Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions—The Need for a Legislative Common Fund Approach

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1. Introduction

Pt IVA of the Federal Court of Australia Act 1976 (Cth) ("FCA Act") was enacted with the objective of providing access to justice, resolving disputes more efficiently, avoiding respondents facing multiple suits and the risk of inconsistent findings, and reducing costs for the parties and the courts.[1] To achieve those goals the FCA Act sought to adopt an opt out form of the class action which is commenced by a representative party or parties on behalf of, but without the express consent of, those entities that fall within the group definition. The group members receive an opportunity to exclude themselves, or opt out of the class action, at a later point.[2]

The issue of group definition in class actions has been enlivened in Australia with the advent of litigation funding. In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 C.L.R. 386 the High Court confirmed the legitimacy of third parties funding litigation in exchange for a percentage of any recovery. Litigation funding is advocated on the basis that it promotes access to justice, spreads the risk of complex litigation and improves the efficiency of litigation through introducing commercial considerations that will aim to reduce costs.[3]

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[1] Second Reading Speech by the Attorney General, Australia, House of Representatives, *Hansard*, November 14, 1991 at p.3176, *Bright v Femcare Ltd* (2002) 195 A.L.R. 574 at [152]; and V. Morabito, "Class Actions and the Right to Opt Out Under Part IVA of the Federal Court of Australia Act 1976 (Cth)" (1994) 19 M.U.L.R. 615 at 627–628.

[2] Traditionally the debate over group definition has been between the "opt out" and "opt in" approaches. An opt in model is where proceedings are commenced by a representative party and a group member is asked to give their express consent to participate in the class action suit. See, e.g. Australian Law Reform Commission ("ALRC"), *Grouped Proceedings in the Federal Court*, (1988) Report No.46, pp.[98]–[130], Alberta Law Reform Institute, *Class Actions*, (2000) Report No.85, pp.[70]–[77], Ontario Law Reform Commission, *Report on Class Actions* (1982), pp.467–492, Scottish Law Commission, *Multi-Party Actions*, (1996) Report No.154, pp.[4.47]–[4.70] and R. Mulheron, *Reform of Collective Redress in England and Wales*, (2008) Research Paper for Submission to the Civil Justice Council of England and Wales.

[3] *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 N.S.W.L.R. 203 at [100]; and *QPSX Ltd v Ericsson Australia Pty Ltd (No.3)* (2005) 219 A.L.R. 1 at [54].

Litigation funders, as repeat players in the class action arena, then set about advocating changes to class action procedure that promoted their business model.[4] Specifically, the use of the opt in model, which was unsuccessful,[5] and then the use of a "limited group" or "closed class" method of group definition that was allowed by the Full Federal Court of Australia in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 F.C.R. 275 ("the *Multiplex* class action").[6] The limited group approach involves a class action being commenced on behalf of a group specifically created for, and prior to, the commencement of the class action. The limited group approach is favoured by litigation funders because it allows them to require each group member to accept the terms of their funding agreement thereby eliminating the so-called "free-riders".[7] Equally, the limited group approach only extends access to justice to those group members who have been identified and who have signed a funding agreement.

The opt out class action and litigation funding both promote access to justice but are at odds with each other, because the opt out class action seeks to include all potential group members at commencement without them needing to take any steps to participate, compared with litigation funding which conditions inclusion in the group on the affirmative step of accepting the terms of funding. This article seeks to reconcile the opt out class action and litigation funding through recommending the legislative adoption in Australia of a form of the US common fund approach to legal fees.

2. Background

2.1 Overview of the Federal Court of Australia class action

The legislation creating group proceedings in Australia at the federal level is Pt IVA of the FCA Act, which was enacted in 1992.[8] A class action brought under this legislation ("Part IVA Class Action"), usually has three hurdles to overcome: complying with the requirements for commencing the proceedings in s.33C (seven or more persons with claims arising out of same, similar or related circumstances that give rise to a substantial common issue of law or fact); complying with the additional pleading requirements in s.33H (identifying the group and specifying the common questions); and avoiding being discontinued pursuant to s.33N (the costs are excessive as compared to separate proceedings; the relief sought can be obtained without resort to a representative proceeding; the representative proceeding is not an efficient and effective means of dealing with the claims; or it is otherwise inappropriate that the claims be pursued by means of a representative proceeding). The legislation also contains requirements for standing, determining non-common issues, adequacy of representation, settlement, notices, judgment and appeals.[9]

[4] IMF (Australia) Ltd, *2008 Annual Report*, (2008), p.6, referring to its 2008 record profit being the result of, inter alia, "many years of patient precedent creation".

[5] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 F.C.R. 394 ("Aristocrat").

[6] *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 F.C.R. 275 ("Multiplex II"); which dismissed the appeal from *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 A.L.R. 111; 25 A.C.L.C. 1192 ("Multiplex I").

[7] See J. Gans, S. King, G. Mankiw and R. Stonecash, *Principles of Economics*, 3rd edn (South Melbourne: Nelson Australia, 2006), p.212 ("A free rider is a person who receives the benefit of a good but avoids paying for it.").

[8] An almost identical procedure exists in Victoria. See Supreme Court Act 1986 (Vic.) Pt 4A.

[9] FCA Act ss.33D, 33Q, 33R, 33T, 33V, 33X, 33Z, 33ZA and 33ZC.

These requirements have been discussed at length on a number of occasions and will not be revisited here.[10] For present purposes the provisions of interest are those dealing with the opt out procedure.

Pt IVA of the FCA Act expressly adopts an opt out procedure that obliges group members to inform the court that they do not wish to be part of the proceedings.[11] If a person falling within the defined group does not opt out then they are bound by the outcome of the proceedings.[12]

The opt out class action was chosen because it promotes access to justice, as group members who cannot be identified at the outset or who are unable to affirmatively participate due to social or economic barriers are not excluded from the legal system and a potential remedy.[13] Access to justice is further bolstered by research findings that people are more likely to consent to a procedure when consent is measured passively, that is by a failure to object, rather than actively, by having to affirmatively register to participate.[14]

The opt out class action also results in the efficient use of judicial resources, as one proceeding instead of many are processed by the court system and all group members are bound by the outcome unless they affirmatively opt out.[15] In a successful class action all members of the group are entitled to any recovery and in an unsuccessful class action the respondent is freed from any future claims from the members of the class.

The opt out class action's advancement of access to justice and efficiency does have some limitations that should be noted. Group members who opt out are free to pursue their individual actions.[16] This may be inefficient as it leads to multiple proceedings. However, the group members who opt out become known. In contrast,

[10] See generally, *Philip Morris (Aust) Ltd v Nixon* (2000) 170 A.L.R. 487 at 496–499; *Femcare Ltd v Bright* (2000) 100 F.C.R. 331 at 334–338; R. Mulheron, *The Class Action in Common Law Systems: A Comparative Perspective* (Oxford: Hart, 2004), D. Grave and K. Adams, *Class Actions in Australia* (Sydney: Lawbook Co, 2005) and P. Cashman, *Class Action Law and Practice* (Annandale, NSW: Federation Press, 2007).

[11] FCA Act s.33J provides for a right to opt out. See also *Williams v FAI Home Security Pty Ltd (No.4)* (2000) 180 A.L.R. 459 at [37].

[12] FCA Act s.33ZB requires that a judgment given in a representative proceeding identify the group members affected and binds all such members unless they opted out of the proceeding pursuant to s.33J.

[13] ALRC, *Grouped Proceedings in the Federal Court* (1988), p.106, Second Reading Speech by the Attorney General, Australia, House of Representatives, *Hansard*, November 14, 1991 at p.3177, B. Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)" (1967) 81 Harv. L. Rev. 356 at 397–398 ("requiring the individuals to affirmatively request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step.") and Morabito, "Class Actions" (1994) 19 M.U.L.R. 615, 631–632.

[14] See D. Hensler et al, *Class Action Dilemmas* (Santa Monica, CA: Rand, 2000), pp.15, 38 fn.22, B. Bertelsen, M. Calfee and G. Connor, "The Rule 23(b)(3) Class Action: An Empirical Study" (1974) 62 Geo. L.J. 1123 at 1150 (finding that using an opt in approach reduced the size of a class action) and T. Willging, L. Hooper and R. Niemic, "An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges" (1996) 71 N.Y.U.L. Rev. 74, 135 (finding that the percentage of class members who opt out is low). See also V. Monabito, *An Empirical Study of Australia's Class Action Regimes–Second Report*, (September 2010), p.31 (finding an average opt out rate of 13.78% and median opt out rate of 5.28% for Pt IVA Class Actions).

[15] ALRC, *Grouped Proceedings in the Federal Court*, 1988, p.[108], Mulheron, *The Class Action in Common Law Legal Systems*,2004, p.37 and R. Mulheron, "Justice Enhanced: Framing an Opt-Out Class Action for England" (2007) 70(4) M.L.R. 550, 556.

[16] Second Reading Speech by the Attorney General, Australia, House of Representatives, *Hansard*, November 14, 1991 at p.3177. For example, in the Amcor/Visy cartel class action, Cadbury Schweppes opted out and commenced its own proceedings. The class action is *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd*, Federal Court of Australia, NSD 702 of 2006 and the proceedings commenced by *Cadbury Schweppes are Cadbury Schweppes Pty Ltd v Amcor Ltd* Federal Court of Australia, VID 1377 of 2006.

an opt in or limited group procedure raises the possibility of multiple class actions as well as multiple individual actions, as the universe of possible applicants is not identified or captured by the initial class action.[17]

Even under an opt out procedure, if a class action is successful, group members must come forward at some point to establish membership of the group and to collect their share of the proceeds, unless the remedy sought is solely declaratory or injunctive. Consequently a court managing an opt out class action may need to "close the class" at some point to be able to deal with any individual issues, administer the remedy obtained and resolve the litigation once and for all.[18] Group members who do not come forward may be unable to participate in any remedy. The characteristics of the notice advising of a settlement or judgment, including how widely it is disseminated, clarity of expression and how burdensome it is to respond, become very important.[19]

The steps to "close the class", the notices needed for the right to opt out and the steps to protect absent class members are additional costs that would not be incurred in relation to an opt in or limited group class action.[20] The opt in or limited group approach is therefore said to be more manageable and less costly because the group members are known, so that there is greater certainty for both the court and the parties.[21]

It should also be noted that the scope of the group is not always readily apparent. There may be situations where it may be necessary to redefine the group definition to allow a Pt IVA Class Action to continue so that some group members are excluded from the proceedings. In the Federal Court context redefinition may be warranted so that the class action complies with s.33C (e.g. compliance with the requirements of same, similar or related circumstances or a substantial common issue of law or fact) or does not run afoul of s.33N (e.g. provide an efficient and effective means of dealing with the claims of group members), as the alternative is the striking out or discontinuance of the whole class action.[22] Redefining or

[17] See I.T. Buschkin, "The Viability of Class Actions Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the US Federal Courts" (2005) 90 Cornell L. Rev. 1563 at 1576, and Class Action Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, "Opting Out on Opting In" (1998) 4(1) N.Y. Litigator 49 at 51 (arguing that the opt in approach will make multiple class actions more likely except in relation to small claims where the loss of efficiencies may make a class action unviable).

[18] See *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2008) 67 A.C.S.R. 569; and M. Legg, "The Aristocrat Leisure Ltd Shareholder Class Action Settlement" (2009) 37 *Australian Business Law Review* 399. If a class is not closed then additional problems may arise. The fund for distribution may be inadequate if unexpectedly large numbers of group members come forward, be undistributed or lead to a windfall for some group members, if less than the expected number of group members come forward. See Mulheron, *The Class Action in Common Law Legal Systems*, 2004, pp.431–434.

[19] M. Legg, "Judge's Role in Settlement of Representative Proceedings: Lessons from United States Class Actions" (2004) 78 A.L.J. 58 at 67.

[20] See *Vernon v Village Life Ltd* [2009] FCA 516 at [32]–[41], dispensing with opt out and settlement notices in a limited group class action because the group members were known and had previously received informal communications from their solicitor explaining their rights.

[21] Mulheron, *The Class Action in Common Law Legal Systems*, 2004, p.30.

[22] See, e.g. *Milfull v Terranora Lakes Country Club Ltd* (1998) A.T.P.R. 41–642, 41105, where a respondent sought the redefinition of the group as an alternative to the discontinuance of the class action. See also *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505 at [8] and [33], where the group definition was amended to exclude consumers who had expended less than A$ 2,000 on the relevant products because of the "extraordinary width of the definition of the group members … result[ing] in the conduct of the proceedings being complex, difficult and expensive" and concerns by the applicant's solicitors that they could not prove all of the claims. While s.33N issues such as efficiency, effectiveness and appropriateness were present, Merkel J. did not make express reference to compliance with the FCA Act as a reason for allowing the amendment. Indeed, the proceedings had previously survived challenges to its compliance with ss.33C, 33M and 33N. See *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405; and *Bray v F Hoffman-La Roche Ltd* (2003) 130 F.C.R. 317.

narrowly defining the group definition may mean that group members, including those facing social or economic barriers, are excluded from a class action so that their ability to access justice through the existing class action is lost.[23]

2.2 Litigation funding explained

Litigation funding in Australia is a contract-based arrangement between the funder and one or more potential litigants. The funder pays the cost of the litigation (such as the lawyer's fees, disbursements, project management and claim investigation costs) and usually indemnifies the litigant against the risk of paying the respondent's costs if the case fails. In return, if the case succeeds, the funder is reimbursed for the costs of the litigation, receives a percentage of the proceeds and in some cases, a project management fee.[24] The percentage of the proceeds is agreed with the litigant, and is typically between 30–40 per cent of the proceeds.[25] The percentage may vary depending on the length of the case, need for appeals and the size of a litigant's claim.[26]

For a litigation funder to determine whether to fund an action they must calculate the risk associated with the litigation, that is, the prospects of success. They must also quantify the amount of a successful recovery and their potential liability for the costs of the proceedings (the expenses they incur bringing the suit and the risk of having to pay the respondent's costs if the action fails). This usually involves some form of "due diligence" to assess the merits of the case, including determining whom to sue, the identity of the representative party, causes of action, the availability of evidence, possible defences and the scope and size of the group.[27]

The class action is an economically attractive way to conduct litigation for funders because it allows for the aggregation of similar claims, thus multiplying the potential recovery. Further, the cost of bringing the action only increases marginally when claimants are added, but the potential return increases by a much larger amount. However, for some claims the costs of locating, contracting with and managing the claim may be greater than the amount of the claim even when some of the costs may be shared or spread across other claims. Class actions may allow for economies of scale because as the number of group members increases costs increase by a lesser amount.[28] Nonetheless the number of funded group members from whom the funder is entitled to a percentage of their recovery is crucial to the recoupment of costs and achievement of a profit.

[23] See N. Morawetz, "Underinclusive Class Actions" (1996) 71 N.Y.U. L. Rev. 402, 420–425 and V. Morabito, "Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors" (2007) 29 *Sydney Law Review* 5, 39.

[24] V. Waye, "'Conflicts of Interest Between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19(1) *Bond Law Review* 225, 297 and J. Walker, S. Khouri and W. Attrill, "Funding Criteria for Class Actions" (2009) 32(3) UNSW Law Journal 1036, 1036–1037. See *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 C.L.R. 75 for an example of a litigation funding arrangement that did not include an indemnity for adverse costs.

[25] Standing Committee of Attorneys General, *Litigation Funding in Australia* (May 2006) pp.4 and 7 and Morabito, "An Empirical Study" (September 2010), p.41.

[26] See IMF (Australia) Ltd's Multiparty Funding Agreement, cl.12.1(e). Copy of Agreement on file with author.

[27] Walker, Khouri and Attrill, "Funding Criteria for Class Actions" (2009) 32(3) UNSW Law Journal 1036, 1039–1045.

[28] See M. Legg, "Shareholder Class Actions in Australia - The Perfect Storm?" (2008) 31(3) UNSW Law Journal 669, 698–699.

2.3 Judicial acceptance of limited group class actions

The Full Federal Court in the *Multiplex* class action allowed a Pt IVA Class Action to proceed as a limited group.[29] The Full Federal Court held that the words "as representing some or all of them" in s.33C(1) permitted a representative party to commence a proceeding on behalf of less than all of the potential members of the group, i.e. a limited group class action. This then supported a holding that s.33N should not be interpreted in a way that would forbid a limited group class action when it was expressly allowed by s.33C.[30] However, a limited group class action commenced pursuant to Pt IVA of the FCA Act must maintain the right to opt out and, further, an opt in class action was impermissible.[31]

The finding was the result of the application of rules of statutory interpretation to Pt IVA of the FCA Act.[32] Nonetheless, Jacobson J. observed that defining a group by reference to persons who have signed a litigation funding agreement is not easily reconciled with the overall aim of Pt IVA Class Actions, being increased "access to justice and judicial efficiency in the form of a common binding decision for the benefit of all aggrieved persons".[33]

Questions of policy were also referred to by Stone J. in the *Aristocrat* class action and by Finkelstein J. in the *Multiplex* class action at first instance. Stone J. in *Aristocrat* recognised that the opt in class action definition adopted there was chosen to reduce the costs of identifying and contacting group members by making them come forward and identify themselves to the solicitors or litigation funder.[34] Further, the structure prevented group members free-riding, that is, being part of the group that can take the benefit of any judgment or settlement but not contribute to the costs of the proceedings.[35] Similarly, Finkelstein J. in the *Multiplex* class action found that the only persons excluded from the limited group class action were free-riders, which could not be criticised because "it provides each potential group member with an incentive to agree to contribute" to the costs of the class action.[36]

The judicial decisions that have considered the limited group class action have raised the issue of the effect of such a group definition on the policy factors of access to justice, free-riding and the inefficiency of multiple proceedings. Each of these issues is discussed in turn.

[29] The represented group was defined, inter alia, on the basis that they "had as at the commencement of the … proceeding entered a litigation funding agreement with International Litigation Funding Partners, Inc. (ILF)." See *Multiplex I* (2007) 242 A.L.R. 111 at [1]. The funding agreement contained provisions that the funded parties would not be liable for any fees, costs or disbursements as they were to be paid by ILF. However, if the proceedings were successful by way of judgment or settlement the funded parties agreed that the sum received would be used to (a) reimburse ILF for the costs and disbursements of the action, (b) pay ILF 30–40% of the recovery, and (c) the remainder to be shared amongst the group. The funding agreement terminated if a funded party settled their claim or opts out of the proceedings but the funded party would still be liable to apply any payment received as if the agreement was still on foot: *Multiplex I* (2007) 242 A.L.R. 111 at [31]–[33].

[30] *Multiplex II* (2007) 164 F.C.R. 275 at [111], [123].

[31] See *Multiplex II* (2007) 164 F.C.R. 275 at [142] ("a group definition that allowed a person to take a positive step of 'opting in' after the commencement of the proceeding would be inconsistent with one or more of ss 33C, 33H, 33J and 33K.").

[32] For a critique of the Full Federal Court's interpretation of Pt IVA of the FCA see M. Legg, "Funding a Class Action through Limiting the Group: What does Pt IVA of the Federal Court of Australia Act 1976 (Cth) Permit?" (2010) 33 *Australian Bar Review* 17.

[33] *Multiplex II* (2007) 164 F.C.R. 275 at [117]. See also [137].

[34] *Aristocrat* (2005) 147 F.C.R. 394 at [111].

[35] *Aristocrat* (2005) 147 F.C.R. 394 at [28].

[36] *Multiplex I* (2007) 242 A.L.R. 111 at [48].

3. Access to justice, free-riding and efficiency

3.1 Access to justice—more or less?

Access to justice is a central purpose behind the adoption of a class action regime.[37] Indeed, access to justice has been expressed as a human right,[38] and has been the main justification for creating procedures for collective action around the world.[39]

Litigation funding is able to improve access to justice by providing financing for class actions.[40] The Pt IVA Class Action retains the usual costs rule for Australian litigation that a losing party is liable for the other side's costs,[41] however, the costs rule is limited to the representative party only and does not apply to other group members.[42] This approach to legal costs has been raised as a disincentive to the commencement of class action litigation, as the representative party is liable for their own costs (which are arguably incurred for the benefit of the entire group) and, if they are unsuccessful, the costs of their opponent.[43] Prior to litigation funding, the disincentive from legal costs was reduced when lawyers were prepared to act on a no-win no-fee basis[44] and, if a judgment was obtained, through recourse to s.33ZJ of the FCA Act, which allowed an out-of-pocket representative to recover costs from the damages awarded.[45] Litigation funding accepts the risk of paying the legal costs to bring the proceedings and being liable for any adverse costs order thus removing both disincentives. However, the litigation funder is only prepared to fund those expenses, and facilitate access to justice, for known group members through a limited group class action.

Access to justice for known group members is unlikely to be as expansive as access for all putative group members, although this will depend on the specific class action.[46] Nonetheless, the limited group approach is advocated on the basis that without financing from litigation funders there would be no class action, and

[37] Mulheron, *The Class Action in Common Law Legal Systems*, 2004, p.37, B. Murphy and C. Cameron, "Access to Justice and the Evolution of Class Action Litigation in Australia" (2006) 30 M.U.L.R. 399 at 402 and F. Valdes, "Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective' (2008) 24 Ga. St. U. L. Rev. 627 at 649 ("Throughout the zigs and zags of time, the virtue of the class action was and is in the effort to provide access to justice—to deliver justice to those who don't have access to justice. It is this virtue that motivates and justifies the modern class action specifically").

[38] Mulheron, "Justice Enhanced" (2007) 70(4) M.L.R. 550 at 556 and 580 (stating that access to justice has been recognised by the English courts (*Thai Trading Co v Taylor* [1998] Q.B. 781) and legislature (Human Rights Act 1998) as a "human right"). See also art.14 of the International Covenant on Civil and Political Rights, UNHCR.

[39] See, e.g. L. Silberman, "The Vicissitudes of the American Class Action—With a Comparative Eye" (1999) 7 Tul. J. Int'l & Comp. L. 201 at 201–202 and G. Watson, "Class Actions: The Canadian Experience" (2001) 11 Duke J. of Comp. & Int'l L. 269 at 285.

[40] *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 N.S.W.L.R. 203 at [105]. See P. Spender, "After Fostif: Lingering uncertainties and controversies about litigation funding" (2008) 18 *Journal of Judicial Administration* 101 at 110, referring to the commoditisation of access to justice whereby commercial litigation funders only achieve access for economic claims, while the demand for legal services in family, housing, credit/debt and employment is unserviced.

[41] *Ruddock v Vadarlis* (2001) 115 F.C.R. 229 at [11]; and *Hughes v Western Australia Cricket Association (Inc)* (1986) A.T.P.R. 40-748, 48,136.

[42] FCA Act s.43(1A).

[43] D. Dewees, J.R.S. Prichard and M. Trebilcock, "An Economic Analysis of Cost and Fee Rules and Class Actions" (1981) 10 *Journal of Legal Studies* 155 at 160–161, P. Spender, "Securities Class Actions: A View from The Land of the Great White Shareholder" (2002) 31 *Common Law World Review* 123 at 143, 160, V. Morabito, "Contingency Fee Agreements with Represented Persons in Class Actions—An Undesirable Australian Phenomenon" (2005) 34 *Common Law World Review* 201 at 206, Victorian Law Reform Commission, *Civil Justice Review—Report 14* (2008) pp.676–677 and D. Hensler, 'The Globalization of Class Actions: An Overview' (2009) 622 *Annals* 7, 23.

[44] See *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 F.C.R. 167 at [27]–[31].

[45] See *Graham Barclay Oysters Pty Ltd v Ryan (No.2)* [2000] FCA 1220; and *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 F.C.R. 480 at [53].

[46] See fn.14 above.

it is therefore better to provide access to justice to a limited number of people than there being no proceeding at all.[47] The relationship between the limited group action and access to justice needs to be examined further.

The main concern about a limited group class action is that it requires the putative group members to take the affirmative steps of first, recognising that they have a cause of action, secondly, identifying who they can approach for funding and/or legal representation and possibly thirdly, obtaining legal advice as to the operation of the funding agreement.[48] These hurdles to participation may dissuade those putative group members facing social or economic barriers. The first hurdle is one that has historically seen the opt out class action model preferred, even recognising that there is still a risk that group members may not benefit from a damages award because they do not come forward to claim their share of the award.[49] Litigation funding creates a further hurdle, as the putative group member must enter into contractual relations with the funder and a law firm.[50] However, as a litigation funding agreement is needed for the funder to recover, they have an incentive to bring the funding arrangements to the attention of a putative group member. The incentive is greater in relation to group members who have large claims, such as institutional investors in a shareholder class action or a major corporate purchaser of goods the subject of a cartel class action. Smaller claims may be less attractive, and it is those claimants who are most likely to face economic barriers. Those facing social barriers, such as lack of education or access to information, may also not be pursued with the same vigour, when they fail to respond to advertisements or letters because of misunderstanding or timidity.

There is limited empirical data on whether the use of a limited group class action results in putative group members being denied access to justice. However, anecdotal evidence from the *Aristocrat* and *Centro* shareholder class actions suggests that access to justice is denied to many people if a limited group class action is employed. In *Aristocrat* an opt in class action was converted to an opt out class action, so that there were 556 group members with litigation funding and then some 2,300 unfunded group members who came forward when the opt out class was closed.[51] This theme is repeated in the *Centro* proceedings, where there are both limited group and opt out class actions. The limited group is estimated to be composed of 1,349 group members while the opt out class action is composed of more than 5,000 group members, who are mostly "mums and dads and other small investors".[52]

[47] Morabito, "Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors" (2007) 29 *Sydney Law Review* 5 at 29, 40. Claims that no class action would proceed need to be viewed with some scepticism as this means that litigation funders would cease operating and that lawyers would not prosecute class actions. Previous experience suggests that profitable class actions can be conducted even with free-riders. See, e.g. *King v AG Australia Holdings Pty Ltd* [2003] FCA 980 at [4]-[9], [15] where only one-third of the shareholders participated in the GIO class action settlement but the applicant's lawyers received A$ 17m.

[48] See Spender, "After Fostif" (2008) 18 *Journal of Judicial Administration* 101 at 112, observing that limited group class actions may "exclude the hesitant, the tardy or the less well-informed from prosecution of their causes of action". See also IMF (Australia) Ltd's Multiparty Funding Agreement, which has been employed in shareholder class actions, which runs to 28 pages including schedules. Copy of Agreement on file with author.

[49] See section 2.1 above.

[50] See V. Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21(2) Monash U. L. Rev. 231 at 236, referring to the obstacle of the time and expense in negotiating contributions from group members to a representative party to fund a class action prior to the advent of litigation funding.

[51] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2008) 67 A.C.S.R. 569 at [7]-[8].

[52] Maurice Dunlevy, "Centro class action zeroes in on insurance", *The Australian*, March 6, 2009, p.19.

In a limited group class action litigation funding improves access to justice, but only for those group members who sign a litigation funding agreement. Other similarly situated but unknown group members may be excluded.

The above concerns must be compared with the operation of the Pt IVA Class Action prior to the Full Federal Court's decision in the *Multiplex* class action. It may be argued that judges and legal practitioners have undervalued the importance of access to justice and placed more importance on being able to define or close the class, so that the proceedings are manageable or a settlement may be concluded.[53] Nonetheless, closing the class or redefining the group in the name of case management can also exclude the very group members, those facing social or economic barriers, that class actions are supposed to assist, through providing access to justice. Practical and aspirational concerns collide. However, the limited group is closed from the commencement of proceedings, compared with the opt out group, which is closed at the conclusion of proceedings when the outcome is known. This can be an important distinction for group members, as the decision to join a limited group requires consideration of the claim and a funding agreement when the outcome is unknown, compared to the closing of the class in an opt out class action when the outcome is known and a remedy available.

3.2 Free-riding

A group member in an opt out class action is able to free ride on a representative party's efforts because they are not obligated to contribute to the costs of bringing the proceeding or to any adverse costs order should the proceeding be unsuccessful.[54] The free-rider criticism of the opt out approach has been raised as hampering class actions relying on litigation funding.[55] This is because an entity will be a group member in a class action if they meet the group definition without needing to make themselves known to the funder or the court. This is the same scenario that promotes access to justice for those facing social and economic barriers. For the funder to receive a percentage of any recovery it must first have a funding agreement with each group member. Under current Australian law the funder cannot recover a percentage of a "free-rider's" successful claim. Thus, funders fear that group members will refrain from entering into litigation funding agreements to commence the proceedings and instead will wait for a successful outcome before coming forward, so they do not have to pay a portion of their recovery to the litigation funder. The 2,300 group members in the *Aristocrat* class

[53] See Morabito, "Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors" (2007) 29 *Sydney Law Review* 5, 39.

[54] Ontario Law Reform Commission, *Report on Class Actions*, 1982, p.657 and Morabito, "Federal Class Actions" (1995) 21(2) Monash U.L. Rev. 231 at 235.

[55] P. Cashman, "Class Actions on Behalf of Clients: Is this Permissible?" (2006) 80 A.L.J. 738 at 750 ("What was of paramount concern to the funder of the litigation was a requirement that all those who were to be the beneficiaries of the financial assistance should contractually agree to pay part of the proceeds to the funder in the event that they succeed in recovering damages") and *Submission by IMF (Australia) Ltd to Victorian Law Reform Commission—Civil Justice Review* (April 2007) pp.34–35 ("in order for funding to be made available, the funder's costs must be spread across all members of the represented group. Accordingly, funding is likely to be made available only when each person seeking to litigate has agreed contractually with the funder to pay the costs of the funding (including a commission) from sums recovered.") available at *http://www.imf.com.au/pdf/20070411_SubmissionToVictorianCivilJusticeReview.pdf* .

action support this concern. The limited group approach is attractive because each group member has to be identified and can be required to accept the funding terms as a pre-condition of participation in the action.[56]

3.3 More duplicative class actions?

Multiple class actions are likely when the following conditions exist:

- not all putative group members are included in the limited group class action;
- the statute of limitations applicable to the remaining or leftover group members has not expired; and
- pursuing the claims of the remainder putative group members is economically viable.

The likelihood of a litigation funder capturing all group members is low unless they can be readily identified and contacted.[57] As explained above, there is an incentive for the litigation funder to sign up putative group members, but only to the point where the additional group member increases the recovery that the funder can make from the class action.

The FCA Act s.33ZE provides that upon the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended. In a limited group class action s.33ZE would only apply to the claims of those group members for whom the proceedings had been commenced, i.e. those who had entered into a litigation funding agreement, and not any other putative group members. The statute of limitations would continue to run on the remaining or leftover group members' claims.

Economic viability means that the potential return is greater than the cost of mounting a second class action. The return must also be better or equal to other investments, which would include other class actions against a different respondent. The return may be lower, as there are fewer group members or fewer group members with large claims. Economies of scale may be less, as there are fewer group members over which to spread costs. However, costs may be less in the second class action, as the first proceeding provides a template for recovery and may even establish liability depending on the similarity between the two class actions. Res judicata and issue estoppel will not be available, as they only bind the parties to the litigation and their privies.[58] However, a court may prevent the re-litigation of an issue if it is an abuse of process because it would be unfair to a party to litigation or it would bring the administration of justice into disrepute.[59]

[56] Victorian Law Reform Commission, *Report 14*, 2008, pp.676, 688.

[57] See V. Waye and V. Morabito, "The Dawning of the Age of the Litigation Entrepreneur" (2009) 28(3) C.J.Q. 389 at 428 (noting that client solicitation is labour-intensive and time-consuming). See also *Jameson v Professional Investment Services Pty Ltd* (2009) 72 N.S.W.L.R. 281 at [122]–[123] in the context of Uniform Civil Procedure Rules 2005 (NSW) r.7.4, referring to a systematic effort to involve relevant persons in the representative proceedings at issue but acknowledging that proceedings may be instituted prior to the full range of parties being contacted with a view to them participating in any proceeding.

[58] Justice J.D. Heydon, *Cross on Evidence* (LexisNexis, Online, 2010), pp.[5040], [5050].

[59] Heydon, *Cross on Evidence* (LexisNexis, Online, 2010), p.[5175], *Walton v Gardiner* (1993) 177 C.L.R. 378 at 393; applying *Hunter v Chief Constable of the West Midlands* [1982] A.C. 529 HL at 536; and *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 C.L.R. 175 at [33]–[34].

Thus, if a respondent sought to avoid liability in a subsequent action after an earlier adverse finding, that applicant may assert abuse of process to prevent the re-litigation of the question of liability.[60] If the class action settles, as often happens, there would be no adverse finding that could be relied on by others.

The existence of multiple class actions is illustrated by the three class actions filed against the Centro Group—two limited group class actions defined by reference to each group member having entered into a litigation funding agreement and a subsequent opt out action that excluded the group members in the earlier limited group class actions.[61] The multiple class actions resulted in the Federal Court canvassing a number of case management options, including allowing one proceeding to go to trial as a test case with the others being stayed, consolidation or a joint trial.[62]

In addition to the *Centro* class actions, multiple class actions are illustrated by: class actions against Oz Minerals that have been launched or are planned by Slater & Gordon and IMF (Australia) Ltd, class actions against MFS that have been launched or are planned by Carneys Lawyers and IMF (Australia) Ltd, and class actions against Great Southern Ltd that have been launched or are planned by Macpherson+Kelley Lawyers, DC Legal and IMF (Australia) Ltd.[63]

The above class actions illustrate that multiple class actions are likely to occur with the use of a limited group. The *Centro* class action also illustrates the difficulties multiple class actions create for the court.[64] Multiple proceedings are undesirable, as they are an inefficient use of judicial resources and could lead to conflicting determinations.[65] The inefficiency applies not just when duplicate proceedings progress through the judicial system to trial but even when various procedural mechanisms such as a stay or consolidation are employed to try and prevent duplication. Those procedural mechanisms create additional complexity, as the court must determine which proceeding to stay or, if consolidation is to be used, which lawyer/funder is to run the proceedings. The criteria for making such a choice was said to be "fraught with difficulty" in the *Centro* class actions.[66] Multiple proceedings also create additional costs and complexity for a respondent who must defend two or more proceedings. Multiple proceedings may also create confusion for group members, who are presented with competing class actions.

[60] *South Australian Housing Trust v State Government Insurance Commission* (1989) 51 S.A.S.R. 1 at 18; and *Haines v Australian Broadcasting Commission* (1995) 43 N.S.W.L.R. 404 at 410 ("notwithstanding the absence of any issue estoppel, a party's attempt to re-litigate against another party an issue which he has already lost may amount to an abuse of process."). See also *Kirby v Centro Properties Ltd* (2008) 253 A.L.R. 65 at [16]–[18].

[61] *Centro* (2008) 253 A.L.R. 65 at [1]-[3].

[62] *Centro* (2008) 253 A.L.R. 65 at [10]-[12].

[63] See J. Eyers and A. Boxsell, "Shareholders queue to sue", *The Australian Financial Review*, January 30, 2009, p.56, A. Main, "Auditors caught in $1bn MFS suit", *The Weekend Australian*, April 18–19, 2009, p.27, IMF (Australia) Ltd, *ASX Announcement—Case Investment Portfolio as at 31 December 2008*, January 29, 2009 and Secure Invest, *Great Southern Limited Class Actions*, February 25, 2010, available at *http://securinvestfp.com.au/great-southern-administration/109-great-southern-limited-class-actions.html*. However, see Morabito, "An Empirical Study", (September 2010), p.27 (finding no multiple class actions other than Centro from the Multiplex decision to July 2009).

[64] See M. Legg, "Entrepreneurs and Figureheads—Addressing Multiple Class Actions and Conflicts of Interest" (2009) 32(3) U.N.S.W. Law Journal 909.

[65] *Kirby v Centro Properties Ltd* (2008) 253 A.L.R. 65 at [9].

[66] *Centro* (2008) 253 A.L.R. 65 at [27].

4. The common fund approach—a possible solution

The above discussion demonstrates that a limited group class action is not the optimal solution for promoting access to justice, and may result in multiple class actions. Equally, the ability of litigation funding to extend access to justice through much-needed financing suggests that it should be facilitated. A potential solution that reduces free-riding but preserves access to justice is a pure opt out class action coupled with a legislative version of the common fund approach to legal fees adopted in the United States that would be applicable to litigation funding.[67]

4.1 The US common fund approach

The common fund approach to legal fees originally developed outside the class action context.[68] The common fund approach was sourced from the historic equity jurisdiction of the US federal courts, which was in turn derived from the English Court of Chancery.[69] In *Trustees v Greenough* the US Supreme Court allowed a plaintiff to recover their reasonable legal fees they had incurred in restoring assets to a trust from the trust fund because:

> "There is no doubt from the evidence that, besides the bestowment of his time for years almost exclusively to the pursuit of this object, he has expended a large amount of money for which no allowance has been made, nor can properly be made. It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself, and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution."[70]

The Supreme Court extended the common fund doctrine to allow lawyers to directly approach the court for a fee from a fund in *Central Railroad & Banking Co v Pettus*, where attorneys were awarded fees equating to the reasonable value of their services from a fund created for a group of creditors in addition to the fee contracted for with the named plaintiffs.[71] The fund concept was "employed to realize the broadly defined purpose of recapturing unjust enrichment".[72]

[67] Suggestions for adoption of various versions of a common fund approach have been briefly put forward in M. Legg, "Institutional investors and shareholder class actions: The law and economics of participation" (2007) 81 A.L.J. 478; S.S. Clark and C. Harris, "The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?" (2008) 32 Melb. U.L. Rev. 775, 812; Victorian Law Reform Commission, *Report 14*, 2008, pp.688—689; and M. Wilcox, "Investor Class Actions", Address at the Launch of Justice K. Lindgren (ed.), Investor Class Actions, Federal Court of Australia, Sydney, August 3, 2009.

[68] J. Dawson, "Lawyers and Involuntary Clients in Public Interest Litigation" (1975) 88 Harv. L. Rev. 849 at 916.

[69] *Trustees v Greenough*, 105 U.S. 527 at 536 (1882); and *Sprague v Ticonic National Bank*, 307 U.S. 161 at 164 (1939).

[70] *Trustees v Greenough*, 105 U.S. 527, 532 (1882).

[71] *Central Railroad & Banking Co v Pettus*, 113 U.S. 116, 127 (1885). See also J. Dawson, "Lawyers and Involuntary Clients: Attorney Fees From Funds" (1974) 87 Harv. L. Rev. 1597, 1602–1603 ("The Pettus case totally transformed [the Greenough holding] into an independent right of the lawyer, reinforced by lien, to an extra reward so that he might share the wealth of strangers.").

[72] Dawson, "Lawyers and Involuntary Clients: Attorney Fees From Funds" (1974) 87 Harv. L. Rev. 1597, 1597. See also J.D. Bercaw, "The Common Fund Doctrine: An Overview" (1989) 14 J. Legal Prof. 203, 204, and C. Silver, "A Restitutionary Theory of Attorneys' Fees in Class Actions" (1991) 76 Cornell L. Rev. 656, 657–658.

In the class action context the common fund doctrine was squarely dealt with by the Supreme Court of the United States in *Boeing Company v Van Gemert*:

> "Since the decisions in *Trustees v. Greenough* … and *Central Railroad & Banking Co. v. Pettus*, … this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.
>
> The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit."[73]

The requirements for a common fund approach to be applicable are:

1. the existence of a fund over which the court has jurisdiction and from which fees can be awarded;
2. the commencement of litigation by one party which is terminated successfully, including through settlement;
3. the existence of a class which received, without otherwise contributing to the lawsuit, substantial benefit as a result of the litigation;
4. the creation, preservation, protection or increase of the fund as a direct and proximate result of the efforts of counsel for that party; and
5. a reasonable relationship between the benefit established and the fees incurred.[74]

The touchstone for fees awarded in common fund cases is that they may not exceed what is "reasonable" in the circumstances.[75] The reasonableness requirement has also been adopted as a legislative requirement for legal fees in the Private Securities Litigation Reform Act of 1996 ("PSLRA") that applies to securities class actions in the United States. The PSLRA places an obligation on a court to independently ensure that fees are reasonable:

> "Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."[76]

Further, r.23(h) of the Federal Rules of Civil Procedure. which was added to the rules in 2003 and applies to federal class actions generally, provides:

[73] *Boeing Company v Van Gemert*, 444 U.S. 472, 478 (1980) (citations omitted). See also ALRC, *Grouped Proceedings in the Federal Court*, Report No.46, 1988, at [289].

[74] L. Smith, 'The Equitable Fund Doctrine and the Payment of Attorney Fees" (1995–1996) 20 J. Legal Prof. 367, 369, D.A. Root, "Attorney Fee-Shifting in America: Comparing, Contrasting and Combining the 'American Rule' and 'English Rule'" (2005) 15 Ind. Intl & Comp. L. Rev. 583, 587, and T. Karatinos and H. Umsted, "Beyond Statute, Rule and Contract: Equity as a Basis for Awarding Attorneys' Fees" (2006) 80 *Florida Bar Journal* 41 at 42.

[75] *Johnson v Ga. Highway Express Inc*, 488 F.2d 714 at 717–719 (5th Cir. 1974); *Lindy Brothers Builders Inc v American Radiator & Standard Sanitary Corp*, 487 F.2d 161 at 167–169 (3rd Cir. 1973); *City of Detroit v Grinnell Corp*, 495 F.2d 448 at 470 (2d Cir. 1974); *Goldberger v Integrated Resources Inc*, 209 F.3d 43 at 47 (2d Cir 2000); and R. Mowrey, "Attorney Fees in Securities Class Action and Derivative Suits" (1978) 3 J. Corp. L. 267 at 301–334.

[76] 15 U.S.C. §78u-4(a)(6).

> "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."[77]

To ascertain what is reasonable, the court must scrutinise the fee award closely, as the portion of the fund allocated to the lawyers reduces the award available to remedy the substantive wrong, and as a result the lawyer and the group are adversaries with respect to the fund created.[78] Overcompensating the lawyers would unjustly enrich them at the expense of group members. The fee payable to the lawyer may be calculated through either the "lodestar" approach, under which the court determines the number of hours reasonably expended and then multiplies that figure by an appropriate hourly rate, or through a percentage of the fund.[79] Further, some courts will use a percentage method but apply a "lodestar cross-check" to prevent the overcompensation of lawyers.[80]

The determination of reasonableness is committed to the sound discretion of the trial court, but the American courts have listed various factors that a trial court should consider. The Second Circuit[81] has set forth the following factors: (1) the time and labour expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.[82]

Items 1 and 4 focus on the amount and quality of the work undertaken by the lawyers. The amount of work done is usually quantified by the hours worked. In "mega fund" cases, such as in the *Enron* or *Worldcom* securities class actions, the percentage of recovery may decrease substantially because the increase in recovery is a result of the size of the class or the size of the losses and has no direct

[77] See Notes of Advisory Committee on 2003 Amendments to FRCP: "This subdivision authorizes an award of 'reasonable' attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the 'common fund' theory that applies in many class actions, …".

[78] *In re Capital Underwriters Inc Securities Litigation*, 519 F. Supp. 92 at 98 (N.D. Cal. 1981); and *In re McDonnell Douglas Equip. Leasing Securities Litigation*, 842 F. Supp. 733 at 740 (S.D.N.Y. 1994); and *City of Detroit v Grinnell Corp*495 F.2d 448 at 470 (2d Cir. 1974). See also Smith, "The Equitable Fund Doctrine" (1995–1996) 20 J. Legal Prof. 367 at 370.

[79] *Blum v Stevenson*, 465 U.S. 889 at 900 fn.16 (1984); *McDaniel v County of Schenectady* 595 F.3d 411 at 417–418 (2d Cir. 2010); Report of the Third Circuit Task Force, Court Awarded Attorney Fees, (1986) 108 F.R.D. 237 at 255; and Federal Judicial Centre, *Manual for Complex Litigation*, 4th edn, (2004) pp.186–193 [14.121].

[80] *Wal-Mart Stores Inc v Visa USA Inc*, 396 F.3d 96 at 123 (2d Cir. 2005); *In re AT&T Corp Securities Litigation*, 455 F.3d 160 at 164 (3d Cir. 2006); and V. Walker and B. Horwich, "The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About 'Reasonable Percentage' Fees in Common Fund Cases" (2005) 18 *Georgetown Journal of Legal Ethics* 1453.

[81] The United States Court of Appeals for the Second Circuit is one of the thirteen United States Courts of Appeals. Its territory comprises the states of Connecticut, New York, and Vermont.

[82] *Goldberger v Integrated Resources Inc*, 209 F.3d 43 at 47 (2d Cir. 2000); and *City of Detroit v Grinnell Corp*, 495 F.2d 448 at 470 (2d Cir. 1974). See also *Gunter v Ridgewood Energy Corp*, 223 F.3d 190 at 195 fn.1 (3d Cir. 2000); and *In re AT&T Corp Securities Litigation*, 455 F.3d 160 at 165–166 (3d Cir. 2006) where the Third Circuit has set out ten factors: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of non-payment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases; (8) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (10) any innovative terms of settlement.

relationship to the lawyers' efforts.[83] US courts recognise that economies of scale are inherent in class actions, so that "it is generally not 150 times more difficult to prepare, try and settle a $150 million case that it is to try a $1 million case".[84]

"Magnitude" and "complexity" recognise the size, difficulty and novelty of a case.[85] Factors which increase the complexity of class action litigation have included "complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel".[86] In the Visa Check/Mastermoney Antitrust Litigation, the labour of counsel and magnitude of the case was summarised by the court through referring to the case involving almost 400 depositions of witnesses, including 21 experts who issued 54 expert reports; four rounds of class certification[87] briefing (through the Supreme Court); 16 summary judgment motions; and a pre-trial order identifying 230,000 pages of trial exhibits and 730 trial witnesses.[88] In the Diet Drugs Product Liability Litigation the case lasted for about 11 years but involved the equivalent of almost 66 years of around the clock legal work and culminated with a settlement agreement that was 520 pages long.[89]

"Risk of the litigation" encompasses whether there are novel legal theories, unfavourable precedents, difficulties in having the class certified, surviving strike-out motions and solvency of the defendant.[90] Where a class action relies on government action, such as by a regulator like the Securities Exchange Commission or Federal Trade Commission, or criminal enforcement by the Department of Justice, then because the risk of the litigation or the benefit provided by the lawyers is reduced, the reasonable fee may also be reduced.[91] This has been more colourfully described as:

> "plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill."[92]

[83] Dawson, "Lawyers and Involuntary Clients in Public Interest Litigation" (1975) 88 Harv. L. Rev. 849 at 922, Report of the Third Circuit Task Force, Court Awarded Attorney Fees (1986) 108 F.R.D. 237 at 256; *In re Prudential Ins Co of Am Sales Practices Litigation*, 148 F.3d 283 at 339 (3d Cir. 1998); *Wal-Mart Stores Inc v Visa USA Inc*, 396 F.3d 96 at 122–123 (2d Cir. 2005); *In re Worldcom Inc Securities Litigation*, 388 F. Supp.2d 319 at 322, 323, 353 (S.D.N.Y. 2005), where the class recovered about US$ 6 billion and the class counsel was paid US$ 194 million or just under 5.5% of the settlement; and *In re Enron Corp*, 586 F. Supp.2d 732 (S.D. Tex. 2008) where the class recovered US$ 7.2 billion and class counsel was paid US$ 688 million or 9.5% of the settlement.

[84] *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465 at 486 (S.D.N.Y. 1998).

[85] See *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp.2d 503 at 523 (E.D.N.Y. 2003); *In re Sumitomo Copper Litigation*, 74 F. Supp.2d 393 at 395 (S.D.N.Y. 1999); *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465 at 474, 488 (S.D.N.Y. 1998) (finding that "liability in this case requires proof of an unusually complex conspiracy involving 37 Defendants and a 'checkerboard' of fact situations and disparate periods for each of 1,659 different securities" and that "the issues were novel and difficult requiring a challenge to a long-standing industry practice and the exercise of skill and imagination").

[86] *In re Cendant Corp PRIDES Litigation*, 243 F.3d 722 at 741 (3d Cir. 2001).

[87] FRCP 23(c)(1) requires the court to certify or approve a proceeding being brought as a class action before it may proceed.

[88] *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp.2d 503 at 523 (E.D.N.Y. 2003).

[89] *In re Diet Drugs Product Liability Litigation*, 553 F. Supp.2d 442 at 475, 478, 479 (E.D. Pa. 2008).

[90] *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465 at 488 (S.D.N.Y. 1998).

[91] *In Goldberger v Integrated Resources Inc*, 209 F.3d 43 at 50 and 54–55 (2d Cir. 2000) the trial court's decision to use the lodestar method which amounted to about 4% of the recovery was upheld where the case involved minimal risk due to the plaintiffs' attorneys relying on government investigations to establish the case and no novel legal issues existed: *In re Merrill Lynch Tyco Research Securities Litigation*, 249 F.R.D. 124 at 139 (S.D.N.Y. 2008); and Mowrey, "Attorney Fees in Securities Class Action and Derivative Suits" (1978) 3 J. Corp. L. 267 at 328. This can be contrasted with *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp.2d 503 at 523 (E.D.N.Y. 2003) determining litigation to be risky where "Lead Counsel did not benefit from any previous or simultaneous government litigation".

[92] *In re Gulf Oil/Cities Service Tender Offer Litigation*, 142 F.R.D. 588 (S.D.N.Y. 1992).

The main public policy considered by the courts is the need to be mindful that a fee award needs to provide adequate motive for lawyers to pursue class actions without bestowing a windfall on the lawyers.[93] Public policy may also consider the use of the class action as a form of private enforcement that benefits the public by promoting compliance with securities and antitrust (competition) laws.[94] A further subsidiary public policy goal that has been put forward is the efficient use of the court system.[95]

An empirical analysis of fees in class actions found that the size of the fee was most closely linked to the amount of the recovery and the risk or uncertainty associated with the litigation.[96] Historically, courts have found that an award of 20–30 per cent is an appropriate benchmark when applying the percentage method,[97] but a benchmark cannot replace a searching assessment of what is a reasonable fee.[98] A review of 2008 district court decisions in the Second Circuit found that the average attorney fee award was 17.41 per cent of the fund.[99] In mega-fund cases of over $1 billion between 1998 and 2008, the attorney's fee award was between 4.8 per cent and 15 per cent, with an average of 8.26 per cent.[100]

The analysis of the reasonableness of fee awards by US courts takes place at the end of litigation.[101] Despite the above guidance about fee methodologies and the factors that courts should consider in assessing reasonableness, there are still concerns in the United States that judges may lack the necessary information, resources and expertise to effectively review fees, which can create uncertainty for class action lawyers.[102]

[93] *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465 at 487 (S.D.N.Y. 1998); Smith, "The Equitable Fund Doctrine" (1995–1996) 20 J. Legal Prof. 367, 377, and Mowrey, "Attorney Fees in Securities Class Action and Derivative Suits" (1978) 3 J. Corp. L. 267, 270.

[94] *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465 at 487–488 (S.D.N.Y. 1998); and *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp.2d 503 at 524 (E.D.N.Y. 2003).

[95] *Fears v Wilhelmina Model Agency*, 2009 WL 2958396, 9 (SDNY 2009) "promoting efficient and effective use of attorney time as well as civility in the legal [profession] are subsidiary public policy goals" that should be promoted.

[96] T. Eisenberg and G. Miller, "Attorneys Fees in Class Action Settlements: An Empirical Study" (2004) 1 J. Empirical Legal Stud. 27, and T. Eisenberg and G. Miller, *"Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008"*, (November 2009) available from *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1497224* .

[97] Federal Judicial Centre, *Manual for Complex Litigation*, 2004, pp.186–193 [14.121] and *In re Enron Corp*, 586 F. Supp. 2d 732 at 746 fn.12 (S.D. Tex. 2008).

[98] *Goldberger v Integrated Resources Inc*, 209 F.3d 43 at 51–52 (2d Cir. 2000); and *In re Cendant Corp PRIDES Litigation*, 243 F.3d 722 at 736 (3d Cir. 2001).

[99] See *Farinella v Paypal Inc*, 611 F. Supp.2d 250 at 272 (E.D.N.Y. 2009); citing *In re Bayer AG Securities Litigation*, 2008 WL 5336691 (S.D.N.Y. 2008) (fee award of 12% of $18.5 million settlement); *Banyai v Mazur*, 2008 WL 5110912 (S.D.N.Y. 2008) (fee award of 20% of $6.1 million settlement); *Park v The Thomson Corp*, 2008 WL 4684232 (S.D.N.Y. 2008) (fee award of 15.6% of $13 million settlement); *Warren v Xerox Corp*, 2008 WL 4371367 (E.D.N.Y. 2008) (fee award of approximately 25% of $12 million settlement); *In re Telik, Inc Securities Litigation*, 576 F. Supp.2d 570 (S.D.N.Y. 2008) (fee award of 25% of $5 million settlement); *Ayers v SGS Control Services Inc*, 2008 WL 4185813 (S.D.N.Y. 2008) (fee award of 19% of $7.25 million settlement); *In re Top Tankers Inc Securities Litigation*, 2008 WL 2944620 (S.D.N.Y. 2008) (fee award of 10% in $1.2 million settlement); *In re Merrill Lynch Tyco Research Securities Litigation*, 249 F.R.D. 124 (S.D.N.Y. 2008) (fee award of 22.5% of $4.9 million settlement); *In re Renaissance Holdings Ltd Securities Litigation*, 2008 WL 236684 (S.D.N.Y. 2008) (fee award of approximately 10% of $13.5 million settlement fund); *In re Ramp Corp Securities Litigation*, 2008 WL 58938 (S.D.N.Y. 2008) (fee award of approximately 15% of $2.075 million settlement).

[100] *In re Diet Drugs Product Liability Litigation*, 553 F. Supp.2d 442 at 480 (E.D. Pa. 2008).

[101] J. Cooper Alexander, "Contingent Fees and Class Actions" (1998) 47 DePaul L. Rev. 347, 348–350.

[102] L. Casey, "Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging" [2003] B.Y.U. L. Rev. 1239, 1281–1282, 1294. See also *Fears v Wilhelmina Model Agency*, 2009 WL 2958396, 3 (S.D.N.Y. 2009) "the task of awarding attorneys' fees from a common fund places the district court in the unique position of being required to exercise considerable discretion while essentially hearing from only one party".

In some US cases an exception has developed where the percentage fee award is determined when class counsel is chosen, through a process of auction or competitive bidding by attorneys.[103] The auction process can be very simple, with lawyers submitting the percentage of any recovery that they would accept, or can be more complex, with fee proposals for discrete stages of the litigation (i.e. certification of the class action, discovery, settlement or trial), with varying percentages depending on the size of the recovery and including qualitative information such as qualifications and experience.[104] The aim of the auction process has been largely to extract the best fee deal for group members. However, a court cannot assess which bid is the cheapest without first assessing the likely amount of recovery, which leads the judge into the merits of the suit. Qualitative aspects can also be difficult to assess and result in subjective elements persisting.[105] The process is also not favoured as it can result in a low-cost/low-quality selection.[106]

Another option is that employed by the PSLRA where, generally speaking, the group member with "the largest financial interest" in the suit is appointed as the lead plaintiff (the "representative party" under Pt IVA of the FCA Act) and has the responsibility of selecting and retaining counsel, which includes negotiating the lawyer's fee.[107] As the lead plaintiff has a substantial financial stake in the proceedings and was likely to be a sophisticated user of legal services, such as an institutional investor, they would be able to bargain for a reasonable fee.[108] As a result, US courts have been prepared to accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel.[109] Although the fee award is still determined by the court at the end of litigation, the lawyer is given greater certainty as to how their fee will be calculated. The presumption approach may be further supported on the basis that it alleviates concerns about judicial discretion. To be balanced against concerns about judicial

[103] *In re Oracle Securities Litigation*, 131 F.R.D. 688 (N.D. Cal. 1990); and J.E. Fisch, "Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction" (2002) 102 Colum. L. Rev. 650. The approach appears to have some support in Australia, see *Kirby v Centro Properties Ltd* (2008) 253 A.L.R. 65 at [34].

[104] J. Fisch, "Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA" (2001) 64 Law & Contemp. Probs 53 at 81. For an example see *In re Bank One Shareholders Class Actions*, 96 F. Supp.2d 780 at 787, 791–799 (N.D. Ill. 2000) where the winning law firm's bid was to charge 17% of the first $5 million recovered, 12% of the next $10 million and 7% of the next $10 million, with no fee charged for any amount recovered in excess of $25 million (thus setting a cap of $2.75 million on the total fees) but with a request that the court consider a possible bonus fee if more than $25 million were recovered which discourages counsel from settling at $25 million because of the self-imposed cap.

[105] In re Cendant Corp Litigation, 264 F.3d 201 at 259–260 (3d Cir. 2001).

[106] Chief Judge E.R. Becker, "Report: Third Circuit Task Force on Selection of Class Counsel" (2001) 74 Temp. L. Rev. 689, 724.

[107] 15 U.S.C. §78u-4(a)(3)(B)(i), (iii) and (v).

[108] E. Weiss and J. Beckerman, "Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions" (1995) 104 Yale L.J. 2053, 2121.

[109] *In re Cendant Corp Litigation*, 264 F.3d 201 at 282 (3d Cir. 2001) suggesting that courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement between a lead plaintiff (representative party) and lawyer that are both selected in accordance with the PSLRA which sets standards, such as the lead plaintiff must be the plaintiff most capable of adequately representing the interests of class members; and *In re Nortel Networks Corp Securities Litigation*, 539 F.3d 129 at 133–134 (2d Cir. 2008).

competence are questions about how effective a market-based approach to fees is,[110] especially where pension funds have taken on the role of lead plaintiff after receiving donations or contributions from the lawyers seeking to be lead counsel.[111]

The US common fund approach prevents free-riding by group members through requiring all group members to contribute to the costs of the litigation by remunerating the lawyers from the fund that they create. The payment of the lawyer's fees from the fund then necessitates the balancing of adequately rewarding the lawyers with protecting group members, who have their compensation diminished by the amount paid to the lawyers.

4.2 A legislative common fund approach for Part IVA Class Actions

A legislative common fund approach for litigation funders in class actions could be created drawing on the above principles. American lawyers invest in a piece of litigation and provide financing and project management similar to litigation funders.[112] The American lawyer and funder similarly create a fund for the benefit of group members and face the same free-riding problem in relation to an opt out class action model, because it is not feasible to contract with all group members.

However, the American lawyers and litigation funders are not in an identical position, so the common fund methodology cannot be adopted unchanged. For example, the factors for assessing reasonableness will vary, because whilst the time and labour expended will be relevant for lawyers who are running the case, it has little relevance to a funder who does not carry out the legal work but rather provides funding on the basis of risk and return on investment.

The common fund approach would also vary the litigation funding business model. The ultimate determination of the quantum of the fee is vested in the court, which may introduce an element of uncertainty for the funder as the fee they receive may be less (or more) than what they could obtain through a contractual negotiation. The use of a flat percentage of the fund would also prevent funders giving a lower percentage to group members with larger losses and charging a higher percentage to group members with smaller losses. Further, the approach of Australian funders whereby they receive a percentage of any recovery and, in addition, are reimbursed costs including legal fees, differs from the US model, where the percentage of any recovery is in lieu of receiving legal fees.

Australia's largest litigation funder, IMF (Australia) Ltd, does not appear to be opposed to a common fund approach, in principle, as it has stated that the court should be empowered:

> "at the commencement of proceedings, to order that a certain percentage of any fund created [as a result of class action] proceedings be paid to the funder of the proceedings."[113]

[110] See *In re UnitedHealth Group Inc PSLRA Litigation*, 643 F. Supp.2d 1094 at 1101–1102 (D. Minn. 2009) stating that the court, not the lead plaintiff and its lawyers, sets attorneys' fees based on a rejection of self-regulation in a competitive market because of "the parties', this Nation's, and indeed the world's, experiences with the beauties of self-regulated financial markets during a period remarkably coterminous with the existence of this case".

[111] C. Silver and S. Dinkin, "Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions" (2008) 57 DePaul L. Rev. 471, 482–487.

[112] Root, "Attorney Fee-Shifting in America" (2005) 15 Ind. Intl & Comp. L. Rev. 583, 592.

[113] Victorian Law Reform Commission, *Report 14*, 2008, p.622, and *Submission by IMF (Australia) Ltd to Victorian Law Reform Commission—Civil Justice Review*, 2007, p.36, available at *http://www.imf.com.au/pdf/20070411_SubmissionToVictorianCivilJusticeReview.pdf* [Accessed October 24, 2010]. See also Wilcox, "Investor Class

However, the share of the fund and the timing of that determination is clearly of significant importance to litigation funders.[114]

The view of the American Bar Association is that the uncertainties present at the beginning of a class action are too great for a fee award to be set at that point and would not be able to have regard to the actual result achieved.[115] Such an approach could result in lawyers being routinely under- or overcompensated, and in the former situation may see proceedings abandoned or settled cheaply. Similar concerns would apply to litigation funding.

A legislative common fund approach could provide not just for the funder to receive a reasonable fee from any fund that it creates through financing and managing a class action, but also for the funder and representative party to enter into an agreement that addresses the funder's share of any recovery. To provide some certainty for litigation funders, a presumption as to the reasonableness of a funding arrangement could operate in defined circumstances. For example, where the retainer is negotiated or bargained for at arm's length, with a representative party that is an adequate representative for the group and has the benefit of independent legal advice.[116] Where the court or representative party believes that the representative party requires assistance, a quasi-guardian for the group could be appointed to negotiate the funding agreement.[117] However, the final amount to be awarded must be approved by the court once there is a settlement or judgment. The approval process would allow all interested parties to make submissions; in particular, group members would be entitled to be heard on the issue.[118]

If the court is required to perform the role of approving a reasonable fee for a litigation funder it can overcome the agency problems that arise from group members having insufficient incentive or ability to monitor the funder and provide protection to consumers against the avarice of some funders.[119] However, courts

Actions", Address at the Launch of Justice Kevin Lindgren (ed.) Investor Class Actions, Federal Court of Australia, Sydney, August 3, 2009, who proposes the enactment of legislation that sets out a mandatory sliding scale of percentages of recovery, such as X% of the first $10 million, Y% of the next $40 million, Z% of the next $10 million and so on. Such an approach would treat all class actions as alike in terms of the costs to bring the proceedings and the risk of the litigation.

[114] S. Issacharoff, "Governance and Legitimacy in the Law of Class Actions" [1999] S. Ct. Rev. 337, 378–379 ("for class actions to continue to be viable, therefore, as much uncertainty as possible must be handled at the threshold stage of litigation so that class counsel may invest in the development of the case knowing the terms under which later returns would be realized.").

[115] Task Force on Contingent Fees, Tort Trial & Insurance Practice Section of the American Bar Association, "Report on Contingent Fees in Class Action Litigation" (2006) 25 *Review of Litigation* 459, 481–485.

[116] Court Awarded Attorney Fees, "Report of the Third Circuit Task Force" (1985) 108 F.R.D. 237, 256 stating that it was of critical importance that the lawyer's compensation be "negotiated in an open and appropriately arm's length manner"; *In re Cendant Corp Litigation*, 264 F.3d 201 at 282 (3d Cir. 2001); and *In re Nortel Networks Corp Securities Litigation*, 539 F.3d 129 at 133–134 (2d Cir. 2008).

[117] See *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2008) 67 A.C.S.R. 569 at [11] where a "contradictor" was briefed to represent absent group members who had failed to respond to a court notice regarding settlement by the specified deadline.

[118] See ALRC, *Grouped Proceedings in the Federal Court*, 1988, at [293] and FRCP r.23(h). However, it should be noted that group members are not necessarily best placed to assess the fairness of a settlement as they may not have the incentive to monitor a settlement offer or access to legal advice to make informed submissions. See C. Leslie, "The Significance of Silence: Collective Action Problems and Class Action Settlements" (2007) 59 Florida L. Rev. 71, 113, arguing that silence by group members is not an endorsement of a settlement because group members may not object to a settlement because of a collective action problem whereby an individual group member's cost of objecting may be greater than the value of their share of any settlement, so that it is rational not to object to an inadequate settlement. *In P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No.4)* [2010] FCA 1029 at [23], this position was accepted generally but not thought to be applicable to institutional investors who have their own legal advisors.

[119] See Morabito, "Contingency Fee Agreements with Represented Persons in Class Actions" (2005) 34 *Common Law World Review* 201, 214–215, 218, and J. Coffee, "Class Wars: The Dilemma of the Mass Tort Class Action" (1995) 95 Colum. L. Rev. 1343, 1375—1376, describing how fees paid under contingency agreements in the United

may need assistance in performing this role, possibly through court-appointed costs experts instead of party-retained cost consultants, and the continuing use of the quasi-guardian referred to above. Further, whilst judicial oversight is essential, it needs to be conducted in a cost-effective manner.

The use of a flat percentage has the advantage that it shifts the cost of the litigation to each group member in the same proportion that the value of the claim bears to the group member's recovery.[120] Further, the recovery of a percentage only, and not the additional reimbursement of legal fees, creates an incentive for the funder to negotiate hard on fees because higher fees are borne by the funder from its percentage rather than, as occurs at present, by the group members.

4.3 A common fund approach and existing provisions of Pt IVA of the FCA Act

It should be noted that the common fund approach may be able to be achieved through a court relying on s.33V(2), s.33ZJ and/or s.33ZF of the FCA Act and applying the above principles. However, each of these provisions is subject to limitations and uncertainty.

Section 33ZJ(2) provides that if:

> "the Court is satisfied that the costs reasonably incurred in relation to the representative proceeding by the person making the application are likely to exceed the costs recoverable by the person from the respondent, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded."

The provision has been argued to be based on the common fund doctrine.[121] The provision seeks to avoid a representative party being out-of-pocket in terms of non-recoverable legal expenses, i.e. where the costs that the respondent is required to pay as the losing party are less than the costs reasonably incurred in bringing the class action. It does not address the payment of a percentage of a group member's recovery to a third party litigation funder, and would be inapposite to such a situation. Further, s.33ZJ(1) makes the power only applicable to an award of damages and not a settlement.

Section 33V requires court approval of any settlement or discontinuance. Section 33V(2) provides that the court:

> "may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court."

The provision has been said to extend to orders providing for payment of legal costs out of the sums to which the representative parties and group members might otherwise be entitled.[122] Whilst the words import a wide discretion, there must be some uncertainty as to whether they extend to requiring group members to pay a

States may be disproportionate to the services actually rendered by lawyers and that clients may be poorly equipped to defend their interests against lawyers. See also *In the matter of Bauhaus Pyrmont Pty Ltd (in liq)* [2006] NSWSC 543 at [53], [62], where the litigation funder stood to receive 75% of any recovery.

[120] *Boeing Co v Van Gemert*, 444 U.S. 472 at 479 (1980).

[121] Morabito, "Contingency Fee Agreements with Represented Persons in Class Actions" (2005) 34 *Common Law World Review* 201, 209.

[122] *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 166 A.L.R. 731 at 735.

share of their recovery to a third party, the litigation funder, based on the risk associated with bringing the proceedings. The court is not addressing costs recovery by a representative party, so that they are not out-of-pocket, as in s.33ZJ, but is determining a risk-related return on investment for the litigation funder. The court would need to conduct an examination of what is a reasonable fee. Indeed, the most objectionable situation would be if non-funded group members were subject to the terms of a litigation funding agreement that existed with other group members without the court considering if the terms of the agreement were reasonable.

Further, it is highly likely that some of the group members will have contractual funding arrangements. A common fund approach may involve those group members paying a different amount to what is specified in the litigation funding agreement, which raises the court's power to terminate or alter contractual relations with a litigation funder where the funder is not a party to proceedings or an officer of the court.

Section 33ZF provides for a court to "make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding". The provision has been interpreted broadly, but is not a vehicle for rewriting the rest of Pt IVA.[123] It would be subject to the same uncertainties as s.33V.

It is preferable to provide a specific legislative mandate that addresses the numerous policy issues around class action financing and provide some certainty, rather than have it dealt with piecemeal by judicial decisions.[124]

5. Conclusion

The traditional opt out class action was enacted to provide access to justice and to resolve disputes more efficiently, including avoiding multiple cases, so as to reduce costs for the parties and the courts. Litigation funding facilitates access to justice through providing the necessary financing and management of litigation to allow claims to be pursued. However, litigation funders also want to make profitable investments in litigation leading to attempts to exclude the so-called free-riders, and the advent of the limited group class action.

The limited group class action reduces free-riding so as to maximise the profitability of the litigation funder and facilitates access to justice only for the identified group members who sign a funding agreement. However, it deprives unidentified putative group members of access to justice and makes multiple suits more likely, giving rise to greater costs for the parties and the court. In contrast, the traditional opt out class action extends access to justice to more persons but can only be employed if the necessary financing for launching the class action is available.

To draw on the best aspects of the traditional opt out class action and litigation funding, this article has advocated the adoption of a legislative version of the US common fund concept in Australian law. Both litigation funders and free-riders are responding in an economically rational way to the incentives created by the Pt IVA Class Action. The common fund approach would alter those incentives. The common fund concept removes the need for a funder to have a contract with each

[123] *Courtney v Medtel Pty Ltd* (2002) 122 F.C.R. 168 at [48], [52].

[124] See ALRC, *Managing Justice: A Review of the Federal Civil Justice System*, Report No.89 (2000) AGPS [7.126] and *Alyeska Pipeline Service Co v Wilderness Society*, 421 U.S. 240 at 262 (1975).

group member to be able to obtain a share of any recovery. Equally, the ability to free ride within the class action is removed. Consequently, an opt out class action rather than a limited group class action could be utilised, which will maximise access to justice and minimise multiple suits. However, the litigation funder, in return for being able to capture the class, must subject its funding arrangements to judicial oversight and approval. This new compromise recognises that litigation funding and class actions involve an intersection of private and public interests. Litigation funders want to make profitable investments but need the publicly funded court system to be able to do so. Class actions are aimed at meeting the public interest in facilitating access to justice but require someone to finance the litigation. While legal aid or other forms of government financing are unavailable, then private litigation funding should be facilitated, albeit with judicial oversight.

The further development of the class action in Australia must focus on the goals of the class action procedure—access to justice and efficient resolution of disputes. This article has sought to promote those goals through a legislative version of the US common fund and traditional opt out procedure that accommodates litigation funding and ensures judicial oversight to protect group members.