, 2nd ed, 2012) 995.

4 As noted by the Scottish Law Commission in 1994, the 'class action procedure has been developed from the representative action and may be regarded as a sophisticated and improved version of it': Scottish Law Commission, *Multi-Party Actions: Court Proceedings and Funding*, Discussion Paper No 98 (1994) [6.1].

Three class action regimes currently operate in Australia.⁵ The first was introduced in the Federal Court of Australia in March 1992 by part IVA of the *Federal Court of Australia Act 1976* (Cth) ('Part IVA'). An almost identical regime has been available in the Supreme Court of Victoria since January 2000 as a result of the enactment of part 4A of the *Supreme Court Act 1986* (Vic) ('Part 4A'). The New South Wales Parliament was the most recent Australian legislature to introduce – through the enactment in March 2011 of part 10 of the *Civil Procedure Act 2005* (NSW) ('Part 10') – a comprehensive class action regime. Part 10 is also based on the federal regime.

Thus, Chief Justice Brennan's and Justice Starke's comments set out above are as applicable and relevant to Australia's three legislative class action regimes as they are to the representative action rules. This becomes apparent from the following comments made by Jessup J of the Federal Court of Australia in 2009 with respect to Part IVA proceedings:

[W]hat sets a Part IVA proceeding apart from other proceedings with multiple parties is that the named party – the applicant – represents others who are not on the record. Steps taken by the applicant in the conduct of the case are binding on the group members because he acts as their representative. Likewise, findings and rulings made in the course of the applicant's case are binding on the group members not because they have the legal status of final orders but because the group members are represented by the applicant.⁶

The importance of the need to ensure that the interests of the absent class members are advanced by the class representatives is also underscored by the fact that these regimes employ an opt out device⁷ pursuant to which the express consent of a person to be a class member is not required.⁸ As a result, unless class members avail themselves of the opportunity that is normally extended to them to

5 The term 'class actions' is used here in a colloquial sense as the federal and NSW regimes actually employ the term 'representative proceedings' whilst the term 'group proceedings' is utilised in the Victorian regime: see *Mathews v SPI Electricity Pty Ltd (Ruling No 1)* (2011) 34 VR 560, 562 [2] (Forrest J); *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [7] (Gordon J). In the United States, an appellate court has recently explained that 'the class action is an ingenious procedural innovation that enables persons who have suffered a wrongful injury ... committed by the same defendant or defendants to obtain relief as a group, a class as it is called': *Eubank v Saltzman*, 753 F 3d 718, 719 (Posner J) (7th Cir, 2014).

6 *Peterson v Merck Sharpe & Dohme (Australia) Pty Ltd (No 3)* [2009] FCA 5, [50]. See also *Cohen v Victoria (No 2)* [2011] VSC 165, [35] (Forrest J) ('[a] number of provisions of Part 4A ... make it clear that it is the representative plaintiff who carries forward the claim on behalf of the group. He or she plays a pivotal role in the carriage of the group's claim').

7 See Shane Williams, 'A Class Act? Representative Proceedings in the Federal Court' (1992) 66 *Law Institute Journal* 376, 377.

8 *Federal Court of Australia Act 1976* (Cth) s 33E(1); *Supreme Court Act 1986* (Vic) s 33E(1); *Civil Procedure Act 2005* (NSW) s 159(1).

exclude themselves from the litigation,⁹ they will be bound by its outcome with respect to the common issues.¹⁰

The risks that are entailed in empowering a ‘self-elected’,¹¹ ‘self-chosen representative and a volunteer champion’¹² to bind similarly situated claimants were recognised by the Australian Law Reform Commission (‘ALRC’) in December 1988 when it recommended a detailed legislative grouped proceeding regime for the Federal Court. An essential dimension of the philosophy that underpinned the ALRC’s proposed regime was that ‘without active court management, the interests of unidentified parties may not be taken properly into account’.¹³ As Part IVA is largely based on the ALRC’s proposed regime, this philosophy also underpins the federal regime as well as the Victorian and New South Wales regimes given that, as noted above, they are in turn based on Part IVA. The end result is that, as noted in 2009 by Perram J of the Federal Court of Australia, judges presiding over class action litigation are ‘effectively discharging a beneficial supervisory jurisdiction’.¹⁴

Chief Justice Brennan’s comments perceptively drew attention to the fact that the need for judicial intervention is most acute when the class representative is not conducting the class action in a manner that advances the interests of class members. It is therefore not surprising that a provision is found in each of the country’s three regimes that authorises the replacement of class representatives who are not able to adequately represent the interests of class members. In Part IVA, this provision is section 33T(1). It provides that:

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 orders as it thinks fit.

Section 33T(2) confers an identical power with respect to the substitution of sub-group representatives.¹⁵ Part 4A’s section 33T and Part 10’s section 171 are almost identical to this federal provision.

9 See *Federal Court of Australia Act 1976* (Cth) s 33J; *Supreme Court Act 1986* (Vic) s 33J; *Civil Procedure Act 2005* (NSW) s 162.

10 *Federal Court of Australia Act 1976* (Cth) s 33ZB; *Supreme Court Act 1986* (Vic) s 33ZB; *Civil Procedure Act 2005* (NSW) s 179. See also *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 118 ALR 510, 511 (Wilcox J) (‘the notion is that they are entitled to take the benefit of, and are bound by, the result of the proceeding unless they opt out of the proceeding by a specified date’).

11 *Markt & Co v Knight Steamship Co* [1910] 2 KB 1021, 1039 (Fletcher Moulton LJ). See also Rob Baxt, ‘Class Action Legislation – A Mirage for the Consumer?’ (1992) 66 *Australian Law Journal* 223, 224.

12 *Cohen v Beneficial Industrial Loan Corp.*, 337 US 541, 549 (1949).

13 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 70 [157].

14 *Mercedes Holdings Pty Ltd v Waters (No 1)* (2010) 77 ACSR 265, 272, [28] (Perram J). See also *Muswellbrook Shire Council v The Royal Bank of Scotland NV* [2013] FCA 616, [24] (Bennett J).

15 Where there are issues common to the claims of only some of the class members, trial judges are empowered to establish a sub-group consisting of these class members and to appoint a person to be their representative: *Federal Court of Australia Act 1976* (Cth) s 33Q(2); *Supreme Court Act 1986* (Vic) s 33Q(2); *Civil Procedure Act 2005* (NSW) s 168(2).

In 1999, the High Court of Australia described section 33T as a safeguard.¹⁶ The following year the Full Federal Court of Australia rejected the submission that a class member's autonomy is infringed by being included, without his or her express consent, in a Part IVA proceeding. This ruling was partly based on the conclusion that section 33T provides 'a remedy for a group member who considers that a representative party is not able adequately to represent the interests of the group members'.¹⁷

Despite the judicially-accepted importance of the section 33T mechanism there has been, to date, no critical analysis of the operation and effectiveness of this mechanism. The purpose of this article is to address this lacuna in the legal literature by providing an empirical study of the operation of the section 33T mechanism in effecting the replacement of inadequate class representatives in Part IVA litigation. The article is divided as follows. In Part II, the ALRC's analysis and recommendations will be summarised together with the differences between the provision that it recommended, with respect to this issue, and section 33T. All the orders that, to the author's knowledge, have been made pursuant to section 33T in the first 22 years of the operation of the Part IVA regime¹⁸ are canvassed in Part III. This review will enable the identification of a number of major problems and uncertainties regarding the effectiveness of the section 33T mechanism as a means of ensuring the replacement of inadequate class representatives. These issues are then explored in Part IV. In Part V, potential reform strategies, for addressing the identified problems, are briefly considered.

II ORIGIN OF SECTION 33T

A The ALRC's Recommendations

Clause 23(1) of the ALRC's proposed Bill provided that the court may, at any stage, order the substitution of the class representative with one or more of the class members where the class representative is not conducting, or is unable to conduct, the proceeding in the interests of the class members. Such an order 'may be made on application by a group member, without leave, by the principal applicant or of the Court's own motion'.¹⁹

Contrary to the United States federal class action regime and Canada's class action regimes,²⁰ the adequacy of the class representative's representation was not a prerequisite to the initiation of a grouped proceeding under the ALRC's proposed regime. Giving class members the ability to challenge the class

16 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 266 [25] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ). See also Julian Burnside and Stewart M Anderson, 'Class Actions' (Paper presented at Victorian Bar Compulsory Continuing Legal Education Program, 10 August 2004) [54].

17 *Femcare Ltd v Bright* (2000) 100 FCR 331, 336 [18] (Black CJ, Sackville and Emmett JJ).

18 This is the period from 4 March 1992 (when Part IVA came into operation) to 3 March 2014.

19 Australian Law Reform Commission, above n 13, 162 (cl 24(2) of the ALRC's proposed Bill).

20 See generally Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004) ch 8.

representative if they felt she was not acting in their interests was regarded by the ALRC as a superior strategy, for safeguarding the interests of class members.²¹ The ability of the court to act of its own motion to replace the class representative was justified by the ALRC on the basis that the class representative may be conducting a grouped proceeding without the express consent of the class members.²² No explanation was provided by the ALRC as to why the mechanism for replacing allegedly inadequate class representatives could be initiated by the class representatives themselves.

The ground of 'unable to conduct' suggests that the ALRC envisaged the replacement of class representatives even where those advocating the change were not able to point to anything that the class representatives in question had done or had failed to do with respect to the proceeding, up to that point, that demonstrated inadequate representation of the interests of the class. The need to prove the existence of this state of affairs was instead essential to secure the substitution under the first ground of not conducting the grouped proceeding in the interests of the class. This becomes apparent from the following example provided by the ALRC:

Group members may wish to challenge the ability of a principal applicant to act in their interest *at the outset of the proceedings* because, for example, the principal applicant may be a relative of the respondent. The onus should be on group members to satisfy the Court that this is the case.²³

The ALRC also referred to the nature of the duties owed by class representatives to the other members of the class. It drew an analogy between the duties of a class representative and those of a tutor conducting proceedings for an infant or a mentally disabled person in that 'there is in each case a fiduciary element, requiring one person to act in the interests of the other'.²⁴ At the same time, it felt that the test for the removal of a class representative needed to be wider than that for a tutor as well as being capable of application in many different situations.²⁵

B Differences between Clause 23(1) and Section 33T

The drafters of Part IVA agreed with the ALRC that the prerequisites that need to be satisfied in order to file a class action ought not to include a requirement that the aspiring class representative will be an adequate representative of the interests of the class. But a number of differences, of varying significance, do exist between section 33T and the provision drafted by the ALRC. In section 33T there is no express reference to the court being able to make a replacement order 'at any stage'. Another subtle difference between section 33T and clause 23(1) is that the power contained in the former provision

21 Australian Law Reform Commission, above n 13, 63 [147].

22 Ibid 78 [179].

23 Ibid (emphasis added).

24 Ibid 77 [176].

25 Ibid 78 [179].

may be exercised where ‘it appears to the Court’ that the relevant scenario of inadequate representation exists; no similar phrase appeared in clause 23(1).

Of far greater importance is the fact that missing from section 33T is the ability to replace a representative plaintiff who is not conducting the proceeding in the interests of the class members. The ‘inability’ ground was retained in section 33T although it has been drafted in a different manner: ‘not able adequately to represent’ – rather than ‘unable to conduct [the class action] in’ – the interests of the class members. Given that, as noted above, the ALRC intended this ground for replacing class representatives to cover a narrower and different set of circumstances than the ‘not conducting the litigation adequately’ ground – such as for instance conflicts of interest between the class representative and the class members – a legislative intent to restrict the ambit of the power to substitute class representatives is apparent.

Another crucial departure from the ALRC’s provision was the failure to confer expressly on the court and the class representative the power to ‘set in motion’ the section 33T machinery. Only dissatisfied class members are expressly authorised by section 33T to do so.²⁶ The former omission is impossible to reconcile with the managerial and supervisory role – adverted to above – expected of courts in class action litigation. As the discussion in the remainder of this article will show, the failure of section 33T to expressly empower trial judges to activate, on their own initiative, the section 33T mechanism has been a principal cause of the Federal Court not giving ‘adequacy of representation the prominence it deserves’.²⁷

The non-implementation of the ALRC’s recommendation that class representatives should be able to initiate the process leading to their replacement as class representatives means that no provision may be found in Part IVA that expressly permits them to request that they be allowed to step down as class representatives and remain as class members instead. There is a provision, section 33W, that allows class representatives to relinquish that role. But the terms of this provision make it clear that this mechanism only applies where the class representative settled her individual claims and thus ceased to be a member of the representative group.²⁸ In fact, section 33W provides that class representatives may, with leave of the court, settle their individual claims in

²⁶ See also Baxt, above n 11, 224; Michael Legg, ‘Judge’s Role in Settlement of Representative Proceedings: Lessons from United States Class Actions’ (2004) 78 *Australian Law Journal* 58, 64; Michael Legg, Vanessa McBride and Stuart S Clark, ‘The New South Wales Representative Proceeding: A Class Action Half-Way House’ (2008) 12 *University of Western Sydney Law Review* 176, 191–2.

²⁷ Michael Legg, ‘Entrepreneurs and Figureheads – Addressing Multiple Class Actions and Conflicts of Interest’ (2009) 32 *University of New South Wales Law Journal* 909, 924.

²⁸ Before his judicial appointment, Basten J of the Court of Appeal of the NSW Supreme Court perceptively drew attention to the fact that although this omission ‘may not have much practical consequence, it leaves a lot of uncertainty for a representative plaintiff who is unable to strike a deal with a recalcitrant defendant’: John Basten, ‘Representative Proceedings in New South Wales: Some Practical Problems’ (1996) 34(2) *Law Society Journal* 45, 46.

whole or in part at any stage of the Part IVA litigation and withdraw as representatives of the class.²⁹

III REMOVAL AND/OR REPLACEMENT OF CLASS REPRESENTATIVES UNDER SECTION 33T

The author has found that in only eight Part IVA proceedings did the orders made with respect to the removal or substitution of class representatives expressly identify section 33T as providing the legislative power for taking these steps. Most of these orders are not publicly-known as they were not accompanied by judgments. In another class action, whilst the order was silent as to the source of the power for ordering the substitution of the class representatives, the judgment that contained the reasons for making this order allows an inference to be drawn that reliance may have been placed on section 33T.³⁰ In another case, whilst the removal of the class representative was ordered pursuant to section 33W, the court went on to find that such an order could have also been made pursuant to the terms of section 33T.³¹ Thus, it is reasonable to regard these two cases as illustrations of the operation of section 33T. Indeed, the orders made in these two cases have been judicially referred to, in subsequent cases, as section 33T orders.³²

A Financial Considerations

The first section 33T order was issued in the very first proceeding filed under Part IVA: *Poignand v NZI Securities Australia Ltd* (*'Poignand'*). Two section 33T orders were actually granted in this case. The first order was made following the filing of an appeal by the respondents with respect to some aspects of the trial judge's post-trial ruling. As a result of this order, Ellen Jenkins replaced Roger Poignand as class representative. The second section 33T order, which resulted in Peter Metcalfe becoming the sole class representative,³³ was issued after the Full Federal Court held that a new trial was required.³⁴ The applications for both orders were filed by Poignand's solicitors, with his approval. In fact, Poignand swore an affidavit explaining that he was stepping down as class representative because he lacked the financial resources to adequately represent the class members, as a result of the Supreme Court of New South Wales awarding, in

29 Section 33W also establishes a mechanism for advising class members of this development and giving them an opportunity to assume the role of class representatives.

30 *Revian v Dasford Holdings Pty Ltd* [2002] FCA 1119 (*'Revian'*).

31 *Tongue v Council of the City of Tamworth* (2004) 141 FCR 233 (*'Tongue'*).

32 See *Tongue* (2004) 141 FCR 233, 239 [44] (Jacobson J) (referring to *Revian*); *Oasis Fund Management Ltd v Royal Bank of Scotland NV* [2010] NSWSC 584, [25] (Biscoe AJ) (referring to *Tongue*).

33 No information was contained on the court file as to the reasons for this second change although it appears reasonable to conclude that, right from the outset, Jenkins assumed the role of class representative only for the purpose of the appeals: see Vince Morabito, 'An Empirical Study of Appeals by Class Members in Australia's Federal Class Actions' (2013) 42 *Common Law World Review* 240, 252.

34 *Jenkins v NZI Securities Australia Ltd* (1994) 52 FCR 572.

August 1993, judgment against him and others in the sum of over \$2 million.³⁵ This New South Wales proceeding was unrelated to the Part IVA proceeding.

Financial considerations were also behind the substitution of the original class representative, Carolyn Hales, in the so-called vitamins class action (Australia's first successful cartel class action). Approximately 10 months after this Part IVA proceeding was filed, Hales' solicitor filed a notice of motion on behalf of Hales seeking an order that Trudy Bray replace her as class representative. In the affidavit sworn by Hales' solicitor in support of this motion, the reason for this application was explained simply on the basis that Hales wished 'to cease acting as the representative party in the proceeding'.³⁶ The author understands that Hales withdrew because she was no longer willing to run the risk of having an adverse cost order made against her. As was the case in *Poignand*, the section 33T order granted by the trial judge was not accompanied by a judgment.

Lewis Securities Ltd ('Lewis Securities') was the sole class representative in *Lewis Securities Ltd v Tate*. Approximately 16 months after the filing of this Part IVA proceeding Lewis Securities went into liquidation. The liquidator's solicitors, Truman Hoyle, then advised the solicitors that were acting for Lewis Securities in the Part IVA proceeding, Maurice Blackburn, that it had resolved to seek the replacement of Lewis Securities, as a class representative, with another class member. This decision meant that at the next directions hearing, held in March 2009, two barristers appeared, in addition to counsel for the respondent: one, briefed by Maurice Blackburn, appeared for Lewis Securities and the other, briefed by Truman Hoyle, appeared for Lewis Securities' liquidator. This led to what Rares J described as an 'unseemly debate between [these two barristers] as to who is appearing for the company'.³⁷

There was however agreement between the lawyers in question that a section 33T application would be filed in due course to have Lewis Securities substituted as class representative and that a potential class representative had already been identified by Maurice Blackburn, subject to proper funding arrangements being finalised.³⁸ At the end of this hearing, Rares J ordered that the proceeding be stayed except for:

the filing, on or before 1 May 2009, by the applicant or a group member, of a notice of motion and evidence in support seeking to substitute another group member as a representative party pursuant to ss 33T, 33W or 33ZF.³⁹

A notice of motion was filed in May 2009 by Maurice Blackburn on behalf of a class member, Christine Windeyer, seeking pursuant to section 33T and section

35 Roger James Poignand, Affidavit in *Poignand v NZI Securities Australia Ltd*, NSD397/1992, 22 March 1994, [2].

36 Bernard Michael Murphy, Affidavit in *Hales v F Hoffman-La Roche Pty Ltd*, VID359/1999, 28 June 2000, [4].

37 Transcript of Proceedings, *Lewis Securities Ltd v Tate* (Federal Court of Australia, NSD1963/2007, Rares J, 6 March 2009) 41.

38 Ibid 25–6.

39 Ibid 39.

33ZF an extension to the time in which the motion for substitution of the class representative was to be filed. It was explained that this extension was sought because Windeyer was willing to assume the role of class representative but only if the support of a commercial litigation funder was secured; something which Maurice Blackburn were in the process of doing.⁴⁰ An extension until 20 August 2009 was granted but Maurice Blackburn were unsuccessful in their attempts to secure the support of a litigation funder. Notices were sent to class members in May and August 2009 advising them of these developments and the inability to continue the litigation without a named applicant; but none of the class members applied to be appointed as class representative. Accordingly, the proceeding was dismissed for want of prosecution on 25 September 2009.

B Health Problems

Poor health was the reason for the class representatives in *Tongue*⁴¹ and in *Flood v Winning Time Pty Ltd* ('*Flood*')⁴² instructing their lawyers to seek judicial permission to step down as class representatives.

The motion filed on behalf of Tongue sought leave to 'discontinue as the representative in the proceeding' but did not specify the statutory provision under which the order was sought.⁴³ Initially, reliance was placed by Tongue's lawyers on section 33W but at the hearing of this motion they submitted that the motion was based on section 33T. This 'dance around the provisions of Part IVA'⁴⁴ was based on the belief on the part of Tongue's lawyers, and the lawyers appearing for the respondent who supported the motion, that section 33W did not apply because Tongue had not settled his individual claim. Justice Jacobson was, instead, of the view that the agreement between Tongue and the respondent that Tongue would not pursue his individual claim and the undertaking provided in open court by the respondent not to pursue him for the costs of the proceeding constituted a settlement of Tongue's individual claim.⁴⁵ As a result, the order sought by Tongue was granted under section 33W.

But, in the event that his views on section 33W were erroneous, his Honour then proceeded to consider whether section 33T empowered him to make this order. The conclusion reached by Jacobson J was that he had the power to allow the withdrawal of Tongue as class representative and appoint another person as representative under section 33T. This was because:

40 Ben Slade, Affidavit in *Lewis Securities Ltd v Tate*, NSD1963/2007, 4 May 2009.

41 Terence Rodney Tongue, Affidavit in *Tongue v Council of the City of Tamworth*, NSD425/1998, 11 April 2003, [17] ('it appeared I had suffered a stroke').

42 Paul Edmond Flood, Affidavit in *Flood v Winning Time Pty Ltd*, VID1419/2006, 12 March 2008, [4] ('that as a result of my medical condition I am unable to adequately perform the duties of the representative nor am I able to adequately represent the interests of the group members as I wish to withdraw entirely from the group proceeding').

43 *Tongue* (2004) 141 FCR 233, 234 [1], 235 [9] (Jacobson J).

44 *Ibid* 236 [14].

45 *Ibid* 238 [33].

by reason of his ill health and the perception of lost confidence by other group members, Mr Tongue is not able to adequately represent the interests of the group members.

The power under s 33T is discretionary and carries with it the power to attach conditions. However, for the reasons stated above, in the exercise of my discretion, I would not impose the condition sought by Reganam.⁴⁶

The entity referred to above by Jacobson J, Reganam Pty Ltd ('Reganam'), was a class member that filed a notice of motion seeking an order that it be substituted as the class representative. The application to replace Tongue was made on the condition that Reganam not assume any liability for the pre-substitution costs of the proceeding.⁴⁷ Justice Jacobson's refusal to authorise the condition sought by Reganam led to the withdrawal of its application to be appointed as class representative. The proceeding was ultimately dismissed given that no other class member applied to replace Tongue.

A similar level of confusion – as to whether a request for the withdrawal from a Part IVA proceeding by a class representative as a result of poor health could be granted under section 33T – was exhibited by the lawyers involved in the already-mentioned *Flood* class action.

Initially, Flood's lawyers sought to have him replaced as class representative under section 33W by a class member chosen by them. In order to be successful in their section 33W application they sought to emulate the circumstances that were found by Jacobson J in *Tongue* to constitute a settlement of Tongue's individual claim, namely, an agreement by the class representative not to pursue his individual claim against the respondents and an agreement by the respondents not to seek costs against him. When the respondents failed to adhere to this suggested strategy, Flood's lawyers relied on section 33T as the legislative basis for the change in class representatives. But the respondents' lawyers objected to the section 33T order on the basis that the documentation filed by Flood's lawyers failed to adequately meet the requirements of section 33T:

as they do not disclose that the present representative party is failing to adequately represent the interests of the group members. The burden is on the *group member* to establish inadequacy.⁴⁸

Indicative of the fact that the uncertainty and confusion as to the precise scope of section 33T was also shared by the respondents' lawyers was the submission made by their counsel during the section 33T hearing that 'the court

46 Ibid 240 [52]–[53].

47 Ibid 239 [45]. Reganam was also responsible for the loss of confidence in Tongue adverted to above as it had objected, on behalf of approximately half of the class members, to the settlement that had been executed by Tongue and the respondent. This objection was the main reason why Allsop J declined to approve this settlement: *Tongue v Council of the City of Tamworth* [2004] FCA 972.

48 Steven Leslie Weill, Affidavit in *Flood v Winning Time Pty Ltd*, VID1419/2006, 17 March 2008 (emphasis added).

has to be satisfied that there is an onus of proof that has been proven by the *named applicant*.⁴⁹

But the debate that followed this submission showed that the section 33T objections were advanced by the respondents only as a means of ensuring that Flood accepted liability for the respondents' costs. Once it became clear that Flood's counsel would not object to an order that Flood 'pay the respondents costs of the [section 33T] application',⁵⁰ they withdrew their objections to the section 33T order.⁵¹ Once again, no judgment outlining the trial judge's reasons for granting the section 33T application was handed down.

C Challenges by Respondents

A section 33T order was issued by Branson J in August 2005 in *Francey v Sharpe Development Group Ltd* ('*Francey*').⁵² This proceeding was filed on behalf of all present lot owners in a particular building in Queensland. The class representative, Kenneth Francey ('K Francey'), resided in England and one of the class members was his brother, Neil Francey of counsel ('N Francey'). In addition to being a class member, N Francey drafted and settled the pleadings in this case and appeared in all the hearings on behalf of the class representative. The respondents sought security for costs from the class representative and applied for an order to strike out the statement of claim.

This latter application was based on, among other things, the fact that K Francey 'is not and never has been the registered owner of a lot' in the building in question⁵³ and thus had no standing to sue the respondents. At first, this assertion was rejected by the class representative by pointing out that he had an equitable entitlement as to 20 per cent of a unit being an interest that had been acquired by rolling over a 10 per cent interest in a previous property together with a further contribution towards the purchase price of the unit in question.⁵⁴ But subsequently an application was filed seeking that N Francey be substituted

49 Transcript of Proceedings, *Flood v Winning Time Pty Ltd* (Federal Court of Australia, VID1419/2006, North J, 17 March 2008) 3 (S Burchell) (emphasis added). Flood's counsel justified the reliance on s 33T on the following line of reasoning:

[I]t is my submission that as Dr Flood has stated that for medical reasons he is not prepared to be a member of the group and that he is not prepared to give instructions to the solicitors acting for the group, that he is not able to represent the group. In my submission, it stands to reason that if Dr Flood is not prepared to take part in the proceedings, he can't possibly be the person who is prepared to get up in court and give evidence on behalf of the group.

At 5 (N Jones).

50 Ibid 17.

51 Transcript of Proceedings, *Flood v Winning Time Pty Ltd* (Federal Court of Australia, VID1419/2006, North J, 17 March 2008) 15 (R Moore) ('with my learned friend's concession, that Dr Flood is going to file a notice of discontinuance and is going to pay my client's costs, then we have nothing further to say about that [the s 33T order]').

52 [2005] FCA 1059.

53 *Sharpe Development Group Pty Ltd*, 'Outline of Submissions of the First and Second Respondents', Submissions in *Francey v Sharpe Development Group Ltd*, NSD 1123/2005, 22 April 2005, [6].

54 Kenneth Francey, 'Outline of Submissions of the Applicant', Submissions in *Francey v Sharpe Development Group Ltd*, NSD 1123/2005, 29 April 2005, [11].

for K Francey as the class representative. In her judgment, Branson J indicated that the respondents did not oppose this change, subject to their contention that the proceeding should not continue as a Part IVA proceeding.⁵⁵ But an affidavit sworn by the respondents' solicitor revealed that it was in fact the respondents' solicitor that had asked Francey's solicitors to consent to an order 'that the applicant be substituted for either Mr Neil Francey or others'.⁵⁶

Her Honour's discussion of the section 33T order was, unfortunately, very brief. Her Honour indicated that whilst the application was not made on the basis that K Francey was not able adequately to represent the interests of the class members, she nevertheless proceeded on the basis that the application was one made under section 33T. Her Honour then expressed the view that:

the difficulties that attend the nomination of Mr K Francey as the representative applicant, which difficulties need not be outlined here, make it appear that he may not be able adequately to represent the interests of the group.⁵⁷

In the fast track response filed in October 2010 in one of the so-called bank fees class actions – *Andrews v ANZ Banking Group Ltd* – the respondent denied that it had charged the third class representative, Ezi Does It Pty Ltd ('Ezi'), commercial card exception fees. This meant that, as succinctly noted by counsel for the respondent during a directions hearing held the following month, 'the third applicant is an inapposite representative party, because he is not even a member of the group'.⁵⁸ After reviewing copies of the statements for Ezi's business one visa credit card account, Ezi's solicitors agreed with the respondent. As a result, they applied on behalf of the three class representatives for Ezi's replacement as third applicant with a class member, Geoffrey Allan Field, who did incur commercial card exception fees.⁵⁹ Whilst the barrister who appeared for the class representatives had initially indicated to Finkelstein J that this substitution would proceed pursuant to section 33W, the consent order that authorized this substitution was made 'pursuant to s 33T and/or s 33ZF'.⁶⁰ Section 33ZF empowers the court to make any order it thinks appropriate or necessary to ensure that justice is done in Part IVA proceedings.

D Decisions by Class Representatives for Unknown Reasons

The original class representatives – in two Part IVA proceedings filed on the same day by the same firm of solicitors on behalf of persons diagnosed with, among other things, Parkinson's disease – subsequently secured at different times

55 *Francey* [2005] FCA 1059, [5].

56 John Andrew Hayward, Affidavit in *Francey v Sharpe Development Group Ltd*, NSD1123/2005, 4 July 2005.

57 [2005] FCA 1059, [5].

58 Transcript of Proceedings, *Andrews v ANZ Banking Group Pty Ltd*, (Federal Court of Australia, VID811/2010, Finkelstein J, 4 November 2010) 21 (A Archibald QC).

59 Paul Noland Gillett, Affidavit in *Andrews ANZ Banking Group Ltd*, VID811/2010, 13 December 2010, [3]–[6].

60 (Order of Finkelstein J, 2 March 2011) [1].

their substitution as class representatives, pursuant to section 33T.⁶¹ A review of the court files did not reveal the reasons for this desire to be replaced as class representatives.

E Adversarial Context

The remaining Part IVA proceeding saw the only instance of a class representative in a Part IVA proceeding being removed, pursuant to section 33T, against her wishes. This occurred in *Revian*.⁶² This class action essentially concerned a dispute between a small number of tenants at a shopping centre and the owner of this shopping centre and its real estate agent. The class representative operated, at the shopping centre in question, a video hire business as trustee of the GKDK Trust. Thus, she was suing in her capacity as trustee of the GKDK Trust. The fourth respondent sought an order that the court strike out the entire proceeding. The main ground for this application was that the class representative lacked the capacity to institute the proceeding. This was because clause 14(a) of the GKDK Deed of Trust provided that a trustee ‘shall ipso facto vacate that office if ... [he/she] becomes subject to any bankruptcy law’ and, before she filed this class action, the class representative had entered into an arrangement under part X of the *Bankruptcy Act 1966* (Cth).⁶³ According to the fourth respondent, this meant that the class representative became subject to a bankruptcy law within the meaning of clause 14(a) of the GKDK Deed of Trust and thereby vacated the office of trustee.

This submission was accepted by French J and, as a result, he ordered that the applicant be removed as representative of the class members and that there be liberty to apply to substitute another class member as class representative. Approximately two weeks after this order was issued the removed class representative swore an affidavit where it was revealed that ‘the group members have resolved that I be replaced as applicant by one of the other group members ... Andrea Szabo’.⁶⁴ Attached to this affidavit were written consents to Szabo’s appointment as class representative executed by all the class members and the outgoing class representative. A month later, Szabo was formally appointed as class representative.

61 *Moore v Pfizer Australia Pty Ltd* (Orders of Bromberg J, 30 March 2011, 21 April 2011); *Sullivan v Aspec Pharmacare Australia Pty Ltd* (Order of Bromberg J, 9 May 2012).

62 *Revian v Dasford Holdings Pty Ltd* [2002] FCA 1119.

63 *Ibid* [8] (French J).

64 Kandi Lee Ann Revian, Affidavit in *Revian v Dasford Holdings Pty Ltd*, WAD101/2001, 24 September 2002, [8].

IV INADEQUACIES AND UNRESOLVED ISSUES

A Perceptions/Expectations v Reality

The philosophy underpinning the ALRC's recommendations for an express power to replace inadequate class representatives, the terms of section 33T and the general views expressed by Australia's highest appellate courts with respect to the importance of section 33T clearly suggest that this provision was intended to provide, together with the opt out regime,⁶⁵ the principal mechanism for addressing major disputes or differences between class representatives, on the one hand, and all or some of the class members, on the other, as to what is required of the class representatives in order to advance the interests of the class. That is to say, it envisages an adversarial setting with the class representative and its solicitor opposing the request by a class member, self-represented or represented by a different law firm, that this class member or another class member be appointed to replace the current class representative. But as the discussion in Part III above has shown, this mechanism has operated in a vastly different manner.

We have seen that the section 33T mechanism has, to the author's knowledge, never been activated as a result of one or more class members being dissatisfied with the adequacy of the representation provided by the class representative. On seven occasions the process of replacing the class representatives was activated because the class representative was not willing or able to continue in that role and on two other occasions because the respondents had raised objections to their standing. On each of these nine occasions the solicitors who commenced the class actions also prepared and filed the required documents and appeared at the hearings where these requests were judicially canvassed. In the remaining section 33T case the class representative was removed, over her objections, following the court's acceptance of, again, standing objections made by the respondents. In Part III above, it was revealed that in the vast majority of these cases the lawyers that filed the proceedings also undertook the task of finding class members who were willing to be appointed as the new class representatives.⁶⁶

The extremely modest role that the section 33T mechanism has played, in practice, in protecting the interests of class members is also highlighted by the

65 As explained by a Canadian court, 'this opportunity is extended to class members because individuals pursuing their self-interest may have very good reasons not to be bound by a resolution of the class case. They may want to preserve their rights to pursue individual actions; they may not feel that they have been wronged; or that they may have other available avenues of redress which they perceive to be superior than the class proceeding': *Mangan v Inco Ltd* (1998) 38 OR (3d) 703, 715. See also *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2008] FCA 575, [16] (Tamberlin J); *Clarke v Great Southern Finance Pty Ltd (in liq)* [2014] VSC 569, [25] (Judd J); *Campbell v Flexwatt Corporation* (1997) 44 BCLR (3d) 343, [76].

66 This role played by the solicitors in question was highlighted in the most unequivocal manner by the following comment found in the affidavit filed by the class member who replaced the class representative in *Flood*: 'our legal practitioners ... requested that I be the Group Representative': Christopher John Lehmann, Affidavit in *Flood v Winning Time Pty Ltd*, VID1419/2006, 17 March 2008, [3].

fact that over the same period – which it will be recalled covers the first 22 years of the operation of Part IVA – the author has identified the filing of 329 Part IVA proceedings.⁶⁷ But the stark contrast between the perceived importance of section 33T – as a legislative ‘safeguard’ and a ‘remedy for group members’⁶⁸ – and its insignificance in practice is most clearly brought to the fore by the fact that the circumstances that led to the employment of the section 33T mechanism in the 10 class actions in question could have all been addressed without any need to resort to section 33T.

In fact, in other Part IVA proceedings trial judges have authorised the removal or replacement of: (a) class representatives at their request, following objections to their standing raised by the respondents;⁶⁹ (b) class representatives who desired to step down as class representatives but provided no reasons for their decision;⁷⁰ and (c) class representatives who desired to step down because of financial⁷¹ or health problems.⁷² The orders in question either relied on provisions other than section 33T – Part IVA’s section 33ZF and section 33Z(1)(g)⁷³ and order 6 rules 8⁷⁴ and 9⁷⁵ of the former *Federal Court Rules 2001* – or were silent as to the source of the power to effect the substitutions in question. An unwillingness to continue representing the class as a result of poor health also prompted the Supreme Court of New South Wales to order the

67 See Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes: Third Report: Class Action Facts and Figures – Five Years Later* (Report, 2014) 7.

68 See above nn 16–17.

69 This was, for instance, the reason for the replacement of: (a) the original class representative in *Courtney v Medtel Pty Ltd* (*‘Courtney’*); and (b) the class representative who had replaced the original class representative in the vitamins class action. Please note that the citation reference for *Courtney* is intentionally omitted, as it does not provide support for the facts referred to in the accompanying text. The names of the cases are provided for informational purposes only to allow readers to conduct further research should they wish. This is also the case for proceedings without citation references provided in below nn 70–2, 79, 139.

70 This is what occurred in the following Part IVA proceedings: *Woodhouse v McPhee* (1997) 80 FCR 529; *Neil v P & O Cruises Australia* [2002] FCA 1325; *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* [2010] FCA 1302, [6] (Tracey J). Similarly, no reasons were provided for the desire of the original class representatives in the following Part 4A proceedings to step down as class representatives: *Thomson v Key Pharmaceutical Pty Ltd* (citation reference intentionally omitted – please see above n 69); *Mathews v SPI Electricity Pty Ltd [No 12]* [2014] VSC 131.

71 This was the reason, for instance, for the removal of the class representative in *Simons v Capital Finance Corporation (Australia) No 1 Pty Ltd* (citation reference intentionally omitted – please see above n 69).

72 This was the reason, for instance, for the replacement of two class representatives in *Haslam v Money for Living (Aust)* (citation reference intentionally omitted – please see above n 69).

73 This provision provides that the court may, in determining a matter in a Part IVA proceeding, ‘make such other order as the Court thinks just’.

74 This rule (now rule 9.05 of the *Federal Court Rules 2011*) provided that where a person who is not a party (a) ought to have been joined as a party; or (b) is a person whose joinder as a party is necessary to ensure that all matters in dispute in the proceeding may be effectively and completely determined and adjudicated upon, the court may order that the person be added as a party.

75 This rule (now rule 9.08 of the *Federal Court Rules 2011*) provided that if a person (a) has been improperly or unnecessarily joined as a party to a proceeding; or (b) has ceased to be a proper or necessary party to a proceeding, the court may order that the person cease to be a party.

substitution of the representative plaintiff in a traditional representative proceeding filed in the pre-Part 10 era.⁷⁶

Resort to section 33T is also unnecessary when it is discovered that a Part IVA representative does not have standing to sue the respondents. Lack of standing means that there has been a failure to comply with one of the essential prerequisites for the employment of the Part IVA regime. Section 33C(1) provides that a Part IVA proceeding may be filed if three conditions are satisfied. The first requirement is that seven or more persons have claims against the respondent. The need for the person that files a Part IVA proceeding to have individual standing to sue the respondent, which is implied by section 33C(1)(a), is made explicit by section 33D(1).⁷⁷ It provides that:

A person referred to in paragraph 33C(1)(a) who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding against that other person on behalf of other persons referred to in that paragraph.

Thus, the drafters of Part IVA have unambiguously determined that the question of whether a Part IVA representative has individual standing to sue the relevant respondent(s) forms part of the broader question of whether the proceeding in question is a properly instituted Part IVA proceeding. If the class representative is found not to have standing the proceeding cannot be allowed to continue unless another class representative is found who does have individual standing. Thus, subject to one potential exception, standing issues are not relevant to the issue of whether particular class representatives are adequate representatives.

The potential exception may arise where a class representative that had standing to sue the respondent at the outset of the litigation loses that standing at a later point in time because, for instance, the court has made a final ruling on the merits of that representative's individual claims or the description of the class represented in the proceeding has been altered and the class representative no longer falls within the ambit of the class as described in the revised pleadings. Section 33D(2) provides that a class representative retains 'a sufficient interest to continue [the Part IVA] proceeding ... even though [it] ceases to have a claim against that respondent'.

Despite this authorisation, a number of Part IVA representatives who ceased to have claims against the respondents sought orders that they be substituted as class representatives with class members who did retain a claim against the

76 *Oasis Fund Management Ltd v Royal Bank of Scotland NV* [2010] NSWSC 584.

77 *Ryan v Great Lakes Council* (1997) 78 FCR 309, 311 (Wilcox J).

respondents.⁷⁸ On some occasions this step was taken following assertions by the respondents that they could not remain as class representatives.⁷⁹ The latter substitution orders, which made no reference to section 33T, were made despite the fact that the relevant objections of the respondents relied on nothing more than the fact that the class representatives in question ceased to have a claim against the respondents; a state of affairs which, as we have seen, is expressly authorised by section 33D(2). Indicative of the unsatisfactory state of the current law with respect to inadequate representation in Part IVA litigation is the fact that when the interests of a class representative *did diverge* from those of the class members, as a result of ceasing to have a claim against the respondent, no substitution order was requested, let alone made.

B Adequacy of Settlements and Adequacy of Representation

The Part IVA proceeding in question was *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd*.⁸⁰ The Full Federal Court rejected completely Peterson's individual claim⁸¹ and the High Court denied him leave to appeal.⁸² This meant that he was liable for the significant costs of his opponents.⁸³ But subsequently he executed, on behalf of the class, a settlement agreement. The class representative received an enormous financial benefit from the settlement – no longer being required to pay the costs of his opponent – whilst the benefits provided to some of the class members by the settlement agreement were found by the trial judge to be inadequate. No order was made under section 33T, or indeed under other provisions, to replace the class representative. The issue of conflicts of interest is revisited in Part IV(E)(4) below.

A similar failure to replace the class representatives was witnessed in two other Part IVA proceedings despite judicial conclusions that the settlements that were put forward by these class representatives for judicial approval, under section 33V, discriminated unjustifiably against certain categories of class members.⁸⁴

78 An instance of a Part IVA class representative stepping down, once he ceased to have a claim (despite the lack of objections from the respondents to them continuing in that role), is furnished by *Wang v Minister for Immigration & Multicultural Affairs* (citation reference intentionally omitted – please see above n 69). This willingness to step down is not entirely surprising given that ‘few individuals will be so public spirited as to pursue proceedings with risk of adverse costs or damages, where they no longer have an individual interest in the proceedings. That would be a case of maximising risk with no possible benefit’: Basten, above n 28, 46.

79 This occurred in, among others, *Spice v Pacific Dunlop Ltd* (citation reference intentionally omitted – please see above n 69) and *Marks v GIO Australia Holdings Ltd* [1999] FCA 1010.

80 [2013] FCA 447.

81 *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128.

82 Transcript of Proceedings, *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd* [2012] HCATrans 105 (11 May 2012).

83 *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [No 2] [2011] FCAFC 146.

84 *Williams v FAI Home Security Pty Ltd* (2000) 180 ALR 459; *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89. Not surprisingly, the class representatives were not members of the relevant sub-groups.

In 2005, Lee J of the Federal Court made the following comments in *Crawford v Bank of Western Australia*⁸⁵ regarding the potential interaction between section 33T and section 33V:

The requirement set out in s 33V that a representative proceeding not be settled or discontinued without the approval of the Court is a necessary caveat to ensure that the power created in Part IVA ... to bind persons not parties to the litigation is not abused. It follows that an application for such approval must provide sufficient particularity of the circumstances of the settlement or of the decision to discontinue to allow the Court to determine whether the settlement or discontinuance is a satisfactory outcome for all interests represented or whether some other group member should be appointed under s 33T ... to replace the representative party. The interests of an applicant may diverge from those of other group members ...⁸⁶

With respect, Justice Lee's comments provide further confirmation of the great disparity that exists between what section 33T enables trial judges to achieve in order to protect the interests of class members, according to judicial 'proclamations', on the one hand, and the actual operation to date of the section 33T mechanism, on the other.⁸⁷

C Why Have Class Members Failed to Avail Themselves of the Section 33T Mechanism?

In a submission filed in June 2013, in response to the discussion paper on representative proceedings released by the Law Reform Commission of Western Australia ('LRCWA') in February 2013, the Law Council of Australia made the following comments with respect to the experience with section 33T in Part IVA proceedings:

it may be that s 33T has not been the subject of judicial determinations because group members are not applying for orders, as the representatives are, in fact, adequate for the task.

The Law Council is not aware of any evidence that group members have been dissatisfied with the adequacy of representation of the class representative, and can see no reason to amend [section 33T].⁸⁸

This line of reasoning does not, with respect, withstand close scrutiny. The international jurisprudence on class actions has clearly demonstrated, for instance, that no or minimal objections to class action settlements by class members, and no or few class members opting out of the class action after the settlement notice is published and/or distributed, do not permit inferences to be drawn that the relevant settlements enjoy the support of the vast majority of class members. This is due to, among other things, the fact that 'the operation of the

85 [2005] FCA 949.

86 Ibid [16].

87 See also Grave, Adams and Betts, above n 3, [14.220].

88 Law Council of Australia, Submission to Law Reform Commission of Western Australia, *Representative Proceedings* June 2013, 7 [32]–[33].

same social and psychological factors that discourage persons from bringing their own civil actions will prevent them from taking other forms of affirmative action'.⁸⁹

Some of the class members may simply not be aware of the existence of the litigation,⁹⁰ a risk that is inherent in class action regimes regulated by opt out devices. Reference should also be made to the fact that the value of the individual claims of many class members is unlikely to justify the not insignificant costs involved in seeking to make reasonably accurate assessments of the adequacy and reasonableness of the settlements in question.⁹¹ Even where the individual claims are significant, in most circumstances, seeking the services of another solicitor would not represent a fruitful exercise. This is because a solicitor who is not involved in the Part IVA proceeding in question would not have all or most of the information and documents that would be required in order to provide effective advice to the class members in question.⁹²

These general problems are also confronted by those class members who desire to assess the adequacy of the representation provided by the class representatives for the purpose of deciding whether a section 33T application should be filed. Indeed additional problems exist in the section 33T context. Deciding whether to incur the expenses entailed in filing a section 33T application also entails thinking about who will replace the class representative in the event that the application is successful. If there is no other class member willing to assume the mantle of class representative, there would be, generally speaking, little point in filing the section 33T application unless the applicant in question plans to accompany the request for the removal of the existing class representative with a request that it be appointed as class representative. After all, in many instances inadequate representation may be perceived as a superior option to there being no class action or other proceeding to enforce one's legal rights.

But even a high level of dissatisfaction with the way the class representative is running the proceeding may not be sufficient to persuade the dissatisfied class member in question to assume the role of class representative. Some of the more

89 Ontario Law Reform Commission, *Report on Class Actions*, Report No 48 (1982) 480. See also Tom Eisenberg and Geoff Miller, 'The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues' (2004) 57 *Vanderbilt Law Review* 1529; *Kidd v Canada Life Assurance Co* [2013] OJ No 1468, [170] (Perrell J); *Mandujano v Basic Vegetable Products Inc*, 541 F 2d 832, 835 n 6 (Sneed J) (9th Cir, 1976); *Scardelletti v Debarr*, 265 F 3d 195, 214 (4th Cir, 2001).

90 A possibility acknowledged by the Full Federal Court in *Femcare Ltd v Bright* (2000) 100 FCR 331, 348 [71] (Black CJ, Sackville and Emmett JJ). See also Legg, 'Judge's Role in Settlement', above n 26, 64; Vince Morabito, 'Class Actions – the Right to Opt Out under Part IVA of the *Federal Court of Australia Act 1976* (Cth)' (1994) 19 *Melbourne University Law Review* 615, 630; *Sollen v Pfizer Canada Inc* [2008] OJ No 866, [40] ('no notice plan can be 100 per cent effective').

91 In *Philip Morris (Australia) Ltd v Nixon* [1999] FCA 1281, the Full Federal Court acknowledged that class members 'may incur not inconsiderable expense in reaching' a decision as to whether they should exercise their opt out right: at [20] (Sackville, Hely and Gyles JJ). See also *Eubank v Saltzman*, 753 F 3d 718, 728 (Posner J) (7th Cir, 2014).

92 *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 175 [26] (Sackville J).

significant disadvantages in being a class representative, as opposed to being simply a member of the class, were eloquently explained by a Canadian court:

The common issue trial will determine the litigation for all class members. Nonetheless, the plaintiffs will be the only class members exposed to costs in the litigation, up to the conclusion of that trial. ... Under virtually any other procedure, they would be exposed to less costs individually. Notwithstanding this, they stand to gain no more from the class proceeding than any other class member on a proportionate basis or than they would in individual lawsuits.⁹³

Aspiring ‘replacement’ class representatives also face conflicting rulings⁹⁴ and therefore uncertainty as to a crucial question: whether their liability for the costs of the litigation, in the event of an unsuccessful outcome, is limited to costs incurred or cost orders made after their appointment or whether it can extend to costs incurred or cost orders made prior to their appointment.⁹⁵

D Instances of Inadequate Representation

Thus, it is not possible to equate the lack of section 33T applications by class members with a lack of dissatisfaction with the representation of their interests by the class representatives. But if this conclusion is not accepted, another conclusion is inescapable: in several Part IVA proceedings, the class members *should have been dissatisfied* with the performance of the class representatives. The most obvious and objective illustrations of inadequate representation are furnished by those Part IVA proceedings where the class representatives were self-represented for all or part of the litigation. The author has identified 12 such Part IVA proceedings.⁹⁶ In one of these class actions, McKerracher J made the following observations:

There can be significant complexities behind representative proceedings. The anticipation of the legislation and rules is that such proceedings will usually be conducted by persons well versed in the procedure of the Court generally ... had

93 *1176560 Ontario Ltd v The Great Atlantic & Pacific Company of Canada Ltd* (2002) 62 OR (3d) 535, 553. See also *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 286 [61] (Jacobson J); *Woodlands v Permanent Trustee Company Ltd* (1995) 58 FCR 139, 145 (Wilcox J).

94 Cf *Tongue* (2004) 141 FCR 233; *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* [2010] FCA 1302, [10]–[16] (Tracey J); *Liesfield v Ausnet Electricity Services Pty Ltd (Ruling No 4)* [2014] VSC 495; *Revian* [2002] FCA 1119, [45] (French J); *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505, [40] (Merkel J); *Tuxford v New South Wales* [2004] NSWSC 445, [8] (Master Harrison).

95 It should also be noted that the reason why, in *Lewis Securities Ltd v Tate*, Christine Windeyer was willing to step in as class representative only if the support of a litigation funder was secured was because Lewis Securities’ counsel had reassured the court that the incoming class representative would provide security for costs: Transcript of Proceedings, *Lewis Securities Ltd v Tate* (Federal Court of Australia, NSD1963/2007, Rares J, 6 March 2009) 26 (M Lee) (‘there will be no contest as to the obligation of the new representative to provide security for costs’).

96 One of these self-represented class representatives was a solicitor: see *Worchild v The Drink Nighclub (Qld) Pty Ltd* [2004] FCA 642, [1] (Cooper J). But that did not prevent the court ordering that ‘the proceedings be dismissed ... on the basis that they disclose no cause of action, are embarrassing in a pleading sense and there exists no demonstrable basis upon which the applicant may make out on his own behalf, or on behalf of the group members, a cause of action which has a prospect of succeeding at trial’: at [37].

the matter progressed to trial, Mr Boase [the self-represented class representative] would have been even further out of his depth.⁹⁷

Similar complaints and/or comments may be found in judgments handed down in some of the other Part IVA proceedings where there were self-represented class representatives.⁹⁸ To the author's knowledge, in only one of these class actions, *McIntyre v Eastern Prosperity Investments Pty Ltd*,⁹⁹ did the court order the class representative to secure legal representation. But in a manner that is again indicative of the practical insignificance of the section 33T mechanism, the 'penalty' specified by the court for failing to comply with this order was not the removal of the class representative; it was dismissal of the proceeding as a Part IVA proceeding.

Examples of inadequate representation of the interests of class members – where the class representatives did have legal representation – were furnished above, with respect to settlements.¹⁰⁰ The author understands that during a directions hearing in the two already-mentioned Part IVA proceedings brought on behalf of victims of Parkinson's disease, Bromberg J expressed concerns with respect to the quality of the representation, of the interests of the class members, that the class representatives had provided to that point through their legal representatives and that, if there was no improvement in the quality of this representation, steps would be taken by the court to rectify the problem. In a subsequent directions hearing, Bromberg J made the following comments:

Now, I've come in here today without being able to make any sense of anybody's submissions because I don't have copies of the documents that you seek to now have leave be granted in relation to. Now, that puts me at a very significant disadvantage ... and I must say that ... whoever is responsible for that incompetence ought to be dealt with.¹⁰¹

The costs of the application in question were awarded against the class representatives' solicitors. There have been other instances of costs being awarded against the solicitors acting for the class representatives.¹⁰² References may also be made to two other Part IVA proceedings in *Nguyen v Minister for*

97 *Boase v Sullivan Commercial Pty Ltd [No 3]* [2013] FCA 15, [6]. See also Australian Law Reform Commission, above n 13, 84–5 [200] ('the technical and procedural requirements of grouped proceedings suggest that independent legal representation should be a requirement').

98 See, eg, *Carroll v Clarence Valley Shire Council* [2012] FCA 1143, [6] (Emmett J); *McIntyre v Eastern Prosperity Investments Pty Ltd* [2001] FCA 1655, [13] (French J); *McIntyre v Eastern Prosperity Investments Pty Ltd* [2001] FCA 1734, [17] (French J); *McIntyre v Eastern Prosperity Investments Pty Ltd (No 4)* [2002] FCA 1133, [25] (French J). See also *Allen v Aspen Group Resources Corp* [2009] OJ No 5213, [153].

99 [2002] FCA 1133, [27] (French J).

100 See also Vince Morabito, 'Judicial Responses to Class Action Settlements that Provide No Benefits to Some Class Members' (2006) 32 *Monash University Law Review* 75. Settlement has been the most common outcome of Part IVA proceedings: Morabito, 'An Empirical Study', above n 67, 13.

101 Transcript of Proceedings, *Moore v Pfizer Australia Pty Ltd; Sullivan v Aspec Pharmacare Australia Pty Ltd* (Federal Court of Australia, VID4/2010 and VID5/2010, Bromberg J, 9 May 2012) 7.

102 See, eg, *Lowe v Mack Trucks Australia Pty Ltd* [2001] FCA 388, [31] (Kenny J); *Cook v Pasmenco Ltd (No 2)* (2000) 107 FCR 44, 57–8 [66] (Lindgren J); *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167, 177–8 [44] (Merkel J); *Vasram v AMP Life Ltd* [2002] FCA 1286.

Immigration, Local Government and Ethnic Affairs ('Nguyen').¹⁰³ Justice Merkel revealed in one of the judgments he handed down in these proceedings that:

Either scant or no attention was given in the application and in the applicant's submissions to several issues which are raised by the evidence and which, on the tentative view I presently have, may be decisive in the present case.¹⁰⁴

As a result, Merkel J gave the class representative leave to apply to amend the application to raise the issues and grounds that his Honour had identified. This step – which was acknowledged by Merkel J 'to constitute a more interventionist role on the part of the Court than is appropriate in a civil proceeding'¹⁰⁵ – was justified on two grounds. The second ground¹⁰⁶ is of direct relevance to the important issue that is explored in Part IV(E)(5) below, namely, whether a trial judge can activate the section 33T mechanism on her own motion:

[Part IVA proceedings] can give rise to a greater responsibility on the part of the Court in relation to the conduct of the hearing ... [given that class] members are not strictly parties in the proceeding able to give instructions as such. Yet [they] are bound by the result...¹⁰⁷

In 2007, Queensland's Legal Services Commissioner sought from that state's Legal Practice Tribunal, among other things, an order that a solicitor be found 'guilty of unsatisfactory professional conduct and/or professional misconduct'.¹⁰⁸ The order sought by the Commissioner concerned the conduct of the solicitor in question in running two Part IVA proceedings.¹⁰⁹ The Tribunal ordered, among other things, that his practising certificate be suspended for a period of approximately nine months and made the following pertinent findings:

[The solicitor] was, as he now recognizes, out of his depth in taking on litigation of such magnitude. ... He was inexperienced in litigation of the type which he undertook and failed to realize that his firm lacked the resources to run such a large case.¹¹⁰

Following the review of Part IVA court files, the author is of the view that these comments are equally applicable to a majority of the Part IVA proceedings in which the solicitors that acted for the class representatives had very limited resources and/or no or little prior experience in running class actions.¹¹¹

103 (1996) 66 FCR 239.

104 *Ibid* 242.

105 *Ibid* 244.

106 The first ground was the fact that the relevant claimants (refugees) had 'little command of the English language and, I assume, even less knowledge of the Australian legal system': *ibid* 244.

107 *Ibid* 245.

108 *Legal Services Commissioner v Scott* [2009] LPT 7, [1] (Fryberg J).

109 The two class actions in question were brought with respect to the Waterfront industrial dispute: see *Batten v CTMS Ltd* [1999] FCA 1576, [1] (Kiefel J).

110 *Legal Services Commissioner v Scott* [2009] LPT 7, [22], [57] (Fryberg J).

111 Two months after Part IVA came into operation a commentator correctly drew attention to the risk of 'a large number of claims being dependent upon the skills of inexperienced, inadequate or under-funded legal representatives': Williams, above n 7, 377.

E Unresolved Issues

The discussion in Part III above has shown that the lack of case law on section 33T has led to confusion as to a number of important issues regarding the scope of section 33T. It will be recalled that the ALRC's clause 23(1) did not specify the criteria, factors or circumstances that ought to be considered by trial judges when asked to exercise the power to replace inadequate class representatives. The ALRC referred to the fact that a similar approach had been adopted by the drafters of the United States federal class action regime but that there existed a significant body of United States case law with respect to the most relevant criteria;¹¹² thus, the expectation was that a similar development would be witnessed in Australia. It is sadly ironic that the United States regime referred to by the ALRC, rule 23 of the *Federal Rules of Civil Procedure*, had been in operation, in its totally revised form, for just over 22 years when the ALRC made these observations; precisely the same period that the Part IVA regime has been in operation. And yet, as we have seen, there is 'relatively little Australian jurisprudence on what constitutes adequate representation'.¹¹³

There are five important issues or questions, concerning the concept of adequate representation and the operation of the section 33T mechanism, that have not been the subject of direct judicial consideration:

- (i) who bears the onus of proof in section 33T applications?
- (ii) what duties are owed by class representatives to the groups of claimants they represent?
- (iii) does the concept of adequate representation, for the purposes of section 33T, encompass the adequacy of the lawyers retained by the class representative?
- (iv) does adequate representation require the absence of circumstances that may result in perceived or actual conflicts between the interests of the class representatives and those of the class members? and
- (v) can trial judges activate the section 33T process on their own motion?

1 Onus of Proof

Grave, Adams and Betts have expressed the view that the onus of proof is carried by the class members that seek the replacement or removal of the allegedly inadequate class representatives. In light of the fact that section 33T only authorises at least expressly class members to initiate the section 33T process and that with respect to section 33N – which expressly empowers Part IVA respondents to seek the discontinuance of Part IVA proceedings, as Part IVA proceedings – it has been held that the onus of proof is on the respondent that seeks the discontinuance,¹¹⁴ their conclusion is logical. But as we have seen

112 Australian Law Reform Commission, above n 13, 77 [177].

113 Grave, Adams and Betts, above n 3, [5.400].

114 See, eg, *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 300 [200] (Jacobson J).

from the discussion in Part III above, the protagonists in section 33T applications have been all the participants in Part IVA proceedings other than class members: the class representatives, their lawyers and their opponents. Thus, it appears that the onus is carried by whoever seeks the change in the leadership of the group.

What was also apparent from Part III above is that when it is the existing class representative that seeks the change, the onus is usually easy to discharge, especially when the change is not opposed by the respondents. Symbolic of this state of affairs is the section 33T order that was made in the vitamins class action. It will be recalled that the evidence tendered in support of the section 33T application filed on behalf of the existing class representative was a statement contained in her solicitor's affidavit that she wished to step down as class representative. But it should be noted that, even with respect to this issue, there has not been a completely uniform judicial approach. In the so-called air cargo cartel class action, for instance, the class representative also justified its motion that it be substituted as a class representative on the basis that it no longer wished to continue in that role. But the trial judge agreed with counsel appearing for the outgoing class representative that the power to make the substitution was not to be found in section 33T.¹¹⁵

The task faced by class members who seek the replacement or removal of a class representative who desires to retain that role is likely to be far more challenging, especially in light of uncertainty surrounding a number of important issues. It is not clear, for instance, whether the inadequacy of a class representative may be established by proving that having other class members as class representatives would increase the chances of success because, for instance, they have the support of lawyers and/or litigation funders with greater expertise and resources than the lawyers and/or litigation funders that support the existing class representative.¹¹⁶

If this line of reasoning is not judicially accepted, is it enough for the aspiring class representative to rely on *Tongue*, by demonstrating that a significant number of class members have no confidence in the current representative? Or are the comments made by Jacobson J in *Tongue*, with respect to loss of confidence being an appropriate ground for a section 33T order, likely to be regarded as inconsistent with the following passing comment made by Gleeson CJ of the High Court two years before *Tongue*?: '[section 33T] is not a mechanism for the plaintiff to be replaced on the application of group members who disagree with the way the case is being run'.¹¹⁷

115 *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* [2010] FCA 1302, [7] (Tracey J).

116 See also Peter Cashman, *Class Action Law and Practice* (Federation Press, 2007) 330; Grave, Adams and Betts, above n 3, [5.400].

117 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 20 [5]. See also Burnside and Anderson, above n 16, [54]; Grave, Adams and Betts, above n 3, [5.400].

2 Duties of Class Representatives

The uncertainty surrounding the issues mentioned above and related issues is of course largely attributable to the lack of judicial pronouncements on section 33T and the failure of that provision to provide any guidance or details.¹¹⁸ But this unsatisfactory state of affairs also stems from uncertainty regarding the precise nature of the relationship between class representatives and class members and, in particular, the duties and obligations owed by the former to the latter.

No such uncertainty is encountered in the United States in light of the ‘the well-established proposition that class representatives in class actions act as fiduciaries to the class’.¹¹⁹ A similar approach has been adopted by Canadian courts.¹²⁰ It will also be recalled from Part II above that a similar conclusion was arrived at by the ALRC. The interaction between adequate representation and the existence of a fiduciary dimension to the relationship between class representatives and class members was cogently explained by Cashman:

the concept of adequacy of representation is inherent in the nature of the fiduciary duty arguably owed by the representative party to the group members whose interests are represented in the proceedings.¹²¹

But the only comment contained in judgments handed down by justices of the Federal Court of Australia¹²² that the author was able to find, that suggested the existence of a similar principle with respect to Part IVA proceedings, was the following observation made in 2003 by Merkel J whilst presiding over the early stages of the vitamins class action: ‘in the present case the applicant has been placed in a situation of potential conflict between her interest in procuring the amendment and her duty to the group members whose interests may be adversely affected by it’.¹²³ But three years later, in the vitamins case itself, Jessup J

118 As recently noted by the LRCWA, ‘there is presently no express rule that sets standards to which the representative plaintiff must adhere, nor any express test to determine whether there is a failure to represent the class’: Law Reform Commission of Western Australia, *Representative Proceedings*, Discussion Paper, Project No 103 (2013) [3.28].

119 *Re US Bioscience Securities Litigation*, 155 FRD 116, 120 (ED Pa, 1994), citing *Re Fine Paper Litigation*, 632 F 2d 1081, 1086 (3rd Cir, 1980). See also *Eubank v Saltzman*, 753 F 3d 718, 723 (Posner J) (7th Cir, 2014).

120 See, eg, *Heron v Guidant Corp* [2007] OJ No 3823, [10]; *Hoffman v Monsanto Canada Inc* [2005] 7 WWR 665, [337]; *Monsanto Canada Inc v Hoffman* (2002) 220 DLR (4th) 542, [16]; *Schroeder v DJO Canada Inc* [2010] SJ No 220, [150]–[151]; *Lau v Bayview Landmark Inc* (2004) 50 CPC (5th) 113, [19]; *Lambert v Guidant Corp* [2009] OJ No 1910, [136]–[138]; *Brooks v Canadian Pacific Railway Ltd* [2007] SJ No 367, [192].

121 Cashman, above n 116, 329. See also Ben Slade and Juliana Trang, ‘Class Actions for Consumers and Investors’ (2005) (unpublished, copy on file with author) [4.1(k)]; Basten, above n 28, 46; Legg, ‘Entrepreneurs and Figureheads’, above n 27, 919 n 58; Grave, Adams and Betts, above n 3, [5.140].

122 Cf Transcript of Proceedings, *Dingle v Ciba-Geigy Australia Ltd* (Federal Court of Australia, NSD851/1996, Wilcox J, 3 March 1999) 11–12 (‘the applicant ... has fiduciary responsibilities towards group members’).

123 *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505, [15]. See also *Hodges v Waters [No 3]* [2014] FCA 233, [28] (Perram J).

observed that the class representatives and active class members in that case were ‘not fiduciaries apropos the generality of group members’.¹²⁴

3 Adequacy of Legal Representation

In Part IV(D) above the judicial failure to employ the section 33T mechanism in Part IVA proceedings where the class representatives were self-represented for all or part of the litigation was revealed. In Canada, on the other hand, the conduct of a class action proceeding without legal representatives has not generally been permitted.¹²⁵ The fact that the drafters of Part IVA chose not to implement the ALRC’s recommendation – that ‘a principal applicant should not be able to conduct a group member’s proceeding otherwise than by a solicitor or barrister who is not a group member except with the Court’s leave’¹²⁶ – does not provide a legitimate justification for this non-interventionist approach by Part IVA judges. As aptly noted by Moore J, whilst there is no requirement for Part IVA representatives to be legally represented, section 33T requires that the representation provided by class representatives be adequate.¹²⁷

The discussion in Part IV(D) has also drawn attention to similar judicial inactivity with respect to the section 33T mechanism where the representation provided by the solicitors acting for the class representatives left a lot to be desired. In United States federal class actions, judicial focus has been placed on, among other things, the expertise and experience of class counsel as well as their ability to conduct the litigation, when considering the adequacy of the lead plaintiffs.¹²⁸ Indeed, as a result of amendments that came into effect in December 2003, the appointment, role and duties of class counsel are expressly set out in rule 23(g).¹²⁹ The absence of a provision similar to rule 23(g) in the class action legislation and rules that operate in 10 Canadian jurisdictions, has not prevented Canadian courts from also considering the adequacy of the lawyers acting for the class representatives when determining the adequacy of the class representatives.¹³⁰

124 *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* (2006) 236 ALR 322, 346 [75].

125 See, eg, *Sandhu v Household Realty Corp* [2011] BCJ No 1300 where reliance was placed on a provision very similar to Part IVA’s s 33ZF to require a self-represented class representative to be represented by counsel.

126 Australian Law Reform Commission, above n 13, 85 [201].

127 *King v AG Australia Holdings Ltd* (2002) 121 FCR 480, 488 [23] (Moore J). See also Grave, Adams and Betts, above n 3, [5.400] where the view is expressed that s 33T ‘impliedly requires the representative party to, or be able to, adequately represent the interests of group members’.

128 See *Amchem Products Inc v Windsor*, 521 US 591, 626 n 20 (1997); *Cotton v Hinton*, 559 F 2d 1326, 1331 (5th Cir, 1977); *Re General Motors Corporation Engine Interchange Litigation*, 594 F 2d 1106, 1124 (7th Cir, 1979); *Bowen v General Motors Corporation*, 685 F 2d 160, 162 (6th Cir, 1982); *Senter v General Motors Corporation*, 532 F 2d 511, 524–5 (6th Cir, 1976); *Griffin v Carlin*, 755 F 2d 1516, 1533 (11th Cir, 1985); *Re Drexel Burnham Lambert Group Inc*, 960 F 2d 285, 291 (2nd Cir, 1992).

129 Fed. R. Civ. P. 23(g). See also *Sheinberg v Sorensen*, 606 F 3d 130, 132 (3rd Cir, 2010).

130 See, eg, *Allen v Aspen Group Resources Corp* [2009] OJ No 5213, [153] (‘the experience and capability of proposed class counsel is an important factor in the court’s assessment of the representative plaintiff’); *Fenn v Ontario* [2004] OJ No 2736, [11]; *Western Canadian Shopping Centres Inc v Dutton* [2001] 2 SCR 534, 555; *Fantl v Transamerica Life Canada* (2009) 95 OR (3d) 767, [60].

The only general circumstances where Part IVA judges have been directly confronted with the need to evaluate the adequacy of the solicitors retained by Part IVA representatives have involved competing class actions; that is, multiple class actions filed by different law firms with respect to the same legal disputes. But in most of these competing class actions, the problem was addressed by the solicitors themselves.¹³¹ *Johnson Tiles Pty Ltd v Esso Australia Ltd*¹³² was one of the few instances where the court needed to choose between the competing class actions and thus the competing solicitors, although the task that faced the court was not overly difficult. In fact, the choice was between Slater & Gordon and Maurice Blackburn, Australia's top two plaintiff law firms, joining forces versus a small firm that lacked the required resources, expertise and experience. In explaining his ruling in favour of the former option, Merkel J made the following pertinent comments:

Further, I am satisfied that the combined resources of Slater & Gordon and Maurice Blackburn & Co are likely to be necessary to efficiently conduct the proceeding and adequately represent the interests of the group members (see s33T of the Act).¹³³

In another judicial pronouncement necessitated by competing Part IVA proceedings, Finkelstein J indicated that the following criteria ought to be considered by trial judges when faced with competing class actions: (a) the experience of the relevant law firms in class actions, together with the background and experience of the relevant lawyers; (b) the costs that the firms expect to charge for all work performed; and (c) the terms pursuant to which the proceedings are being funded.¹³⁴ As Grave, Adams and Bett have pointed out, these criteria are similar to those found in the United States in the already-mentioned rule 23(g).¹³⁵

4 *Conflicts of Interest*

As correctly noted by Michael Legg, in the United States, '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'.¹³⁶ This fact has also been recognised by law makers in Canada given that most of the class action regimes in that country expressly require judges to be satisfied, before certifying a proceeding as a class action, that the class representatives do not have, on the

131 See Vince Morabito, 'Clashing Classes Down Under – Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives' (2012) 27 *Connecticut Journal of International Law* 245, 314 and the accompanying footnotes.

132 (1999) ATPR 41–679.

133 Ibid [68]. One commentator has expressed the view that these comments imply that 's 33T gives the Court power to make orders in respect of adequacy of representation of both the representative party and class lawyers': Barry Lipp, 'Mass Tort Class Actions under the Federal Court of Australia Act: Justice for All or Justice Denied?' (2002) 28 *Monash University Law Review* 361, 386.

134 *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 72 [32].

135 Grave, Adams and Betts, above n 3, [5.330].

136 Legg, 'Entrepreneurs and Figureheads', above n 27, 923.

common issues, an interest in conflict with the interests of the class members.¹³⁷ It will also be recalled from Part II above that the ALRC envisaged that conflicts, or perceived conflicts, of interest, on the part of the class representatives, may justify in appropriate circumstances their replacement.¹³⁸

The existence of a vastly different state of affairs, in practice, in Part IVA proceedings is demonstrated most clearly by the *Francey* proceeding. To the author's knowledge, no concern was expressed by Branson J with respect to the fact that the class representative and the barrister who appeared for him in the proceeding were brothers. Even more surprising was the fact that her Honour granted the order sought by both parties, for the barrister in question to replace his brother, without first canvassing whether this substitution would produce perceived or actual conflicts between the interests of the class representative/counsel appearing for the class and the interests of the class.¹³⁹

In Ontario, which has the most important and vibrant class action regime in Canada, the first time that a trial judge was faced with a class action where there was a close relationship between the class representative and class counsel a diametrically opposed judicial approach was adopted:¹⁴⁰

As a general principle, it is best that there is no appearance of impropriety. In this situation, there is the perception of a potential for abuse by class counsel through acting in their own self-interest rather than in the interests of the class. ... In my view, the better practice is that class counsel be unrelated to a representative plaintiff so that there is not even the possible appearance of impropriety.¹⁴¹

In July 2014 in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* Ferguson J of the Supreme Court of Victoria was faced with Part 4A proceedings where the solicitor acting for the sole class representative, a corporation, was also the sole director and shareholder of the class representative. Justice Ferguson ruled that either the class representative or the solicitor had to

137 See, eg. *Class Proceedings Act*, RSO 1992, c 6, s 5(1)(e)(iii).

138 See also Cashman, above n 116, 329; Legg, 'Judge's Role in Settlement', above n 26, 62; Grave, Adams and Betts, above n 3, [5.310].

139 See also S Stuart Clark and Christina Harris, 'Class Actions in Australia: (Still) a Work in Progress' (2008) 31 *Australian Bar Review* 63, 83 for a discussion of another Part IVA proceeding (*Taylor v Telstra Corporation Ltd* (citation reference intentionally omitted – please see above n 69)) where conflicts of interest issues were raised in a Part IVA proceeding by the business relationship between the lawyers running the proceeding and the sole class representative. The author's review of the court file revealed that these issues were not raised, let alone reviewed, by the trial judge. This was despite the fact that this issue received significant attention in most of the print media at the time a settlement agreement had been executed by the class representative and the respondent.

140 Similarly, in the United States, 'a majority of courts ... have refused to permit class attorneys, their relatives or business associates from acting as the class representative. The most frequently cited policy justification for this line of cases arises from the relationship of the putative class representative and the putative class attorney': *Susman v Lincoln American Corp*, 561 F 2d 86, 92 (7th Cir, 1977). See generally *Eubank v Saltzman*, 753 F 3d 718, 722 (7th Cir, 2014); *Petrovic v Amoco Oil Company*, 200 F 3d 1140, 1154-5 (8th Cir, 1999); Neil L Rock, 'Class Action Counsel as Named Plaintiff: Double Trouble' (1987) 56 *Fordham Law Review* 111; Mulheron, above n 20, 283.

141 *Kerr v Danier Leather Inc* (2001) 14 CPC (5th) 292, [69]. The class representative in question was a partner in the law firm seeking to be class counsel.

step down from those roles; otherwise the litigation could not proceed. The principal reason for this ruling was that:

The risks associated with entrepreneurial lawyers acting in group proceedings ... are exacerbated here where the plaintiff and the solicitor are not independent of one other. I have a concern that, whilst MCI is the plaintiff and Mr Elliott its solicitor, despite their best intentions, there is a risk (which cannot be dismissed as remote) that self-interest will dominate over the interests of group members. Ordinarily, lead plaintiffs have the benefit of independent advice about what they should or should not do taking into account the interests of group members. Ordinarily, the solicitor is not facing any possibility of adverse costs orders that will affect them if the plaintiff fails in expensive interlocutory disputes or does not succeed at trial. Mr Elliott is simply not in a position to give detached advice to MCI.¹⁴²

It should also be noted that the ALRC was of the view that the class representative's solicitor and barrister 'should not be a group member because of the potential for conflicts of interest to arise'.¹⁴³

Another powerful illustration of the need for Part IVA judges to 'consider the potency ... of ... s 33T as a mechanism for responding to perceived conflicts'¹⁴⁴ is furnished by two of the Part IVA proceedings filed against Centro Group companies.¹⁴⁵ The section 33T mechanism was not activated by the trial judge despite his incorrect conclusion¹⁴⁶ that the class representative in these two class actions sought orders from the Court which, if granted, would have benefitted his lawyers and litigation funders but not the members of the class that he represented.¹⁴⁷ The rapidly increasing importance of commercial litigation funders in Australia's class action landscape will no doubt result in an increase in the circumstances where the employment of the section 33T mechanism ought to be at least considered.¹⁴⁸

Problems or issues with respect to conflicts of interest may also be raised by the increasingly popular 'class closure'¹⁴⁹ device, pursuant to which:

a court may require group members to identify themselves by a certain point in time as having an interest in any judgment or proposed settlement. Failing a

142 [2014] VSC 340, [63]. See also *Bolitho v Banksia Securities Limited [No 4]* [2014] VSC 852.

143 Australian Law Reform Commission, above n 13, 85 [201].

144 Grave, Adams and Betts, above n 3, [5.340]. See also Legg, 'Entrepreneurs and Figureheads', above n 27, 924; Morabito, 'Clashing Classes Down Under', above n 131, 300.

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

146 Morabito, 'Clashing Classes Down Under', above n 131, 300.

147 (2008) 253 ALR 65, 71 [22]–[24] (Finkelstein J).

148 See generally Grave, Adams and Betts, above n 3, [17.1080]; Vicki Wayne, 'Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs' (2007) 19 *Bond Law Review* 225.

149 See, eg, *Winterford v Pfizer Australia Pty Ltd* [2012] FCA 1199; Transcript of Proceedings, *Leonie's Travel Pty Ltd v International Air Transport Association* (Federal Court of Australia, NSD2449/2006, Moore J, 30 September 2010) 5 ('I know there's a – what I might describe as a philosophical point of view that if a class action is brought on behalf of a class of – let us say, notionally, a hundred people, then further steps shouldn't be taken to reduce potentially the class to fifty people. A hundred should be the beneficiaries of any success if there is success, but if there's agreement between your side of the record and the respondent's, I'm not going to stand in the way of the agreement').

declaration of such interest (normally achieved by registering with the court or a firm of solicitors by a certain date), any subsisting entitlement to damages of the group members relating to the claim may be extinguished.¹⁵⁰

5 *Judicial Initiative*

A Canadian court has aptly noted that ‘the ultimate responsibility to protect the interests of class members lies with the court’.¹⁵¹ This general observation is particularly appropriate with respect to the removal or substitution of inadequate class representatives. One may have the most clear and sophisticated regimes and principles to regulate this area but satisfactory outcomes will be attainable only if trial judges take seriously the beneficial supervisory role that they are required to serve in Part IVA proceedings. What this means, in concrete terms, is that trial judges must not allow section 33T’s failure to expressly grant them the power to initiate the process that may lead to the removal or substitution of a class representative, to create circumstances that may jeopardise the interests of class members.

We have seen that to achieve this desirable outcome in *Nguyen*, Merkel J chose to, essentially, inform lawyers for the class representatives what grounds the pleadings should contain; a step which eventually led to a successful outcome for the class.¹⁵² It has also been shown that in *McIntyre*, French J addressed the risks for the interests of the class – created by a self-represented leader - by ordering that a failure to secure legal representation within a specified date would lead to the discontinuance of the proceeding as a Part IVA proceeding. An alternative – and, in the author’s view, preferable – strategy would have entailed ordering the removal of the class representative in question, in the event of a continued failure to secure legal representation.

In the context of Part IVA respondents seeking to contact individually class members for the purpose of settling their individual claims, Moore J put in place regimes – which included the judicial review and approval of these individual settlement offers – that were designed to safeguard the interests of the class members in question.¹⁵³ For present purposes, the crucial matter to note about Justice Moore’s approach is the fact that section 33V requires the judicial approval of the settlement or discontinuance of Part IVA proceedings only. It does not extend that requirement to the settlement of the individual claims of some of the class members.¹⁵⁴

It is difficult to accept that any deficiencies or lacunae in Part IVA may be judicially overcome – for the purpose of safeguarding the interests of absent class

150 *Mathews v SPI Electricity Pty Ltd (Ruling No 13)* [2013] VSC 17, [23] (Forrest J). See also *Grave, Adams and Betts*, above n 3, [14.420].

151 *Lau v Bayview Landmark Inc* (2004) 71 OR (3d) 487, [38]. See also *McCarthy v Canadian Red Cross Society* (2001) 8 CPC (5th) 349, [21]; *Zients v LaMorte*, 459 F 2d 628, 630 (2nd Cir, 1972).

152 *Nguyen v Minister of Immigration Local Government & Ethnic Affairs* (1996) 66 FCR 239.

153 *King v AG Australia Holdings Ltd* (2002) 121 FCR 480, 493–4 [43]–[44].

154 See generally Vince Morabito, ‘Judicial Supervision of Individual Settlements with Class Members in Australia, Canada and the United States’ (2003) 38 *Texas International Law Journal* 663.

members – with respect to the procedural and substantive fairness of the settlement process but not in the context of ensuring that only adequate representatives are permitted to represent the class. As pointed out by Biscoe AJ of the New South Wales Supreme Court:

The Court should be jealous of ensuring the adequacy of representation of represented persons ... If that requires substitution of a representative plaintiff, one would expect the rules to be flexible enough to permit the Court to order substitution.¹⁵⁵

It is crucial to note that these comments were made in the context of the New South Wales representative action rules which contained no provisions at all with respect to the replacement of representative plaintiffs.

The most obvious source of power for overcoming the failure of section 33T to expressly empower trial judges to initiate the section 33T mechanism is section 33ZF which, it will be recalled, empowers the court to make any order it thinks appropriate or necessary to ensure that justice is done in Part IVA proceedings. The extremely wide scope of this provision¹⁵⁶ is most powerfully highlighted by *Vernon v Village Life Ltd*¹⁵⁷ and *Kirby v Centro Properties Ltd*.¹⁵⁸ In the former case section 33ZF was used to waive the right conferred on class members to opt out¹⁵⁹ whilst in the latter it was employed to order the establishment of an entity, a litigation committee, which is not easy to reconcile with several important dimensions of the Part IVA regime.¹⁶⁰ It is also pertinent to note that the order made by Ferguson J in the Victorian *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* class actions mentioned above was made pursuant to Part 4A's section 33ZF which is virtually identical to Part IVA's section 33ZF.

155 *Oasis Fund Management Ltd v Royal Bank of Scotland NV* [2010] NSWSC 584, [24]. Ironically, reliance for this principle was placed on a s 33T judgment: *Tongue* (2004) 141 FCR 233. See also *Singer v Schering-Plough Canada Inc* [2010] OJ No 113, [209] (ensuring adequacy of representation 'is part of the court's supervisory jurisdiction in class actions'); *Heron v Guidant Corp* [2007] OJ No 3823, [10] ('[class members] should not be vulnerable to deficiencies in the ability of the named plaintiff to represent them'); *Fantl v Transamerica Life Canada* [2008] OJ No 1536, [59].

156 As recently noted in *Matthews v SPI Electricity Pty Ltd [No 9]* [2013] VSC 671, [67] (Derham AsJ), 'it has been held that this section gives to the Court the widest possible power to do whatever is appropriate or necessary in the interests of justice in the conduct of a group proceeding'.

157 [2009] FCA 516. See generally Michael Legg, 'Village Life Ltd – Further Developments in Shareholder Class Actions' (2010) 21 *Insurance Law Journal* 51.

158 (2008) 253 ALR 65.

159 As noted by Tracey J in *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* (2008) 251 ALR 166, 175 [27], 'group members who do not wish to be bound by the outcome of the proceeding must have the opportunity to opt out'.

160 See Morabito, above n 131, 295–6; Grave, Adams and Betts, above n 3, [5.340].

V CONCLUSION AND PROPOSED REFORM STRATEGY

The analysis contained in this article has shown that the federal mechanism for regulating ‘a cornerstone of class action proceedings’,¹⁶¹ namely, the adequacy of the representation of the interests of absent class members provided by class representatives, has not secured its intended benefits and objectives. Reform in this area of federal class action litigation is clearly required.

Four general reform alternatives exist. The first, and most radical, option entails emulating the United States and Canada by introducing a certification regime where one of the certification criteria is adequacy of representation. Surprisingly, one of the supporters of certification regimes is Peter Gordon, one of the country’s class action pioneers.¹⁶² But a change of this magnitude could not be justified simply on the inadequacies of the section 33T mechanism; especially when there is evidence that the regime that the drafters of Part IVA designed, in lieu of the certification device, has so far operated in a satisfactory manner.¹⁶³

A slightly less radical move would entail adding to section 33N – which empowers trial judges, on an application by the respondent or of its own motion, to order the discontinuance of proceedings as Part IVA proceedings where they are satisfied that (a) it is in the interests of justice to do so and (b) one or more of four specified grounds/circumstances exist – the following ground: ‘a representative party is not able to adequately represent the interests of the group members’. This is the addition that the New South Wales legislature made to Part 10’s counterpart to Part IVA’s section 33N.¹⁶⁴ But discontinuance of a class action, as a class action, should only be a measure of last resort;¹⁶⁵ namely, where no appropriate replacement has been identified who is willing ‘to take on the mantle of class representation’.¹⁶⁶

In the author’s view, another significant problem with this option is that, as noted above, the section 33N mechanism may be activated by respondents. It is true that, as noted by Michael Legg, ‘respondents have the incentive to investigate matters resulting in the discontinuance of a group proceeding’.¹⁶⁷ But it is also true that, as aptly noted by the Alberta Law Reform Institute in 2000, ‘the defendant is in a conflict of interest when it comes to speaking for the class

161 Cashman, above n 116, 329.

162 Peter Gordon, ‘Class Actions – The Plaintiff’s Perspective’ (Paper presented at Class Actions – The Victorian Direction Seminar, Melbourne, June 1996) 5 (‘class actions should only be commenced with leave of the Court, which should need to be satisfied that [among other things] the representative party is capable of adequately representing the class’).

163 See Vince Morabito and Jane Caruana, ‘Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia’ (2013) 61 *American Journal of Comparative Law* 579.

164 *Civil Procedure Act 2005* (NSW) s 166(1)(d). This provision is based on rule 7.4(4D)(e) of the *Uniform Civil Procedure Rules*: see Michael Legg and Jennifer Dowler, ‘The Class Actions Juggling Act’ (2010) 48(6) *Law Society Journal* 59.

165 See Grave, Adams and Betts, above n 3, [5.400].

166 *Luevano v Campbell*, 93 FRD 68, 90 (Col, 1981).

167 Legg, ‘Judge’s Role in Settlement’, above n 26, 64.

members' interests'.¹⁶⁸ One needs to go no further than *Francey* to find evidence in support of the Institute's conclusion. The respondents in that Part IVA proceeding allowed their interests – having a class representative with significant means who resided in Australia – to supersede the desirable goal of 'eschewing potential conflict of interest situations',¹⁶⁹ when they suggested that the class representative be replaced by the most important member of the class representative's legal team. It is for the same reason that the author does not favour a third possible reform strategy: adding to the three requirements contained in section 33C, which must be satisfied in order to employ the Part IVA regime, an adequate representation requirement.¹⁷⁰

The last and preferred strategy entails making significant improvements to section 33T. In light of the findings contained in this article, the most obvious addition entails expressly empowering trial judges to activate, on their own initiative, the section 33T machinery.¹⁷¹ It must also be made clear in section 33T or in other parts of Part IVA: (a) that a Part IVA proceeding may not be conducted without legal representation;¹⁷² and (b) that the class representative's solicitors and barristers cannot be, at the same time, among the class representatives or class members. Section 33T should also set out the:

standards to which a representative plaintiff must adhere and [the] matters the Court may take into account in determining whether there has been a failure to represent the class.¹⁷³

These matters or criteria should include the competence, experience and resources of the lawyers running the case and whether the class representatives, their lawyers and/or their litigation funders have, on the common issues, interests in conflict with the interests of the class members.

168 Alberta Law Reform Institute, *Class Actions*, Report No 85 (2000) 89 [219].

169 *Parsons v Coast Capital Savings Credit Union* [2010] BCJ No 1184, [9].

170 Lipp, above n 133, 387.

171 See Lipp, above n 133, 385; Legg, 'Judge's Role in Settlement', above n 26, 64; Clark and Harris, above n 139, 83 n 134; Litigation Law and Practice Committee, Law Society of New South Wales, *Proposed Amendments to Uniform Civil Procedure Rules 2005 (UCPR) rule 7.4* (2009) 2; Vince Morabito, 'Opt in or Opt Out? A Class Dilemma for New Zealand' (2011) 24 *New Zealand Universities Law Review* 421, 441; Grave, Adams and Betts, above n 3, [5.340].

172 Morabito, 'The Right to Opt Out', above n 90, 625.

173 Western Australian Bar Association, Submission to Law Reform Commission of Western Australia, *Representative Proceedings*, 7 June 2013, 4.