

FIDUCIARY OBLIGATIONS OF LAWYERS IN AUSTRALIAN CLASS ACTIONS: CONFLICTS BETWEEN DUTIES

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ABSTRACT

The interaction between the demanding requirements of fiduciary obligations and the undemanding requirements of the Australian class action regime in facilitating the aggregation of differing claims creates a challenging environment for legal representation. The solicitor who acts in a class action owes fiduciary obligations to the representative party that is their immediate client. This article finds that the solicitor also owes fiduciary obligations to the group members on whose behalf the class action is brought. Due to the operation of the class action regime many of these group members will be ‘known unknowns’, individually unidentified but identifiable by reference to certain broadly defined characteristics. The solicitor must therefore address a conflict, or real possibility of conflict, of duties. This article explores the existence of such conflicts and how, if at all, the solicitor may discharge his or her fiduciary obligations.

I INTRODUCTION

The archetype model of equity’s duty-bound solicitor features a single or at least identified client to whom the solicitor owes fiduciary obligations.¹ However, in a modern litigation landscape solicitor–client relationships are potentially more complex. They may arise in response to the statutory class

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1 See, eg, ‘[t]he solicitor is classically a fiduciary to the client and as such owes certain duties in each particular case’: *Maguire v Makaronis* (1997) 188 CLR 449, 463 (Brennan CJ, Gaudron, McHugh and Gummow JJ). See also *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68 (Gibbs CJ) (*‘Hospital Products’*); *Clark Boyce v Mouat* [1994] 1 AC 428, 437 (Lord Jauncey).

actions regime which permits a representative party to sue a respondent on behalf of group members.² The question arises whether the representative party's solicitor owes fiduciary obligations not only to the representative party, but also to the members of the represented group. In answering this important question, difficult issues of principle arise. In particular, the operation of fiduciary law within a statutory environment and the extent to which these fiduciary obligations are directly shaped by that statutory context. There are also significant remedial consequences to this analysis. Negligence case law is replete with examples of plaintiffs who sue their lawyer for the loss of a chance in relation to the loss of the underlying cause of action.³ Equitable compensation for breach of fiduciary duty may be an attractive option for a group member, particularly when it is realised that equity does not readily accommodate the notion of the plaintiff group member's contributory fault.⁴

It is axiomatic that the relationship of a solicitor and client is an 'accepted fiduciary relationship', a 'relationship of trust and confidence'.⁵ The obligations of the fiduciary are proscriptive: the fiduciary must not obtain any unauthorised benefit from the relationship and not be in a position of conflict. As explained by Gaudron and McHugh JJ in *Breen v Williams*, 'the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed'.⁶

Of particular relevance to this analysis is the no conflict rule, succinctly described by Gummow J in *Breen v Williams* as an obligation 'not to enter upon conflicting engagements to several parties'.⁷ As stated in *Pilmer v Duke Group Ltd (in liq)*:

the fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is 'a conflict or a real or substantial possibility of a conflict' between personal interests of the fiduciary and those to whom the duty is owed. That is how the matter was put by Mason J in *Hospital Products*. Similar

2 Relationships in the class action may be further complicated through the addition of third party litigation funding as this creates a tripartite arrangement between client, lawyer and funder. This article does not directly address litigation funding, which is the subject of further work by the current authors. For a discussion of the impact of litigation funding on conflicts of interest for lawyers, see Michael Legg, 'Litigation Funding in Australia: Identifying and Addressing Conflicts of Interest for Lawyers' (Report, US Chamber Institute for Legal Reform, February 2012).

3 See, eg, *Johnson v Perez* (1988) 166 CLR 351; *Nikolaou v Papasavas, Phillips & Co* (1989) 166 CLR 394; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408.

4 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 201–2 (McHugh, Gummow, Hayne and Callinan JJ). Other factors weighing in the equitable discretionary balance would of course apply to an award.

5 *Hospital Products* (1984) 156 CLR 41, 96–7 (Mason J).

6 (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ), approved by the majority judgment in *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 198 (McHugh, Gummow, Hayne and Callinan JJ).

7 (1996) 186 CLR 71, 135.

reasoning applies where the alleged conflict is between competing duties, for example, where a solicitor acts on both sides of a transaction.⁸

Clients may have an identity of interest and separate clients may have unrelated interests, but such cases aside, instances of competing duties, and instances of the *mere possibility* of such conflict,⁹ place the solicitor in breach of duty. Solicitors are sometimes able, via the giving of full disclosure to their clients of conflicts and possible conflicts of duty and duty, to obtain properly informed client consent to what would otherwise be a breach of fiduciary duty. The implementation of practical measures such as the construction of information barriers may also assist. To the extent that a solicitor is able to act ‘fairly and adequately for both’ clients,¹⁰ his or her fiduciary duty is thereby discharged. Of course, this may not be established. As explained by Richardson J in *Farrington v Rowe McBride & Partners*, ‘there will be some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both’.¹¹ As emphasised in *Howard v Federal Commissioner of Taxation*, careful analysis is required to determine whether on the facts of the case there is a real sensible possibility of conflict: ‘[m]uch closer attention must be given to the duties, interests and alleged manner of conflict than is given simply by observing that [fiduciaries] owe fiduciary duties. It is necessary to identify the duties or interests which are said to conflict or present a real possibility of conflict.’¹² Conflicts of duty and self-interest are also possible,¹³ but fall outside the scope of this analysis.

The question therefore arises whether and within what scope does the representative party’s solicitor owe fiduciary duties to members of the

8 (2001) 207 CLR 165, 199 (McHugh, Gummow, Hayne and Callinan JJ) (citations omitted), quoted in *Howard v Federal Commissioner of Taxation* (2014) 88 ALJR 667, 681 (Hayne and Crennan JJ). See also *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 392 (The Court); *Maguire v Makaronis* (1997) 188 CLR 449, 463–7 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1, 47 (The Court).

9 *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 285 FLR 121, 170–3 (Edelman J) (and the cases cited therein); *Bristol & West Building Society v Mothew* [1998] Ch 1, 18–19 (Millett LJ), quoted in *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1, 97 (The Court). See also *Marshall v Prescott [No 3]* [2013] NSWSC 1949, [129]–[130] (Beech-Jones J); *Bristol & West Building Society v Daniels & Co* [1997] PNLR 323, 326 (Weeks J).

10 *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90 (Richardson J), cited in *Maguire v Makaronis* (1997) 188 CLR 449, 465 (Brennan CJ, Gaudron, McHugh and Gummow JJ). See also ‘the plaintiffs in that action ... were represented by the same legal representatives (necessarily assuming identity of interest between the plaintiffs in their pursuit of the proceedings)’: *Howard v Federal Commissioner of Taxation* (2014) 88 ALJR 667, 686 (Hayne and Crennan JJ).

11 [1985] 1 NZLR 83, 90.

12 (2014) 88 ALJR 667, 681 (Hayne and Crennan JJ).

13 See, eg, *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 77 (Callinan J); *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 67 (Finkelstein J).

represented group?¹⁴ Class actions are defined by reference to ‘claims’ which are linked through ‘same, similar or related circumstances’ and the existence of ‘a substantial common issue of law or fact’.¹⁵ Despite a superficial similarity between group members, it cannot be assumed that group members possess an identity of interest for the purposes of the solicitor’s fiduciary duties. Indeed, the Australian class action regime accepts the existence of different circumstances and non-common issues.¹⁶ Additionally, the group may comprise unidentified but identifiable persons, so the solicitor may have no list of clients from whom to obtain an informed consent to any conflict or potential conflict of duty and duty.

This article demonstrates that in a class action environment, fiduciary obligations are owed by the representative party’s solicitor to group members, and it is virtually impossible for that solicitor to obtain informed consent from each group member to any conflict of duty and duty. The only strategy therefore to employ in attempting to discharge the fiduciary obligation in relation to conflicts of duty is to narrowly construct the represented group, thus attempting to minimise potential conflicts of duty.¹⁷ In doing so, the very object of the legislation may be undermined. The policy imperative of the legislation,¹⁸ which is to promote access to justice by allowing for groups with varying degrees of difference in their claims to band together so as to achieve economies of scale and share costs,¹⁹ is arguably fundamentally at odds with the requirements of fiduciary law. Despite various indirect mechanisms in the regime which afford some protections to absent group members, such as the right to request

14 The existence of a fiduciary relationship between the representative party’s lawyer and group members has been assumed or alluded to in *McMullin v ICI Australia Operations Pty Ltd* (Unreported, Federal Court of Australia, Wilcox J, 27 November 1997) 3; *King v AG Australia Holdings Ltd* (2002) 121 FCR 480, 489 (Moore J); *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 184–5 (Sackville J); *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505, [15] (Merkel J); *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [8] (Stone J). See also Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 546–7 [7.115]–[7.118].

15 *Federal Court of Australia Act 1976* (Cth) s 33C(1).

16 *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179, 184 (The Court); *Bright v Femcare Ltd* (2002) 195 ALR 574, 589–90 (Lindgren J).

17 In the United States, *Federal Rules of Civil Procedure* r 23(b)(3) arguably assists in reducing conflicts of interest by requiring that ‘the questions of law or fact common to class members predominate over any questions affecting only individual members’. No such requirement exists in Australia.

18 See the Second Reading Speech for the Federal Court of Australia Amendment Bill 1991 (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General). See also *Femcare Ltd v Bright* (2000) 100 FCR 331, 334 (The Court); *Bright v Femcare Ltd* (2002) 195 ALR 574, 605–6 (Finkelstein J); *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394, 422–3 (Stone J); *Guglielmin v Trescowthick [No 2]* (2005) 220 ALR 515, 518 (Mansfield J); *Hopkins v AECOM Australia Pty Ltd [No 2]* (2013) 92 ACSR 677, 681 (Nicholas J).

19 See *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 117 (Finkelstein J); Bernard Murphy and Camille Cameron, ‘Access to Justice and the Evolution of Class Action Litigation in Australia’ (2006) 30 *Melbourne University Law Review* 399, 402–3; Michael Legg, ‘Shareholder Class Actions in Australia – The Perfect Storm?’ (2008) 31 *University of New South Wales Law Journal* 669, 698–9.

independent representation in the form of a different representative party,²⁰ court scrutiny of settlements,²¹ and the court's ability to make orders to prevent injustices,²² these do not operate to ensure discharge of the representative party's fiduciary obligations. This article explains the Australian class action statutory framework before considering the fiduciary obligations which thereby arise and possible claims for equitable compensation.

II AUSTRALIAN CLASS ACTION REGIME: STATUTORY FRAMEWORK

A class action is a 'generic term for a procedure whereby the claims of many individuals against the same defendant can be brought or conducted by a single representative'.²³ Class actions are provided for by a network of statutory obligations that specify the terms on which the claims of numerous persons or entities may be aggregated and a representative permitted to litigate those claims on behalf of the group.²⁴

A Aggregation of Differing Claims

The class action framework contains a number of provisions aimed at determining when claims may be aggregated and the degree of cohesion, or difference, that is permitted. The requirements to commence a class action in the Federal Court are set out in section 33C(1) of the *Federal Court of Australia Act 1976* (Cth), which provides that where:

- (a) 7 or more persons have claims against the same person; and
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) the claims of all those persons give rise to a substantial common issue of law or fact;

20 *Federal Court of Australia Act 1976* (Cth) s 33T (adequacy of representation).

21 *Federal Court of Australia Act 1976* (Cth) s 33V.

22 *Federal Court of Australia Act 1976* (Cth) s 33ZF.

23 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 1 [2].

24 Class actions have existed in Australia since the enactment of the *Federal Court of Australia Amendment Act 1991* (Cth) which provided for 'representative proceedings' through inserting pt IVA into the *Federal Court of Australia Act 1976* (Cth). Part IVA commenced on 4 March 1992, and subsequently became the model for class action procedures in other Australian jurisdictions. In Victoria, a procedure for a 'group proceeding' was inserted in pt 4A of the *Supreme Court Act 1986* (Vic) through the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic), which commenced on 1 January 2000. The Victorian and federal provisions are almost identical, including adopting the same numbering for most sections. In NSW, pt 10 was inserted into the *Civil Procedure Act 2005* (NSW) through the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) so as to make 'representative proceedings' modelled on, but not identical to, the federal provisions available in NSW courts. Part 10 commenced on 4 March 2011.

a proceeding may be commenced by one or more of those persons as representing some or all of them.

Section 33C(2) provides that the proceeding may be commenced whether or not the relief sought includes claims for damages that require individual assessment, and whether or not the relief sought is the same for each person represented. Similarly, the proceeding may be commenced whether or not it is concerned with separate contracts or transactions between the individual group members and the respondents, or involves separate acts or omissions of the respondents done or omitted to be done in relation to individual group members.

Section 33C allows for relatively loose groupings of claims. The ‘same, similar or related circumstances’ requirement of section 33C(1)(b) has been interpreted liberally so that some relationship must exist between the claims but they need not be identical.²⁵ Indeed, the legislation was drafted with the aim of accepting differences, as shown by the use of the term ‘related’.²⁶ Equally, the requirement of a single ‘substantial common issue of law or fact’ is not an onerous one, as ‘substantial’ does not indicate a large or significant issue but instead is ‘directed to issues which are “real or of substance”’.²⁷ The idea is that the common issue not be trivial or contrived. Further, the existence of non-common issues does not take a case outside section 33C(1)(c).²⁸ Cohesion had been reinforced through the ‘claims against the same person’ requirement, which had been read as requiring that each applicant and all group members must have a claim against all respondents.²⁹ However, the need for group members to have a claim against all respondents has been overturned by the Full Federal Court.³⁰ The decision states that section 33(1)(a) only requires seven or more persons to have claims against one respondent for a class action to be commenced, and imposes no requirement or restriction on the inclusion of other group members.³¹

25 *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 404–5 (French J).

26 *Guglielmin v Trescowthick [No 2]* (2005) 220 ALR 515, 526 (Mansfield J).

27 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 267 (The Court).

28 *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179, 184 (The Court); *Green v Barzen Pty Ltd* [2008] FCA 920, [13] (Finkelstein J).

29 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, 520–1 (Sackville J), 489 (Spender J agreeing), 491 (Hill J agreeing); *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209, 220–1 (Moore J). See also *Johnstone v HIH Ltd* [2004] FCA 190, [36]–[38] (Tamberlin J); *Guglielmin v Trescowthick [No 2]* (2005) 220 ALR 515, 522 (Mansfield J); *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 37 ACSR 326, 334 (Sackville J); *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* (2008) 251 ALR 166, 181 (Tracey J); *Kirby v Centro Properties Ltd* (2010) 189 FCR 301, 308 (Ryan J).

30 *Cash Converters International Limited v Gray* [2014] FCAFC 111, [13], [22], [28] (The Court). The Court found that this issue was not in dispute in *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 and therefore laid down no legal rule.

31 See also *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, 371–4 (Finkelstein J), 344 (Carr J agreeing); *McBride v Monzie Pty Ltd* (2007) 164 FCR 559, 562–3 (Finkelstein J).

Section 33C and its subsequent judicial interpretation has sought to foster access to justice and efficiency by allowing for groups with less cohesion or, put another way, a greater degree of difference in their claims, to band together and share costs in a single class action proceeding.³² This approach means that there may be a lack of congruence between some group members' claims and other group members' claims. Indeed, sections 33Q, 33R and 33P accept the existence of differences amongst group members and create a regime to address the resolution of subgroup or individual issues.³³

However, even when the threshold requirements of section 33C are met, a class action may be discontinued.³⁴ Section 33N gives the court a discretion, upon its own motion or on application by the respondent, to terminate the class action where the court is satisfied that it is in the interests of justice to do so because, inter alia, the class action 'will not provide an efficient and effective means of dealing with the claims of group members', or where it is 'otherwise inappropriate' that the claims be pursued by means of a class action.³⁵ Despite the broad discretion, the Federal Court's general approach has been to try and use case management techniques, consistent with the purpose of part IVA, to enable a class action to at least continue to the stage of resolution of the common issues before relying on sections 33N (discontinuance), 33Q or 33R (sub-groups, individual issues or other directions).³⁶

B Group Members

Section 33A defines a 'group member' as a member of a group of persons on whose behalf a representative proceeding has been commenced. Section 33H requires the pleadings to 'describe or otherwise identify the group members to whom the proceeding relates', but 'it is not necessary to name, or specify the number of, the group members'. A group member's consent to being a group

32 See *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 260–1 where the High Court held that s 33C should not be viewed as operating in a narrow or unduly limiting way.

33 *Cash Converters International Ltd v Gray* [2014] FCAFC 111, [25] (The Court). The Court cited ss 33Q and 33R, among other provisions, as expressly acknowledging 'variation between claimants in a representative proceeding'.

34 *Bright v Femcare Ltd* (2002) 195 ALR 574, 601 (Kiefel J); *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 279–80 (Lindgren J), 298–9 (Jacobson J).

35 *Federal Court of Australia Act 1976* (Cth) ss 33N(1). See also *Bright v Femcare Ltd* (2002) 195 ALR 574, 588–9 (Lindgren J), 601 (Kiefel J); *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 279–80 (Lindgren J), 293 (Jacobson J).

36 *Bright v Femcare Ltd* (2002) 195 ALR 574, 580 (Lindgren J), citing the order made by French J in *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 403–4 and the course followed by Stone J in *Vasram v AMP Life Ltd* [2000] FCA 1676, [18].

member is usually not required,³⁷ but they must receive an opportunity to opt out of the proceedings.³⁸

The right to opt out is given effect by section 33X(1)(a), which imposes the requirement that group members receive notice of the right and the commencement of the proceedings. If a group member falling within the defined class does not opt out then they are bound by the outcome of the proceedings.³⁹ Consequently, '[t]he failure by a group member to opt out of representative proceedings may therefore be attended by serious consequences'.⁴⁰ The opt out approach may be contrasted with an opt-in class action, which is not provided for in Australia. In an opt in model, a group member must expressly consent to participation in the class suit. Only those group members who opt in are bound or entitled to the benefit of the judgment on the common questions.⁴¹ Further, those group members will be known as they have come forward to participate in the class action.

The opt out model is, however, augmented in Australia with the recognition of the 'closed class'.⁴² In the *Multiplex* shareholder class action, the Full Federal Court held that section 33C(1) permits a representative party to commence a proceeding where they are representing 'some or all' of the group members, thus allowing for a proceeding on behalf of less than all of the potential members of the group.⁴³ However, the right to opt out must be maintained and the group cannot be defined to allow putative group members to opt into the proceedings once they have been commenced.⁴⁴ The 'closed class' model is excluded from the analysis in this article. To the extent that the 'closed class' procedure is invoked, the solicitor would enter a retainer with multiple known clients and then discharge his or her fiduciary obligations via measures such as client consent, information barriers and, if required, ceasing to act. The closed class therefore does not raise the problem under consideration in this analysis.

Despite the right to opt out, the ability to exit is hampered by a number of factors. To opt out, the group member must first know they are included in a class action and then have sufficient incentive to take the steps to exclude themselves. The effectiveness of notice is therefore crucial, as discussed below. Even if notice is received, in low value claims there may be no incentive to spend the time and effort to complete and send the opt out form, let alone understand

37 *Federal Court of Australia Act 1976* (Cth) s 33E(1). Exceptions to the requirement, such as for government bodies, are set out in s 33E(2).

38 *Federal Court of Australia Act 1976* (Cth) s 33J.

39 *Federal Court of Australia Act 1976* (Cth) s 33ZB.

40 *Petrusevski v Bulldogs Rugby League Club Ltd* [2003] FCA 61, [20] (Sackville J).

41 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, 616.

42 The advent of the 'closed class' has seen the traditional opt out model be referred to as an 'open class'.

43 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 291 (Jacobson J).

44 *Ibid* 295 (Jacobson J).

the litigation and how it is being conducted. Moreover, without the class action procedure it may not be cost effective to pursue a claim, so the group member must remain in the class action to achieve a remedy.⁴⁵ In addition, without legal advice, the opt-out notice may be misunderstood.⁴⁶ By placing the onus of withdrawal on individual group members, those who are inactive (by design or due to apathy) or not aware of the proceedings are likely to remain as group members. Further, the right to opt out is usually given at an early stage.⁴⁷ After this point, the group member is locked into the class action; yet it may be the decisions about the conduct of the litigation after the right to opt out has passed, such as settlement, that are of greatest concern.

Ultimately, the representative party and the group members who do not opt out of the class action will be bound by issue estoppel and *res judicata* on the issues of law and/or of fact decided in the representative proceedings.⁴⁸

III PARADIGMATIC PROBLEMS FOR SOLICITORS: FIDUCIARY OBLIGATIONS

In determining the existence and scope of fiduciary obligations in any given relationship, it is necessary to examine the facts of the case, conduct of the parties and course of dealing between the parties. The analysis in this article relies on the actions provided by the class action procedure to provide a likely hypothetical backdrop to solicitors' obligations in this environment. As outlined above, the solicitor for the representative party will be making various litigation and settlement decisions, all of which potentially put the solicitor in a situation of breach, or a serious possibility of breach, of duty and duty, as well as duty and interest. The threshold question is therefore whether or not the representative party's solicitor owes fiduciary obligations to group members.

Group members will all satisfy the requirements of claims arising from 'same, similar or related circumstances' and giving rise to a 'substantial common issue of law or fact' set out in sections 33C(1)(b) and (c), and also fall into the description required in section 33H(1)(a) of the *Federal Court of Australia Act 1976* (Cth). After the expiration of the opt out period, all potential group

45 See *Federal Court of Australia Act 1976* (Cth) s 43(1A) which specifies that only the representative party is liable for an adverse costs order if the litigation is unsuccessful, not group members. Further, the group members do not incur legal costs in bringing their own individual claims.

46 Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes: Second Report – Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives' (Report, Australian Research Council, September 2010) 33.

47 'The usual practice is to send opt-out notices to group members shortly after the close of pleadings': Federal Court of Australia, *Practice Note CM 17 – Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976* (Cth), 9 October 2013, [7.3].

48 *Federal Court of Australia Act 1976* (Cth) s 33ZB; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 73–4 (Callinan J); *Femcare Ltd v Bright* (2000) 100 FCR 331, 347 (The Court).

members falling into the group definition who have not opted out will have their claims determined by the class action. From the solicitor's perspective, the group members are therefore not identified but are identifiable. They are 'known unknowns'.⁴⁹ We are therefore inquiring about a fiduciary obligation owed to a person whose precise identity is not known, but about whose existence we are certain, and into whose interests we have some limited insight based on compliance with the statutory requirements to commence the class action.

In constructing the existence and scope of the fiduciary obligation owed by the representative party's solicitor, our starting point is the observation that the solicitor becomes a duty-bound party by acting in that capacity:

Even in the case of a solicitor–client relationship, long accepted as a status based fiduciary relationship, the duty is not derived from the status. As in all such cases, the duty is derived from what the solicitor undertakes, or is deemed to have undertaken, to do in the particular circumstances. Not every aspect of a solicitor client relationship is fiduciary. Conduct which may fall within the fiduciary component of the relationship of solicitor and client in one case, may not fall within the fiduciary component in another.⁵⁰

There is no retainer between the unidentified group members and the solicitor, but the absence of the contract of engagement between solicitor and client does not prevent fiduciary obligations arising. As stated in *Beach Petroleum NL v Abbott Tout Russell Kennedy*:

It is well-established that a person may take upon herself or himself the role of a fiduciary by a less formal arrangement than contract or by self-appointment. ... But whether the relationship derives from retainer, a less formal arrangement or self-appointment, it must be examined to see what duties are thereby imposed on the fiduciary and the scope and ambit of those duties.⁵¹

The existence and scope of the fiduciary obligation in such a situation will arise from the course of dealing. In a passage relied on by the Court in *Beach Petroleum NL v Abbott Tout Russell Kennedy*,⁵² Dixon J in *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* said:

The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists; and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued ...⁵³

49 '[A]s we know, there are known knowns; there are things that we know that we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns, the ones we don't know we don't know': Federal News Service, 'DoD News Briefing – Secretary Rumsfeld and Gen Meyers', 12 February 2002 (Donald H Rumsfeld, United States Secretary of Defense) <<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>>.

50 *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1, 45 (The Court).

51 Ibid 46 (The Court), citing *Boardman v Phipps* [1967] 2 AC 46, 100, 118, 126–7. See also *Marshall v Prescott [No 3]* [2013] NSWSC 1949, [109]–[113] (Beech-Jones J); *Cooper v Winter* [2013] NSWCA 261, [93] (Ward JA), [1] (McCull JA agreeing), [2] (Barrett JA agreeing).

52 (1998) 48 NSWLR 1, 46.

53 (1929) 42 CLR 384, 408.

So what exactly does the solicitor do? The class action legislative regime clearly contemplates the following actions or range of actions will likely be undertaken in relation to class members:

- pre-trial procedure, discovery;
- selecting and engaging relevant experts;
- interviewing witnesses and drafting witness statements;
- drafting an application and statement of claim;
- deciding on and implementing a trial strategy;
- examining and cross examining witnesses;
- communicating with the respondent's legal representatives;
- entry into alternative methods of dispute resolution; and
- settlement negotiations.⁵⁴

There is no mechanism for instructions to be taken by the solicitor from group members. All instructions are provided by the representative party, with whom the solicitor will likely have entered a retainer. Although Justice Mason's account of the 'essence' of a fiduciary relationship in *Hospital Products* has not been formally applied by the High Court,⁵⁵ and its elements should not be read as a statute, it is nonetheless of assistance in pointing out particular aspects of the power dynamic in the configuration envisaged by the class action regime: 'The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense'.⁵⁶

Applying these elements to the range of activities undertaken by the representative party's solicitor, it is clear that the solicitor has undertaken or agreed to act for members of the class action. The nature and purpose of the tasks likely commenced and completed by the solicitor in relation to the litigation against the respondent reveal that there is a clear inconsistency, or at least a risk of inconsistency, between the performance of these tasks and the pursuit of the interests of other group members. Members of the class are vulnerable to the actions of the solicitor as, although the group members are not present before the

54 The extensive range of actions is illustrated by Order 2.4 in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) [No 3]* [2010] FCA 747, [11] (Rares J).

55 See, eg, *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 34 (The Court). 'The parties accepted that the relevant principles regarding the existence of a fiduciary relationship which does not fall within an established category, and the incidents of such a relationship, are those stated by Mason J in that case. This is so notwithstanding that Mason J was in dissent'. Despite discussing various aspects of Justice Mason's formulation, these elements were not formally applied by the Court: at 37 (The Court).

56 *Hospital Products* (1984) 156 CLR 41, 96–7 (Mason J).

court,⁵⁷ their interests are affected by the outcome of the proceedings. To the extent that group members have not opted out, *res judicata* or issue estoppel applies.⁵⁸ The scope of the fiduciary relationship therefore encompasses the litigation for the purposes of the group proceedings. However, from equity's perspective, the class action legislation can do no more than this. What the legislation cannot do is cure what would otherwise be a breach of fiduciary duty. It is no answer for the representative party's solicitor to say, in relation to a potential conflict of duty and duty, that this conflict is contemplated and indeed mandated by the class action regime. As stated by the plurality judgment in *Maguire v Makaronis* (speaking of the legal professional conduct legislation):

Where the question is one of professional conduct, the legislation may operate to qualify what otherwise would be the scope of the fiduciary principle. But it by no means necessarily follows that the legislation, upon its proper construction, limits the well-entrenched equitable jurisdiction, in matters of private law, to remedy, at the instance of the client, abuses of what equity regards as the fiduciary duties of solicitors.⁵⁹

Similarly, there is no evidence that part IVA of the *Federal Court of Australia Act 1976* (Cth) was intended to operate to limit a solicitor's fiduciary duties.⁶⁰ The object of the legislation is to provide a procedure which allows for the grouping of claims and use of a representative party so as to promote access to justice and the efficient resolution of multiple claims.⁶¹ It is tolerably clear that it has been assumed that a solicitor's fiduciary duties exist untrammelled below the superstructure of this regime.

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- 57 Group members are generally not parties to the proceedings: *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 34 [50] (Gaudron, Gummow and Hayne JJ); *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167, 174–5 [31] (Merkel J); *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 179 [36] (Sackville J). See also *Federal Court of Australia Act 1976* (Cth) s 33A (definition of 'group member').
- 58 *Federal Court of Australia Act 1976* (Cth) s 33ZB. Consequently, '[t]he failure by a group member to opt out of representative proceedings may therefore be attended by serious consequences': *Petrusevski v Bulldogs Rugby League Club Ltd* [2003] FCA 61, [20] (Sackville J).
- 59 (1997) 188 CLR 449, 465–6 (Brennan CJ, Gaudron, McHugh and Gummow JJ).
- 60 Neither the legislation, second reading speech, nor explanatory memorandum speak to the issue. The Australian Law Reform Commission addressed multiple legal representation but only to note that the *Federal Court Rules 1979* (Cth) O 45 r 2, which prevented a solicitor from acting for any other party not in the same interest without leave of the court, did not prevent the solicitor for the representative party acting for group members 'unless some issue of conflicting issues arose': Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 85 [202].
- 61 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174–6 (Michael Duffy, Attorney-General); Michael Legg and Ross McInnes, *Annotated Class Action Legislation* (LexisNexis, 2014) ch 1. To the extent the legislation embraces differences between group members' claims, the Act is aimed at overcoming the limitations of the representative action (see, eg, *Federal Court Rules 1979* (Cth) s 33C(2)), and pursuing the goals of access to justice and efficiency: see *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

A Consent

In the non-group litigation context, in a case where the solicitor is acting for more than one party and may be in breach, via an actual or potential conflict of duty and duty, it may be a defence to an action for breach of fiduciary duty if the fiduciary can show the principal has given informed consent to this divided loyalty.⁶² The finding of an informed consent is a finding of fact to be made in all the circumstances of the case but may include ‘the importance of obtaining independent and skilled advice from a third party’.⁶³ In a standard case, for example, the lawyer acting on both sides of a transaction will disclose to both parties the material facts including the identity and interest of the other party and the fact that the solicitor intends to act for both so as to obtain informed consent.⁶⁴

From a practical perspective, it will not be possible either for the solicitor to ensure this proper disclosure has occurred, nor therefore to obtain proper client consent. Disclosure is not possible in relation to all or some of the group members as, pursuant to section 33H(2) of the *Federal Court of Australia Act 1976* (Cth), ‘[i]n describing or otherwise identifying group members ... it is not necessary to name, or specify the number of, the group members’. What is known about the interest of the group members is limited to the description of group members under section 33H, and the requirements in section 33C that the claims of all arise in respect of or out of ‘the same, similar or related circumstances ... and give rise to a substantial common issue of law or fact’. To this extent the solicitor will be able to extrapolate from what is actually known about the representative party to the identifiable but unidentified group members. Group members are faint in appearance but are nonetheless constructed as siblings of the representative party. Their interests are not identical as the requirement is only for ‘same, similar or related circumstances’ and the need for only one common issue of fact or law, but there is nonetheless some familial genetic resemblance. However, for the purpose of disclosure, this can hardly be said to be the ‘fullest disclosure’.⁶⁵ Revelations about the ways in which conflicting engagements are *similar* will not assist a client in determining whether or not to consent to the potential conflict of interest. Thus, on its face, there is not proper disclosure. In fact, the position of the solicitor may be even worse. As emphasised in *ABN AMRO Bank NV v Bathurst Regional Council*, ‘[t]he identification of the relevant conflict informs the required disclosures by

62 *Maguire v Makaronis* (1997) 188 CLR 449, 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

63 *Ibid* 466–7.

64 See, eg, G E Dal Pont, *Lawyers’ Professional Responsibility* (Thomson Reuters, 5th ed, 2013) 242 [7.30]; Law Council of Australia, *Australian Solicitors Conduct Rules 2011* (June 2011), rr 11.2–11.3, which apply in NSW, Queensland and SA.

65 *Fullwood v Hurley* [1928] 1 KB 498, 502 (Scrutton LJ), quoted in *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90 (Richardson J).

the fiduciary and the analysis of whether the fiduciary has breached those requirements'.⁶⁶ The identity of the other group members is not known, and little about them is known as would inform any decision to agree to the conflicting engagement or not. The representative party's solicitor is systematically unable to determine the required level of disclosure because this is itself a function of a highly unstable set of variables which may produce actual or potential conflict of duty and duty. Similarly, any requirement of independent advice would be hollow.

1 Notices to Group Members

Although it is not possible to individually communicate or contract with a group member who is not identified, part IVA of the *Federal Court of Australia Act 1976* (Cth) provides for communication with group members through notices. Section 33X specifies the matters for which notice must be given, including notice of the commencement of the proceedings, the right to opt out and settlement, subject to certain discretions to dispense with notice. The court also has power to give notice at any stage of any matter to group members.⁶⁷ Section 33Y provides that the form and content of a notice must be approved by the court, and the court must order who is to give the notice, the way it will be given and who should pay for it. Notice may be given by press advertisement, radio or television broadcast and 'any other means',⁶⁸ but not personally to each group member unless the court is satisfied that it is reasonably practical and not unduly expensive to do so.⁶⁹

Notices of the right to opt out and of a settlement do not seek to obtain informed consent to conduct by the solicitor which would otherwise be a breach of duty. It has been recognised that the effectiveness of a notice turns not just on whether it is given, but is also determined by how the notice is given, the language used, the time period for responses, and how burdensome it is to respond.⁷⁰ Notices must be readily comprehensible by those to whom they are addressed and be written in plain English.⁷¹ It is 'imperative that any

66 (2014) 309 ALR 445, 668 (The Court).

67 *Federal Court of Australia Act 1976* (Cth) s 33X(5).

68 *Federal Court of Australia Act 1976* (Cth) s 33Y(4).

69 *Federal Court of Australia Act 1976* (Cth) s 33Y(5). Note it may be possible to have a claim with an open class where group members are known. For example, a claim based on contract where it may be possible for a respondent to identify the contractual counterparty: see, eg, *Courtney v Medtel Pty Ltd* [2001] FCA 1037 (personal notice ordered where patient registration lists were available, which allowed each person implanted with the pacemaker the subject of the proceedings to be identified).

70 Michael Legg, 'Judge's Role in Settlement of Representative Proceedings: Lessons from United States Class Actions' (2004) 78 *Australian Law Journal* 58, 67.

71 *McMullin v ICI Australia Operations Pty Ltd [No 6]* (1998) 84 FCR 1, 5 (Wilcox J); *Pharm-a-Care Laboratories Pty Ltd v Commonwealth [No 4]* [2010] FCA 749, [20], [23] (Flick J).

communications made to group members ... be accurate' and not misleading.⁷² Consequently, opt out and settlement notices have sought to convey the effect of these steps in the class action in as straightforward a manner as possible.⁷³ Extraneous matters create the risk that the notice may become unwieldy or lead to misunderstandings.

Nonetheless, the existence of the notice provisions raises for consideration whether a notice could be used to facilitate informed consent.⁷⁴ It may be argued that if an opt-out notice was given that referred to the possibility of conflicts of interest arising, or to specific conflicts that may arise, and the group member did not opt out, they may be taken as consenting to those conflicts. Alternatively, or in addition, if a conflict arose then a specific notice stating the nature of the conflict and seeking consent, or stating that consent was taken as given unless the group member objected, may be argued as achieving consent. However, these options are problematic.

There is no way of knowing that the group member received the notice or accepted the modified terms of representation suggested above. This is because rather than giving consent there is an assumption of an absence of objection. Failing to object is not the same as affirmatively giving consent. Further, general descriptions of conflicts of interest will not likely be sufficient for informed consent,⁷⁵ and if consent is given to one particular conflict that does not equate to consent for other conflicts.

B No Court Sanction

There is similarly no power in a court to authorise conduct which would otherwise be a breach of fiduciary duty. There is a general power in a court, in section 33ZF, on its own motion or on application by a party or a group member, to make any order the court thinks appropriate or necessary to ensure that 'justice is done in the proceeding'.⁷⁶ Despite the breadth of this section it seems unlikely it could be used to sanction conduct which would otherwise be a breach of

72 *Williams v FAI Home Security Pty Ltd [No 3]* [2000] FCA 1438, [24] (Goldberg J); *King v GIO Australia Holdings Ltd* [2001] FCA 270, [14]–[16] (The Court).

73 See Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Thomson Reuters, 2nd ed, 2012) app 7, containing 11 examples of opt-out notices.

74 See *ibid*, where some opt-out notices refer to obtaining separate legal advice and the possibility of needing legal representation to prove individual loss.

75 Lord Wilberforce in *New Zealand Netherlands Society 'Oranje' Inc v Kuys* stated that informed consent required 'full and frank disclosure of all material facts': [1973] 2 All ER 1222, 1227. See also *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 170 (Street CJ).

76 *McMullin v ICI Australia Operations Pty Ltd [No 6]* (1998) 84 FCR 1, 4 (Wilcox J); *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 182 (Sackville J).

fiduciary duty by the representative party's solicitor.⁷⁷ In any case, equity has no jurisdiction to authorise a breach of fiduciary duty. Unlike the position, for example, in the case of an express private trustee where on the application of the trustee a court may give directions,⁷⁸ the effect of which – if there has been full disclosure of material facts – will be to render the trustees' conduct safe from impeachment on the ground of breach of trust, equity has no jurisdiction to sanction a breach of fiduciary duty. On finding a breach of fiduciary duty, equity may exercise a discretion as to whether or not to award an allowance to the defaulting fiduciary on account of care and skill.⁷⁹ However, this is not the same as an ambit of decision-making which sanctions the breach of fiduciary duty.

While section 33ZF could not be used to permit a breach of fiduciary duty, it could be employed pre-emptively to prevent circumstances arising that create a risk of duty–duty conflict. This is shown by *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd [No 3]*.⁸⁰ Melbourne City Investments ('MCI') was a shareholder and representative party in multiple shareholder actions against various companies. The solicitor for MCI, its sole shareholder and director were all the same person: Mr Elliott. In the words of Ferguson J, 'it [was] probable that the reason for MCI's existence [was] to launch proceedings ... to enable its sole director and shareholder to earn legal fees from acting as the solicitor for MCI'.⁸¹ One of the defendants to the group proceedings argued that Elliott could not act independently and without a conflict of interest in his conduct of the litigation given his dual identity as lawyer and controller of lead plaintiff MCI.⁸² Justice Ferguson agreed and held that an order could be made under section 33ZF 'to the effect that the proceedings ought not be allowed to continue as group proceedings ... for so long as Mr Elliott is acting for MCI or, if Mr Elliott

77 Any order can only be made if it is appropriate or necessary to ensure that justice is done: *McMullin v ICI Australia Operations Pty Ltd [No 6]* (1998) 84 FCR 1, 3–4 (Wilcox J). However, if what was sought was an order to prevent a conflict of interest from arising, or to address a conflict through some additional step such as the appointment of separate legal representation, then s 33ZF may be able to be called on in aid of such an order: see *King v AG Australia Holdings Ltd* [2003] FCA 1420, [15] (Moore J); *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2008) 67 ACSR 569, 574 (Stone J), where a 'contradictor' was appointed to represent group members who belatedly sought to be included in a settlement and to avoid a conflict of interest arising for the solicitors acting for the applicant who may have had to argue against the group members' inclusion. Section 33ZF does not appear to have been relied on in these cases, rather Moore J made the original 'suggestion' and the contradictor was then briefed by the solicitors for the applicant.

78 For example, *Trustee Act 1925* (NSW) s 63(1) provided that the trustee has fully and fairly disclosed all material matters to the court: *Arakella Pty Ltd v Paton* (2004) 60 NSWLR 334, 337 (Austin J).

79 *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 561–2 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Boardman v Phipps* [1967] 2 AC 46, 104 (Lord Cohen); *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157, 242–3 (The Court).

80 [2014] VSC 340 ('MCI Case').

81 *Ibid* [9].

82 *Ibid* [58]–[59].

continues to represent MCI, for so long as MCI remains the representative plaintiff'.⁸³

The difficulty with utilising section 33ZF is that little is known about the interests of group members. This makes it difficult for the court to be able to be aware of, or identify, conflicts of interest. In the *MCI Case* it was the defendants who moved the court for relief. They were able to do so because they had knowledge of the particular relationship between the solicitor and the representative party. Indeed, the conflict relied upon was a duty–interest conflict which is easier to identify because the interests of the solicitor can be more readily ascertained.

C Breach of Fiduciary Obligation

Apart from the existence of the initial conflicting engagement, there are at least two other points in the pattern of interaction mandated by the class action procedure at which the fiduciary obligations of the representative party's lawyers will obviously be engaged: (1) conduct of litigation, and (2) settlement. Each warrants separate consideration.

Turning first to conduct of the litigation, members of the represented group have no direct input into decision-making. The representative party is the party of record and the face of the litigation for the represented group.⁸⁴ Although adequacy of representation is not a requirement for the commencement of a class action by the representative party,⁸⁵ subsequent inadequacy of that representation is a separate trigger which allows for replacement of the representative party. Section 33T thus permits individual group members to apply to the court requesting that a representative party be replaced if the latter 'is not able adequately to represent the interests of the group members'.

Adequate representation embodies the ideals of loyalty and common – not conflicting – interests.⁸⁶ The United States Supreme Court has given the requirement considerable consideration.⁸⁷ In *Smith v Swormstedt*, the Supreme Court observed that 'care must be taken that persons are brought on the record fairly representing the interest or right involved' to ensure that class members'

83 Ibid [62].

84 Group members are generally not parties to the proceedings: see above n 57.

85 *Federal Court of Australia Act 1976* (Cth) s 33D(1) addresses standing and requires a representative party to have a sufficient interest to commence a proceeding on his or her own behalf against a particular person before they can commence proceedings on behalf of group members. See *Ryan v Great Lakes Council* (1997) 78 FCR 309, 312 (Wilcox J); *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394, 420 (Stone J).

86 Legg, 'Judge's Role in Settlement of Representative Proceedings', above n 70, 63.

87 The United States *Federal Rules of Civil Procedure* r 23(a) sets out the prerequisites to the commencement of all class actions, including 'the representative parties will fairly and adequately protect the interests of the class'.

interests will be protected.⁸⁸ The requirement of an alignment of interests between the representative and the absent parties was further considered in *Hansberry v Lee*, where the Supreme Court held that adequate representation of interests was necessary to meet constitutional due process requirements for binding non-parties.⁸⁹

In Australia, adequacy of representation was considered by the High Court in the representative action context in *Carnie v Esanda Finance Corporation Ltd*.⁹⁰ The plaintiffs originally sought a declaration of the meaning of a legislative provision and a declaration that contracts that violated that provision were null and void. However, the latter declaration was subsequently deleted from the statement of claim. Justices Toohey and Gaudron observed that while all of the group had the same interest in the determination of the legislation's meaning, the group may have differed as to whether they wanted their contracts rendered void or would have preferred to keep the contract on foot.⁹¹ A representative party seeking to avoid the contract is not an adequate representative for group members who have the conflicting interest of wanting to retain the contract. Further, if the court is not satisfied that the interests of the absent group are being properly advanced, it should discontinue the case as a representative action.⁹²

The issue of adequacy of representation impacts the fiduciary obligations of the representative party's solicitor. To the extent that the representative party is an identikit applicant for the group members, this will mean at a practical level that the risk of an *actual* conflict of duty and duty is low. A group member who identifies sufficient divergence of interest between him or herself and the representative party may persuade the court to establish a second or subgroup with a separate representative plaintiff.⁹³ That second representative plaintiff may then engage a second solicitor, who is then a fiduciary duty-bound party, albeit owing duties to the more narrowly defined group.⁹⁴ However, the difficulty is that with an opt out model it is possible that the representative party will be litigating on behalf of unidentified group members who are unaware they *are*

88 57 US 288, 303 (Nelson J) (1853); Stephen C Yeazell, *From Medieval Group Litigation to the Modern Class Action* (Yale University Press, 1987) 220–6.

89 311 US 32, 42–3 (Stone J) (1940).

90 (1995) 182 CLR 398.

91 *Ibid* 421 (Toohey and Gaudron JJ).

92 *Ibid* 408 (Brennan J), 424 (Toohey and Gaudron JJ), 427 (McHugh J). The ability to discontinue a class action as a result of inadequacy of representation has been adopted in the NSW class action regime: *Civil Procedure Act 2005* (NSW) s 166(1)(d).

93 *Federal Court of Australia Act 1976* (Cth) s 33Q arms the court with the power to deal with non-common issues including establishing a subgroup consisting of those group members and appointing a person to be the subgroup representative party on behalf of the subgroup members.

94 To date, where subgroups have been used the lawyer has been the same for all subgroups. This is because s 33Q has been employed to manage non-common issues rather than concerns about fiduciary obligations: see *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1; *Wingecarribee Shire Council v Lehman Brothers Australia Ltd [No 3]* [2010] FCA 747; Legg and McInnes, above n 61, ch 17.

group members and so are unable to raise objections to a representative proceeding they do not know about. In such circumstances there is a latent but real risk of a potential conflict of duty and duty. The class action model provides some indirect built-in protections against this to the extent that, pursuant to section 33T, group members may identify to the court their fragmented interest, but this mechanism does not work in the case of unidentified group members.⁹⁵

The conduct of settlement negotiations also raises specific issues for the fiduciary obligations of the representative party's solicitor. A representative proceeding may not be settled or discontinued without the approval of the court.⁹⁶ Further, unless the court is satisfied that it is just to do so, an application for approval of a settlement must not be determined unless notice has been given to group members.⁹⁷ In the absence of statutory criteria for approving settlement,⁹⁸ courts have developed their own criteria for approving settlement,⁹⁹ which have now been consolidated into *Practice Notice CM 17*.¹⁰⁰ The parties will usually need to persuade the court that:

- (a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who will be bound by the settlement; and
- (b) the proposed settlement has been undertaken in the interests of group members, as well as those of the applicant, and not just in the interests of the applicant and the respondent/s.¹⁰¹

The repeated reference to the need to consider group members arises because many of them may not have separate legal representation.¹⁰² Consequently, the task of the court, to ascertain whether the compromise is a fair and reasonable compromise of the claims made on behalf of the group members as a whole, is 'onerous'.¹⁰³ Moreover, the court's role is protective: 'It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant

95 Legg, 'Judge's Role in Settlement of Representative Proceedings', above n 70, 64.

96 *Federal Court of Australia Act 1976* (Cth) s 33V. A further regime applies when the representative party seeks to settle its own claim but not the claims of the group: *Federal Court of Australia Act 1976* (Cth) s 33W.

97 *Federal Court of Australia Act 1976* (Cth) s 33X(4).

98 Despite the importance of settlement approval, s 33V makes no express reference to the criteria for approving settlement.

99 See, eg, *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250, 258 (Branson J); *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, [15] (Finkelstein J); *Williams v FAI Home Security Pty Ltd [No 4]* (2000) 180 ALR 459, 465–6 (Goldberg J).

100 Federal Court of Australia, *Practice Note CM 17 – Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, 9 October 2013. *Practice Note CM 17* originally commenced on 5 July 2010.

101 *Ibid* 5 [11.1].

102 *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801, [3] (Emmett J); *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [8] (The Court) ('*Storm Financial*'); *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) [No 9]* (2013) 97 ACSR 227, 234 (Jacobson J).

103 *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, [16] (Finkelstein J).

compromises'.¹⁰⁴ The reason for the court's role may be illustrated by the Storm Financial class action involving investors suing Macquarie Bank Ltd. The proposed settlement, which was rejected by the Full Court on appeal, involved some 317 group members who were clients of the solicitor on the record (had entered a retainer) and had contributed funds to the litigation, receiving about 42 per cent of their losses. The other 733 group members who were not represented by the solicitor on the record (had not entered a retainer) would have received about 17.6 per cent of their losses.¹⁰⁵ As emphasised by Jacobson J: 'The court's role is most sensitive when some group members are not represented by the solicitors for the applicant'.¹⁰⁶

However, despite the existence of the court approval requirement, it is unclear whether judges are able to adequately assess the quality and fairness of the settlement agreement reached.¹⁰⁷ The information provided to the court comes almost exclusively from the lawyers acting for the representative party.¹⁰⁸ Respondents rarely actively gather evidence or make submissions in relation to a settlement, but rather simply express their support.¹⁰⁹ The approval process therefore takes place without an opposing voice seeking to identify aspects of the settlement that are unfair or unreasonable. Group members tend not to object, with the lack of objections by group members being seen as a sign that a settlement is not opposed and is a factor in favour of the settlement being fair and reasonable.¹¹⁰ Reliance on a lack of objections has been identified as problematic because silence may not equate to acquiescence but rather reflect the high cost of objecting compared to the benefit to be obtained, or result from group members being unaware of the settlement, having insufficient information or miscomprehending the settlement notice.¹¹¹

104 *Storm Financial* [2013] FCAFC 89, [8] (The Court). See also '[t]he court's role is to protect those group members who are not represented and whose interests may be prejudiced by their absence': *Collin v Aspen Pharmacare Australia Pty Ltd* [2013] FCA 1336, [4] (Davies J).

105 *Storm Financial* [2013] FCAFC 89, [2] (The Court). See also *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd [No 6]* [2013] FCA 447; *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd [No 3]* [2014] VSC 340, [46] (Ferguson J) (note this paragraph contains both conflicts of duty and duty as well as duty and interest).

106 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) [No 9]* (2013) 97 ACSR 227, 234 (Jacobson J).

107 Judith Resnick, 'Failing Faith: Adjudicatory Procedure in Decline' (1986) 53 *University of Chicago Law Review* 494, 551.

108 Justice Finkelstein observed in *Lopez v Star World Enterprises Pty Ltd* that the settlement approval task is one 'in which the court inevitably must rely heavily on the solicitor retained by, and counsel who appears for, the applicant to put before it all matters relevant to the court's consideration of the matter': [1999] FCA 104, [16].

109 *Pharm-a-Care Laboratories Pty Ltd v Commonwealth [No 6]* [2011] FCA 277, [49] (Flick J).

110 *Clime Capital Ltd v Credit Corporation Group Ltd [No 3]* [2012] FCA 218, [23] (Nicholas J).

111 Michael Legg, 'Mass Settlements in Australia' in Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Edward Elgar Publishing, 2013) 188.

Against this backdrop the fiduciary obligations of the representative party's solicitor comes sharply into view. The solicitor is through settlement negotiating the extinguishment by consent of the claims of those represented.¹¹² Importantly, a settlement is almost always in relation to the entirety of each group member's claim and is not limited to the determination of the common issues. The settlement includes the non-common issues where group members' interests are likely to diverge. This has clear ramifications for actual or potential conflicts of duty and duty that are apparent if we return to the core concept, which is that the 'acceptance of multiple engagements is not necessarily fatal. There may be an identity of interest or the separate clients may have unrelated interests'.¹¹³ As the proposed settlement in *Storm Financial* shows, an identity of interest in commencing the litigation, to the extent that this is demonstrated via satisfaction of the requirement of 'same, similar or related circumstances'¹¹⁴ and 'a substantial common issue of law or fact',¹¹⁵ may not translate into an identity of interest at settlement. There may well be a breach of fiduciary duty to some group members. The fact that the settlement must be approved by a court cannot operate to discharge the fiduciary obligation. As explained above, the court has no power to sanction a breach of fiduciary duty.¹¹⁶

The conduct and settlement of class action litigation may be further complicated by the presence of a litigation funder who pays the costs of the litigation, including the representative party's legal fees, and accepts the risk of paying the respondent's costs in the event that the claim fails. The litigation funder takes in return a percentage (typically 20–40 per cent) of any funds recovered if the case is successful.¹¹⁷ For example, where the lawyers act for both the funder and the group members, a conflict between duties may arise for the lawyer. Further, the terms of a settlement may be more acceptable to a funder who can avoid the risk of trial and invest in another case than to the group member who has the one opportunity to obtain compensation. The representative party's lawyer, even when not formally acting for the funder, may find themselves torn between their fiduciary obligations to the group members and wanting to promote the funder's interests.¹¹⁸ Further analysis of the nature and scope of the interactions between the role of litigation funders and fiduciary

112 'A judgment given in a representative proceeding ... binds all' persons who are group members: *Federal Court of Australia Act 1976* (Cth) s 33ZB.

113 *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90 (Richardson J).

114 *Federal Court of Australia Act 1976* (Cth) s 33C(1)(b).

115 *Federal Court of Australia Act 1976* (Cth) s 33C(1)(c).

116 *Maguire v Makaronis* (1997) 188 CLR 449, 465–6 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

117 Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach' (2011) 30 *Civil Justice Quarterly* 52, 56.

118 See Australian Securities and Investments Commission, *Regulatory Guide 248 – Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013) 7–8, 25; Legg, 'Litigation Funding in Australia', above n 2, 31.

obligations requires detailed consideration which lies beyond the scope of this article.

For completeness, it is worth considering the position of the solicitor acting for a respondent and the possibility of a duty–duty conflict arising in relation to absent group members. Some courts have stated that:

the respondent’s lawyers should also bear some responsibility for ensuring that the court has all the information that objectively describes the merits of the case and brings to the court’s attention the obstacles to recovery and the benefits to be derived from the proposed settlement.¹¹⁹

Indeed, in the NAB shareholder class action settlement the Victorian Supreme Court went further and expressed a preference for an opinion, rather than submissions, which candidly evaluated the strength and weaknesses of a party’s case.¹²⁰ The respondent’s lawyer does not act for the group members, nor does he or she undertake to promote their interests. There is no fiduciary relationship. Indeed, actions that created such a duty would be contrary to the duty that the lawyer owed to the respondent. The above calls from courts for the respondent’s lawyers to assist courts in discharging their responsibilities for the approval of class action settlement are better conceived of as deriving from the lawyer’s duties to the court, including candour, honesty and fairness.¹²¹

IV EQUITABLE COMPENSATION FOR LOSS OF CHANCE

It is uncontroversial that breach of fiduciary duty may lead to a claim for equitable compensation where the loss is measured by the principal’s loss of opportunity or loss of a chance.¹²² The unidentified group member who alleges breach of fiduciary duty may identify various losses as flowing from the path or opportunity not taken. It is impossible to attempt to identify all of the potential losses the unidentified group member may thereby construct, but the following are specific choices which the class action regime contemplates as being available to group members which may lead to loss of opportunity. The

119 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* [2010] FCA 1029, [4] (Finkelstein J).

120 *Pathway Investments Pty Ltd v National Australia Bank Ltd [No 3]* [2012] VSC 625, [3], [6] (Pagone J).

121 *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 41 (McHugh J). The existence of absent group members who may have interests that diverge from the representative party raises the issue of whether the degree of candour required should be equated with an ex parte application: see *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, 682 (Isaacs J).

122 See, eg, *O’Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 272 (Spigelman CJ); *Edmonds v Donovan* (2005) 12 VR 513, 540–1, 545 (Phillips JA) upholding Warren J at trial who assessed equitable compensation at ‘the opportunity that the plaintiffs lost’. This reasoning was not the subject of appeal to the High Court of Australia in *Howard v Federal Commissioner of Taxation* (2014) 88 ALJR 667, 676 (French CJ and Keane J), 683 (Hayne and Crennan JJ); *Ramsay v BigTinCan Pty Ltd* [2014] NSWCA 324, [68]–[72] (Macfarlan JA); *Spotless Group Ltd v Blanco Catering Pty Ltd* [2011] FCA 979, [125] (Mansfield J); *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 296 ALR 418, 429–30 (Emmett, Edmonds and Rares JJ).

unidentified group member may, for example, argue that if the conflict had been disclosed she or he would have: (a) opted out of the proceedings;¹²³ (b) obtained separate legal representation; (c) applied to the court for orders ‘appropriate or necessary to ensure that justice is done in the proceeding’, such as an order fragmenting the group and appointing a separate representative party;¹²⁴ and/or (d) objected to an offer of settlement.¹²⁵ In respect of these identified lost opportunities, the object of an award of equitable compensation is ‘to restore persons who have suffered loss to the position in which they would have been if there had been no breach of the equitable obligation.’¹²⁶

The causation test relevant to an award of equitable compensation has been the subject of much judicial consideration,¹²⁷ and academic commentary and discussion.¹²⁸ It lies beyond the scope of this discussion to thoroughly engage with this debate other than to note that the type of compensation applicable to this claim is reparative compensation. The defaulting fiduciary is being asked not to restore the balance of a fund depleted through dissipation of an asset held in a fiduciary or custodial capacity,¹²⁹ but rather to compensate for the true loss suffered in breach of duty. Equity has no one test of causation for equitable

123 *Federal Court of Australia Act 1976* (Cth) s 33J. By not opting out, *res judicata* applies: *Federal Court of Australia Act 1976* (Cth) s 33ZB.

124 *Federal Court of Australia Act 1976* (Cth) ss 33T, 33ZF.

125 *Federal Court of Australia Act 1976* (Cth) s 33X(4); Federal Court of Australia, *Practice Note CM 17 – Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976* (Cth), 9 October 2013, 6 [11.5(m)]. Alternatively, the unidentified group member may argue that she or he would have disputed a distribution of settlement funds within the group assuming that the representative party has accepted an offer of settlement: see *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd* [No 6] [2013] FCA 447.

126 *O’Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 272 (Spigelman CJ), 280 (Priestley JA agreeing), 281 (Meagher JA agreeing).

127 Principal appellate decisions include: *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534; *Target Holdings Ltd v Redfern* [1996] 1 AC 421; *O’Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484.

128 J D Heydon, ‘Causal Relationships between a Fiduciary’s Default and the Principal’s Loss’ (1994) 110 *Law Quarterly Review* 328; W M C Gummow, ‘Compensation for Breach of Fiduciary Duty’ in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 57; Steven Ballantyne Elliott, ‘Compensation Claims against Trustees’ (DPhil Thesis, University of Oxford, 2002); Steven B Elliott, ‘Remoteness Criteria in Equity’ (2002) 65 *Modern Law Review* 588; Lionel Smith, ‘The Measurement of Compensation Claims against Trustees and Fiduciaries’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 363; Matthew Conaglen, ‘Remedial Ramifications of Conflicts between a Fiduciary’s Duties’ (2010) 126 *Law Quarterly Review* 72; James Allsop, ‘Causation in Commercial Law’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 269, 299–307; Jamie Glister, ‘Equitable Compensation’ in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 143; Charles Mitchell, ‘Equitable Compensation for Breach of Fiduciary Duty’ (2013) 66 *Current Legal Problems* 307; P G Turner, ‘Measuring Equitable Compensation for Breach of Fiduciary Duty’ (2014) 73 *Cambridge Law Journal* 257.

129 This is referred to as substitutive compensation. See Elliott, ‘Compensation Claims against Trustees’, above n 128, 51; Elliott, ‘Remoteness Criteria in Equity’, above n 128, 592.

compensation, but rather ‘[i]t is necessary to identify the purposes of the particular rule to determine the appropriate approach to issues of causation’¹³⁰ such as will establish an ‘adequate or sufficient connection’ between the loss and the breach of duty.¹³¹ In relation to a claim for reparative compensation for breach of fiduciary duty, the causation rule is that ‘but for’ the breach the loss would not have occurred.¹³² This is said to perform as an exclusionary rule to be applied against the backdrop of common sense reasoning in assigning legal responsibility for loss.¹³³ With the benefit of hindsight, the court will examine the facts to apply the appropriately ‘stringent’ test in order to determine whether causation is satisfied. The degree of stringency will be evident in the extent to which separate and concurrent causes will be admitted as relevant to causing the loss. *O’Halloran v R T Thomas & Family Pty Ltd* tells us that, at least in the case of breach of trust or the parallel example of the exercise of custodial fiduciary power to dispose of property for an improper purpose, ‘[t]here is a sufficient connection, irrespective of the identification of a separate and concurrent cause, when the loss would not have occurred if there had been no breach of duty’.¹³⁴ Common law notions of foreseeability and remoteness have no role to play,¹³⁵ and contributory negligence has similarly been excluded.¹³⁶ In the configuration under consideration in this analysis, the breach of fiduciary duty will likely, on the facts, be a necessary condition for all of the losses identified above. The group member must demonstrate that, had there been no breach, the lost opportunity would have come to fruition or been taken.¹³⁷ A court in evaluating the evidence in this respect ‘must do its best to assess the probabilities, or indeed possibilities involved. ... [P]erformance of this task may involve a degree of speculation by the Court’.¹³⁸ A court will then be faced with the admittedly often

130 *O’Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 275 (Spigelman CJ), 280 (Priestley JA agreeing with Spigelman CJ), 281 (Meagher JA agreeing with Spigelman CJ).

131 *Ibid* 276–7 (Spigelman CJ), 280 (Priestley JA agreeing), 281 (Meagher JA agreeing).

132 *Parker, Re Purcom No 34 Pty Ltd (in liq) [No 2]* [2010] FCA 624, [23] (Gordon J); *Singtel Optus Pty Ltd v Almad Pty Ltd* [2013] NSWSC 1427, [260] (McDougall J); *Ramsay v BigTinCan Pty Ltd* [2014] NSWCA 324, [62] (Macfarlan JA), [1] (McColl JA agreeing), [104] (Gleeson JA agreeing); *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 296 ALR 418, 429 (The Court); *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 98 ACSR 615, 681–2 (Edelman J).

133 *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 296 ALR 418, 429–30 (The Court); *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 98 ACSR 615, 681–2 (Edelman J).

134 (1998) 45 NSWLR 262, 277 (Spigelman CJ), 280 (Priestley JA agreeing), 281 (Meagher JA agreeing) (ie, an award of substitutive compensation).

135 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 500–1 (The Court); *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 296 ALR 418, 430 (The Court).

136 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 201–2 (McHugh, Gummow, Hayne and Callinan JJ), 228–31 (Kirby J). Note Conaglen, above n 128, who points out that the High Court’s view in that case was ‘based in part on the unavailability of such pleas in Australian contract claims, which has now been altered by statute, but there is no cause for thinking that the statutory changes would lead the High Court to alter its view’: at 97.

137 *Ramsay v BigTinCan Pty Ltd* [2014] NSWCA 324, [72] (Macfarlan JA), [1] (McColl JA agreeing).

138 *Ibid* [82] (Macfarlan JA), [2] (McColl JA agreeing).

difficult task of valuing the lost chance. There is thus a systemic risk of the representative party's solicitor being required to compensate group members for their lost opportunity.

V CONCLUSION

There is an inherent and perhaps irreconcilable tension between the objectives of the class actions regime and the fiduciary obligations of the representative party's solicitor to members of the represented group. Even taking on board the cautionary words of Hayne and Crennan JJ in *Howard v Federal Commissioner of Taxation* that 'attention must be given to the duties, interests and alleged manner of conflict than is given simply by observing that [the solicitor] owe[s] fiduciary duties',¹³⁹ there is a real or substantial possibility of a duty/duty conflict. The only sure way in which the solicitor can exclude this possibility is to pursue the representative action via a closed class, thus obtaining the opportunity to assess potential conflicts of duty and duty and obtain informed consent from all members of the represented group.

Anything less than this will be a function of the circumstances and facts of the case and how much risk the solicitor is willing to accept. Prudence suggests utilising a narrow group definition, perhaps via the description or identification of group members,¹⁴⁰ and the selection of the 'same, similar or related circumstances' and 'substantial common issue[s] of law or fact'.¹⁴¹ Refinements on this strategy include deploying sections 33Q (determination of issues where not all issues are common) and 33ZF (general power of the court to make orders appropriate or necessary) to try and craft arrangements that prevent conflict from arising; effectively 'fragmenting the group' and thus ensuring separate legal representation. If required, a court may order separate legal representation for those group members. However, such strategies do not remove the possibility of conflict; the risk is merely minimised. How much is a matter of degree in each case. With each step towards discharge of their fiduciary obligation, the representative party's lawyer is forced to make the class action less efficient. More perfect solutions will require legislative intervention.

139 (2014) 88 ALJR 667, 681 (Hayne and Crennan JJ).

140 *Federal Court of Australia Act 1976* (Cth) s 33H.

141 *Federal Court of Australia Act 1976* (Cth) s 33C(1)(b), (c).